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CIVIL PROCEDURE NEWS

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1999

C PR Focus

Practice Directions

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PRACTICE DIRECTION—CIVIL EVIDENCE ACT 1995

This Practice Direction supplements CPR Part 33

1. Section 16(3A) of the Civil Evidence Act 1995 (c.38.) (as amended) provides that transitional provisions for the application of the provisions of the Civil Evidence Act 1995 to proceedings begun before 31st January 1997 may be made by practice direction.
2. Except as provided for by paragraph 3, the provisions of the Civil Evidence Act 1995 apply to claims commenced before 31st January 1997.
3. The provisions of the Civil Evidence Act 1995 do not apply to claims-
 - (a) in which directions have been given, or orders have been made, as to the evidence to be given at the trial or hearing; or
 - (b) where the trial or hearing began before 26th April 1999.

Comment

1. The historic reasons for the words appearing in para.1 of the Practice Direction are to be found in the judgment of Phillips L.J. in *John Bairstow v. Queens Moat Houses plc*, The Times, October 23, 1997.
2. The effect of the Practice Direction is to apply The Civil Evidence Act 1995 to *all* proceedings except:
 - (1) those in which directions have been given or orders made as to evidence to be given at the trial or hearing; *or*
 - (2) where the trial or hearing began before April 26,1999.

3. Accordingly, it would appear that, subject to the Practice Direction supplementing Pt 51 and in particular para. 11 thereof, that there are now three sets of rules in operation:

- (1) The Civil Evidence Act 1968 and the 1997 RSC* : these apply to claims commenced *before* January 31, 1997:
 - (a) in which directions have been given or orders have been made, as to evidence to be given at the trial or the hearing: or
 - (b) where the trial or hearing began before April 26, 1999
- (2) The Civil Evidence Act 1995 and the post-1997 RSC*—these apply, to claims commenced *between* February 1, 1997 and April 26, 1999.
- (3) The Civil Evidence Act 1995 and the CPR—these apply to claims commenced *after* April 26, 1999.

[* or CCR equivalent]

CPR PD51, para. 11 provides:

“General Principle

Where a new step is to be taken in any existing proceedings on or after 26 April 1999 it is to be taken under the CPR.”

4. The chronology behind this Practice Direction :

- 7.8.87—judgment in *Bairstow* handed down
- January 1999—version 1 of CPR Pt 33 issued
- 19.4.99—version 2 of CPR Pt 33 issued
- 23.4.99—“the Lord Chief Justice, the Master of the Rolls and the Vice Chancellor issued a notice formally making Practice Direction [Pt 33 Civil Evidence Act, which would] . . . come into effect on 26 April 1999”
- 25.4.99—The Civil Procedure (Modification of Enactments) Order 1999 was made by the Lord Chancellor
- 26.4.99—the Order came into force, amending s. 16 of the 1995 Act in these terms:

“**3A** Transitional provisions for the application of the provisions of this Act to proceedings begun before commencement may be made by rules of court or practice directions” (underlining supplied).

5. In the course of his judgment in *Bairstow* Phillips L.J. said this:

“The prospect of two different rules as to the admissibility of hearsay applying simultaneously

in English law, dependent upon the date of commencement of proceedings, is not attractive. No more attractive is the prospect of the simultaneous applicability of alternative codes of procedure. If the craftsmen responsible for the three statutory instruments which we have had to consider intended to make the choice of the rule of admissibility and the attendant procedural code dependent not upon the date of commencement of proceedings, which is at least certain, but upon whether or not "directions have been given or orders have been made as to the evidence to be given at the trial or hearing", they were setting out to make confusion worse confounded. As it is, they appear to have introduced new rules of court in circumstances where they have no sensible application."

A test based upon "directions given" or "orders made" can, indeed, cause confusion. In *Bairstow* itself Nelson J. at first instance held that "... no [such] direction or order as to the evidence to be given at the trial or hearing has been given by Master Eyre..." whereas Phillips L.J. found that "... the present case is plainly one where directions have been given and orders have been made as to the evidence to be given at the trial."

Whether exception (2) has any "sensible application" is unclear. At the time of writing this commentary (week ending May 27, 1999, the week in which HMSO published PD33 on paper) there are only two cases proceeding in the RCJ in which the trial began before April 26, 1999.

A cautionary note for litigators

1. The forms of statement of truth set out in PD 22 do not distinguish between belief based upon direct personal observation and belief based upon hearsay.
2. Section 4(1) of the 1995 Act states in apparently mandatory terms:

"In estimating the weight (if any) to be given to hearsay evidence in civil proceedings the court shall have regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence."
3. There is no obligation to identify hearsay evidence relied upon either at the interlocutory stages (CPR r.33.3 (a)) or by a witness giving oral evidence at trial (r.33.2). Accordingly, the Court may not come to learn of the circumstances making it necessary to weigh such evidence.

Tim Lamb, Q.C. and Roger Harris, 2 Temple Gardens

PRACTICE DIRECTION—JUDGMENTS AND ORDERS

This Practice Direction supplements CPR Part 40

Drawing up and filing of judgments and orders

- 1.1 Rule 40.2 sets out the standard requirements for judgments and orders and rule 40.3 deals with how judgments and orders should be drawn up.
- 1.2 A party who has been ordered or given permission to draw up an order must file it for sealing within 7 days of being ordered or permitted to do so. If he fails to do so, any other party may draw it up and file it.
- 1.3 If the court directs that a judgment or order which is being drawn up by a party must be checked by the court before it is sealed, the party responsible must file the draft within 7 days of the date the order was made with a request that the draft be checked before it is sealed.
- 1.4 If the court directs the parties to file an agreed statement of terms of an order which the court is to draw up, the parties must do so no later than 7 days from the date the order was made, unless the court directs otherwise.
- 1.5 If the court requires the terms of an order which is being drawn up by the court to be agreed by the parties the court may direct;
 - (1) a copy of the draft order to be sent to all parties for their agreement to be endorsed on it and returned to the court before the order is sealed, or
 - (2) a copy of the draft order together with notice of an appointment to attend before the court to agree the terms of the order.

Preparation of deeds or documents under an order

- 2.1 Where a judgment or order directs any



deed or document to be prepared, executed or signed, the order will state:

- (1) the person who is to prepare the deed or document, and
- (2) if the deed or document is to be approved, the person who is to approve it.

2.2 If the parties are unable to agree the form of the deed or document, any party may apply in accordance with Part 23 for the form of the deed or document to be settled.

2.3 In such case the judge may:

- (1) settle the deed or document himself, or
- (2) refer it to
 - (a) a master, or
 - (b) a district judge, or
 - (c) a conveyancing counsel of the Supreme Court to settle.

(See also the Sale of Land practice direction supplementing RSC Order 31 scheduled to the CPR at Part 50)

Consent orders

3.1 Rule 40.6(3) sets out the types of consent judgments and orders which may be entered and sealed by a court officer. The court officer may do so in those cases provided that:

- (1) none of the parties is a litigant in person, and
- (2) the approval of the court is not required by the Rules, a practice direction or any enactment.

3.2 If a consent order filed for sealing appears to be unclear or incorrect the court officer may refer it to a judge for consideration.

3.3 Where a consent judgment or order does not come within the provisions of rule 40.6(2):

- (1) an application notice requesting a judgment or order in the agreed terms should be filed with the draft judgment or order to be entered or sealed, and
- (2) the draft judgment or order must be drawn so that the judge's name and judicial title can be inserted.

3.4 A consent judgment or order must:

- (1) be drawn up in the terms agreed,
- (2) bear on it the words "By Consent", and
- (3) be signed by
 - (a) solicitors or counsel acting for

each of the parties to the order, or

- (b) where a party is a litigant in person, the litigant.

3.5 Where the parties draw up a consent order in the form of a stay of proceedings on agreed terms, disposing of the proceedings, and where the terms are recorded in a schedule to the order, any direction for:

- (1) payment of money out of court, or
- (2) payment and assessment of costs should be contained in the body of the order and not in the schedule.

Correction of errors in judgments and orders

4.1 Where a judgment or order contains an accidental slip or omission a party may apply for it to be corrected.

4.2 The application notice (which may be an informal document such as a letter) should describe the error and set out the correction required. An application may be dealt with without a hearing:

- (1) where the applicant so requests,
- (2) with the consent of the parties, or
- (3) where the court does not consider that a hearing would be appropriate.

4.3 The judge may deal with the application without notice if the slip or omission is obvious or may direct notice of the application to be given to the other party or parties.

4.4 If the application is opposed it should, if practicable, be listed for hearing before the judge who gave the judgment or made the order.

4.5 The court has an inherent power to vary its own orders to make the meaning and intention of the court clear.

Adjustment of final judgment figure in respect of compensation recovery payments

5.1 In a final judgment where some or all of the damages awarded:

- (1) fall under the heads of damage set out in column 1 of Schedule 2 to the Social Security (Recovery of Benefits) Act 1997 in respect of recoverable benefits received by the claimant set out in column 2 of that Schedule and

- (2) where the defendant has paid to the Secretary of State the recoverable benefits in accordance with the certificate of recoverable benefits,

there should be stated in a preamble to the judgment or order the amount awarded under each head of damage and the amount by which it has been reduced in accordance with section 8 and Schedule 2 to the Social Security (Recovery of Benefits) Act 1997.

- 5.2** The judgment or order should then provide for entry of judgment and payment of the balance.

Adjustment of final judgment figure in respect of an interim payment

- 6.1** In a final judgment where an interim payment has previously been made which is less than the total amount awarded by the judge, the judgment or order should set out in a preamble:

- (1) the total amount awarded by the judge, and
- (2) the amount and date of the interim payment(s).

- 6.2** The total amount awarded by the judge should then be reduced by the total amount of any interim payments, and the judgment or order should then provide for entry of judgment and payment of the balance.

- 6.3** In a final judgment where an interim payment has previously been made which is more than the total amount awarded by the judge, the judgment or order should set out in a preamble;

- (1) the total amount awarded by the judge, and
- (2) the amount and date of the interim payment(s).

- 6.4** An order should then be made for repayment, reimbursement, variation or discharge under rule 25.8(2) and for interest on an overpayment under rule 25.8(5).

Statement as to service of a claim form

- 7.1** Where a party to proceedings which have gone to trial requires a statement to be included in the judgment as to where, and by what means the claim form issued

in those proceedings was served, application should be made to the trial judge when judgment is given.

- 7.2** If the judge so orders, the statement will be included in a preamble to the judgment as entered.

Orders requiring an act to be done

- 8.1** An order which requires an act to be done (other than a judgment or order for the payment of an amount of money) must specify the time within which the act should be done.

- 8.2** The consequences of failure to do an act within the time specified may be set out in the order. In this case the wording of the following examples suitably adapted must be used:

- (1) Unless the [claimant][defendant] serves his list of documents by 4.00pm on Friday, January 22, 1999 his [claim][defence] will be struck out and judgment entered for the [defendant][claimant], or
- (2) Unless the [claimant][defendant] serves his list of documents within 14 days of service of this order his [claim][defence] will be struck out and judgment entered for the [defendant][claimant].

Example (1) should be used wherever possible.

Non-compliance with a judgment or order

- 9.1** An order which restrains a party from doing an act or requires an act to be done should, if disobedience is to be dealt with by an application to bring contempt of court proceedings, have the penal notice endorsed on it as follows:

“If you the within-named [] do not comply with this order you may be held to be in contempt of court and imprisoned or fined, or [in the case of a company or corporation] your assets may be seized.”

- 9.2** The provisions of paragraph 8.1 above also apply to an order which contains an undertaking by a party to do or not do an act, subject to paragraph 8.3 below.

- 9.3** The court has the power to decline to:

- (1) accept an undertaking, and
- (2) deal with disobedience in respect of an undertaking by contempt of court proceedings,

unless the party giving the undertaking has made a signed statement to the effect that he understands the terms of his undertaking and the consequences of failure to comply with it.

- 9.4** The statement may be endorsed on the [court copy of the] order containing the undertaking or may be filed in a separate document such as a letter.

Foreign currency

- 10.** Where judgment is ordered to be entered in a foreign currency, the order should be in the following form: "It is ordered that the defendant pay the claimant (*state the sum in the foreign currency*) or the Sterling equivalent at the time of payment."

Costs

- 11.1** Attention is drawn to the costs practice direction and, in particular, to the court's power to make a summary assessment of costs.
- 11.2** Attention is also drawn to costs rule 43.5(5) which provides that if an order makes no mention of costs, none are payable in respect of the proceedings to which it relates.

Judgments paid by instalments

- 12.** Where a judgment is to be paid by instalments, the judgment should set out:
- (1) the total amount of the judgment,
 - (2) the amount of each instalment,
 - (3) the number of instalments and the date on which each is to be paid, and
 - (4) to whom the instalments should be paid.

Order to make an order of the House of Lords an order of the High Court

- 13.1** Application may be made in accordance

with Part 23 for an order to make an order of the House of Lords an order of the High Court. The application should be made to the procedural judge of the Division, District Registry or court in which the proceedings are taking place and may be made without notice unless the court directs otherwise.

- 13.2** The application must be supported by the following evidence:

- (1) details of the order which was the subject of the appeal to the House of Lords,
- (2) details of the order of the House of Lords, with a copy annexed, and
- (3) a copy annexed of the certificate of the Clerk of Parliaments of the assessment of the costs of the appeal to the House of Lords in the sum of £.....

- 13.3** The order to make an order of the House of Lords an order of the High Court should be in Queens Bench practice form No. 68.

Examples of forms of trial judgment

- 14.1** The following general forms may be used;

- (1) judgment after trial before judge without jury—form no. 45,
- (2) judgment after trial before judge with jury—form no. 46,
- (3) judgment after trial before a Master or district judge—form no. 47,
- (4) judgment after trial before a judge of the Technology and Construction court—form no. 45 but with any necessary modifications.

- 14.2** A trial judgment should, in addition to the matters set out in paragraphs 5, 6 and 7 above, have the following matters set out in a preamble:

- (1) the questions put to a jury and their answers to those questions,
- (2) the findings of a jury and whether unanimous or by a majority,
- (3) any order made during the course of the trial concerning the use of evidence,
- (4) any matters that were agreed between the parties prior to or during the course of the trial in respect of
 - (a) liability,
 - (b) contribution,
 - (c) the amount of the damages or part of the damages, and

- (5) the findings of the judge in respect of each head of damage in a personal injury case.

14.3 Form no 49 should be used for a trial judgment against an Estate. The forms referred to in this practice direction are set out in the practice direction which supplements Part 4 (Forms).

For information about

- (1) Orders for provisional damages: see Part 41 and the practice direction which supplements it.
- (2) Orders in respect of children and patients: see Part 22 and the practice direction which supplements it.
- (3) Orders containing directions for payment of money out of court: see Parts 36 and 37 and the practice directions which supplement them.
- (4) Structured settlement orders: see the separate practice direction supplementing Part 40.



Comment

There is much continuity with the provisions of RSC O. 42 and CCR O. 22 in terms of content. The Practice Direction supplementing Part 40 is also in fairly familiar terms, but the following points are worth noting:

- In the Practice Direction, para. 1.2 sets out the general rule that a party who has been ordered or given permission to draw up an order must file it for sealing within 7 days of being ordered or being permitted to do so (r.40. 3 (3) (a)). However, the PD follows r. 40.3.3 (b) in not setting any kind of time limit for a party who may wish to draw it up and file it if the original party tasked with that responsibility fails to do so. It remains to be seen whether this is a lacuna which will be the subject of controversy.
- Paragraph 2.1 amplifies the formal requirements where a judgment or order directs any deed or document to be prepared, executed or signed. The order must state the person who is to prepare the deed or document and, if the deed or document is to be approved, the person who is to approve it.
- Paragraph 2.2 usefully sets out the necessary procedure if parties are unable to agree the form of the deed or document. Any party may apply in accordance with Pt 23 for the form of the deed or document to be settled.
- Paragraph 4 elaborates upon the procedure for the correction of errors in a judgment or order (r. 40.12).

Where the judgment or order contains an obvious slip or omission a party may apply for it to be corrected (para. 4.1) and it is worthy of note that such an application notice can be an informal document such as a letter (para. 4.2). A judge may deal with the application without notice if the slip or omission is obvious or may direct notice of the application to be given to the other party or parties (para 4.3).

- An order which requires an act to be done (other than a judgment or order for the payment of an amount of money) must specify the time within which the act should be done (PD, para. 8.1). Parties will no doubt wish to avail themselves of para. 8.2 of the PD which sets out that the consequences of a failure to do an act within the time specified may be set out in the order. The preferred wording of an Unless Order is set out at para. 8.2 (1)— the new CPR would seem to favour guillotine days being set out explicitly (e.g. “by 4 pm on Friday January 22, 1999”) rather than expressed as within 14 days. It will be interesting to see whether this results in greater compliance.
- Paragraph 11.2 draws attention to costs r. 43.5 (5) which provides that if an order makes no mention of costs, none are payable in respect of the proceedings to which it relates.

Practitioners, drawing up orders at the end of a heavy day, beware!

Andrew Miller, 2 Temple Gardens



PRACTICE DIRECTION—INSOLVENCY PROCEEDINGS

Comment

Much of what is in this Practice Direction is a consolidation of a number of earlier Practice Directions and Practice Notes. Not only is that convenient, it should present no real surprises for the practitioner.

However, there are some differences:

- *Section 5 on Distribution of Business—*
 - (1) Reference to contributories’ petitions and section 127 is excluded, save for “urgent interim relief”, which is included under section 5.1(2);
 - (2) Legal executives have a right of audience before the Registrar, under section 5.3(1) in respect of Petitions;

- (3) References to contributories and liquidators are excluded.
- *Section 6 on Drawing up of Orders*—Schemes of arrangement, etc., are not included as an exception as was previously the case.
- *Directors disqualification*—The Practice Directions on this issue are unaffected, as they do not fall within the definition of “Insolvency Proceedings” under section 1.1(5).
- *Section 12 on Setting Aside a Statutory Demand*—Applications for an extension of time within which to apply to set aside a statutory demand are now to be made to the Registrar unless an injunction is also being sought to restrain the presentation of a Petition. Previously, applications had to be made to the judge.
- *Section 15 on Bankruptcy*—
 - (1) Details of the times to be included in the written evidence, in respect of personal service, have been slightly modified by section 15.5(1). The new Practice Direction refers to “after 17.00 hours”, an hour later than before, and “any time on a Saturday or a Sunday”, as opposed to “after 12.00 hours on Saturday”.
 - (2) Practitioners should also note that the period of search for prior petitions has been reduced still further to 18 months.
- *Section 16 on Orders without Attendance*—The express pro-

hibition on correspondence in lieu of an application, as provided in Practice Note (Bankruptcy: Orders without attendance) No.2/92, is excluded. It would seem then that a letter might suffice.

Unfortunately, the very great similarity between the new Practice Direction and the previous set of Directions means that there are only limited instances in which terminology has been simplified. Practice Note (Bankruptcy: Statutory Demand) No.5/86 has been reproduced at section 13, with all its repetition and convolution.

Further, the opportunity has not been taken to standardise the style in the Practice Direction. Thus, the inclusion of “helpful comments” (section 13.3 being a case in point) is by no means uniform. It would have been helpful if comments on other matters had been included. For example, distilling the dicta in *sub nom. Royal Bank of Scotland v. Farley* [1996] B.P.I.R. 638, CA, in respect of section 12.3 on going behind a judgment.

Finally, this new Practice Direction may be another candidate for early revision given the typographical errors at 5.1(4) where “liquidate” should read “liquidator”; at 5.2 where “paragraph 15.4” should read “paragraph 5.4”; at 7.1 where “Insolvency Rule 7.47(4)” should read “Insolvency Rule 7.474(4)”; at 12.1 where “paragraph 4(2)” should read “paragraph 2.2”; and at 17.6(b) where there is a stray “7”.

Monya Anyadikes-Danes, Bar Library, RCJ, Belfast

Table of Destinations

Provisions in “new” Practice Directions		Provision in previous Practice Directions
Paragraph	Heading	Paragraph
1. 1.1 (1)–(5) 1.2 1.2 1.3 1.3 1.4 1.4 1.5 1.5	PART ONE <i>General</i>	Practice Directions— Insolvency (No.10/91)
2. 2.1 2.2	PART TWO— COMPANIES <i>Advertisement of winding up Petition</i>	(i) Advertisement of winding up Petition (i) (a) Practice Note (No.1/96)
3. 3.1	<i>Certificate of compliance— time for filing</i>	(iii) Certificate of compliance— time for filing
4. 4.1 4.2 4.3 4.4	<i>Errors in Petitions</i>	(v) Errors in Petitions

5. 5.1 (1)–(9) 5.2 5.3 (1)–(3) 5.4 (1)–(9)	<i>Distribution of Business</i> Legal executives have rights of audience	(vi) Applications to the Judge, Registrar and Court Manager a–h (i) on motions and (i)(a) on provisional liquidator are omitted (ii) (iii) (a)–(c) (iv) (a)–(p) Items dealing with contributories and liquidators omitted: (e) and (j) - (n)
6. 6.1	<i>Drawing up of Orders</i>	(vii) Orders, drawing up of (a) (b) on orders by the Registrar concerning reductions in capital, share premium account, etc., omitted
7. 7.1 7.2 7.3 7.4 7.5	<i>Rescission of a winding up Order</i>	(ix) Rescission of a winding up Order
8.	<i>Restraint of presentation of winding-up Petition</i>	(x) Restraint of presentation of winding up Petition
9. 9.1 (1)–(3) 9.2 9.3 (1)–(5) 9.4 9.5 (1)–(2)	PART THREE <i>Personal insolvency—Bankruptcy</i> <i>Distribution of Business</i>	Practice Directions— Listing (No.12/91)
10. 10.1 10.2 10.3 10.4 10.5 10.6 (1)–(2)	<i>Service Abroad of Statutory Demand</i>	Practice Note (Bankruptcy): Service Abroad (No.1/88) 1. 2. Includes text of IR 6.3(2) 3. Ref. to <i>SCP 1988</i> , Vol.1 at Note 11/9/3 omitted 4. 5. Ref. to Extra Jurisdiction Tables in <i>SCP 1988</i> , Vol.2, pt 3, para. 902 omitted 6. Example of how to amend a Statutory Demand for service abroad omitted
11. 11.1 11.2 (1)–(3) 11.3 11.4 (1)–(5) 11.5	<i>Substituted Service</i> <i>Statutory Demands</i> Statutory Demand form also includes ref. to 18 days to set aside the Statutory Demand <i>Petitions</i> Ref. in (5) to written evidence filed pursuant to Rule 6.11	Practice Note (Bankruptcy: Substituted Service) (No.4/86) 1. 2. (a)–(c) 3. 4. (a)–(e) 5.
12. 12.1	<i>Setting Aside a Statutory Demand</i>	Practice Note (Bankruptcy: Statutory Demand: Setting Aside) (No.1/87) 1.

12.2 12.3 12.4 12.5		2. 3. 4. 5. Ref. to listing superceded by: Practice Direction (Insolvency Act: Individual Insolvency) (No.5/88), but in any case omitted
13. 13.1 13.2 13.3	<i>Proof of Service of a Statutory Demand</i>	Practice Note (Bankruptcy: Statutory Demand) (No.5/86) 1. 2. 3.
14. 14.1 (1)–(3) 14.2 14.3	<i>Extension of Hearing Date of Petition</i>	Practice Note (Bankruptcy: Hearing Dates) (No.1/92) 1. Ref. to March 1, 1992 omitted. (1–(3) 2. (1) 3. (2)
15. 15.1 15.2 15.3 15.4 15.5 (1)–(3) 15.6 15.7 (1)–(2) 15.8 15.9	<i>Bankruptcy Petition</i>	Practice (Bankruptcy: Petition) (No.3/86) 1. 2. 3. 4. 5. (a)–(c) 16.00 has been changed to 17.00 and Sunday is added 6. 7. (a)–(b) 3 years has been reduced to 18 months 8. Practice Note (Bankruptcy: Service of Debt) (No.1/86)
16. 16.1 (1)–(4) 16.2 16.3 (1)–(3) 16.4 16.5 16.6 16.7	<i>Orders without Attendance</i>	Practice Note (Bankruptcy: Individual Voluntary Arrangements: Orders Without Attendance) (No.1/91) 1. (1)–(4) Consideration of the nominee's report by the Court is substituted for "hearing" 2. Practice Note (Bankruptcy: Orders Without Attendance) (No.2/92) 1. 2 (1)–(3) Ref. to IVAs omitted 3. Practice Note (Bankruptcy: Individual Voluntary Arrangements: Orders Without Attendance) (No.1/91) 3. Practice Note (Bankruptcy: Orders Without Attendance) (No.2/92) 4. 6.
17. 17.1 17.2 (1)–(3) 17.3 17.4 17.5 (1)–(5) 17.6 (a)–(g) 17.7	<i>Appeals</i> (g) on substituted service added	Practice Direction (Insolvency Appeals: Individuals) (No.1/95) (1) (2) (i)–(iii) (3) (4) (5) (6) (7) (i)

17.8 17.9 (1)–(9) 17.10	(7) (ii) (8) (i)–(vii) (9)
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PRACTICE DIRECTION—ALLOCATION OF CASES TO LEVELS OF JUDICIARY

- 1.1** Rule 2.4 provides that Judges, Masters and District Judges may exercise any function of the court except where an enactment, rule or practice direction provides otherwise. This Practice Direction sets out the matters over which Masters and District Judges do not have jurisdiction or which they may deal with only on certain conditions. It does not affect jurisdiction conferred by other enactments. Reference should also be made to other relevant Practice Directions (eg Part 24, paragraph 3 and Part 26, paragraphs 12.1-10). References to Circuit Judges include Recorders and Assistant Recorders and references to Masters and District Judges include Deputies.
- 1.2** Wherever a Master or District Judge has jurisdiction, he may refer the matter to a Judge instead of dealing with it himself.

THE HIGH COURT

Injunctions

- 2.1** Search orders (rule 25.1(1)(h)), freezing orders (rule 25.1(1)(f)), an ancillary order under rule 25.1 (1)(g) and orders authorising a person to enter land to recover, inspect or sample property (rule 25.1 (1)(d)) may only be made by a Judge.
- 2.2** Except where paragraphs 2.3 and 2.4 apply, injunctions and orders relating to injunctions, including orders for specific performance where these involve an injunction, must be made by a Judge.

- 2.3** A Master or a District Judge may only make an injunction in terms agreed by the parties; in connection with or ancillary to a charging order; in connection with or ancillary to an order appointing a receiver by way of equitable execution; or in proceedings under RSC Order 77 rule 16 (order restraining person from receiving sum due from the Crown).
- 2.4** A Master or District Judge may make an order varying or discharging an injunction or undertaking given to the court if all parties to the proceedings have consented to the variation or discharge.

Other pre-trial orders and interim remedies

- 3.1** A Master or District Judge may not make orders or grant interim remedies:
- relating to the liberty of the subject;
 - relating to criminal proceedings or matters except procedural applications in appeals to the High Court (including appeals by case stated) under any enactment;
 - relating to proceedings for judicial review, except applications under RSC Order 53 rule 8 (interlocutory applications);
 - relating to appeals from Masters or District Judges;
 - in appeals against a costs assessment under Parts 43-48, except—
 - on an appeal under rule 47.22 against the decision of an authorised court officer; or
 - on an application for the grant of permission where rule 47.24 requires this.
 - in applications under section 42 of the Supreme Court Act 1981 by a person subject to a Civil or a Criminal or an All Proceedings Order (vexatious litigant) for permission to start or continue proceedings.

3.2 This Practice Direction is not concerned with family proceedings. It is also not concerned with proceedings in the Family Division except to the extent that such proceedings can be dealt with in the Chancery Division or the Family Division eg proceedings under the Inheritance (Provision for Family and Dependants) Act 1975 or under section 14 of the Trusts of Land and Appointment of Trustees Act 1996. District Judges (including District Judges of the Principal Registry of the Family Division) have jurisdiction to hear such proceedings, subject to any Direction given by the President of the Family Division.

Trials and assessments of damages

4.1 A Master or District Judge may, subject to any Practice Direction, try a case which is treated as being allocated to the multi-track because it is proceeding under Part 8 (see rule 8.9(c)). He may try a case which has been allocated to the multi-track under Part 26 only with the consent of the parties. Restrictions on the trial jurisdiction of Masters and District Judges do not prevent them from hearing applications for summary judgment or, if the parties consent, for the determination of a preliminary issue.

4.2 A Master or a District Judge may assess the damages or sum due to a party under a judgment without limit as to the amount.

Chancery proceedings

5.1 In proceedings in the Chancery Division, a Master or a District Judge may not deal with the following without the consent of the Vice-Chancellor:-

approving compromises (other than applications under the Inheritance (Provision for Family and Dependants) Act 1975) (i) on behalf of a person under disability where that person's interest in a fund, or if there is no fund, the maximum amount of the claim, exceeds £100,000 and (ii) on behalf of absent, unborn and unascertained persons;

making declarations, except in plain cases;

making final orders under section 1(1) of the Variation of Trusts Act 1958, except for the removal of protective trusts where the interest of the principal beneficiary has not failed or determined;

where the proceedings are brought by a Part 8 claim form in accordance with paragraph A.1(2) or (3) of the Part 8B Practice Direction (statutory or other requirement to use originating summons), determining any question of law or as to the construction of a document which is raised by the claim form;

giving permission to executors, administrators and trustees to bring or defend proceedings or to continue the prosecution or defence of proceedings, and granting an indemnity for costs out of the trust estate, except in plain cases;

granting an indemnity for costs out of the assets of a company on the application of minority shareholders bringing a derivative action, except in plain cases;

making an order for rectification, except for rectification of the register under the Land Registration Act 1925 in plain cases;

making orders to vacate entries in the register under the Land Charges Act 1972, except in plain cases;

making final orders on applications under section 19 of the Leasehold Reform Act 1967, section 48 of the Administration of Justice Act 1985 and sections 21 and 25 of the Law of Property Act 1969;

making final orders under the Landlord and Tenant Acts 1927 and 1954, except (i) by consent, (ii) orders for interim rents under section 24A of the 1954 Act and (iii) on applications to authorise agreements under section 38(4) of the 1954 Act;

making orders in proceedings in the Patents Court except (i) by consent, (ii) to extend time, (iii) on applications for permission to serve out of the jurisdiction and (iv) on applications for security for costs.

5.2 A Master or District Judge may only give directions for early trial after consulting the Judge in charge of the relevant list.

5.3 Where a winding-up order has been made against a company, any proceedings

against the company by or on behalf of debenture holders may be dealt with, at the Royal Courts of Justice, by a Registrar and, in a District Registry with insolvency jurisdiction, by a District Judge.

Group or multi-party claims

- 6.1** In group or multi-party claims the Lord Chief Justice and/or the Vice-Chancellor may give directions that all pre-trial applications in the group or multi-party act claims must be made to and heard by a designated High Court Judge, Circuit Judge, Master or District Judge.
- 6.2** A party seeking a direction under paragraph 6.1 must apply to the Senior Master, the Chief Master or the appropriate Designated Civil Judge for the matter to be referred to the Lord Chief Justice and/or the Vice-Chancellor for such a direction. Any judge may on his own initiative refer a case for such a direction to be made.
- 6.3** When a direction has been made under paragraph 6.1, all pre-trial applications must be made in accordance with it.

Assignment of claims to Masters and transfer between Masters

- 7.1** The Senior Master, and the Chief Master will make arrangements for proceedings to be assigned to individual Masters. They may vary such arrangements generally or in particular cases, for example, by transferring a case from a Master to whom it had been assigned to another Master.
- 7.2** The fact that a case has been assigned to a particular Master does not prevent another Master from dealing with that case if circumstances require, whether at the request of the assigned Master or otherwise.

Freezing orders: cross examination of deponents about assets

- 8.** Where the court has made a freezing order under rule 25.1(f) and has ordered a person to make a witness statement or

affidavit about his assets and to be cross-examined on its contents, unless the Judge directs otherwise, the cross-examination will take place before a Master or a District Judge, or if the Master or District Judge directs, before an examiner of the Court.

COUNTY COURTS

Injunctions and committal

- 9.1** Injunctions which a county court has jurisdiction to make may only be made by a Circuit Judge, except:-

where the injunction is to be made in proceedings which a District Judge otherwise has jurisdiction to hear (see paragraph 11.1 below);

where the injunction is sought in a money claim which has not yet been allocated to a track, where the amount claimed does not exceed the fast track financial limit;

in the circumstances provided by paragraph 2.3.

- 9.2** A District Judge may make orders varying or discharging injunctions in the circumstances provided by paragraph 2.4.

- 9.3** A District Judge may not make an order committing a person to prison except where an enactment authorises this: see section 23 of the Attachment of Earnings Act 1971, sections 14 and 18 of the County Courts Act 1984, sections 152-157 of the Housing Act 1996, section 3 of the Protection from Harassment Act 1997, and the relevant rules.

Other pre-trial orders and interim remedies

- 10.1** In addition to the restrictions on jurisdiction mentioned at paragraphs 9.1-3, paragraph 3(d) and (e) above applies.

Trials and assessments of damages

- 11.1** A District Judge has jurisdiction to hear the following:-
any claim which has been allocated to

the small claims track or fast track or which is treated as being allocated to the multi-track under rule 8.9(c) and Table 2 of the Practice Direction to Part 8, except proceedings under:-

- CCR Order 43 rules 4, 6 and 18 (certain applications under the Landlord and Tenant Acts 1927 and 1954);
- CCR Order 43, rule 20 (Landlord and Tenant Act 1987);
- CCR Order 44, (Agricultural Holdings Act 1986);
- CCR Order 46, rule 1 (Legitimacy Act 1976);
- CCR Order 49, rule 5 (Fair Trading Act 1973);
- CCR Order 49, rule 10 (Local Government and Finance Act 1982);
- CCR Order 49, rule 12 (Mental Health Act 1983);

proceedings for the recovery of land;

the assessment of damages or other sum due to a party under a judgment without any financial limit;

with the consent of the parties and the permission of the Designated Civil Judge in respect of that case, any other proceedings.

11.2 A case allocated to the small claims track may only be assigned to a Circuit Judge to hear with his consent.

Freezing orders: cross examination of deponents about assets

12. To the extent that a county court has power to make a freezing order, paragraph 8 applies as appropriate.

Distribution of business between Circuit Judge and District Judge

13. Where both the Circuit Judge and the District Judge have jurisdiction in respect of any proceedings, the exercise of jurisdiction by the District Judge is subject to any arrangements made by the Designated Civil Judge for the proper distribution of business between Circuit Judges and District Judges.

14.1 In District Registries of the High Court and in the county court, the Designated Civil Judge may make arrangements for

proceedings to be assigned to individual District Judges. He may vary such arrangements generally or in particular cases.

14.2 The fact that a case has been assigned to a particular District Judge does not prevent another District Judge from dealing with the case if the circumstances require.



Comment

The power to allocate judicial resources is a clear example of the new rules creating a flexible and reactive structure for managing civil litigation. One of the fundamental principles postulated by Lord Woolf was that judges should be deployed effectively so that they can manage litigation in accordance with the new rules and protocols.

The rule providing for such flexibility is itself expressly subject to rules, practice directions or enactments to the contrary. In some instances the norm is prescribed, for example in multi-track cases. The Practice Direction ("PD") supplementing Pt 29, para. 3.10 provides that generally case management will be dealt with by a Master in RCJ cases, a District Judge in High Court District Registry cases and a District Judge or Circuit Judge in county court cases.

Similarly, in applications for summary disposal, PD24, para. 3 provides that generally it will take place before a Master or a District Judge who may also direct that it be heard by a High Court Judge or Circuit Judge, depending on the venue of the litigation.

Rule 2.4 now has its own practice direction in which the stipulations and restrictions on judicial deployment are set out, in some instances repeated from other practice directions and rules.

The High Court—Only a judge has power to make orders to search premises, freeze assets, provide information about assets potentially to be frozen or enter land to inspect or preserve, etc., property.

Masters and District Judges can grant injunctions in limited circumstances such as the all party consent or in relation to charging orders but in most situations the jurisdiction remains solely that of the judge.

A number of subjects are beyond the jurisdiction of Masters and District Judges including liberty of the subject, most judicial review and criminal proceedings and, of course, appeals from their own tier.

In multi-track cases, consent of the parties will enable Masters and District Judges to conduct trials and determine preliminary issues.

There is, as previously, no upper financial limit on Masters' and District Judges' jurisdiction to assess

damages, although greater use of this tier in practice is likely.

In the Chancery Division 11 aspects of jurisdiction are withheld from Masters and District Judges unless the Vice-Chancellor consents. In many of these aspects, for example power to make declarations and grant rectification, there is a qualitative element to the jurisdiction in that it is available to Masters and District Judges in plain cases.

The appointment of designated judicial resources in group claims, fashioned from the Court's inherent jurisdiction is now formalised: the Lord Chief Justice or Vice-Chancellor may so direct upon application via the Senior Master, Chief Master or designated Civil Judge.

The assignation of cases to individual Masters continues.

Cross-examination about assets following freezing orders will normally be before Masters or District

Judges or, as they may order, an examiner of the Court.

The county court—There is a comparable devolution of jurisdiction. In limited circumstances District Judges may grant or vary injunctions. A Circuit Judge will only hear small claims cases if he consents; a District Judge has jurisdiction to hear not only small and fast track cases but also certain multi-track cases.

There remains, notwithstanding the stipulation of allocation, potentially great flexibility in that a District Judge has jurisdiction in any proceedings with the consent of parties and the permission of the designated Civil Judge. The designated Civil Judge is the hub not only for allocation to the appropriate judicial tier where Circuit and District Judge jurisdiction overlap but also to assign particular proceedings to individual District Judges.

Christopher Russell, 2 Temple Gardens



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