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IN BRIEF

Cases

■ NASSER v. UNITED BANK OF KUWAIT, [2001] EWCA Civ 556, April 11, 2001, CA, unrep. (Simon Brown & Mance L.JJ.)
CPR rr. 3.1(7), 23.11, 25.13 & 25.15, Human Rights Act 1998 Sched. 1, Pt. I, arts. 6 & 14—claim by C, resident in U.S., against bank (D), struck out for want of prosecution under r. 3.4—C granted permission to appeal—single lord justice making order requiring C to provide security for costs of the appeal—on C's application, held, varying the order, (1) the discretion to make an order for security for costs against a person resident out of the jurisdiction, but not resident in a Convention state, must be exercised in a manner which is not discriminatory, (2) the discretion should be exercised on objectively justified grounds related to the obstacles to, or the burden of, enforcement of any order for costs in the foreign claimant's country—extensive review of authorities relevant to rr. 23.11, 25.13 & 25.15 in their ECHR context (see *Civil Procedure* Spring 2001, Vol. 1, para. 25.13.1 *et seq.* & 25.15.2, and Vol. 2, paras 3D-34 & 3D-41)

■ ALEXANDER v. ARTS COUNCIL OF WALES, *The Times*, April 27, 2001, CA (Lord Woolf C.J., May & Jonathan Parker L.JJ.)
CPR Pt. 53, Supreme Court Act 1981, s. 69(1)—in the course of the trial before a jury of C's defamation claim, judge concluding that a jury could not find that the publications complained of had been made maliciously—accordingly, judge discharging jury and entering judgment for D—held, dismissing C's appeal, (1) if there is a material issue of fact in a libel case, s. 69(1) entitles a party to have that issue determined by a jury, however (2) it is for the judge to decide whether there really is such an issue, (3) where the judge comes to the conclusion that the evidence, taken at its highest, was such that a jury properly directed could not properly reach a necessary factual conclusion, it his duty, upon a submission being made, to withdraw that issue from the jury, (4) in the instant case, if the issue of malice had been left to the jury, and they had found in C's favour, the Court would have set that decision aside as perverse—observations on desirability of leaving issues to jury where risk that judge's view on them might be overturned on appeal—*Safeway Plc. v. Tate, The Times*, January 25, 2001, CA, expl'd (see *Civil Procedure* Spring 2001, Vol. 2, para. 9A-325 & 9A-624)

■ BEATTIE v. SECRETARY OF STATE FOR SOCIAL SECURITY, *The Times*, May 3, 2001, CA (The President, and Pill & Jonathan Parker L.JJ.)
CPR Pt. 40, Practice Direction (Structured Settlements), Income Support (General) Regulations 1987, regs. 41 & 42—C awarded damages in personal injuries proceedings—sum awarded paid under structured settlement arrangement—social security commissioner ruling that C no longer entitled to income support—held, dismissing C's appeal, (1) the arrangement was a typical example of an annuity within reg. 41 and the payments made under it were to be treated as income, (2) the payments could not be treated as payments of income to a third party for the purposes of reg. 42 (see *Civil Procedure* Spring 2001, Vol. 1, para. 40CPD-001)

■ BEEDELL v. WEST FERRY PRINTERS LTD., *The Times*, April 5, 2001, CA (Aldous, Mummery & May L.JJ.)
CPR rr. 1.1 & 52.9—C bringing claim for unfair dismissal etc—employment tribunal applying "range of reasonable responses" test and finding that D had acted reasonably etc—EAT dismissing C's appeal—in ignorance of key authority, single lord justice granting C permission to appeal to Court of Appeal—D applying to set aside permission—held, (1) the test applied by the tribunal was controversial, (2) if the Court were to grant D's application, the EAT's decision would be unappealable, (3) given the state of the authorities, C's appeal was bound to fail, (3) in these circumstances, the just course was to refuse D's application and to dismiss C's appeal, leaving it open to C to apply for permission to appeal to the House of Lords—*Foley v. Post Office*, [2000] I.C.R. 1283, CA ref'd to (see *Civil Procedure* Spring 2001, Vol. 1, para. 52.9.1)

■ BRISTOL-MYERS SQUIBB COMPANY v. BAKER NORTON PHARMACEUTICALS INC., *The Times*, April 26, 2001, CA (Aldous & Laws L.JJ. and Blackburne J.)
CPR r. 40.12(1)—in patent claim, trial judge holding that patent invalid—judge ordering that C should pay costs of both defendants (Ds) up to particular date and one set of costs thereafter—Court of Appeal holding that the restriction to one set of costs was unjustified ([2001] R.P.C. 1, CA)—under judge's order, interest on costs running from date of judgment—under Court of Appeal order, interest running from date of Court's order—held, granting Ds' application, (1) it is possible under the slip rule to amend an order to give effect to the intention of the court, (2) it was not the Court's intention to deprive D of interest accruing after the date of judgment (see *Civil Procedure* Spring 2001, Vol. 1, para. 40.12.1)

■ C. INC. PLC. v. L., (2001) 151 New L.J. 535 (Aikens J)
CPR rr. 6.20(3), 6.30(2), 19.2 & 25.1(1)(f)—D failing to pay for loan stock in company acquired by C—C commencing proceedings against D and obtaining default judgment—C obtaining freezing order over D's assets—on affidavit D stating that she had no assets of her own and was entirely dependent on her

husband (X), who was out of the jurisdiction—C granted freezing order over X's assets—C applying for appointment of receiver over D's assets—X applying to set freezing order against him aside—held, granting C's application and dismissing X's application, (1) X was a necessary or proper party and the court had jurisdiction under r. 6.20 and r. 6.30 to permit service of C's application notice on X, even though he was resident out of the jurisdiction and there was no substantive claim against him, (2) X could be joined in the proceedings because, as the default judgment remained unsatisfied, there were "matters in dispute" within the meaning of r. 19.2(2), (3) the assets of X were not (even arguably) beneficially owned by D, however (4) the court had jurisdiction to grant a freezing order against X in favour of C provided C had a right against D, that being a right that gave rise to a right that D could enforce against X and his assets, (5) in the circumstances of this case, D had arguably a right to indemnity from X that could be enforced, either by her or by a receiver appointed by the court—*Cardile v. L.E.D. Builders Pty. Ltd.*, [1999] H.C.A. 18, (1999) 198 C.L.R. 380, ref'd to (see *Civil Procedure* Spring 2001, Vol. 1, paras 6.21.28, 19.2.3 & 25.1.23)

■ CARLSON v. TOWNSEND, [2001] EWCA Civ 511, April 10, 2001, CA, unrep. (Simon Brown, Brooke & Mance L.JJ.)
CPR Pt. 35, Pre-Action Protocol for Personal Injury Claims paras 3.14 to 3.21—before commencing personal injury claim, C giving D list of three medical consultants considered suitable to be instructed as experts—upon D objecting to one of the three, C instructing T, one of the remaining two—upon receiving T's report, C deciding not to disclose it and instructing another expert (S), not one of those originally named—district judge ordering C to disclose T's report—judge allowing C's appeal—single lord justice granting D permission to make second appeal (r. 52.13)—held, dismissing appeal, (1) C's withholding of T's report did not constitute non-compliance with the Protocol, (2) the sanctions which may be imposed by the court for breach of the Protocol do not include overriding C's privilege in T's report, (3) D's non-objection to C's instruction of T did not transform T into a single joint expert whose report would be available to both parties, (4) it is not the aim of the Protocol to deprive a claimant of the opportunity to obtain confidential pre-action advice about the viability of his claim—Brooke L.J. giving extended account of background to paras 3.13 to 3.21 (see *Civil Procedure* Spring 2001, Vol. 1, paras 35.7.1 & C2-015)

■ MURRELL v. HEALY, *The Times*, May 1, 2001, CA (Waller & Dyson L.JJ.)
C injured in two separate road accidents—C's claim for damages for loss of earnings arising out of first accident settled in without prejudice negotiations—subsequently, in C's claim arising out of second accident, at hearing for assessment of damages judge admitting in evidence documents from files of insurers of defendant in first claim—held, dismissing C's appeal, the documents were admissible because they were relevant to an inquiry as to what injuries C had suffered in the first accident—*Muller v. Linsley & Mortimer* [1996] PNLR 74, CA, ref'd to (see *Civil Procedure* Spring 2001, Vol. 1, para. 31.3.40)

■ PANTMAENOG TIMBER CO. LTD., IN RE [2001] 1 W.L.R. 730 (Judge Weeks QC)
Insolvency Act 1986, s. 236(2), Company Directors Disqualification Act 1986 s. 6—company (X) dissolved and struck off register—official receiver (C) making report to Secretary of State—C directed to bring proceedings under 1986 Act against director (D) of X—C also applying to have X restored to the register—district judge granting C's application for order requiring D's professional advisers to disclose documents under s. 236(2)—held, allowing D's appeal, once proceedings under the 1986 Act had been commenced, C could not properly rely on s. 236 to obtain evidence for use against D in those proceedings

■ R. (TSHIKANGU) v. NEWHAM LONDON BOROUGH COUNCIL, *The Times*, April 27, 2001 (Stanley Burnton J.)
CPR Pt. 54, Supreme Court Act 1981, s. 19—on ground that local authority (D) had failed to provide him with suitable housing, C applying for permission to apply for judicial review—before application heard, C provided with suitable accommodation but not informing court of this development—judge granting permission—held, discharging judge's order, it is not in general appropriate for an applicant for judicial review to determine unilaterally that a case in which he no longer required any substantive relief should go forward as a test case of the respondent's procedures in general—observations on procedure to be followed where arguable that application for judicial review should go forward as a test case—*R. v. Secretary of State for the Home Department, ex p. Salem* [1999] 1 A.C. 450, H.L., ref'd to (see *Civil Procedure* Spring 2001, Vol. 1, para. 54.13.1, and Vol. 2, para. 9A-68)

■ SYNSTAR COMPUTER SERVICE (U.K.) LTD. v. I.C.L. (SORBUS) LTD., *The Times*, May 1, 2001 (Lightman J.)
CPR rr. 1.1(2) & 3.1(1)(f), Supreme Court Act 1981, s. 49(3), Competition Act 1998—Director-General of Fair Trading refusing to investigate C's allegation of uncompetitive practices by D1 and D2—C bringing claim against D1 and D2 alleging that relationship between the defendants constituted breaches of s. 2 and s. 8 of the 1998 Act—parties agreeing that proceedings should be stayed pending decision by C whether to appeal from the Director-General's decision to the Competition Commission Appeal Tribunal (CCAT)—C contending that stay should not take effect until the disclosure of documents and exchange of witness statements had been completed—held, rejecting this contention, (1) there should be

an immediate stay on the proceedings, (2) the powers of case management of the CCAT were no less extensive than those of the court and it was not for the court to affect or pre-empt decisions which the CCAT may make in exercise of those powers—observations on point at which stay should take effect generally (see *Civil Procedure* Spring 2001, Vol. 2, paras 9A-161 *et seq*.)

■ TOTALISE PLC. v. MOTLEY FOOL LTD., 151 New L.J. 644 (2001) (Owen J.)
CPR Pt. 31, Data Protection Act 1998, s. 35, Contempt of Court Act 1981, s. 10—D operating website discussion board to which public had access —anonymous contributor (X) posting material to board about C—C claiming that material defamatory of him—for the purpose of legal advice on his position, C applying for order requiring D to disclose to him identity of X—held, granting the application, (1) s. 35 provides an exemption from the non-disclosure provisions in the 1998 Act, (2) that exemption preserves the principles under which the court can order a person who has become involved in the tortious acts of another to disclose the identity of the tortfeasor, (3) the exemption is not restricted to circumstances where disclosure is necessary for the purpose of legal proceedings involving the data controller, (4) s. 10 had no application to the instant facts—*Norwich Pharmacal Co. v. Customs and Excise Commissioners* [1974] A.C. 133, H.L., ref'd to (see *Civil Procedure* Spring 2001, Vol. 1, para. 31.18.2)

■ UNITED FILM DISTRIBUTION LTD. v. CHHABRIA, *The Times*, April 5, 2001, CA (Aldous & Laws L.JJ. and Blackburne J.)
CPR rr. 19.2(2) & 6.20(3)—C given permission to serve claim form on D1 and D2 out of the jurisdiction—judge dismissing appeal by D1 and D2 from Master's refusal of their application to set aside the order and any service effected on them in pursuance of it—held, dismissing further appeal by D1 and D2, (1) the grounds upon which the court may give permission to serve out of the jurisdiction as stated in r. 6.20(3) are not narrower than those formerly stated in Sched. 1, RSC Ord. 11, r. 1(1)(c), (2) the circumstances under which a person might properly be joined as a defendant under r. 19.2(2) are not narrower than those formerly stated in RSC Ord. 15, r. 6(2)(b), (3) the court's power to permit service out of the jurisdiction under r. 6.20(3) is not less wide that the court's power to add or substitute a party under r. 19.2(2) (see *Civil Procedure* Spring 2001, Vol. 1, paras 6.17.5 & 19.2.2)

Practice Directions

■ PRACTICE DIRECTION (CITATION OF AUTHORITIES), [2001] 1 W.L.R 1001, CA (Lord Woolf LCJ, May & Jonathan Parker L.JJ.)
for purpose of preventing courts from being burdened with a weight of inappropriate and unnecessary authority, states uniform practice (to be followed in all courts except criminal courts) designed to limit the citation of previous authority to cases that are relevant and useful to the court—certain categories of decisions (e.g. applications for permission to appeal) not to be cited unless specified requirements fulfilled (e.g. (extending of present law clearly indicated)—in skeleton arguments and notices of appeal etc., proposition of law for which each authority cited to be stated and reasons for citing additional authorities on same proposition to be given—note also Practice Direction (Appeals) para. 15.11, see *Civil Procedure* Spring 2001, Vol. 1, para. 52PD-055)

Statutory Instruments

■ CIVIL PROCEDURE (AMENDMENT NO. 2) RULES 2001 (S.I. 2001 No. 1388)
Civil Procedure Act 1997, s. 2(6)(a)—adds to CPR Pt. 57 (Contentious Probate : Rectification of Wills : Substitution and Removal of Personal Representatives) and provides transitional provisions—amends Sect. III of Pt. 6 to give effect to Council Regulation (EC) No. 1348/2000 (the "Service Regulation") on the service of judicial and extrajudicial documents—amends r. 22.1 to require that an acknowledgment of service in a claim begun by way of the Pt. 8 procedure should be verified by a statement of truth—adds r. 39.8, giving effect to the Race Relations Act 1976, s. 67A—makes amendments to Sched. 1, RSC Ord. 115 consequential on the coming into force of the Terrorism Act 2000—amends Sched. 2 CCR Ord. 48B and 48D to provide for the enforcement of certain additional traffic penalties—in force May 31, June 1, and October 15, 2001

■ COUNTY COURT FEES (AMENDMENT) ORDER 2001 (S.I. 2001 No. 1385)
County Courts Act 1984, s. 128, County Court Fees Order 1999—substitute new fee 4.10 in the 1999 Order so as to include requests for orders to recover certain additional traffic penalties, now recoverable in a county court—the amount of the fee remains unchanged at £5—in force June 6, 2001 (see *Civil Procedure* Spring 2001, Vol. 2, para. 10-22, p 2121)

■ CRIMINAL JUSTICE (INTERNATIONAL CO-OPERATION) ACT 1990 (ENFORCEMENT OF OVERSEAS FORFEITURE ORDERS) (AMENDMENT) ORDER 2001 (S.I. 2001 No. 957)
CPR Sched. 1, RSC Ord. 115—Criminal Justice (International Co-operation) Act 1990, s. 9—amends Criminal Justice (International Co-operation) Act

1990 (Enforcement of Overseas Forfeiture Orders) Order 1991 and the Criminal Justice (International Co-operation) Act 1990 (Enforcement of Overseas Forfeiture Orders) (Northern Ireland) Order 1991—makes a number of additions to the lists of countries and territories designated for drug trafficking offences and other offences—inserts entries relating to the "appropriate authority" in respect of certain countries previously designated—inserts an indication of when proceedings are to be regarded as being instituted in Trinidad and Tobago—in force April 17, 2001

■ CRIMINAL JUSTICE ACT 1998 (DESIGNATED COUNTRIES AND TERRITORIES) (AMENDMENT) ORDER 2001 (S.I. 2001 No. 960)
CPR Sched. 1, RSC Ord. 115—Criminal Justice Act 1988, s. 96—amends Criminal Justice Act 1988 (Designated Countries and Territories) Order 1991 (S.I. 1991 No. 2873)—makes a number of additions to the list of countries and territories in Sched. 1—provides that the "appropriate authority" in respect of Ireland shall be the Department of Justice, Equality and Law Reform—in force April 17, 2001

■ DRUG TRAFFICKING ACT 1994 (DESIGNATED COUNTRIES AND TERRITORIES) (AMENDMENT) ORDER 2001 (S.I. 2001 No. 956)
CPR Sched. 1, RSC Ord. 115—Drug Trafficking Act 1994, s. 96—amends Drug Trafficking Act 1994 (Designated Countries and Territories) Order 1996, Sched. 1 (S.I. 1996 No. 2880)—inserts new entries relating to the "appropriate authority" in respect of certain countries—inserts, in the Appendix to the 1996 Order, an indication of when proceedings are to be regarded as being instituted in Trinidad and Tobago—in force April 17, 2001

■ HIGH COURT AND COUNTY COURTS JURISDICTION (AMENDMENT) ORDER 2001 (S.I. 2001 No. 1387)
Courts and Legal Services Act 1990, ss. 1 & 120, High Court and County Courts Jurisdiction Order 1990, art. 8A—amends art. 8A to provide that proceedings for the recovery of certain traffic penalties in addition to those previously referred to in art. 8A, and which now may be brought in a county court, may only be taken in the Northampton county court—in force June 1, 2001 (see *Civil Procedure* Spring 2001, Vol. 2, para. 9B-153.1)

IN DETAIL

Security for costs orders

CPR r. 25.12(1) states that "a defendant to any claim may apply under Section II of this Part", that is to say, under Sect. II of Pt. 25, "for security for his costs of the proceedings". In fact, the rules found in Sect. II of Pt. 25 have a wider ambit than that as r. 25.15 provides that the court may order security for costs of an appeal against an appellant and against respondent who also appeals (either of whom may or may not be the defendant to the claim).

It should also be noted that in CPR r. 3.1 (The court's general powers of case management) it is stated that, in certain circumstances (see paras (3) and (5) of the rule), the court may order a party to pay a sum of money into court. Rule 3.1(6A) states that money paid into court in such circumstances shall be security for "any sum payable" by that party to any other party in the proceedings. Presumably, "any sum payable" would include a sum payable under an order for costs (either an unsatisfied order previously made, or an order subsequently made). Therefore, the exercise by the court of its powers under r. 3.1(3) and (5) may in effect amount to an order for security for costs made outwith the provisions of Sect. II of Pt. 25. (This analysis assumes that r. 3.1(3) and (5) would not be regarded as an enactment permitting the court to require security for costs within the meaning of r. 25.13(1)(b).)

Sect. II of Pt. 25 was added to the CPR in May 2000. Rules 25.12 and 25.13 largely replaced former RSC Ord. 23. Rule 25.15 (Security for costs of an appeal) replaced former RSC Ord. 59, r. 10(5), but applies to all appeals. Rule 25.14 (Security for costs other than from the claims) is new and remedies certain deficiencies in the old law (see *Civil Procedure* Spring 2001, Vol. 1, para. 25.0.3).

In the years immediately preceding the enactment of the CPR, the security for costs rules had run into various problems. In particular, it was held that, insofar as the rules permitted the making of security for costs orders against E.C. Nationals (whether at first instance or on appeal) they were capable of having a discriminatory effect, thereby infringing Art. 6 of the E.C. Treaty (see *Fitzgerald v. Williams*, [1996] 2 W.L.R. 447, CA, and *Chequepoint S.A.R.L. v. McClelland*, [1997] Q.B. 51, CA). Further, in *Tolstoy Miloslavsky v. United Kingdom*, (1995) 20 E.H.R.R. 442, the European Court of Human Rights

considered the question whether the former rules infringed Art. 6(1) of the European Convention of Human Rights. The Court rejected the submission that the order for security for costs made by the Court of Appeal in those proceedings impaired the "very essence of the right of access to court and was disproportionate for the purpose of Article 6". After the new rules as to appeals now found in CPR Pt. 52 came into effect (imposing the general rule that no appeal could be made without permission and discouraging appeals that had no real prospects of success), in *Federal Bank of the Middle East v. Hadkinson, The Times*, December 7, 1999, CA, the Court of Appeal considered the impact of the Tolstoy case on the rules as security for costs of an appeal.

The rules in Sect. II of Pt. 25 are not in the same terms as the rules they replace. Two principal differences are as follows.

First, the rules do away with the distinction formerly drawn between orders for security for the costs of an appeal and orders for security for the costs of first instance proceedings, under which an order was more likely to be made against an appellant than against a claimant at first instance. Rule 25.15, bringing into effect a recommendation made in the Report of the Review of the Court of Appeal (Civil Division) (the Bowman Review) states that the court may make an order security for the costs of an appeal on the same grounds as it may order security for costs against a claimant under r. 25.13 (see further *Civil Procedure* Spring 2001, Vol. 1, para. 25.15.1). In the past, the stricter approach to appellants was justified on the ground that it helped to discourage frivolous appeals. With the introduction of the new rules as to appeals (now found in Pt. 52), under which permission to appeal will generally be refused unless the appeal has real prospects of success, the stricter approach was seen as unnecessary.

The second principal difference is this. Rule 25.13, which sets out the conditions that have to be satisfied before an order for security for costs may be made, endeavours to deal with the E.C. Treaty problems identified in *Fitzgerald v. Williams*, [1996] 2 W.L.R. 447, CA, and *Chequepoint S.A.R.L. v. McClelland*. Rule 25.13 states that the court may make an order for security for costs (a) if it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order, and (b) one or more of the conditions in paragraph (2) of the rule applies (or an enactment permits the court to require security for costs). Seven conditions are enumerated in paras (a) to (g) of r. 25.13(2). The first two, para. (a) dealing with individual parties and para. (b) with bodies corporate, are of interest here. The remaining five (paras (c) to (g)) deal with rather special circumstances.

In paras (a) and (b) the starting point is the general rule that an order for security for costs may not be made against an individual claimant or a body corporate claimant (unless one of the special conditions referred to in paras, (c) to (g) applies). However, for the purpose of dealing with the E.C. Treaty difficulties, the general rule is subject to an exception, which is in turn qualified. The result is that, in each paragraph, the exception imposes a condition on which an order for security may be granted, but the general rule and the exemption prevent the court from making an order. (It could be argued that the drafting of these provisions is unnecessarily tortuous.)

Thus, para. (a) states that an order for security may be made against an individual claimant "who is ordinarily resident out of the jurisdiction". Then comes the exemption; an order may not be made against such an individual claimant if he is a person against whom a claim can be enforced under the Brussels Conventions or the Lugano Convention. Para. (b) states that an order for security may be made against a corporate claimant "which is ordinarily resident out of the jurisdiction". Then comes the exemption; and order may not be made against such a corporate claimant if it is a body against whom a claim can be enforced under the Brussels Conventions or the Lugano Convention.

On its face, the phrase "a body against whom a claim can be enforced under the Brussels Conventions or the Lugano Convention" in para. (b) is ambiguous. A judgment may be enforced outside of the jurisdiction of the English court in a Convention country (a) against a body that is ordinarily resident in a Convention country, as well as (b) against a body that is not ordinarily resident in a Convention country but is ordinarily resident elsewhere. On a literal interpretation of para. (b) it would seem that a body falling within the latter category would be "a body against whom a claim can be enforced" under the Conventions. And it would follow from this that an order for security for costs should not be made against such a body (unless one of the other conditions stated in r. 25.12(2) is satisfied). In *White Sea & Onega Shipping Co. v. International Transport Workers Federation*, [2001] EWCA Civ 377, March 7, 2001, CA (decided before *Nasser v. United Bank of Kuwait*, see below), the question was whether an order for security for the costs of an appeal should be made against a Russian shipping company (whose ships regularly visited ports in Convention countries). Brooke L.J. (sitting as a single lord justice) held that para. (b) should not be given a literal interpretation but should be interpreted in a purposive manner in its historical context. As explained above, the provision was introduced in order to abolish the objection of discriminatory effect of the language of the old rule. His lordship held that the exemption in para. (b) is confined to companies and other incorporated bodies ordinarily resident in Convention countries and, therefore, did not extend to the Russian company.

Since October 2, 2000, the English courts have been obliged to act compatibly with the European Convention of Human Rights. When determining any question which raises a Convention right, the courts must take account of decisions of the European Court of Human Rights. This development has implications for the law relating to security for costs (see *Civil*

Procedure Spring 2001, Vol. 1, para. 3.1.5). At least two Convention rights need to be considered. One is the right of access to the court guaranteed by Art. 6, the right which was considered by the European Court of Human Rights in relation to the old English security for costs rules in the Tolstoy case. The impact of Art. 6 was considered by Mance L.J. (sitting as a single lord justice dealing with an application for security for costs of an appeal) in *Gulf Azoz Shipping Co. Ltd. v. Idisi*, December 19, 2000, CA, unrep., and by the Court of Appeal in *Nasser v. United Bank of Kuwait*, [2001] EWCA Civ 556, April 11, 2001, CA, unrep., where Mance L.J. gave the leading judgment. In both cases, Mance L.J. stressed the importance of the Tolstoy line of authority.

The other right which needs to be considered is the prohibition on discrimination stated in Art. 14. As explained above, the new rules as to security for costs were drafted in the light of the case law modifying the former rules of court in the light of the anti-discrimination clauses in the E.C. Treaty. But that does not exhaust the matter. The Nasser case was principally concerned with the question whether the rules as to security for costs now found paras (a) and (b) of CPR r. 25.13(2) raise any issue of discrimination under Art. 14. As was explained above, those paragraphs draw a distinction between individuals or companies resident out of the jurisdiction on the basis of whether they are (a) resident in a Convention country, or (b) not resident in a Convention country. If (a) applies, an order for security for costs may not be made (unless one of the special conditions in paras (c) to (g) of r. 25.13 applies); if (b) applies, then an order may be made if the court is satisfied, having regard to all the circumstances of the case, that it is just to make such an order. In the Nasser case, the claimant (C) was an individual resident out of the jurisdiction, not in a Convention country but in the United States. C's claim was struck out for want of prosecution and judgment was entered for the defendant (D). Subsequently, permission to appeal was granted and, on D's application, a single lord justice made an order against C for security for D's costs of the appeal. The Court of Appeal noted that, when the application for security came before the single lord justice, the Convention issues were not considered and for this, and other reasons, ruled that the decision should be re-considered.

Mance L.J. said the discretion to make an order for security for costs against a person resident out of the jurisdiction, but not resident in a Convention country, must be exercised in a manner which is not discriminatory. In this context all claimants (or appellants) before the English courts must be regarded as the relevant class. His lordship said it would be both discriminatory and unjustifiable if the mere residence outside a Convention state could justify the exercise of the discretion for the purpose of protecting defendants or respondents to appeal risks to which they would equally be subject and in relation to which they would have no protection if the claim or appeal were being brought by a resident of a Convention state. The discretion should be exercised in a manner reflecting its rationale and not so as to put residents outside the Convention countries at a disadvantage compared with residents within. The discretion should be exercised on objectively justified grounds related to the obstacles to, or the burden of, enforcement of any order for costs in the foreign claimant's country.

In the event, the Court held that an order for security for D's costs of the appeal should be made against C for the purpose of protecting D from the extra burden in terms of costs and delay which may be involved in enforcing an order for costs against C in the United States, that is to say, an extra burden compared with any equivalent steps for enforcement that could be taken in England or in a Convention state. The sum ordered by the Court was £5,000.

Citation of authorities

In *Banton v. Banton* [1990] 2 F.L.R. 465, C.A., Ralph Gibson L.J. said counsel should always be ready with authority in support of their submissions and should not rely on their beliefs or opinions as to what the law is. However, counsel should not overdo things. As Lord Roskill said in *Pioneer Shipping Ltd. v.* B.T.P. *Tioxide Ltd.* [1982] A.C. 724, H.L., "massive citation of authority" in cases where the relevant legal principles have been clearly and authoritatively determined is "of little or no assistance and should be firmly discouraged". In *Lambert v. Lewis* [1982] A.C. 225, H.L., Lord Diplock said: "The citation of a plethora of authorities apart form being time and cost-consuming, presented the danger of so blinding the court with case law that it had difficulty in seeing the wood of legal principle for the trees of paraphrase".

In the 1970s and 1980s, when the move towards submitting legal submissions in written form emerged, the English appeal courts took fright at the prospect of the practice of the filing of American-style briefs emerging. The House of Lords with its practice of printed cases was particularly exposed. And with the advent of skeleton arguments, first in the Court of Appeal (Civil Division) and then in other courts, the problem of over-citation of authority spread. In an effort to contain the problem the courts expressed a preference for restricting the citation of cases to decisions that had been officially reported, and rejecting transcripts and reports in a specialised series of reports produced by commercial publishers. That device was probably doomed to failure. Certainly, in the new era of routine electronic publishing of court decisions it could not be maintained. The danger of over-citation in skeletons was met by practice directions and guidance (given in court guides) stressing that the purpose of a skeleton argument is to identify and summarise the points, not to argue them fully on paper, and emphasising that citation should be restricted to the main authorities. On occasion judges have expressed their disquiet at the length of lists of authorities filed with the courts. And, from time to time, judges have criticised over-citation in notices of appeal.

A recurring complaint made by the judges has been the over-citation of cases that do no more than illustrate the exercise of the court's discretion in particular procedural contexts. For example, cases on striking out (for whatever reason). For obvious reasons, such cases are legion. Most of them turn on their own facts, and the fact that a decision went one way in one case and one way in another, is of little or no significance. Where new areas of conflict between parties to litigation open up, a certain amount of "citation inflation" has to be expected, at least in the short term until the principles are settled and guidelines as to how discretion should be judicially exercised emerge. But even in these circumstances there is a tendency towards excess. In *Pegler Ltd. v. Wang* (U.K.) Ltd., February 26, 2001, unrep., where the successful claimants made an application for costs against a non-party, on the basis that they had supported the defendants in the litigation, in a reserved judgment Judge Bowsher QC noted that counsel cited 23 reported cases to him and his honour recalled that, when faced with a similar application in another case in March 1998, "about ten cases were cited to me and I was able to give an ex tempore judgment on a Friday afternoon".

Practice Direction (Citation of Authorities), [2001] 1 W.L.R 1001, C.A., issued on April 9, 2001 (with immediate effect), endeavours to attack the principle of over-citation anew by stating a uniform practice to be followed with the object of limiting the citation of previous authority to cases that "are relevant and useful to the court". In large part the directions reflect the practices followed by the courts in pursuit of their general discretion in the management of litigation. The direction applies to all courts apart from criminal courts, including within the latter category the Court of Appeal (Criminal Division).

The Practice Direction focuses initially on reports of judgments given on particular types of application. These types are: (1) applications attended by one party only; (2) applications for permission to appeal, and (3) decisions on applications that only decided that the application was arguable. A judgment falling into one of the categories may not in future be cited before any court unless it clearly indicated that it purported to establish a new principle or to extend the present law. What is meant by "clearly indicated" here? The Practice Direction says that, in respect of judgments delivered after April 9, 2001, the indication has to take the form of an express statement to that effect. (It may be commented that such express statements are likely to be rare.) In respect of judgments delivered before that date the indication must be present in or clearly deducible from the language used in the judgment.

Subject to exceptions, reports of judgments delivered in county courts will be treated in the same way as judgments given on the particular types of application mentioned immediately above. The exceptions are (a) judgments cited in order to illustrate the conventional measure of damages in a personal injury case, or (b) judgments cited in a county court in order to demonstrate current authority at that level on an issue in respect of which no decision at a higher level of authority was available.

In relation to the citation of judgments not falling within the categories mentioned above, the Practice Direction says that, in future, the courts will pay particular attention to any indication given by the court delivering the judgment that it was seen by that court as only applying decided law to the facts of the particular case, or otherwise as not extending or adding to the existing law. Advocates who seek to cite a judgment that contained indications of that type will be required to justify their decision to cite the case.

After having cleared the ground, as it were, the Practice Direction goes on to explain that, in citing any authority in any skeleton argument and in any appellant's or respondent's notice, the advocate must expressly justify the inclusion of the authority. The advocate is required to state the proposition of law that the authority demonstrated, and the parts of the judgment that supported that proposition. If it is sought to cite more than one authority in support of a given proposition, the advocate must state the reason for taking that course. The Practice Direction says that the statements expressly justify the citation should not materially add to the length of the submission or of skeleton argument, but should be sufficient to demonstrate, in the context of the advocate's argument "the relevance of the authority or authorities to that argument and that the citation was necessary for a proper presentation of that argument". Any bundle or list of authorities prepared for the use of the court must in future bear a certification by the advocate responsible for arguing the case that these requirements had been complied with in respect of each authority included.

The Practice Direction concludes with directions designed to restrict the citation of reports of judgments in cases decided in other jurisdictions. These particular directions do not apply to cases decided in either the European Court of Justice or the organs of the Council of Europe.

Nothing in the Practice Direction detracts from the duty of advocates to draw the attention of the court to any authority not cited by an opponent which is adverse to the case being advanced.

RULES UPDATE

Civil Procedure (Amendment) Rules 2001

In the "Rules Update" section of issue 02/2001 of the CP News (February 28, 2001), amendments made to the CPR by this statutory instrument and coming into effect on March 26, 2001, were explained. Those amendments are now incorporated in *Civil Procedure* Spring 2001, Vol. 1. Some amendments made by this statutory instrument do not come into effect until October 15, 2001; in particular the insertion in the CPR of Part 55 (Possession Claims) and Part 56 (Landlord and Tenant Claims and Miscellaneous Provisions About Land) and amendments to the CPR consequential thereto. With two exceptions, these amendments are not incorporated in *Civil Procedure* Spring 2001, Vol. 1, (the exceptions relate to CPR Sched. 1, RSC Ord. 62, App. 3 Pt. II para. 1(2), and Sched. 2, CCR Ord. 38, App. B Pt. III para. 10).

Amendments not incorporated in *Civil Procedure* Spring 2001, Vol. 1 but now in force are explained immediately below (page references are to the Spring 2001, edition).

Yet further amendments made to the CPR by this statutory instrument came into effect on April 1, 2001 (the date of entry into force of the Access to Justice Act 1999 s. 90 and the Family Law Reform Act 1978 s. 23). These amendments also are not incorporated in *Civil Procedure* Spring 2001, Vol. 1 but are set out below.

Page 1297—*Sched.* 1 RSC *Ord.* 79, *r.* 9 (*Bail*)

In paras (6)(b), (8)(b) and (10)(b) of this rule, for "clerk of", substitute "justices' chief executive for".

Page 1379—*Sched.* 1 RSC *Ord.* 109, *r.* 4 (*Release of appellant on bail by the Court of Appeal*)

In para. (5) of this rule, for "clerk of", substitute "justices' chief executive for".

Page 1381—*Sched.* 1 RSC *Ord.* 112 (*Applications for Use of Blood Tests in Determining Paternity*)

For the heading to this Order, substitute "Applications for Use of Scientific Tests in Determining Parentage".

In rr. 1, 2(1) & 4, for "blood samples" substitute "bodily samples".

In rr. 1, 3(b), 5 & 6, for "blood tests" substitute "scientific tests".

Page 1429—*Sched.* 1 RSC *Ord.* 116, *r.* 10 (*Determination of the application*)

In para. (14)(a) of this rule, for "justices' clerk" substitute "justices' chief executive".

Page 1472—*Sched.* 2 CCR *Ord.* 27, *r.* 4 (*Mode of applying*)

In para. (1)(b) of this rule, for "justices' chief executive for the magistrates' court" substitute "the clerk to the magistrates' court", and for "that clerk to the same effect" substitute "that chief executive to the same effect".

Page 1475—*Sched.* 2 CCR *Ord.* 27, *r.* 10 (*Contents and service of order*)

In para. (3) of this rule, for "clerk of the magistrates' court" substitute "justices' chief executive for the magistrates' court".

Page 1534—*Sched.* 2 CCR *Ord.* 47, *r.* 5 (*Family Law Reform Act* 1969)

In paras (1), (2), (3), (4) and (6) of this rule, for "blood samples" substitute "bodily samples".

In paras (1) and (4)(b), for "blood tests" substitute "scientific tests".

Civil Procedure (Amendment No. 2) Rules 2001

This statutory instrument amends the CPR and was laid before Parliament on April 6, 2001. These amendments are not incorporated in *Civil Procedure* Spring 2001, Vol. 1. This statutory instrument inserts in the CPR a new Part, Part 57 (Probate Claims—Rectification of Wills—Substitution and Removal of Personal Representatives) and makes consequential amendments thereto. Part 57 does not come into effect until October 15, 2001. When it does come into effect, contentious probate proceedings will cease to be "specialist proceedings" within Part 49, but Practice Direction (Contentious Probate Proceedings) will continue to apply where a claim form has been issued before October 15, 2001.

Other amendments made to the CPR by this statutory instrument come into force on earlier dates, specifically, May 31 and June 1, 2001. The amendments coming into force on May 31, 2001, are explained below. Page references are to *Civil Procedure* Spring 2001, Vol. 1. The amendments coming into force on June 1, 2001 (and not noted hereunder), are to Sched. 2, CCR Ord. 48B (Enforcement of Traffic Penalties) and CCR Ord. 48D (Enforcement of Fixed Penalties Under the Road Traffic (Vehicle Emissions) (Fixed Penalty) Regulations 1997).

Several of the amendments set out below relate to the special provisions about service out of the jurisdiction found in Sect. III of CPR Pt. 6 and are made for the purpose of giving effect to the Council Regulation (E.C.) on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters. A number of amendments are made to rules in Sched. 1, RSC Ord. 115 about applications for restraint orders etc., and are consequential upon the implementation of the Terrorism Act 2000 (which replaces the Prevention of Terrorism (Temporary Provisions) Act 1989). A new rule is added giving effect to the Race relations Act 1976, s. 67A and enabling a county court

hearing a claim under s. 57(1) of that Act to exclude a claimant or his representative from a hearing in the interests of national security. By an amendment to r. 22.1(1) it is provided that an acknowledgment of service in a claim begun by way of the Part 8 procedure must be verified by statement of truth. On its face this seems odd. However, it has to be understood that, under the Pt. 8 procedure, a defendant is required to file an acknowledgment of service and is expected to provide certain information in that document (see r. 8.3).

Page 117—Rule 6.18 (Definitions)

After para. (e) of this rule, insert:

"(ea) "the Service Regulation" means Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters;"

Page 122—Rule 6.20 (Service out of the jurisdiction where the permission of the court is required)

In para. (18) of this rule, for "a claim made", substitute "a claim is made".

Page 136—Rule 6.24 (Method of service-general provisions)

In this rule for para. (1)(b) substitute:

"(b) provided for by -

(i) rule 6.25 (service through foreign governments, judicial authorities and British consular authorities);

(ii) rule 6.26A (service in accordance with the Service Regulation); or

(iii) rule 6.27 (service on a state); or".

Page 139—Rule 6.25 (Service through foreign governments, judicial authorities and British Consular authorities)

For para. (4) of this rule substitute the following:

"(4) Except where a claim form is to be served in accordance with paragraph (1) (service under the Hague Convention), the methods of service permitted by this rule are not available where the claim form is to be served in -

(a) Scotland, Northern Ireland, the Isle of Man or the Channel Islands;

(b) any Commonwealth State; or

(c) any United Kingdom Overseas Territory."

After para. (4) add the following:

"(5) This rule does not apply where service is to be effected in accordance with the Service Regulation."

Page 140—Rule 6.26 (Procedure where service is to be through foreign governments, judicial authorities and British consular authorities)

After para. (6) of this rule, insert:

"(7) This rule does not apply where service is to be effected in accordance with the Service Regulation."

Page 141—Rule 6.26

After this rule insert the following new rule (r. 6.26A):

"Service in accordance with the Service Regulation

6.26A--(1) This rule applies where a claim form is to be served in accordance with the Service Regulation.

(2) The claimant must file the claim form and any translations or other documents required by the Service Regulation.

(3) When the claimant files the documents referred to in paragraph (2), the court officer will -

(a) seal(GL) the copy of the claim form; and

(b) forward the documents to the Senior Master.

(4) Rule 6.31 does not apply.

(The Service Regulation is annexed to the relevant practice direction)".

Page 228—Rule 12.3 (Conditions to be satisfied)

At the end of this rule, add the following additional cross-reference:

"(Article 19(1) of Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters applies in relation to judgment in default where the claim form is served in accordance with that Regulation)".

Page 241—Rule 13.3 (Cases where the court may set aside or vary judgment entered under Part 12)

At the end of this rule, add the following additional cross-reference:

"(Article 19(4) of Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters applies to applications to appeal a judgment in default when the time limit for appealing has expired)".

Page 366—Rule 22.1 (Documents to be verified by statement of truth)

For para. (1) of this rule, substitute the following:

"(1) The following documents must be verified by a statement of truth -

(a) a statement of case;

(b) a response complying with an order under rule 18.1 to provide further information;

(c) a witness statement;

(d) a certificate stating [FINISH THIS]; and

(e) and acknowledgment of service in a claim begun by way of the Part 8 procedure."

[NB para. (e) comes into force on May 31, 2001, but para. (d) does not come into force until October 15, 2001].

Page 732—Rule 39.7 (Impounded documents)

After this rule insert the following new rule (r. 39.8):

"Claims under the Race Relations Act 1976

39.8--In a claim brought under section 57(1) of the Race Relations Act 1976, the court may, where it considers it expedient in the interests of national security

(a) exclude from all or part of the proceedings -

(i) the claimant;

(ii) the claimant's representatives; or

(iii) any assessors appointed under section 67(4) of that Act;

(b) permit a claimant or representative to make a statement to the court before the start of the proceedings (or part of the proceedings) from which he is to be excluded; or

(c) take steps to keep secret all or part of the reasons for its decision in the claim.

(Section 67A(2) of the Race Relations Act 1976 provides that the Attorney General may appoint a person to represent the interests of a claimant in any proceedings from which he and his representatives are excluded)"

Page 1421—Sched. 1 RSC Ord. 115 [heading]

After r. 23, for the heading of Section III, substitute:

"III. Terrorism Act 2000".

Page 1421—Sched. 1 RSC Ord. 115, r. 24 (Interpretation)

This rule is amended so as to read as follows:

"Interpretation

24. In this Part of this Order -

(a) "the Act" means the Terrorism Act 2000;

(b) "Schedule 4" means Schedule 4 to the Act;

(ba) "the prosecutor" means the person with conduct of proceedings which have been instituted in England and Wales for an offence under any of sections 15 to 18 of the Act, or the person who the High Court is satisfied will have the conduct of proposed proceedings for such an offence; and

(c) other expressions used have the same meanings as they have in Schedule 4 to the Act."

Page 1422—Sched. 1 RSC Ord. 115, r. 26 (Application for restraint order)

In para. (1) of this rule, for "paragraphs 3 and 4" substitute "paragraph 5"

In para. (2)(a) of this rule, for "Part III" substitute "any of sections 15 to 18"

Page 1423—Sched. 1 RSC Ord. 115, r. 27 (Restraint order)

In para. (2) of this rule, after "a restraint order made without notice of" insert "the application for"

Page 1423—Sched. 1 RSC Ord. 115, r. 29 (Compensation)

In this rule, for "paragraph 7 of Schedule 4" substitute "paragraph 9 or 10 of Schedule 4", and for "the relevant authority under paragraph 7(5)" substitute "the person or body by whom compensation, if ordered, will be payable under paragraph 9(6) or 10(4)".

Page 1424—Sched. 1 RSC Ord. 115, r. 32 (Register of orders)

In para. (1) of this rule, for "Crown Office" substitute "Administrative Court".

Page 1425—Sched. 1 RSC Ord. 115, r. 35 (Enforcement of order)

In para. (3) of this rule, for "paragraph 5 or 6" substitute "paragraph 7 or 8", and for "paragraph 9(6)" substitute "paragraph 13(6)".

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