ISSUE 8/99 AUGUST 10, 1999

CIVIL PROCEDURE NEWS

A White Book Service

- Trial dates and expert witnesses' availability
- Claimant's offer to settle
- Application for jury trial
- Inadvertent disclosure

In Brief

Cases

■ BREEZE v. JOHN STACEY & SONS LTD, *The Times*, July 8, 1999, CA
CPR rr. 1.1, 1.2 & 31.20—D's solicitor inadvertently exhibiting to affidavit served on P's solicitor a document subject to legal professional privilege—master's order restraining P from using this document in proceedings to strike out his personal injuries claim reversed by judge—held, dismissing D's appeal, (1) it would not have been obvious to a hypothetical reasonable solicitor that a mistake had occurred and D's solicitor was under no duty to inquire whether privilege had been deliberately waived, (2) the requirement that the court should give effect to the overriding objective when exercising any power under the CPR did not affect the established principles as stated in the authorities (see *Civil Procedure*, para. 31.20, and *SCP 1999*, Vol. 1, para. 24/5/46)

■ MATTHEWS v. TARMAC BRICKS AND TILES LTD, *The Times*, July 1, 1999, CA
CPR rr. 1.3, 28.2 & 28.6, Practice Direction (The Fast Track), para. 7—in personal injuries claim, parties unable to agree trial date—at hearing to fix date, county court judge advised by D's counsel that, apparently for reasons unknown, their expert witnesses would not be available on certain dates—nevertheless, judge choosing one of those dates (12 weeks hence)—held, refusing permission to appeal, (1) D had a duty to help the court to deal with the case expeditiously and fairly, (2) D's predicament was attributable to their delay in seeking to fix a date and then failing to place before the court all relevant information as to the reasons for the experts' unavailability—Master of the Rolls explaining approach to be adopted when fixing trial dates under new case management system where commitments of expert witnesses likely to create difficulties (see *Civil Procedure*, paras 28.2.3, 28.6.2 & 28PD-004)

■ OLIVER v. CALDERDALE METROPOLITAN BOROUGH COUNCIL, *The Times*, July 7, 1999, CA
County Courts Act 1984, s. 66—in malicious prosecution case, which had proceeded under former automatic directions procedure, date fixed for non-jury trial—subsequently, P's application for trial by jury refused by judge—held, dismissing P's appeal, (1) trial in a county court shall be without jury unless the court orders otherwise under s. 66 on application made by a party, (2) P's application should have been made at the earliest pre-trial directions hearing and was wholly out of time and unreasonable (see SCP 1999, Vol. 2, para. 20A-739/2)

■ ROLLINSON v. KIMBERLEY CLARK LTD, *The Times*, June 22, 1999, CA
when trial date for P's personal injury claim (wherein quantum only live issue) due to be fixed, D requesting that P be examined by second medical expert—later, after date for trial fixed, judge refusing D's application to vacate date because of the unavailability of the second expert—held, when the fixing of a trial date is imminent it is not acceptable for a solicitor (1) to continue with instructions to an expert where there was no reasonable prospect that he would be available, or (2) to instruct an expert without first checking as to his availability.

■ ADOKO v. JEMAL, *The Times*, July 8, 1999, CA
CPR rr. 1.1(2)(e) & r. 1.3, Sched. 1, RSC O. 59, r. 7 — master striking out P's defamation action—P's application to judge for extension of time for appealing dismissed—permission to appeal against judge's decision granted—notice of appeal relating to master's (instead of to judge's) decision—on hearing of appeal, P applying to amend notice of appeal—held, refusing application and dismissing appeal, (1) the appeal had come before the Court in complete disarray and it was neither appropriate nor just that any further share of the Court's resources should be allocated to sorting out the mess, (2) appropriate proportional use of the Court's resources should be considered as a part of substantial justice (see *Civil Procedure*, para. 1.3.7)

■ BEATHAM v. CARLISLE HOSPITALS NHS TRUST, *The Times*, May 20, 1999
CPR r. 21.10, Practice Direction (Children and Patients), para. 1.8—although the hearing of an application under r. 21.10 for the court's approval of a damages settlement in a claim by a child or a patient will take place in private unless the court directs otherwise (para. 1.8), once the judge is satisfied that the settlement should be approved he could, and normally should, give his approval in open court (see *Civil Procedure*, paras 21.10.1 & 21PD-001)

■ CAMILLER v. COMMISSIONER OF POLICE FOR THE METROPOLIS, *The Times*, June 98, 1999, CA
CPR r. 44.4, Practice Direction (Directions Relating to Pt 44—General Rules about Costs), para. 2.4—in trial of action for malicious prosecution brought by legally aided plaintiff (P), jury failing to agree—judge ordering re-trial but making no order for costs—after order drawn up, judge granting P permission to appeal—held, allowing P's appeal, (1) the effect of the judge's order was to make it likely that any damages recovered by P at a re-trial (over which the LAB would have a charge) would be extinguished by the costs of the aborted trial which she had incurred, (2) normally costs of an aborted jury trial should be

costs in the case (formerly costs in the cause), so that if in due course one party or the other wins, they will get the costs of that trial (see *Civil Procedure*, paras. 44.3.2 & 48PD-004)

■ CLARK v. CHIEF CONSTABLE OF CLEVELAND POLICE, *The Times*, May 13, 1999, CA
CPR Sched. 1, RSC O. 59, r. 11(4), Courts and Legal Services Act 1990, s. 8—in jury trial, damages awarded to P, including £500 for malicious prosecution—P appealing on ground that award inadequate—held (Henry L.J. diss.), (1) the threshold for interference by the Court of Appeal with an inadequate jury award had been altered by case law since s. 8 came into effect, (2) the award of £500 should be increased to £2,000 (see *Civil Procedure*, para. R59.11 and SCP 1999, Vol. 1, para. 59/11/12 and Vol. 2, para. 20B-206)

■ CUSTOMS AND EXCISE COMMISSIONERS v. ANCHOR FOODS LTD [1999] 1 W.L.R. 1139
CPR r. 25.1.(1)(f), Supreme Court Act 1981, s. 37(1)—Customs (C) commencing proceedings against D for £264m arrears of duty—D proposing to transfer whole of its business to X, a new company, for £9m and to wind-up D—on C's motion to continue freezing injunction preventing transfer, held, (1) the fact that the proposed sale was a bona fide transaction at an independently verified price entered into for a proper motive did not prevent the court granting the injunction, (2) the proposed sale was not in the normal course of business or on the open market but was made because of the very existence of C's claim, (3) in the circumstances, it was appropriate that the injunction should be continued provided C gave an undertaking in damages (see *Civil Procedure*, para. 25.1.6, and SCP 1999, Vol. 1, paras 29/L/22 & 29/L/37)

■ FEDERAL BANK OF THE MIDDLE EAST v. HADKINSON, *The Times*, May 28, 1999
CPR r. 25.1(1)(f)—D obtaining freezing injunction against D—D applying for variation on ground that certain assets should not have been included—P alleging that D in contempt of court for breach of court orders—held, (1) D's contempt would not be a complete bar to an application for variation, (2) in such circumstances, the court should exercise its discretion in the best interests of justice, (3) "defendant's assets" in the order included assets of which D was the legal, but not the beneficial, owner (see *Civil Procedure*, para. 25.1.16 and SCP 1999, para. 29/L/45)

■ MARS (U.K.) LTD v. TEKNOWLEDGE LTD (NO. 2), *The Times*, July 8, 1999 (Jacob J.)
CPR r. 44.3(8)—at trial, judge upholding P's claim for infringement of copyright and ordering D to pay P's costs—held, (1) in general, where an order for costs is made, the court should exercise its discretion under r. 44.3(8) to order an amount to be paid on account before costs are assessed, (2) in doing so, the court should take into account (a) all the circumstances (r. 44.3(4)), including the paying party's wish to appeal, and (b) the overriding objective to deal with case justly (r. 1.1(1)), in particular, the financial position of each party (r. 1.1(2)(c)(iv)) (see *Civil Procedure*, paras 1.3.5 & 44.3.4)

■ MANATEE TOWING COMPANY v. OCEANBULK MARITIME S.A. [1999] 1 Lloyd's Rep. 876
RSC O. 24, rr. 3 & 7 [CPR r. 31.6]—negotiations for sale of P's ship to D conducted with help of X (P's brokers)—P commencing action for declaration that no sale concluded—in counterclaim, D claiming (1) as against P, declaration that a binding contract had been concluded (but making no financial claim against P, that being a matter for arbitration), and, alternatively, (2) as against X (joined as a co-defendant to the counterclaim), damages for breach of warranty—X applying for order for discovery against P of documents relating to the ship's condition at the time of alleged sale—held, although there was no material issue between X and P, under rr. 3 and 7 the court had jurisdiction to grant the order—judge not deciding whether court would have such jurisdiction under r. 31.6 (see SCP 1999, Vol. 1, para. 24/2/6, and *Civil Procedure*, para. 31.6)

■ MCPHILEMY v. TIMES NEWSPAPERS LTD, *The Times*, May 26, 1999, CA
CPR Pt 51 (Transitional Arrangements), Pt 16 (Statements of Case), Sched. 1 RSC O. 59; Practice Direction (Statements of Case), para. 8.3—judge granting D leave to re-amend their defence to P's libel action—in dismissing appeal, Master of the Rolls explaining that, in an appeal from an interlocutory decision made before April 26, 1999, (1) if the decision would not have been regarded as wrong before that date the Court will not interfere, (2) if it would have been regarded as wrong the Court will take into account the CPR (in particular the provisions of Pt 1) when deciding what order should be made for the future—observations on application of overriding objective and case management principles to statements of case, in particular in libel cases (see *Civil Procedure*, paras 16PD-002 and 51.1)

■ MEALEY HORGAN PLC v. HORGAN, *The Times*, July 6, 1999
CPR rr. 3.1(2)(a), 3.1(3)(a), 3.1(5) & 32.10—D serving witnesses statements after time specified for service expired—application by D to extend time limit under r. 3.1(2)(a)—held, granting the application, (1) it would be unjust to exclude a party from adducing evidence at trial save in very rare circumstances, *e.g.*, where there had been deliberate flouting of court orders, or inexcusable delay such that the only way the court could fairly entertain the evidence would be by adjourning the trial, (2) in the circumstances, it would not be appropriate to grant the application on the condition that D pay a sum of money into court (see *Civil Procedure*, paras 3.1 & 32.10.1)

■ MEMORY CORPORATION PLC v. SIDUE, *The Times*, May 31, 1999
CPR r. 25.1(1)(f) & (h), Practice Direction (Interim

Injunctions), para. 3.3—on application without notice, judge making freezing and search orders against D—on return date, judge varying freezing order so that terms as to disclosure by D of information claimed to be privileged complied with *Den Norske Bank A.S.A. v. Antonatos* [1998] 3 W.L.R. 711, CA—D applying to discharge the orders—held, refusing the application, a distinction is to be drawn between (1) the advocate's duty to bring all relevant authorities as to law and practice to the attention of the court, and (b) the duty of party applicants to disclose all material facts (see *Civil Procedure*, para. 25PD-003 and SCP 1999, Vol. 1, para. 29/1A/24)

■ MERC PROPERTY LTD, IN RE, *The Times*, May 19, 1999
Supreme Court Act 1981, s. 51(6), CPR rr. 1.1(2) & 48.7, Practice Direction (Part 48: Costs: Special Cases) paras 2.1 *et seq.*—judge striking out proceedings brought by P to wind-up D Co.—D Co. applying for wasted costs order against P's solicitors—in dismissing application, judge noting that time spent on wasted cost proceedings had exceeded that spent on substantive proceedings and stating that, in future, applicants for wasted costs orders must bear in mind the principle of proportionality (see *Civil Procedure*, paras 1.3.5, 48.7.1 & 48PD-015, and SCP 1999, Vol. 2, para. 20A-401)

■ NASCIMENTO v. KERRIGAN, *The Times*, June 23, 1999, CA
Practice Direction (Court of Appeal: Leave to Appeal and Skeleton Arguments), para. 20[1999] 1 W.L.R. 2, CA, para. 20 and Practice Direction (Court of Appeal (Civil Division)) [1999] 1 W.L.R. 1027, CA, para. 2.19.1—judge dismissing P's appeal against district judge's order striking out P's claim for personal injuries—P applying for permission to appeal against judge's ruling—held, refusing permission, (1) P's application did not satisfy the test stated in para. 20 or para. 2.19.1, (2) those provisions were not *ultra vires*.

■ NORDSTERN ALLGEMEINE VERSICHERUNGS A.G. v. INTERNAV LTD, *The Times*, June 8, 1999, CA
CPR r. 48.2, Supreme Court Act 1981, s. 51—judge ordering X to pay costs of D in action brought against them by P—held, dismissing X's appeal, the jurisdiction to make an order for costs against a non-party in favour of a party is not dependent on that party first obtaining an order for costs against his opponent in the proceedings (see *Civil Procedure*, para. 48.2.1 and SCP 1999, Vol. 1, para. 62/2/7 and Vol. 2, para. 20A-403)

■ PIGLOWSKA v. PIGLOWSKI [1999] 1 W.L.R. 1360, HL
CPR Sched. 1, RSC O. 59, r. 14, Practice Direction (Court of Appeal (Civil Division)) [1999] 1 W.L.R. 1027, CA, paras 2.8.1 & 2.19.1, Matrimonial Causes Act 1973, ss. 24 & 25—property adjustment order made by district judge enabling W to retain matrimonial home but leaving H with insufficient to purchase property—H and W both legally aided—order affirmed by judge but varied by Court of Appeal—held, allowing W's appeal, there is no presumption that both parties had the right to purchase accommodation—House of Lords noting that estimated legal costs exceeding matrimonial assets and cautioning against allowing successive appeals in ancillary relief applications in such circumstances, even in cases raising important points of principle or practice (see *Civil Procedure*, para. R59.14)

■ SHIKARI v. MALIK, *The Times*, May 20, 1999, CA
CPR rr. 3.1 & 3.4—Master striking out C's personal injury claim for want of prosecution—on C's appeal, judge finding that there had been a wholesale disregard by C of the setting down obligations and upholding striking out, but on alternative abuse of process grounds—held, dismissing C's appeal, (1) a claim commenced under the old rules may be struck out on abuse of process grounds even though it would not have been regarded as exceptional before the case management system contained in the CPR was introduced, (2) litigants cannot rely on the court tolerating what had been tolerated previously, (3) the exercise of the court's discretion is not limited by *Hytec Information Services Ltd v. Coventry City Council* [1997] 1 W.L.R. 1666, CA (see *Civil Procedure*, para. 3.4.1)

■ SMITHKLINE BEECHAM BIOLOGICALS S.A. v. CONNAUGHT LABORATORIES INC., *The Times*, July 13, 1999, CA
RSC O. 24, r. 14A [CPR r. 31.22], European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 6—P rejecting C's offer to surrender to P's patent revocation petition—at hearing of petition, C offering no opposition and judge revoking patent on grounds found to be well-founded—documents containing confidential information referred to in skeleton arguments and pre-read by judge but not referred to at hearing—judge holding that S were not free to make use of these documents in parallel patent proceedings as they had not "been read to or by the court, or referred to" in open court (see *The Times*, January 14, 1999 (Laddie J.))—held, allowing S's appeal, (1) under modern practice, the judge is invited to familiarise himself with material out of court (including witness statements, documents, skeletons and chronologies) to which, in open court, only brief reference may be made, (2) the judge's decision was based on the material before him, including the confidential documents, and could be said to have been "referred to" within the meaning of r. 14A (now r. 31.22)—general observations on problems involved in balancing needs of efficient justice and public justice under pre-reading modern practice (see *Civil Procedure*, para. 31.22.1, and SCP 1999, Vol. 1, para. 24/14A/2)

■ SULLIVAN v. CO-OPERATIVE INSURANCE SOCIETY LTD, *The Times*, May 19, 1999, CA
CPR r. 44.5, Practice Direction (Part 44—General Rules about Costs), para. 3.1 [RSC O. 62, r. 12(1)]—D

applying for review of taxation following settlement of P's personal injury action with Manchester locus in quo—D contending that, had P instructed provincial solicitors, rather than (through his union) London solicitors, his costs would have been less—judge sitting with assessors dismissing application—held, allowing D's appeal, (1) in determining whether P had acted reasonably the court took account of and balanced a wide range of relevant circumstances, (2) the fact that a union habitually used particular solicitors was a factor of limited relevance on an individual taxation (see *Civil Procedure*, paras 44.5.1 & 48PD-0040, see also SCP 1999, Vol. 1, para. 62/A2/28)

■ VISKASE LTD. v. PAUL KIEFEL GMBH [1999] 1 W.L.R. 1305, CA
Civil Jurisdiction and Judgments Act 1982, Sched. 1, Brussels Convention, Art. 5(1)—English manufacturing company (P) bringing proceedings for breach of contract against German suppliers of machinery (D)—judge finding that English court had jurisdiction and refusing D's application to set writ aside—held, allowing D's appeal (Evans L.J. diss.), (1) the alleged breach was of an obligation to supply a machine fit for the known purpose, (2) that obligation had to be performed at the time when the machine was supplied, (3) the "place of performance" for the purposes of Art. 5(1) was Germany, which was the place of delivery under the contract (see SCP 1999, Vol. 2, para. 7B-48)

Practice Directions

■ PRACTICE NOTE (COMPANIES COURT: SKELETON ARGUMENTS : TIME LIMITS), *The Times*, June 25, 1999
practitioners must comply with the provisions in the Chancery Guide (April 1999 revision) as to the delivery of bundles of documents and skeleton arguments (see ibid., respectively, paras 8.19 to 8.30 and 8.31 to 8.41)—in particular, on normal applications bundles and skeletons should be lodged as soon as possible and not later than 10 a.m. on the day preceding the hearing (*e.g.* not later that 10 a.m. on a Friday for a hearing on the following Monday)—failure to lodge in time may result in (1) the matter not being heard, (2) the costs of preparation being disallowed, and (3) an adverse costs order (ibid., para. 8.42) (*St Alban's Court Ltd v. Daldorch Estates Ltd*, *The Times*, May 24, 1999 ref'd to)

■ PRACTICE DIRECTION (COURT OF APPEAL (CIVIL DIVISION)) [1999] 1 W.L.R. 1027, CA
CPR Sched. 1, RSC O. 59—consolidates, with some amendments, all of the principal practice directions which apply to proceedings in the Court of Appeal—the 40 former practice directions so consolidated are listed in Annex A and include Practice Direction (Court of Appeal: Leave to Appeal and Skeleton Arguments) [1999] 1 W.L.R. 2 (see *Civil Procedure*, para. R59.1 and SCP 1999, Vol. 1, para. 59/0/3)

■ PRACTICE DIRECTION (FAMILY PROCEEDINGS: ALLOCATION AND COSTS) [1999] 1 W.L.R. 1128
explains application of Practice Direction (Allocation of Cases to Levels of Judiciary) and Practice Direction about Costs Supplementing Pts 43 to 48 of the Civil Procedure Rules to family proceedings (see *Civil Procedure*, pp. 467-522, paras 48PD-001 to 48PD-029)

■ PRACTICE DIRECTION (MERCANTILE COURT BRISTOL) (NO.2) [1999] 1 W.L.R. 1278, QBD
deletes para. 11 from Practice Direction (Mercantile Court: Bristol) [1993] 1 W.L.R. 1522—removes power of presiding judges to designate judges to whom cases may be released by mercantile judge.

■ PRACTICE NOTE (COURT OF APPEAL: ASSESSMENT OF COSTS) [1999] 1 W.L.R. 871, CA
CPR Sched. 1, RSC O. 59—outlines approach to be taken by Court of Appeal with regard to summary assessment of costs—complements practice in High Court and county courts as stated in CPR Pt 44 and accompanying practice direction (see *Civil Procedure*, paras 48PD-004 & R59.1 and SCP 1999, Vol. 1, para. 59/0/3)

■ PRACTICE NOTE (COURT OF APPEAL: DISPOSAL OF BUNDLES) [1999] 3 All E.R. 384, CA
states new arrangements for disposal of bundles following determination of cases in the Court of Appeal on or after July 5—contains safeguards to ensure that original documents are not destroyed and that papers genuinely required for subsequent use are retained (see *Civil Procedure*, para. R59.1 and SCP 1999, Vol.1, para. 59/9/58).

■ PRACTICE NOTE (FAMILY PROCEEDINGS: VACATION BUSINESS), *The Times*, July 9, 1999
gives guidance as to conduct of business in the Family Division during the long vacation.

■ ST. ALBAN'S COURT LTD v. DALDORCH ESTATES LTD, *The Times*, May 24, 1999
Practice Direction (Miscellaneous Provisions Relating to Hearings), para. 3.6, Chancery Guide (April 1999 revision), paras 8.15, 8.17, 8.38 & 8.39—the content of skeleton arguments should comply with paras 8.38 & 8.39—in a case of any size, the judge should be provided with a summary which should normally appear in the claimant's skeleton argument—where the documents are numerous, a core bundle should be prepared in accordance with para. 3.6 (see *Civil Procedure*, para. 39PD-002)—any material change in the time estimate for a hearing must be justified by a proper reason (paras 8.15 & 8.17)

IN DETAIL

Fixing trial dates and expert witnesses' availability

In *Matthews v. Tarmac Bricks* and *Tiles Ltd*, *The Times*, July 1, 1999, CA, the Court of Appeal dismissed an appeal by defendants from an order of a county court judge fixing a date for trial. In *Rollinson v. Kimberley Clark Ltd*, *The Times*, June 22, 1999, CA, the Court dismissed a defendant's appeal from the decision of a county court judge refusing to vacate a date that had been fixed for trial. Judgments in these appeals were given, respectively, on June 14 and June 15, 1999. In both instances, the decisions appealed against were made before the new case management arrangements, introduced by the CPR and supplementing practice directions came into effect on April 26, 1999.

In the Rollinson case the facts were that, in July 1996, C brought a claim against D for personal injuries sustained in the course of her employment. C was examined by a medical expert appointed by D. In December 1998 he recommended to D that she be seen by another expert, but nothing was done about that immediately. By January 1999 the case was due to be fixed for hearing and D then requested that C be examined by a second expert appointed by them. Her solicitors complained about the lateness of the involvement of the second expert but, nevertheless, C complied with the request. After an order for disclosure of all evidence, the second expert's report revealed for the first time questions about surgical interventions performed on C, information about which had been disclosed by C to D in May 1998. In February 1999 the case was fixed for hearing on June 29 and 30, 1999. By this time, liability had been admitted and quantum was the only live issue. At this point, D issued an application to vacate the trial date, arguing that, because of the unavailability of the second expert witness on the trial dates as fixed by the court, they would be left without any substantial medical evidence. On March 24, 1999, before the new rules and practice directions came into effect, the county court judge refused the application. The Court of Appeal dismissed D's appeal.

In the Court of Appeal, D relied on *Boyle v. Ford Motor Co. Ltd* [1992] 1 W.L.R. 476, CA, where a county court judge, acting under a local practice direction, refused D's application for further postponement of dates fixed for the hearing of P's industrial deafness claims, made on the ground that D's experts had not had time to inspect the site. The Court of Appeal held, allowing D's appeal, (1) that justice could be defeated if it were administered on the basis of partially prepared cases, and (2) that if postponement was necessary for failure of party to meet timetable laid down an appropriate special order for costs should be made.

In dismissing the appeal, Judge L.J. said that if it ever had been acceptable, which, despite *Boyle v. Ford Motor Co. Ltd*, his Lordship doubted, under the new case management arrangements introduced by the CPR it was certainly no longer acceptable when a trial date was bound to be fairly imminent for a solicitor to seek to instruct an expert witness without checking his availability, and if he had instructed an expert witness to go ahead when there was no reasonable prospect that the expert would be available. If a check was made and the expert witness would not be available then another expert should be instructed.

In the *Matthews* case P brought proceedings against D for personal injuries and on April 22, 1999, both parties attended before the county court judge in Plymouth for the fixing of a date for the trial of P's claim. The judge suggested July 15 as a suitable date. Counsel for D told the judge that her instructions were that neither of her clients' two expert medical experts were available on certain dates, including July 15. When pressed she was unable to enlighten the judge as to the reasons for this unavailability, having no instructions on the matter. The judge ordered that July 15 (12 weeks hence) should be fixed as the date for trial. The true position was that one doctor had been subpoenaed to attend a county court in London on July 15 and the other would be on holiday on that date. The Court of Appeal refused D's application for permission to appeal against the judge's order.

Lord Woolf M.R. said ways had to be found to meet the obvious requirement (stated in the overriding objective set out in CPR r. 1.1(1)) that cases involving expert witnesses should be heard expeditiously. That required co-operation between the parties and the courts (r. 1.3) and members of the medical profession. The Master of the Rolls added that the position in which the defendants in this case found themselves was attributable to their delay in seeking to fix a date and then failing to place before the court the true nature of the problems with regard to their two doctors. If parties want cases to be fixed for hearing in accordance with the dates that met their convenience, it was essential that those dates should be fixed as early as possible. If there was no agreement as to the dates that were acceptable to the court, the lawyers for the parties had to be in a position to give the reasons why certain dates were not convenient to the doctors. In the past it may have been thought that all that was required was for parties to tell the court the dates that their doctors had indicated would not be convenient and the court would thereupon find a date which would allow the case to be heard to meet their convenience. If it had ever been appropriate to adopt that sort of approach to listing cases, it was certainly no longer appropriate. It is essential that it be appreciated that, whereas the courts would take account of the important commitments of medical men, they could not always meet those commitments in a way which

would be satisfactory from the doctor's point of view. Doctors who held themselves out as practising in the medico-legal field had to be prepared to arrange their affairs to meet the commitments of the courts where that was practical.

Application for jury trial

In the High Court and the county courts the general rule is that trial is by judge alone. The Supreme Court Act 1981, s. 69 and the County Courts Act 1984, s. 66 (see, respectively, SCP 1999, Vol. 1, paras 20A-454 & 20A-739) provide for the circumstances in which trial may be with a jury in the High Court, on the one hand, and in a county court, on the other. Section 69 of the 1981 Act states that a party may apply for an action to be tried by jury and application must be made "not later than such time before the trial as may be prescribed". Section 66 of the 1984 Act states that the trial of certain proceedings shall be without jury and that in all other proceedings trial should be without a jury unless the court otherwise orders "on an application made in that behalf by any party to the proceedings in such manner and within such time before the trial as *may be prescribed*".

Before the Civil Procedure Rules came into force on April 26, 1999, "as may be prescribed" in s.69 of the 1981 Act and in s. 66 of the 1984 Act meant as prescribed by, respectively, RSC O. 33, rr. 4 and 5 and CCR O. 13, r. 10. RSC O. 33, rr. 4 and 5 said that the mode of trial should be determined at the summons for directions and that an application for trial by jury should be made before mode of trial was fixed under r. 4. CCR O. 13, r. 10 that stated that application should be made "on notice stating the grounds of the application". This rule further provided that notice had to be given not less than 10 days before the return day and where notice was given later, or where for that or any other reason the application could not be heard in time for a jury to be summoned, the court could postpone the trial so as to allow time for a jury to be summoned. These rules of court are not replicated in the CPR. Presumably, the position now is that a party wishing to have trial by jury applies to the court in accordance with the provisions of Pt 23 (General rules about applications for court orders).

Section 69 of the 1981 Act and s.66 of the 1984 Act are in similar, but not the same terms. They attempt to achieve the same objectives. Both provide that in certain circumstances trial by judge and jury should be ordered, for example, where the court is satisfied that there is a claim in respect of malicious prosecution or false imprisonment. Both provide that, even where such circumstances exist, jury trial should not be ordered if, for example, the trial requires any "scientific investigation" which cannot conveniently be made with a jury.

Section 66 of the 1984 Act fell for consideration in *Oliver v. Calderdale Metropolitan Borough Council*, *The Times*, July 7, 1999, CA. P commenced a county court action for assault and malicious prosecution against a local authority to be tried with a jury. The case had proceeded under the automatic directions procedure formerly found in the CCR. A date was fixed for non-jury trial. P then applied for a jury trial. The application was refused by a county court judge. The judge took the view that the action was in effect for assault and, in these circumstances, a right to jury trial did not exist. The Court of Appeal dismissed P's appeal, but not for the reasons given by the judge.

Buxton L.J. said there was no automatic right to jury trial. Application had to be made. Where the court was satisfied that the case raised, for example, an issue of malicious prosecution a presumption of jury trial arose, but it could be displaced. It appeared that the rules of court applicable when P made his application contained no specific provision as to the time within which the application should have been made. However, P's application was wholly out of time and unreasonable. It could not be right for a party to apply in April for a jury trial when a non-jury trial had already been fixed for the end of June. The application ought to have been made at the earliest pre-trial directions hearing. His Lordship was prepared to dismiss the appeal on that ground alone.

It may be noted that, as indicated above, although s. 69 of the 1981 Act and s. 66 of the 1984 Act both say that applications for jury trials should be made "in such manner and within such time before the trial as *may be prescribed*", nothing as to the manner or timing of such applications is specifically prescribed by the CPR. This omission gives added significance to the decision of the Court of Appeal in this case.

Inadvertent disclosure of privileged documents

Rules of court as to the disclosure (formerly discovery) and inspection of documents are found in Pt 31 of the CPR. Rule 31.19 states that a person who wishes to claim that he has a right to withhold inspection of a document, for example, on the ground of privilege, must state in writing that he has such a right and the grounds on which he claims it. Rule 31.20 states that, where a party inadvertently allows a privileged document to be inspected, the party who has inspected the document may use it or its contents only with the permission of the court.

The problems that arise where a party inadvertently allows a privileged document to be inspected have been considered by the courts on a number of occasions in recent years. In *International Business Machines Corp. v. Phoenix International (Computers) Ltd* [1995] 1 All

E.R. 413, Aldous J. reviewed the modern authorities (including *Guinness Peat Properties Ltd v. Fitzroy Robinson Partnership* [1987] 1 W.L.R. 1027, CA, *Derby & Co. v. Weldon* (No. 8) [1991] 1 W.L.R. 73, CA, and *Pizzey v. Ford Motor Co. Ltd, The Times*, March 8, 1993, CA). From them his Lordship derived a number of propositions including the following: (1) a party giving discovery is under a duty to ensure that only documents in respect of which no claim for privilege is made are disclosed, (2) after inspection has taken place, the court can intervene by way of injunction to prevent the use of privileged documents, (3) when deciding whether to intervene to prevent the use of privileged documents the court is exercising an equitable jurisdiction and is therefore not confined to rigid rules, but when fraud is not established, the general rule is that no injunction will be granted after inspection unless (a) the document is privileged and (b) disclosure has occurred as a result of an obvious mistake, (4) at all times the onus is on the person claiming relief to establish that the relief sought should be granted. Clearly, nowadays the law does not lean in favour of the party who makes a mistake. This makes it incumbent upon solicitors to perform their duties with the greatest possible care.

Inadvertent disclosure may come about otherwise than in the context of pre-trial disclosure in accordance with the rules of court found in Pt 31 of the CPR. The recent case of *Breeze v. John Stacey & Sons Ltd*, *Civil Procedure*, July 8, 1999, CA, provides an example. P brought an action for personal injuries against D. In 1998, D applied to strike out the claim. For that application D's solicitors prepared and served on P an affidavit. By mistake the solicitors exhibited to the affidavit documents subject to legal professional privilege. The application was unsuccessful. Subsequently, the master made an order restraining P from using the documents. The judge reversed the master's order and D appealed. The appeal was dismissed.

In the Court of Appeal, Peter Gibson L.J. said that relevant principles were summarised in the *IBM Corporation* case. There was a two-stage test. (1) Was it evident to the solicitor receiving the privileged documents that a mistake had been made? If so, the solicitor should return the documents? (2) If it was not obvious, would it have been obvious to the hypothetical reasonable solicitor that disclosure had occurred as a result of a mistake? The judge held that it was not evident to the solicitor receiving the privileged documents that a mistake had been made. The judge further held that it would not have been obvious to the hypothetical reasonable solicitor that disclosure had occurred as a result of a mistake. The Court of Appeal agreed. It was entirely reasonable for P's solicitor to conclude that the disclosure of the privileged documents was deliberate. Where a mistake which was less than obvious had been made a solicitor receiving the privileged documents was under no duty to inquire of the party supplying the documents whether privilege had been deliberately waived.

The Court gave attention to the question whether the new Civil Procedure Rules gave rise to different or additional considerations where a party claimed that privileged documents had been inadvertently disclosed. The appellant argued that, because the overriding objective stated in r. 1.1(1) of the CPR required that cases should be dealt with justly it was right to adopt a broader approach than heretofore and, applying equitable considerations, say that documents inadvertently disclosed should retain the privilege they originally had. The Court was not attracted to this argument. The established principles as to inadvertent disclosure of privileged documents have not been, and should not be, affected by the CPR.

CPR Focus

Claimant's offer to settle ("Part 36 offer")

Introduction

The provisions in Pt 36 of the CPR deal with (1) offers to settle by claimants, (2) offers to settle by defendants, and (3) payments into court by defendants; (1) and (2) are called "Part 36 offers" (formerly *Calderbank* offers) and (3) is called a "Part 36 payment" (formerly payment into court).

Some of the provisions in Pt 36 deal with these three quite different forms of settlement offers separately and others deal with two of them or all of them. Consequently, it is not always easy to follow what is intended, not only because the drafting in places leaves something to be desired. Part 36 is supplemented by Practice Direction—Offers to Settle and Payment into Court (hereinafter referred to simply as "Practice Direction").

It is possible to "unpack" the rules in Pt 36 and to separate out those rules, or parts of rules, which deal with offers to settle by claimants. If that is done, the following picture emerges. (Much of what is said below applies to Pt 36 offers made by defendants and to Pt 36 payments as well, but for ease of exposition it is assumed throughout that the Pt 36 offer made or to be made is an offer by a claimant.)

Claimant's offer

A claimant may make a Pt 36 offer at any time after proceedings have started (but note "Claimant's offer made before proceedings commenced" below) and such an offer may be made in appeal proceedings (r. 36.2(4)). His offer is treated as being "without prejudice except as to costs" (r. 36.19(1)), thus by implication restricting the circumstances in which it can be revealed to the court. (In former RSC O. 22, r. 14(2) and CCR O. 11, r. 10(2) the extent of this restriction was stated expressly, see also CPR r. 47.19(2), explained below.) It would seem that, by definition, an "open offer" (whether made by a claimant or a defendant) is not a "Part 36 offer" and, therefore, does not fall within the Pt 36 regime.

The offer must be in writing (r. 36.5(1)), must state that it is a Pt 36 offer and must be signed by the claimant or his legal representative (Practice Direction, para. 5.1) (as to signature where claimant is a company, etc., see *ibid.*, paras 5.5 & 5.6). If the offer is withdrawn it will not have the consequences set out in this Part (r. 36.5(8)) and it shall not have such consequences while the claim is being dealt with on the small claims track unless the court orders otherwise (r. 36.2(5)). (Rule 27.2 simply provides that Pt 36 does not apply to the small claims track.)

The offer may relate to the whole claim or to part of it or to any issue that arises in it (r. 36.5(2)). Indeed, the offer must state whether it relates to the whole of the claim or to part of it or to an issue that arises in it and if so to which part or issue. In addition it must state whether it takes into account any counterclaim, and, if it is expressed not to be inclusive of interest, give the details relating to interest set out in r. 36.22(2) (see further "Interest" below) (r. 36.5(3)). Further, the offer must contain the information referred to in r. 36.5(6) & (7) reflecting the provisions in r. 36.12 (see further "Offer made not less than 21 days before trial" and "Offer made less than 21 days before trial" below).

The offer may be made by reference to an interim payment (r. 36.5(5)). (Part 25 contains provisions relating to interim payments.)

Nothing in Pt 36 prevents a claimant from making an offer to settle in whatever way he chooses, but if that offer is not made in accordance with this Part, it will only have the consequences specified in this Part if the court so orders (r. 36.1(2)), and will be given such weight on any issue as to costs as the court thinks appropriate (Practice Direction, para. 1.3).

In deciding what order (if any) to make about costs, the court must have regard to all the circumstance, including any offer to settle made by a claimant (or by any party), whether or not the offer is made in accordance with Pt 36 (r. 44.3(4)(c)).

Consequences of defendant's rejection of claimant's offer

Where at trial (a) a defendant is held liable for more, or (b) the judgment against a defendant is more advantageous to the claimant, than the proposals contained in a claimant's offer (r. 36.21(1)), the court may order that the defendant should pay interest on the whole or part of any sum of money (excluding interest) awarded to the claimant at a rate not exceeding 10 per cent above base rate for some or all of the period starting with the latest date on which the defendant could have accepted the offer without needing the permission of the court (r. 36.21(2)). The court may also order that the claimant is entitled to (a) his costs on the indemnity basis from the latest date when the defendant could have accepted the offer without needing the permission of the court, and (b) interest on those costs at a rate not exceeding 10 per cent above base rate (r. 36.21(3)). The power of the court to award interest in these circumstances on the sum of money stated in the

claimant's offer and on the costs is in addition to any other power it may have to award interest (r. 36.21(6)).

The court will make the orders referred to above unless it considers it unjust to do so (r. 36.21(4)). Rule 36.21(5) states that, in considering whether it would be unjust to make the orders against the defendant referred to above, the court will take into account all the circumstances of the case including (a) the terms of any Pt 36 offer (including, presumably, any offer made by the defendant), (b) the stage in the proceedings when any such offer was made, (c) the information available to the parties at the time when the claimant's offer was made, and (d) the conduct of the parties with regard to the giving or refusing to give information for the purposes of enabling the offer to be made or evaluated. Doubtless (though r. 36.21 does not say so), the court would also take into account the terms of any payment into court made by the defendant and the stage at which such payment was made, and any offer to settle made by either party but not in accordance with Pt 36 (see r. 36.1(2)).

Rule 1.2(a) states that, in exercising any power given to it by the CPR, the court is to give effect to the overriding objective as stated in r. 1.1(1) and as elaborated in r. 1.1(2). There are certain elements of the overriding objective which would appear to be particularly relevant to the exercise by the court of the powers to penalise a party in costs and interest given to it by r. 36.21. They are, the obligations of the court to ensure "that the parties are on an equal footing" and to deal with the case in ways which are "proportionate to the financial position of each party".

Time of offer and acceptance

For various reasons it is important that the time when a claimant's offer is made and the time when it is accepted should not be matters for doubt. An offer is made when received by the offeree (r. 36.8(1)) or, if legally represented, his legal representative (Practice Direction, para. 11.1). An improvement to the offer will be effective when its details are received by the offeree (r. 36.8(3)). A claimant's offer is accepted when notice of its acceptance is received by the offeror (r. 36.8(5)).

Clarification of offer

The offeree may, within seven days of the claimant's offer being made, request the offeror to clarify the offer (r. 36.9(1)). If the offeror does not give the clarification requested within seven days of receiving the request, the offeree may, unless the trial has started, apply under Pt 23 for a "clarification order" (r. 36.9(2)) (see Practice Direction, paras 6.1 to 6.3). If the court makes an order in these circumstances, it must specify the date when the offer is to be treated as having been made (r. 36.9(3)).

Offer made not less than 21 days before trial

A claimant's offer made not less than 21 days before the start of the trial must be expressed to remain open for acceptance for 21 days from the date it is made (r. 36.5(6)). A defendant may accept such an offer without needing the court's permission if he gives the claimant written notice of acceptance not later than 21 days after the offer was made (r. 36.12(1)). In this event, the claimant will be entitled to his costs of the proceedings up to the date upon which the defendant serves notice of acceptance (r. 36.14). The costs order will be deemed to have been made on the standard basis (r. 44.12(1)). Interest payable pursuant to section 17 of the Judgments Act 1838 or section 74 of the County Courts Act 1984 deemed to be ordered shall run from "the date on which the event which gave rise to the entitlement to costs occurred" (r. 44.12(2)), that is (it would seem), from the date when the notice of acceptance is received by the claimant (rr. 36.14 & 36.8(5)).

In addition, a claimant's offer made not less than 21 days before the start of the trial must provide that after 21 days the offeree may only accept it if (a) the parties agree the liability for costs, or (b) the court gives permission (r. 36.5(6)). If the defendant does not accept the offer within the 21 day period then, if the parties agree the liability for costs, the defendant may accept the offer without needing the permission of the court, but if the parties do not agree the liability for costs the defendant may only accept the offer with the permission of the court (r. 36.12(2)).

It should be noted that r. 32.14 seems to say that if the parties agree costs in the circumstances mentioned immediately above and therefore do not need the court's permission, a costs order is deemed to have been made in the terms of that rule. However, it would seem that what is intended (though this is not expressly stated) is that r. 32.14 should be confined to the acceptance of an offer within r. 36.12(1).

If the parties cannot agree costs and, therefore, the permission of the court is needed the court will, if it gives permission, make an order as to costs (r. 36.12(3)).

Offer made less than 21 days before trial

A claimant's offer made less than 21 days before the start of the trial must state that the offeree may only accept it if (a) the parties agree the liability for costs, or (b) the court gives permission (r. 36.5(7)). If the parties agree the liability for costs, the defendant may accept the offer without needing the permission of the court (r. 36.12(2)). (Again, it would seem that r. 32.14 does not apply, see above). However, if the parties do not agree the liability the defendant may only accept the offer with the permission of the court (r. 36.12(2)). If the court gives permission it will make an order as to costs (r. 36.12(3)).

Acceptance of claimant's offer

The defendant's notice of acceptance must be signed by the defendant (or his legal representative), must be sent to the claimant and filed with the court (Practice Direction, para. 7.6). The notice must also contain the information as to the identity of the claim and the offer to which it relates referred to in Practice Direction, para. 7.7.

As to time for acceptance, see "Offer made not less than 21 days before trial" and "Offer made less than 21 days before trial" above.

Obtaining court's permission

Where the court's permission is required in the circumstances mentioned in r. 36.12(2) such permission is sought on an application under Pt 23 or, if the trial has already started, on application to the trial judge (Practice Direction, para. 7.4).

At this point it is convenient to note that the court's permission or approval is required in certain other circumstances. For example, where the offer is made in proceedings involving a child or patient (r. 36.18(1)) (see further r. 21.10 (Compromise, etc., by or on behalf of child or patient)) and where the offer involves apportioning money in a case under the Fatal Accidents Act, etc., (see Practice Direction, para. 7.8). Again, application for approval is made under Pt 23.

Stay where offer accepted

If a claimant's offer relates to the whole claim and is accepted, the claim will be stayed (r. 36.15(1)). The stay will be upon the terms of the offer, and either party may apply to enforce those terms without the need for a new claim (r. 36.15(2)). If the claimant's offer relates to only part of the claim and is accepted, the claim will be stayed as to that part, and, unless the parties have agreed costs, the liability for costs shall be decided by the court (r. 36.15(3)). If the approval of the court is required before a settlement can be binding (*e.g.* where a child or patient is a party, see r. 36.18(1)), any stay which would otherwise arise on the acceptance of the claimant's offer will take effect only when that approval has been given (r. 36.15(4)).

Enforcement of terms of offer

Where a claim or part of a claim is stayed upon the acceptance of a claimant's offer the powers of the court to do the following things are unaffected; that is to say, the court may (a) enforce the terms of a Pt 36 offer, (b) deal with any question of costs (including interest on costs) relating to the proceedings, and (c) order payment out of court of any sum paid into court (r. 36.15(5)).

Where an offer to settle by a claimant has been accepted and a party alleges that (a) the other party has not honoured the terms of the offer, and (b) he is therefore entitled to a remedy for breach of contract, the party may claim the remedy by applying to the court without the need to start a new claim unless the court orders otherwise (r. 36.15(6)).

Interest

Where a claimant makes an offer to settle for a sum of money it is important that the offeree should understand exactly what the claimant is proposing as to interest. If doubts exist in the mind of the offeree as to whether interest is being sought and, if so, in what amount and on what bases (including rates and periods of time), he could seek a clarification order (see r. 36.9).

Conceivably, a claimant in making an offer to accept a sum of money may deal with the matter of interest in one of several different ways. He may wish to say (a) that the sum he is offering to settle for does include a sum for interest; or he may wish to say (b) that the sum he is offering to settle for does not include interest, and either (i) that he will settle for that sum plus interest to be calculated or (ii) that he will settle for that sum alone and without any sum for interest being added.

Rule 36.22 contains provisions as to interest. They are not free from doubt but the inherent ambiguities are largely removed by Practice Direction, para. 5.4. (Part of the problem is that the rule seems to have offers by defendants primarily in mind.) The combined effect of the rule and the direction would seem to be as follows. By r. 36.22(1), a claimant's offer is treated as an offer inclusive of all interest until the last date for acceptance without needing the permission of the court, unless the offer "indicates to the contrary". As para. 5.4 explains, that is to say, "unless it is expressly stated in the offer" that the interest is not included. If it is so expressly stated, then the offer must state (a) that interest is sought, and (b) the amount sought, including the periods of time for which interest is claimed and the rates applicable to those periods (r. 36.22(2)). The point is that, without an express indication to the contrary, the defendant can assume that the claimant's offer is an offer inclusive of all interest until the last date for acceptance without needing the permission of the court. (As was explained above, if the offer (whenever made) is not accepted in the prescribed manner within 21 days after it is made or before the start of trial, whichever is the later, then the court's permission will need to be obtained for the offer to be accepted unless the parties agree the liability for costs (r. 36.12).)

Claimant's offer made before proceedings commenced

In certain circumstances, if a claimant makes an offer

to settle before proceedings are begun the court will take that offer into account when making any order as to costs (r. 36.10(1)). The circumstances are that the offer was expressed to be open for at least 21 days after the date it was made and that it otherwise complied with the provisions of Pt 36 (r. 36.10(2)). Such an offer is made when it is received by the offeree (r. 36.10(5)). An offeree may not, after proceedings have begun, accept an offer made in these circumstances without the permission of the court (r. 36.10(4)).

Offers to settle costs of proceedings

In conclusion, something may be said about offers to settle disputes as to costs. Under the CPR, proceedings for taxation of costs are called detailed assessment proceedings. In a given case, the paying or receiving party may make a written offer to settle the costs of the proceedings giving rise to such proceedings. Technically speaking, an offer made in these circumstances is not "a Part 36 offer". Rule 47.19(1) states that, if the offer is expressed to be without prejudice save as to the costs of the detailed assessment proceedings, that offer will be taken into account by the court in deciding liability for the costs of those proceedings. It is expressly stated in the rules that the fact such an offer has been made must not be communicated to the costs officer until the costs of the detailed assessment proceedings fall to be decided (r. 47.19(2)). (It was noted above that r. 36.19(1) contains no such express prohibition.) An offer to settle costs does not have the consequences referred to in r. 47.19 where the receiving party is legally aided, unless the court orders otherwise (see Practice Direction About Costs, para. 7.6).

EDITOR: **Professor I. R. Scott,** University of Birmingham.
Published by Sweet & Maxwell Ltd, 100 Avenue Road, London NW3 3PF.
ISSN 0958-9821

Typeset by Sweet & Maxwell Ltd
Printed by Hart-Talbot Press Ltd