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CIVIL PROCEDURE NEWS

A White Book Service

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Sweet & Maxwell

In Brief

Cases

- ARROW NOMINEES INC. v. BLACKLEDGE, *The Times*, December 8, 1999
  CPR r. 3.4, European Convention on Human Rights and Fundamental Freedoms, Art. 6.1 — application by D to strike out petition presented by P — application based solely on ground that P was in contumacious breach of rules or an order of the court — held, dismissing the application, striking out on this basis would be an improper exercise of the court's powers and was likely to be a breach of Art. 6 (see *Civil Procedure* (2nd ed.), para. 3.4.1)

- BEGUM (NIPA) v. TOWER HAMLETS LONDON BOROUGH COUNCIL, *The Times*, November 9, 1999, CA
  Housing Act 1996, ss. 203 & 204 — housing authority, under s. 203 reviewing and confirming its earlier decision under s. 202 in relation to B's application for housing as homeless person — county court judge allowing B's appeal — in allowing the authority's appeal, held, in s. 204, "any point of law" includes, not only matters of legal interpretation, but also the full range of issues which would otherwise be the subject of an application to the High Court for judicial review (*e.g.* procedural error and questions of power, irrationality, and adequacy or inadequacy of reasons) (see *SCP 1999*, Vol. 2, para. 8Q-246)

- BANK OF CREDIT AND COMMERCE INTERNATIONAL S.A. v. ALI (NO. 4) 149 New L.J. 1734 (1999)
  CPR rr. 1.1(1), 1.2, 44.3 — claims for breach of contract brought against bank (D) by several hundred former employees — claims of five employees (P) selected and tried as test case — at trial, court holding that, although D was in breach of contract, P could not prove that they had suffered any loss — judge hearing submissions from D, P and other claimants on the question of costs — held, (1) r. 44.3 introduces new factors to which the court must have regard when considering what order to make as to costs, (2) the overriding concern is to make the order which justice requires, (3) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, but the court may make a different order, (4) in group actions, the constraints on making a different order previously imposed by case law no longer obtain, (5) the judge's task is to take an overview of the case as a whole and reach a considered conclusion on two questions (a) who succeeded in the action? (b) taking into account the answer to the first question, what order for costs justice required? (6) in the circumstances of this case the proper course was to make no order as to costs (see *Civil Procedure* (2nd ed.,) para. 44.3.5; see also *SCP 1999*, Vol. 1, paras 62/3/3 & 62B/83)

- DEMETRI v. WESTMINSTER CITY COUNCIL, *The Times*, November 11, 1999, CA
  Housing Act 1996, ss. 202(2) & 204 — housing authority, under s. 203 reviewing and confirming its earlier decision under s. 202 in relation to D's housing application — county court judge striking out D's appeal under s. 204 — held, dismissing D's appeal (1) under s. 204(2), an appeal to a county court must be brought within 21 days of the applicant's being notified of the decision on his request made under s. 202(1), (2) an applicant has no right to request a further review of a decision made on such request, (3) where, in the exercise of discretion, the decision-making body reconsiders its decision, any appeal to a county court must be made within 21 days as aforesaid, that is to say, within 21 days of the applicant's being notified of the decision made on his original request (see SCP 1999 ,Vol. 2, para. 8Q-246)

- FEDERAL BANK OF THE MIDDLE EAST v. HADKINSON, *The Times*, December 7, 1999, CA
  CPR r. 1.1(1), Sched. 1, RSC O. 59, r. 10(5), Practice Direction (Court of Appeal (Civil Division)), para. 2.8.1, European Convention on Human Rights and Fundamental Freedoms, Art. 6 — bank (P) obtaining summary judgment against a bankrupt (D) and a company with no realisable assets (D2) for US$1.5m — as a consequence of a finding of contempt against him, stay imposed on D1's further participation in the proceedings — in addition, D1 ordered to pay P's costs of contempt hearing, summarily assessed at £63,000 — permission granted to D1 and D2 for appeal against summary judgment, and to D1 for appeal against contempt finding — appellants' legal expenses being met by persons outside the jurisdiction and with no assets within the jurisdiction — P applying for and granted (by single judge) orders for security for their costs against D1 and D2 — on appeal against costs orders, held, dismissing the appeals, (1) where an appellant contends that security for costs should not be ordered because it would prevent him from pursuing his appeal, he has to satisfy the Court, not only that he is unable to furnish security for costs from his own resources, but also that he is unable to raise the money elsewhere, (2) it did not follow that, because the judges granting permission to appeal had done so on the basis (now required by para. 2.8.1) that the appeals had some realistic prospects of success that an order for security for costs could not, or should not, be made, (3) in arguing that an order for security for costs was inappropriate, the appellants were seeking to argue the appeal on an unequal footing, a consequence which, in the light of the overriding objective, should be avoided, so far as is practicable, (4) as it had not been demonstrated that the costs orders would stifle the appeals, there was no breach of Art. 6(1) (see *Civil Procedure* (2nd ed.), paras 1.3.6, R59.10 & PD-001 (p. 1408), and SCP 1999, Vol. 1, paras 59/10/33 & 59/10/39)

■ FULTON MOTORS LTD v. TOYOTA (G.B.) LTD, July 23, 1999, CA, unrep.
CPR rr. 44.3(8), 44.7 & 48.2, Supreme Court Act 1981, s. 51(3), Practice Direction (General Rules About Costs), paras 4.3 & 4.11, Practice Note (Court of Appeal: Assessment of Costs) [1999] 1 W.L.R. 871 — following the dismissal of action by F (a company in receivership) against T, F appealing to Court of Appeal — L, a director of F, ordered to provide security in the sum of £7,500 for T's costs on the appeal, then estimated at £28,600 — appeal dismissed with costs, now estimated by T to be in excess of £60,000 — T applying (1) for costs order against L personally, and (2) for summary assessment of those costs — L made a party to the proceedings for the purpose of these applications — held, (1) the test for whether a non-party should be made liable for costs is whether it is just in all the circumstances to make the order, (2) L (and not the receiver) had funded the appeal, he had a personal interest in pursuing it, and he was aware of the risks as to costs, (3) the appeal could not be said, on any realistic assessment, to have good prospects of success, (4) in these circumstances, L could and should be made liable in costs personally, but (5) this was not a case in which a summary assessment of T's costs should be made, however (6) an order for payment of an amount on account before those costs was assessed was appropriate (observations by Pill L.J. on fact that L may have been misled as to his costs risk by T's initial estimate of their costs, a substantial underestimate that was not satisfactorily explained) (see *Civil Procedure* (2nd ed.), paras 44.3.8, 44.7.4, 44PD-004 & 48.2.1; see also *SCP 1999*, Vol. 2, para. 20A-401)

■ HAZLETT v. SEFTON METROPOLITAN BOROUGH COUNCIL, 149 New L.J. 1869 (1999), DC
CPR r. 44.3, Environmental Protection Act 1990, s. 82(12) — H, occupier and tenant of premises owned by S, instructing solicitors to make a complaint that the condition of the premises gave rise to a statutory nuisance — by date of hearing, nuisance abated — at hearing application made for order under s. 82(12) compensating H for expenses incurred in the proceedings — both H and her solicitor declining to give evidence on question whether a proper private fee agreement existed between them making H liable on costs — stipendiary magistrate holding that, as there was no admissible evidence on which he could be satisfied that H had incurred expenses in the proceedings, he could not make an order under s. 82(12) — held, allowing H's appeal by way of case stated and remitting the matter to the magistrate, (1) there is a presumption that H's costs of the proceedings were properly incurred, (2) the mere fact that S did not accept that there was a proper private fee agreement between H and her solicitor did not disturb that presumption, however (3) the presumption could be displaced if S could show that there were genuine reasons for believing that there was no such agreement, and (4) in that event, H could be required to adduce evidence of her liability to pay costs (see *Civil Procedure* (2nd ed.), para. 44.3.5)

■ LITTLE v. GEORGE LITTLE SEBRIE & CO., *The Times*, November 17, 1999
CPR rr. 1.1(2), 1.2(a) & 36.21 — offer by claimant (C) to settle made before trial not accepted by defendant (D) — at trial, C obtaining judgment for damages in which D held liable for more than the proposals contained in C's offer — held, in these circumstances the court's power under r. 36.21(2) to order enhanced interest payable by D on the damages awarded had to be exercised in accordance with the overriding objective, (2) in determining the amount of such interest it was appropriate for the court to proceed by (a) calculating interest at 10 per cent above base rate on the whole of the judgment (excluding interest) from the earliest date when it could be awarded, and then (b) considering whether this calculation would (i) work an injustice, or (ii) result in a disproportionate advantage to C or disadvantage to D (see *Civil Procedure* (2nd ed.), para. 36.21.1)

■ MALGAR LTD v. R.E. LEACH (ENGINEERING) LTD, November 1, 1999, unrep.
CPR Pt 1, Pt 22 & r. 32.14, Practice Direction (Statements of Truth), para. 5 — on C's application for summary judgment, consent order made under which D submitted to judgment on part of C's claim — before trial of outstanding issues, C applying for court's permission to bring proceedings for contempt of court against defendant company and two of its officers — C alleging that false statements had been made in documents verified by statements of truth, in particular (a) in D's statement of case, and (b) in witness statements by officers prepared for purpose of resisting C's application for summary judgment — held by Vice-Chancellor, dismissing the application, (1) an attempt to interfere with the course of justice of a sufficient seriousness to warrant committal proceedings had not been shown, (2) the statements alleged to have been false related to matters no longer in dispute, they were not persisted in, and were abandoned by D by their agreeing to the consent order, (3) in all the circumstances the application was disproportionate — Vice-Chancellor (a) explaining (i) that rules of court cannot make substantive changes in the law of contempt, and (ii) that proceedings under r. 32.14 involve allegations of interference with the course of justice which is a public (not a private) wrong, and (b) outlining principles to be applied on applications for permission to commit for such contempt whether made under r. 32.14 or other provisions (see *Civil Procedure* (2nd ed.), paras 22.1.16 & 32.14.1)

■ MCCAULEY v. VINE [1999] 1 W.L.R. 1977, CA
Civil Evidence Act 1968, s. 11(2) — in personal injury action, P claiming that she was injured when the driver of the vehicle in which she was being carried swerved to avoid a vehicle being driven negligently by D and collided with a tree — D unaware of the incident but subsequently traced by police and convicted by magistrates of driving without due care and

attention — in statement of case, P indicating that she intended to take advantage of s. 11(2) and to rely on the conviction as evidence of D's negligence — D admitting conviction but pleading in defence that it was erroneous — D proposing to call expert evidence in support of that defence master granting P's application for summary judgment and judge dismissing D's appeal — held, allowing D's appeal, (1) as D had good cause for doing so, it was open to her to seek to rebut the presumption raised by proof of the conviction, (2) there was no abuse of process because D was not attempting to mount a collateral attack on the conviction, (3) the summary judgment procedure is inappropriate where there are real questions to be tried (see *Civil Procedure* (2nd ed.), para. 16.4.4 and *SCP 1999*, Vol. 2, para. 21G-29)

- NATWEST LOMBARD FACTORS LTD v. ARBIS, *The Times*, December 10, 1999
  CPR r. 1.1(1) & 1.2, Sched. 1, RSC O. 58 & O. 59, r. 10(2) — district judge dismissing N's application for bankruptcy order against A — on appeal to judge, held, the question whether N should be permitted to adduce on appeal under O. 58 evidence that had not been before the district judge was to be resolved in accordance with the same principles as stated in *Ladd v. Marshall* [1954] 1 W.L.R. 1489, CA, in relation to O. 59, r. 10(2) — judge observing that it is not necessarily the case that former RSC and CCR rules re-enacted in identical terms in the CPR will be interpreted in the same way as previously (see *SCP 1999*, Vol. 1, para. 59/10/11, and *Civil Procedure* (2nd ed.), paras 1.3.2 & 2.3.3)

- PARRY v. NORTH WEST SURREY HEALTH AUTHORITY, *The Times*, January 5, 2000
  CPR r. 25.7, Supreme Court Act 1981, s. 32 — in medical negligence claim, judgment for P on issue of liability with damages to be assessed entered in June 1994 — subsequently, D making interim payments totalling £950,000 — these payments invested by P and accruing interest — in November 1999, at trial of quantum, held (1) what P had done with the money once paid was of no concern to the court, consequently (2) the accrued interest should not be taken into account and, therefore (3) should not be deducted from the sum allowed for interest in the final determination of quantum (see *Civil Procedure* (2nd ed.), paras 25.7.14 & 25.7.21 and *SCP 1999*, Vol. 2, para. 20A-209)

- PENNEY v. EAST KENT HEALTH AUTHORITY, November 16, 1999, CA, unrep.
  P bringing action in medical negligence against health authority — judge giving judgment in favour of P on liability — in dismissing D's appeal, Court of Appeal explaining approach to be adopted by Court in reviewing trial judge's findings on issues which judge had to resolve in the light of conflicting expert evidence

- RICHARDSON v. DESQUENNE ET GIRAL U.K. LTD, November 23, 1999, CA, unrep.
  CPR rr. 44.3 & 44.7, Practice Direction (General Rules About Costs), paras 2.5 & 4.4 — employers (C) commencing claim against former employee (D) to enforce contractual obligation in restraint of trade — C granted interim injunction *ex parte* — at *inter partes* hearing, judge directing trial of preliminary issue and continuing injunction until judgment on that issue — judge also making order for costs in favour of C, which he summarily assessed at £16,000, to be paid by D immediately upon judgment on the preliminary issue — held, allowing D's appeal and ordering costs reserved to trial judge, (1) the purpose of the injunction was to preserve the status quo, (2) in these circumstances, it could not be said that D was an "unsuccessful party" within r. 44.3(2)(a) who, as a general rule, should be ordered to pay costs, consequently (3) this was not a case in which the court's discretion under r. 44.3(1)(a) as to whether costs should be payable by one party to another arose, therefore (4) the power to make a summary assessment under r. 44.7 (as reinforced by para. 4.4) did not fall to be exercised, (5) if any order for costs was to be made it should be of a type commonly made in proceedings before trial as referred to in para. 2.5 (see *Civil Procedure* (2nd ed.), paras 44.3.2, 44.3.4, 44PD-002 & 44PD-004)

- SULLIVAN v. BLANNING, *The Times*, October 27, 1999, CA
  CPR rr. 2.6 — action commenced under CCR struck out by district judge on ground that judgment had not been entered within 12 months of service of P's default summons (O. 9, r. 10) — court seal affixed to application for default judgment made in time but court records containing no record of entry of judgment — judge dismissing P's appeal — held, allowing P's appeal, the proper inference to be drawn from the sealed application was that the judgment was entered in time (see *Civil Procedure* (2nd ed.), para. 2.6.3)

- TURNER & CO. v. O. PALOMO S.A. [1999] 4 All E.R. 353, CA
  Solicitors Act 1974, s. 70 — held, a solicitor's client who no longer has a right to claim taxation of the bill of costs under s. 70, after expiry of the statutory time limit, is nevertheless entitled to challenge the reasonableness of the sum claimed by the solicitor as due (see *SCP 1999*, Vol. 2, para. 15A-58/71)

- U.C.B. CORPORATE SERVICES LTD v. HALIFAX (S.W.) LTD, *The Times*, December 23, 1999, CA
  CPR r. 3.4 — bank (P) lending money on security of property valued by surveyors (D) — in 1995, P bringing action in negligence against D — on D's application (made in May 1999), judge striking out action on ground that its continuation would be an abuse of the process of the court in view of the wholesale disregard by P of rules and orders — held, dismissing P's appeal, (1) under r. 3.4 the court has an unfettered discretion to strike out a case where there has been a breach of a rule, (2) it is entirely in line with the underlying purposes of the CPR that a judge may regard striking out of a claim as the appropriate sanction where there has been a wholesale disregard of rules and orders, (3) there was no reason to believe

that the judge was not aware of other sanctions available to the courts under the CPR for dealing with delay (*Biguzzi v. Rank Leisure Plc.* [1999] 1 W.L.R. 1926, CA and *Shikari v. Malik*, The Times, May 20, 1999, CA, ref'd to) (see *Civil Procedure* (2nd ed.), para. 3.4.1)

Practice Directions

- PRACTICE DIRECTION (HOUSE OF LORDS: CIVIL PROCEDURE AMENDMENTS) [1999] 1 W.L.R. 1833, HL
amends following Practice Directions applicable to civil appeals (references are to appropriate paragraphs in *SCP 1999*, Vol. 2): 1.6(b) (Admissibility of petitions) (para. 19A-7), 4.7 (Respondent's objections) (para. 19A-22), 12.1 & 12.2 (Statement of facts and issues) (para. 19A-43), 14.5 (Petitions for extension of time) (para. 19A-53), 16.1 & 16.6 (Appellants' and respondents' cases) (paras 19A-57 & 19A-58), 16.12 (Joint cases) (para. 19A-60), 16.13 (Lodgment of cases) (para. 19A-61), 17.1 (Bound volumes) (para. 19A-63), 19 (Authorities) (paras 19A-65 & 19A-66), 20.1 (Submissions at the hearing as to costs), 25.3 (Legal aid) (para. 19A-76), 42 (Dispute between parties disposed of) — also amends O. V of the Standing Orders Regulating Judicial Business (para. 19A-107)

- PRACTICE DIRECTION (TAXATION PROCEDURE AMENDMENT) [1999] 1 W.L.R. 1860, HL
amends Form of Bills of Costs Applicable to Judicial Taxations (1997) by inserting in Part I a new direction 9(A) relating to criminal legal aid — a copy of this Form is available on request from the Judicial Office (Practice Directions Applicable to Criminal Appeals No. 6.6 (see SCP 1999, Vol. 2, para. 19B-19, p. 1565) and Practice Directions and Standing Orders Applicable to Civil Appeals No. 23.2 (see *ibid.*, para. 19A-73, p. 1540))

- PRACTICE DIRECTION (POST-TRAUMATIC STRESS DISORDER LITIGATION AGAINST MINISTRY OF DEFENCE), *The Times*, November 26, 1999, Sup.Ct.
directions issued by Lord Chief Justice for conduct of claims for post-traumatic stress disorder and related claims against the Ministry of Defence where the earliest alleged failure occurred before May 15, 1987 (the Group 1 actions, assigned to Master Rose) or after that date (the Group 2 actions, assigned to Master Foster) — all claim forms, etc., to be marked in accordance with these directions — actions proceeding in a district registry or in a county court to be transferred to the RCJ — CPR to apply and all claims to be allocated to the multitrack — all applications, etc., to judge to be made to Buckley J. until such time as trial judge assigned

Statutory Instruments

- CIVIL LEGAL AID (GENERAL) (AMENDMENT) (NO. 2) REGULATIONS 1999 (S.I. 1999 No. 2565)
namend Civil Legal Aid (General) Regulations 1989 to exempt the costs of giving advice and assistance related to mediation in family matters from the statutory charge in favour of the Legal Aid Board, under the Legal Aid Act 1988, s. 16(6) — in force October 5, 1999 (see SCP 1999, Vol. 2, para. 16D-1)

- LEGAL ADVICE AND ASSISTANCE (AMENDMENT) (NO. 3) REGULATIONS 1999 (S.I. 1999 No. 2575)
amend the Legal Advice and Assistance Regulations 1989, so as to replace references to family credit and disability working allowance with references to working families' tax credit and disabled person's tax credit, following the changes made by the Tax Credits Act 1999 — recipient of one of these tax credits will be eligible for advice and assistance provided that the amount to be deducted from the weekly maximum allowance does not exceed £70 — those in receipt of family credit or disability working allowance under a decision made before the coming into force of these Regulations will continue to be eligible - these Regulations also: (a) exclude the costs of giving advice and assistance related to mediation in family matters from the charge under section 11(2)(b) of the Legal Aid Act 1988, and provide that such advice and assistance shall be treated as a separate matter from other advice and assistance and (b) restrict the procedure, under regulation 10 of the 1989 Regulations, whereby a client may authorise another person to attend on the solicitor on his behalf, to clients present or resident in England and Wales — in force October 5, 1999

- LEGAL AID (MEDIATION IN FAMILY MATTERS) (AMENDMENT) (NO. 2) REGULATIONS 1999 (S.I. 1999 No. 2738)
these Regulations amend the Legal Aid (Mediation in Family Matters) Regulations 1997, so as to replace references to family credit and disability working allowance with references to working families' tax credit and disabled person's tax credit, following the changes made by the Tax Credits Act 1999 — a recipient of one of these tax credits will be eligible for mediation (so far as his income is concerned) provided that the amount to be deducted from the weekly maximum allowance does not exceed £70 — those in receipt of family credit or disability working allowance under a decision made before the coming into force of these Regulations will continue to be eligible for mediation — revoke and replace Legal Aid (Mediation in Family Matters) (Amendment) Regulations 1999 (S.I. 1999 No. 2576) (which contained formal errors) — in force October 5, 1999

- UNFAIR ARBITRATION AGREEMENTS (SPECIFIED AMOUNT) ORDER 1999 (S.I. 1999 No. 2167)
raises to £5,000 (from £3,000) the amount specified for the purposes of the Arbitration Act 1996, s. 91 (agreements unfair under Unfair Terms in Consumer Contracts Regulations 1994) for England and Wales and Scotland — in force January 1, 2000 (see SCP 1999, Vol. 2, para. 21D-213)

IN DETAIL

New CPR Practice Directions

The following new Practice Directions came into effect on December 13, 1999 (for complete texts, see below): Practice Direction (Reciprocal Enforcement of Judgments) (supplementing CPR Sched. 1, RSC O. 71) (R71.0.1, Civil Procedure (2nd ed.), p. 1128); Practice Direction (Revenue Proceedings) (supplementing CPR Sched. 1, RSC O. 91) (R91.0.1, p. 1187); Practice Direction (Bills of Sale) (supplementing CPR Sched. 1, RSC O. 95) (R95.0.1, p. 1214); Practice Direction (Execution) (supplementing CPR Sched. 1, RSC O. 46 and Sched. 2, CCR O. 26) (R46.0.1, p. 910 & C26.0.1, p. 1312)

Practice Direction (Reciprocal Enforcement of Judgments)

This Practice Direction supplements CPR Sched. 1, RSC O. 71. The text of this Order is found in *Civil Procedure* (2nd ed.), beginning at para. R71.0.1, p. 1128, and ending at para. R71.44.1, p. 1153.

One of the principal objectives of the procedural reforms recommended in the Access to Justice Reports was the rationalisation of the forms of process, both originating and interlocutory. A number of rules of court previously found in the RSC and the CCR were re-enacted in Schedules 1 and 2 of the CPR. Many of them provided for the commencement of proceedings by various means. These means had to be brought into line with the process provisions in the CPR. In some instances, this was accomplished by the notorious Practice Direction (Alternative Procedure for Claims) (see *Civil Procedure* (2nd ed.), para. 8PD-001). In other instances, the texts of the former rules were amended when re-enacted, for example, by substituting the term "claim form" (see CPR Pt 7) for "writ of summons" or "application notice" (see CPR Pt 23) for "summons".

This latter solution has not proved wholly successful. An example is provided by RSC O. 71, r. 22. Before the CPR came into effect, this rule stated that an application for the variation or cancellation of the registration of a Community judgment on the ground that the judgment had been wholly or partly satisfied at the date of registration "shall be made by summons supported by affidavit". As re-enacted in Schedule 1, it is stated that such application "shall be made by claim form supported by witness statement or affidavit" (see *Civil Procedure* (2nd ed.), para. R71.22). In this context, the substitution of "claim form" for "summons" seems wrong. Further, before the CPR came into effect, RSC O. 71, r. 33(1) stated that an appeal under Art. 37 or Art. 40 of the Brussels Convention "must be made by summons to a judge" and r. 33(2) and r. 33(2) provided for the manner in which such "summons in an appeal" should be served. As re-enacted in Schedule 1, r. 33(1) states, as would have been expected that the appeal "must be made to a judge by application in accordance with CPR Part 23" (see *Civil Procedure* (2nd ed.), para. R71.33). It might also have been expected that, in its re-enacted form, r. 33(2) would provide for the manner in which such application notice should be served. However, in fact (confusingly) r. 33(2) speaks of service of "a claim form in an appeal".

This Practice Direction patches up these errors in RSC O. 71, rr. 22 and 33 as re-enacted in the CPR. (Doubtless, in due course the rules themselves will be amended.) Accordingly, the Practice Direction states as follows:

"Application to vary or cancel registration of European Community judgments

1. Notwithstanding the provisions of RSC Order 71 rule 22, an application under rule 22 may be made by application notice under CPR Part 23 supported by witness statement or an affidavit.

Appeals

2. Notwithstanding the provisions of RSC Order 71 rule 33(2), an appeal to which rule 33 applies may be made by application notice in accordance with CPR Part 23. The application notice must be served in accordance with rule 33(2)(a) and (b)."

Practice Direction (Revenue Proceedings)

This Practice Direction supplements CPR Sched. 1, RSC O. 91. The text of this Order is found in *Civil Procedure* (2nd ed.), beginning at para. R91.0.1, p. 1187, and ending at para. R91.6.1, p. 1191.

Before the CPR came into effect, RSC O. 91, r. 1 stated (amongst other things) that any case stated for the opinion of the High Court under section 13 of the Stamp Act 1891 "shall be assigned to the Chancery Division and heard and determined by a single judge". As re-enacted in CPR Sched. 1, r. 1 is to the same effect.

This Practice Direction contains a single paragraph and it states that "any case stated for the opinion of the High Court under s. 13B of the Stamp Act 1891 will be assigned to the Chancery Division and heard and determined by a single judge". This provision leaves the misleading impression that cases may be stated under ss. 13 and 13B and, in either instance, will be treated in the same way. It is doubtful whether, strictly speaking, this gloss on r. 1 is necessary. (If it is, doubtless r. 1 itself will be amended in due course.)

Section 12 of the 1891 Act provides for the assessment by Commissioners of stamp duty. Section 13 provides that a person dissatisfied with a decision of Commissioners on an adjudication under s. 12 may appeal against it to the High Court. By the Finance Act 1999, s. 109(3), Sched. 12, para. 2, ss. 13, 13A and 13B have been substituted for s. 13. Section 13(4) now

provides that an appeal which relates only to the penalty payable on late stamping may be brought to the Special Commissioners in accordance with s. 13A. Section 13(5) provides that any other appeal may be brought in accordance with s. 13B to the High Court. The terms of s. 13B (dealing with the statement of a case by the Commissioners, etc.) do not differ markedly from the terms of the former s. 13.

A note is to be added after r. 1 (after sub-rule (a)) stating that this Practice Direction "makes further provision for the assignment of case stated".

Practice Direction (Bills of Sale)

This Practice Direction supplements CPR Sched. 1, RSC O. 95. The text of this Order is found in *Civil Procedure* (2nd ed.), beginning at para. R95.0.1, p. 1214, and ending at para. R95.6.2, p. 1219.

Rule 2 of this Order deals with applications to the High Court under s. 15 of the Bills of Sale Act 1878. Within the rule, a distinction is drawn between applications for the entry of a memorandum of satisfaction (1) where the consent of the person entitled to the benefit of the bill can be obtained, and (2) where such consent cannot be obtained. In the form in which this rule appeared in the former RSC, applications of the former type were made ex parte and applications of the latter type were made by originating summons (in the expedited form).

As is explained in para. R95.2.1 of *Civil Procedure* (2nd ed.), when re-enacted in Sched. 1 of the CPR, RSC O. 95, r. 2 was amended and was further amended by the *Civil Procedure* (Amendment) Rules 1999. As re-enacted, r. 2(1) states that every application "must be made by claim form" and no distinction is drawn between applications with consent and applications without. Further, r. 2(1) is listed in Table 1 of Practice Direction (Pt 8 and Sched. 1 & Sched. 2) (see *Civil Procedure* (2nd ed.), para. 8BPD-002, p. 132) thus bringing all applications under the rule within Section A of that Practice Direction. Neither in the rule nor in the Practice Direction is a distinction drawn between applications with consent and applications without. In para. R95.2.1 of Civil Procedure (2nd ed.) it is suggested that, nevertheless, "it would seem that an application or an application notice would suffice" where consent is forthcoming.

The matter is now put right by this Practice Direction. (As is explained on the CPR Focus page, a complementary amendment has been made to the reference to RSC O. 95, r. 2(1) in Table 1 of Practice Direction (Pt 8 and Sched. 1 & Sched. 2).) The Practice Direction states as follows:

"Entry of satisfaction

1. Notwithstanding the provisions of RSC Order 95, rule 2(1), (1A) and (2), if a consent to the satisfaction signed by the person entitled to the benefit of the bill of sale can be obtained, the application under RSC Order 95, rule 2(1) can be made by affidavit or witness statement instead of by claim form.
2. If paragraph 1 applies and the application is made by affidavit or witness statement —
   (1) CPR Part 23 will apply to the application;
   (2) the affidavit or witness statement will constitute the application notice;
   (3) the affidavit or witness statement need not be served on any other person; and
   (4) the application will normally be dealt with without a hearing.
3. Where the consent of the person entitled to the benefit of the bill of sale cannot be obtained, the application under RSC Order 95, rule 2(1) must be made by claim form in accordance with CPR Part 8 and RSC Order 95, rule 2(3) will apply."

Practice Direction (Execution)

This Practice Direction supplements CPR Sched. 1, RSC O. 46 and Sched. 2, CCR O. 26. The text of RSC O. 46 is found in *Civil Procedure* (2nd ed.), beginning at para. R46.0.1, p. 910, and ending at para. R46.9.1, p. 919. The text of CCR O. 26 begins at para. C26.0.1, p. 1312, and ends at para. C26.18.1, p. 1318.

Former RSC O. 65 (Service of Documents), r. 10 stated that no process, including a writ of execution, should be executed within the jurisdiction on a Sunday except, in case of urgency, with the leave of the Court. RSC O. 75 (Admiralty Proceedings), r. 11(3) provided that r. 10 should not apply in relation to a warrant of arrest or writ *in rem*. Former CCR O. 7 (Service of Documents), r. 3 was more broadly drawn and stated that no process should be executed within England and Wales on a Sunday, Good Friday or Christmas Day except, in case of urgency, with the leave of the Court. This rule was expressed to be without prejudice to O. 40 (Admiralty Proceedings), r. 5(5) which stated that any warrant of arrest in an action in rem could be served on a Sunday, Good Friday or Christmas Day, as well as any other day.

In the CPR, provisions as to service of process are found principally in Pt 6. Provisions comparable to the former RSC and CCR rules referred to above prohibiting the levying of execution on certain days in certain circumstances are not included in Pt 6. However, this Practice Direction imposes similar restrictions and follows the pattern of the former CCR provisions. The Practice Direction states as follows:

"Levying execution on certain days

1.1 Unless the Court orders otherwise, a writ of execution or a warrant of execution to enforce a judgment or order must not be executed on a Sunday, Good Friday or Christmas Day.

1.2 Paragraph 1.1 does not apply to an Admiralty claim in rem."

CPR Focus

Amendments to CPR Practice Directions

Amendments have been made to fourteen of the CPR Practice Directions as published in *Civil Procedure* (2nd ed.). Some of the amendments came into effect on December 13, 1999, the remainder on January 10, 2000. (For new Practice Directions introduced with effect from December 13, 1999, see page 6 of this issue).

The Practice Directions amended are:

Practice Direction (Court Documents) (5PD-001, p. 78)

Practice Direction (Part 8 and Sched. 1 & Sched. 2) (8BPD-001, p. 129)

Practice Direction (Children and Patients) (21PD-001, p. 237)

Practice Direction (Applications) (23PD-001, p. 260)

Practice Direction (Case Management - Preliminary Stage: Allocation and Re-Allocation) (26PD—001, p. 337)

Practice Direction (Civil Evidence Act 1995) (33PD-001, p. 454)

Practice Direction (Miscellaneous Provisions Relating to Hearings) (39PD-001, p. 519)

Practice Direction About Costs (Directions Relating to Part 43) (43BPD-001, p. 559)

Practice Direction About Costs (Directions Relating to Part 44 — General Rules About Costs) (44PD-001, p. 576)

Practice Direction About Costs (Directions Relating to Part 47 — Procedure for Detailed Assessment of Costs and Default Provisions) (47PD-001, p. 612)

Practice Direction About Costs (Directions Relating to Part 48 — Costs — Special Cases) (48PD-001, p. 638)

Practice Direction (Mercantile Courts and Business Lists) (49HPD-001, p. 798)

Practice Direction (Admiralty) (49FPD-001, p. 728)

Practice Direction (Insolvency Proceedings) (PD-045, p. 1456)

The changes made to these Practice Directions are as follows (the page references are to *Civil Procedure* (2nd ed.)).

PRACTICE DIRECTION (COURT DOCUMENTS)

Page 79 (para. 5PD-002)

Re-number existing paras 5.3 to 5.5 as paras 5.4 to 5.7 and insert new para. 5.3 as follows:

Filing by Facsimile

(1) Subject to paragraph (6) below, a party may file a document at court by sending it by facsimile ("fax").

(2) Where a document is filed by fax, the party filing it is not required in addition to send the court a copy by post or document exchange.

(3) A party filing a document by fax should be aware that the document is not filed at court until it is delivered by the court's fax machine, whatever time it is shown to have been transmitted from the party's machine.

(4) The time of delivery of the faxed document will be recorded on it in accordance with paragraph 5.2.

(5) It remains the responsibility of the party to ensure that the document is delivered to the court in time.

(6) Fax should not be used, except in the case of unavoidable emergency, for the delivery to the court of trial bundles or skeleton arguments.

PRACTICE DIRECTION (PART 8 AND SCHED. 1 & SCHED. 2)

Page 132 (para. 8BPD-002)

In Table 1 for "RSC O. 95, r. 2(1)(b)" *substitute* "RSC O. 95, r. 2(1)" *(correcting error referred to in Civil Procedure (2nd ed.), para. R95.2.1, p. 1217). (See also Practice Direction (Bills of Sale) (supplementing CPR Sched. 1, RSC O. 95).)*

Page 141 (para. 8BPD-004)

After para. B.14, the following note is inserted, reflecting an amendment (explained below) made to para. 10.1 of Practice Direction (Case Management — Preliminary Stage : Allocation and Re-Allocation) (see 26PD-005, p. 343) ("paragraph 10(1)" should read "paragraph 10.1(1)"):

(A defended county court claim for possession of land, where it has been allocated to the multi-track, will not normally be transferred to the Civil Trial Centre: see paragraph 10(1) of the Part 26 (Case Management preliminary stages practice direction))

PRACTICE DIRECTION (CHILDREN AND PATIENTS)

Page 238 (para. 21PD-001)

Following upon Beatham v. Carlisle Hospitals NHS Trust, The Times, May 20, 1999 (Buckley J.) (noted in Civil Procedure News, August 10, 1999), para. 1.8 is deleted and the following note is inserted after para 1.7:
(Rule 39.2(3) provides for a hearing or part of a hearing to be in private)

PRACTICE DIRECTION (APPLICATIONS)

Page 264 (para. 23PD-003)

After para. 12.1 add new para. 12.2 as follows:

Where rule 23.11 applies, the power to re-list the application in rule 23.11(2) is in addition to any other powers of the court with regard to the order (for example to set aside, vary, discharge or suspend the order).

PRACTICE DIRECTION (CASE MANAGEMENT — PRELIMINARY STAGE: ALLOCATION AND RE-ALLOCATION)

Page 343 (para. 26PD-005)

For para. 10.1 substitute the following (a consequential amendment is made to Practice Direction (Part 8 and Sched. 1 & Sched. 2) para. B.14, see above):

The following paragraphs do not apply to-

(1) a claim for possession of land in the county court, where the defendant has filed a defence;

(2) any claim which is being dealt with at the Royal Courts of Justice.

PRACTICE DIRECTION (CIVIL EVIDENCE ACT 1995)

Page 454 (para. 33PD-001)

Paragraph 3 is amended for the purpose of making it clear that the orders and directions referred to are those made before April 26, 1999. For this paragraph substitute the following:

The provisions of the Civil Evidence Act 1995 do not apply to claims commenced before 31 January 1997 if, before 26 April 1999:

(a) directions were given, or orders were made, as to the evidence to be given at the trial or hearing; or

(b) the trial or hearing had begun.

PRACTICE DIRECTION (MISCELLANEOUS PROVISIONS RELATING TO HEARINGS)

Page 523 (para. 39PD-002)

In para. 5.3 the following sentence is added at the end:

In considering whether to grant permission the matters to be taken into account include the complexity of the issues and the experience and position in the company or corporation of the proposed representative.

After para. 5.5, insert the following new paragraph:

5.6 Permission should not normally be granted under rule 39.6:

(a) in jury trials;

(b) in contempt proceedings.

PRACTICE DIRECTION ABOUT COSTS (DIRECTIONS RELATING TO PART 43)

Page 560 (paras 43BPD-001 & 43BPD-002)

In para. 1.3, for "Part 44" *substitute* "Rule 44.7".

Paragraph 1.7 has been substituted and now reads as follows:

Form 2 of the Schedule of Costs Forms and the next section of this practice direction both refer to the model form of bills of costs. The use of the model form is not compulsory, but it is encouraged. A party wishing to rely upon a bill which departs from the model form should include in the background information of the bill an explanation for that departure.

An addition has been made to para. 2.2(3) which now reads as follows (the addition consists of para. 2.2(3)(b)):

Where the receiving party obtained legal aid in respect of all or part of the proceedings the bill should be divided into separate parts so as to distinguish between;

(a) costs claimed before legal aid was granted;

(b) costs claimed against another party after legal aid was granted;

(c) costs against the Legal Aid Board only; and

(d) any costs claimed after legal aid ceased.

Page 561 (para. 43BPD-002)

Two extra paragraphs have been added to para. 2.4(2) (forcing the punctuation of para. 2.4 awry). In its entirety, para. 2.4(2) now reads as follows:

A statement of the status of the solicitor or solicitor's employee in respect of whom costs are claimed and (if those costs are calculated on the basis of hourly rates) the hourly rates claimed for each such person.

It should be noted that "legal executive" means a Fellow of the Institute of Legal Executives.

Other clerks who are fee earners of equivalent experience, may be entitled to similar rates. It should be borne in mind that Fellows of the Institute of Legal Executives will have spent approximately 6 years in practice, and taken both general and specialist examinations. The Fellows have therefore acquired considerable practical and academic experience. Clerks without the relevant experience of legal executives will normally be treated as being the equivalent of trainee solicitors and para-legals.

Page 562 (para. 43BPD-002)

In para. 2.10, for "must" *substitute* "may".

In para. 2.11, for "five or more" *substitute* "twenty or more".

In para. 2.15(3) the following sentence is added at the end:

Where travelling and waiting time is claimed, this should be allowed at the rate agreed with the client unless this is more than the hourly rate on the assessment.

Page 563 (para. 43BPD-002)

In para. 2.16, delete "In head (12) in paragraph 2.5 (other work done)".

Page 565 (para. 43BPD-004)

In para. 4.5(1), at the end add the following:

The legal representative must in addition serve a copy of the estimate upon the client.

In para. 4.5(2), at the end add the following:

Where a party is represented, the legal representative must in addition serve a copy of the estimate on the client.

Delete para. 4.5(3) and re-number para. 4.5(4) as para. 4.5(3).

PRACTICE DIRECTION ABOUT COSTS (DIRECTIONS RELATING TO PART 44 — GENERAL RULES ABOUT COSTS)

Pages 576 to 577 (para. 44PD-002)

After para. 2.3, insert as para. 2.4 the following and re-number existing paras 2.4 to 2.6 as paras 2.5 to 2.7:

In deciding what order to make about costs the court is required to have regard to all the circumstances including any payment into court or admissible offer to settle made by a party which is drawn to the court's attention (whether or not it is made in accordance with Part 36). Where a claimant has made a Part 36 offer and fails to obtain judgment which is more advantageous than that offer that circumstance alone will not lead to a reduction in the costs awarded to the claimant under this rule.

Page 579 (para. 44PD-004)

In para. 4.4(1)(b) for "less than" *substitute* "not more than" *and at the end* (before "unless there is good reason etc") *insert:*

If this hearing disposes of the claim, the order may deal with the costs of the whole claim;

Page 580 (para. 44PD-004)

At the end of para. 4.5(3) add the following:

Where a litigant is represented by a solicitor in his employment the statement of costs need not include the certificate appended at the end of Form 1.

In para. 4.9(1), for "must not" *substitute* "will not".

In para. 4.9(3), for "may not" *substitute* "will not".

Heretofore, para. 4.10 has stated that paras 4.4 and 4.5 of this Practice Direction "do not apply where the parties have agreed the amount of costs". *Paragraph 4.10 is now entirely replaced and as substituted now states as follows:*

The court will not endorse disproportionate and unreasonable costs.

Accordingly:

(a) When the amount of the costs to be paid has been agreed, the court will make this clear by saying that the order is by consent;

(b) If the judge is to make an order which is not by consent, the judge will, so far as possible, ensure that the final figure is not disproportionate and/or unreasonable having regard to Part 1 of the CPR. The judge will retain this responsibility notwithstanding the absence of challenge to individual items in the make-up of the figure sought. The fact that the paying party is not disputing the amount of costs can however be taken as some indication that the amount is proportionate and reasonable. The judge will therefore intervene only if satisfied that the costs are so disproportionate that it is right to do so.

PRACTICE DIRECTION ABOUT COSTS (DIRECTIONS RELATING TO PART 47 — PROCEDURE FOR DETAILED ASSESSMENT OF COSTS AND DEFAULT PROVISIONS)

Page 613 (para. 47PD-001)

For para. 1.4(3) substitute the following and re-number the existing para. 1.4(3) as para. 1.4(4):

in the case of appeals from the Principal Registry of the Family Division, a District Registry or a county court in respect of family proceedings, the Principal Registry of the Family Division;

Page 617 (para. 47PD-004)

Additions have been made to para. 4.1 which now reads as follows:

(1) Where the receiving party wishes to serve a reply, he must also serve a copy on every other party to the detailed assessment proceedings. The time for doing so is within 21 days after service of the points of dispute.

(2) A reply means:-

(i) a separate document prepared by the receiving party; or

(ii) his written comments added to the points of dispute.

(3) A reply must be signed by the party serving it or his solicitor.

Page 618 (para. 47PD-004)

At the end of para. 4.5 add:

(i) In the county court certain Acts and Regulations provide for costs incurred in proceedings under those Acts and Regulations to be assessed in the county court if so ordered on application. Where such an application is made, a copy of the order.

Page 621 (para. 47PD-006)

Paragraph 6.3(g) is substituted and now reads as follows:

in the Supreme Court Costs Office the relevant papers in support of the bill as described in paragraph 4.13 above; in cases proceeding in District Registries and county courts this provision does not apply and the papers should only be lodged if requested by the costs officer.

In para. 6.5, for "the amount of costs" *substitute* "of the amount of costs" *and at the end add the following sentence:*

The legal representative should, if the provisional assessment is to be accepted, then complete the bill.

Page 622 (paras 47PD-006 & 47PD-007)

In para. 6.6, for "notice of amount" *substitute* "notice of the amount".

After para. 6.8 add as para. 6.9 the following:

It is the responsibility of the legal representative to complete the bill by entering in the bill the correct figures allowed in respect of each item, recalculating the summary of the bill appropriately and completing the legal aid assessment certificate (Form 15).

After para. 7.4 insert the following new provision as para. 7.5 and re-number existing paras 7.5 and 7.6 as paras 7.6 and 7.7:

Where an offer to settle is made it should specify whether or not it is intended to be inclusive of the costs of preparation of the bill, interest and VAT. The offer may include or exclude some or all of these items but the position must be made clear on the face of the offer so that the offeree is clear about the terms of the offer when it is being considered. Unless the offer states otherwise, the offer will be treated as being inclusive of all these items.

In para. 8.1, after "rule 47.23(2) and (3)." *and before the next sentence, insert the following sentence*:

A copy of the request for written reasons must at the same time be served on all other parties to the detailed assessment hearing.

Page 623 (para. 47PD-008)

In para. 8.10, for "A party" *substitute* "The party" *and at the end add the following additional sentences:*

As a general rule the request should first be made to the judge who made the decision which is sought to be appealed. Where the same judge is unavailable, or states that he is unable to deal with the request for permission, the request may be made direct to the appellate court.

In para. 8.13, for "time limit for appeal" *substitute* "time limit for seeking permission to appeal".

Page 624 (para. 47PD-009)

Delete para. 9.5 and re-number existing paras 9.6 and 9.7 as paras 9.5 and 9.6.

After para. 9.6 (as re-numbered), add the following new provision as para. 9.7:

Where costs have been assessed at prescribed rates it is the responsibility of the legal representative to enter the correct figures allowed in respect of each item and to recalculate the summary of the legal aid schedule referred to in paragraph 9.2 above.

PRACTICE DIRECTION ABOUT COSTS (DIRECTIONS RELATING TO PART 48 — COSTS — SPECIAL CASES)

Page 641 (para. 48PD-003)

In para. 2.17, at the end add the following:

In these paragraphs "client" includes any person entitled to make an application under Part III of that Act.

Page 642 (para. 48PD-003)

In para. 2.25, for "order of the costs" *substitute* "order for the costs".

PRACTICE DIRECTION (ADMIRALTY)

Amendments are made to three paragraphs in this Practice Direction dealing with, respectively, in personam claims, collision claims, and limitation claims. These amendments are explained below. In each instance the change relates to service out of the jurisdiction. Amendments are also made to Forms ADM1 and ADM15.

Page 735 (para. 49FPD-004)

Paragraph 3.1(2) of this Practice Direction states that an in personam claim form may be served out of the jurisdiction where, first, any of the circumstances stated in sub-paras (a), (b) and (c) obtains and, secondly, the court grants permission to serve. On the CPR Focus page of Civil Procedure News, December 3, 1999, it was explained that the last part of para. 3.1, which deals with the second of these requirements, had been amended. This part of para. 3.1(2) has been further amended by substituting "rule 4" *for* "rule 4(1), (2) and (4)". *Consequently, in its entirety, para. 3.1(2) now states as follows:*

(2) An in personam claim form may also be served out of the jurisdiction where:

(a) the defendant has agreed to submit the claim to the jurisdiction of the court; or

(b) the claim is in the nature of salvage and any part of the services took place within the jurisdiction; or

(c) the claim is to enforce a claim under sections 153 and/or 154 and/or 175 of the Merchant Shipping Act 1995,

and the Court grants permission to serve the claim form out of the jurisdiction on an application in accordance with RSC Order 11, rule 4 (Schedule 1 to the CPR).

Page 736 (para. 49FPD-004)

Paragraph 4.4 has been amended by additions at the end and

now reads as follows (presumably "section 22(a) to (c)" *should read* "section 22(2)(a) to (c)"*):*

A claim form in a collision claim may not be served out of the jurisdiction unless—

(a) the case falls within section 22(a) to (c) of the Supreme Court Act 1981; or

(b) the defendant has submitted to or agreed to submit to the jurisdiction of the court,

and the Court grants permission in accordance with RSC Order 11, rule 4 (Schedule 1 to the CPR). If permission is granted the court will specify the period within which the defendant may file an acknowledgement of service and a Preliminary Act. RSC Order 11, rule 4(4) does not apply.

Page 748 (para. 49FPD-007)

Paragraph 9.1(6) is amended by the addition of a clause at the end (beginning "and the court grants permission"*). In the Stationery Office version of the amended paragraph it is suggested that this addition is made to sub-para.(c) of para. 9.1(6), but this would appear to be a mistake. In its entirety (and correcting this mistake), para. 9.1(6) now reads as follows:*

The limitation claim form may not be served out of the jurisdiction unless—

(a) the case falls within section 22(2)(a) to (c) of the Supreme Court Act 1981;

(b) the Defendant has submitted to or agreed to submit to the jurisdiction of the court; or

(c) the Admiralty Court has jurisdiction over the claim under any applicable Convention,

and the Court grants permission in accordance with RSC Order 11, rule 4 (Schedule 1 to the CPR).

Page 759 (para. 49FPD-011)

In Form ADM1 (Claim form (Admiralty action in rem)), within Practice Direction (Admiralty), at the foot of the first page for "between 10am and 4pm" *substitute* "between 10am and 4.30pm".

Page 770 (para. 49FPD-015)

On the second page of Form ADM15 (Claim form (Admiralty limitation claim)), within Practice Direction (Admiralty), before "Full name" *insert:*

Statement of Truth

*(I believe)(The Claimant believes) that the facts stated in these particulars of claim are true.

*I am duly authorised by the claimant to sign this statement.

PRACTICE DIRECTION (MERCANTILE COURTS AND BUSINESS LISTS)

Page 798 (para. 49HPD-001)

In the preamble to this Practice Direction, for "being established in Cardiff" *substitute* "being established in Wales and Chester".

PRACTICE DIRECTION (INSOLVENCY PROCEEDINGS)

Page 1467 (para. PD-061)

Sub-paragraph (5) of para. 17.5 is deleted.

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