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IN BRIEF

Cases

■ COWL v. PLYMOUTH CITY COUNCIL *The Times* January 8, 2002, CA (Lord Woolf LCJ, Mummery & Buxton L.JJ.)
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■ DICKINSON v. RUSHMER 152 New L.J. 58 (2002) (Rimer J. & assessors)
CPR r.47.14, Practice Direction (Costs) para. 40.14, Human Rights Act 1998, Sched. 1 art. 6(1)—C succeeding at trial and on appeal—C proceeding to detailed assessment of his costs—on preliminary issue as to whether certain costs claimed by C were costs for which he was entitled to be indemnified, C producing privileged documents to costs judge—judge holding in favour of C—held, allowing D's appeal, the procedure adopted had been unfair (see *Civil Procedure*, Autumn 2001, Vol. 1, paras 31.3.27, 47.14.3 & 47PD-013, and Vol. 2, para. 3D-34)

■ SOUTH COAST SHIPPING CO. LTD. v. HAVANT BOROUGH COUNCIL 152 New L.J. 59 (2002) (Pumfrey J.)
CPR r.47.14, Practice Direction (Costs) para. 40.14, Human Rights Act 1998, Sched. 1 art. 6(1)—at detailed assessment of costs, paying party (D) raising preliminary issue as to whether certain costs claimed by receiving party (C) were costs for which he was entitled to be indemnified—on this issue, C voluntarily producing privileged documents to costs—judge holding in favour of C—held, dismissing D's appeal, (1) under para. 40.14, a costs judge may put a receiving party to his election, (2) this discretion should be exercised having regard to the requirements of fairness and justice, (3) this procedure is not incompatible with the principles articulated by the Convention (see *Civil Procedure*, Autumn 2001, Vol. 1, paras 31.3.27, 47.14.3 & 47PD-013, and Vol. 2, para. 3D-34)

■ ANSOL LTD. v. TAYLOR JOYNSON GARRETT *The Times* January 30, 2002 (Sir Andrew Morritt V.-C.)
Chancery Guide paras 7.21, 7.22, 7.23 & 7.30—counsel explaining reasons for late delivery of skeleton arguments—Vice-Chancellor (1) finding that there was good reason for the delay in this case, (2) noting that time limits fixed by paras 7.21 to 7.24 appeared to be more honoured in the breach than in compliance, and (3) emphasising that Chancery Division judges would now seek to apply the sanctions stated in para. 7.20 for failure to deliver on time (see *Civil Procedure*, Autumn 2001, Vol. 2, paras 1-60 & 1-63)

■ GERRARD LTD v. READ 152 New L.J. 22 (2002) (Blackburne J.)
CPR r.3.1(7)—in proceedings by C against D, court making consent order—D applying to vary order by deleting term on ground that it was unenforceable—held, (1) the court may vary a consent order where (a) the whole order is vitiated, or (b) a term of the order is unenforceable, (2) the term in question was not an unreasonable restraint of trade and was not unenforceable (see *Civil Procedure*, Autumn 2001, Vol. 1, para. 3.1.1)

■ GOODE v. MARTIN [2001] EWCA Civ 1899, 152 New L.J. 109, CA (Brooke, Latham & Kaye L.JJ.)
CPR r.17.4, Limitation Act 1980, s. 35, Human Rights Act 1998, s. 3 and Sched. 1, Pt I, art. 6(1)—C bringing personal injuries claim against D following accident in which she was rendered unconscious and of which she had no clear recollection—D serving detailed defence giving his version of accident—after expiry of primary limitation period, C applying for permission to amend under r.17.4 to add new claim based on the facts as alleged by D—in effect, C now claiming that, even if the accident happened in the way D said it happened, he was nevertheless negligent—judge holding that C's new claim did not arise out of "substantially the same facts" within s. 35(5) and r.17.4 and dismissing application (see [2001] 3 All E.R. 562)—held, allowing C's appeal, (1) the judge's interpretation of the legislation involved a restriction on C's right of access to a court guaranteed by art. 6, (2) in the circumstances, this restriction had no legitimate aim, accordingly (3) in discharge of its duty under s. 3, the Court should read the words "substantially the same facts as a claim" already made in r.17.4 as "substantially the same facts as are already in issue on a claim" already made—*Ashingdane v. U.K.* (1985) 7 E.H.R.R. 528; *Cachia v. Faluyl* [2001] EWCA Civ 998; [2001] 1 W.L.R. 1966, CA; *R. v. A. (No. 2)* [2001] UKHL 251; [2001] 2 W.L.R. 1546, H.L., ref'd to (see *Civil Procedure*, Autumn 2001, Vol. 1, para. 17.4.4, and Vol. 2, para. 8-85)

■ KONAMANENI v. ROLLS ROYCE INDUSTRIAL POWER (INDIA) LTD. *The Times* January 31, 2002 (Lawrence Collins J.)
CPR rr.6.20(3) & 19.9—claimants (C), as minority shareholders in company incorporated in India (D2), bringing claim against company incorporated in England (D1) and D2—C's claim against D1 based on fraud exception to rule in *Foss v. Harbottle* (1843) 2 Hare 461—master giving C permission to serve claim form on D2 outside jurisdiction—D1 applying (1) for orders (a) setting aside the permission and (b) staying the proceedings on *forum non conveniens* grounds, and on behalf of D2 (2) for a declaration that the court had no jurisdiction to hear the derivative claim—held, granting D1's application, (1) the court had jurisdiction to permit service out on D2 because (a) if there were "a real issue" between C and D1 within the meaning of r.6.20(3)(a), then, because of r.19.9, D2 would be a "necessary party" within r.6.20(3)(b), (b) even though the underlying claim was by D2, and not by C, there was a real issue between C and D1, and (c) r.19.9 is not restricted to derivative claims on behalf of English companies, and even if it were the court would not be deprived of jurisdiction to entertain a claim on behalf of a foreign company, (2) almost invariably, the courts of the place of incorporation would be the appropriate forum for the resolution of issues relating to the right of shareholders to sue on behalf of the company, (3) the issue whether the *Foss v. Harbottle* exception applied was to be taken into account in determining the appropriate forum, but as it was an integral part of C's claim it would be unjust to treat it as a purely procedural matter to be determined at a preliminary stage without trial, (4) the order permitting service out should be set aside because, in the circumstances, India was the more appropriate forum (see *Civil Procedure*, Autumn 2001, Vol. 1, paras 6.21.8, 6.21.17 & 19.9.3)

■ LILLY ICOS LTD. v. PFIZER LTD. (NO. 2) *The Times* January 28, 2002, CA (Aldous, Buxton & Longmore, L.JJ.)
CPR rr.5.4 & 31.22—in course of revocation proceedings (on grounds of obviousness) brought by claimants (C) against holder of pharmaceutical patent (D), D disclosing confidential documents to C—C succeeding at trial and D's appeal dismissed (see [2002] EWCA Civ 1)—on own motion, trial judge refusing to maintain confidentiality of documents after trial—on appeal, D contending that confidentiality should be maintained in relation to one particular document containing advertising figures—held, allowing appeal, (1) very good reasons are required for making an order under r.31.22(2), departing from the general rule of publicity of documents referred to at a public hearing, (2) patent cases are subject to the same general rules as other cases, but some particular considerations may apply, (3) the document (a) contained information generally regarded in the pharmaceuticals industry as highly commercially sensitive, and (b) had played only a limited role in the trial—relationship with issue of access to court documents by third parties under r.5.4 referred to (see *Civil Procedure*, Autumn 2001, Vol. 1, paras 5.4.1 & 31.22.1)

■ MEREDITH v. COLLEYS VALUATION SERVICES LTD. [2001] EWCA Civ 1456, September 7, 2001, CA (Peter Gibson and Hale L.JJ.)
CPR rr.1.1, 3.9 & 35.13—claimant's (C) claim for professional negligence against surveyors (D) allocated to fast track—on May 11, 2001, judge directing (1) that case should be listed for a three-day trial commencing on September 11, 2001, and (2) that experts' reports should be exchanged by July 20, 2001—D failing to serve their expert's report in time—C applying for order barring D from relying on the evidence of X at trial—D applying for an extension of time for serving X's report—on August 8, 2001, judge granting C's application and dismissing D's—held, allowing D's appeal, (1) as a result of D's failure to comply with the judge's order, by operation of rr.3.8 and 35.13, D could not use X's evidence at trial, (2) in effect, D's application was for relief from a "sanction" imposed by a court order within r.3.8, (3) in dealing with that application, the judge erred in principle in not considering the circumstances listed in r.3.9(1), (4) in the light of those circumstances, in the exercise of discretion time for serving X's report should be extended—*Baron v. Lovell*, *The Times*, September 14, 1999, CA; *Bansal v. Cheema* March 2, 2000, CA, unrep.; *Keith v.* C.P.M. *Field Marketing Ltd. The Times*, August 29, 2000, CA, ref'd to (see *Civil Procedure*, Autumn 2001, Vol. 1, paras 3.9.1 & 35.13.1)

■ ROUSE v. FREEMAN *The Times* January 8, 2002 (Gross J.)
CPR r.39.3(1)(b)—C bringing claim against D for personal injuries—at trial, solicitor for C with authority to act appearing but C not attending—judge proceeding with trial but striking out C's claim under r.39.3(1)(b) on ground that C did not attend—held, allowing C's appeal, C was present through his solicitor (see *Civil Procedure*, Autumn 2001, Vol. 1, para. 39.3.4)

■ SAYERS v. SMITHKLINEBEECHAM PLC. [2001] EWCA Civ 2017, *The Times* December 21, 2001, CA (Mummery, Buxton & Longmore L.JJ.)
CPR Pt 19, Sect. III & r.48.6A—prospective costs sharing order made in multi-party action—order directing that, if in any quarter, a claimant discontinues his claim, he will be liable (1) for his individual costs, together with (2) his several share of the com-

mon costs incurred by D, up to the end of that quarter—held, allowing in part appeal by claimants, for (2) should be substituted "liability for common costs and disbursements to be determined following the trial of common issues (see *Civil Procedure*, Autumn 2001, Vol. 1, para. 48.6A.3)

■ SEA ASSETS LTD. v. P.T. GARUDA INDONESIA June 27, 2001, unrep. (Thomas J.)
CPR Sched. 1, RSC Ord. 47, r.1(1), Insolvency Act 1986—C obtaining judgment against foreign company (D)—application by D under r.1(1) for stay of execution of this judgment by writ of *fieri facias*—D insolvent, but not subject to winding-up order of English court—however, English and foreign court expected to be asked to approve a scheme of arrangement—held, (1) in these circumstances, the court has no jurisdiction to stay execution under the 1986 Act but had jurisdiction to do so under r.1(1), (2) in the exercise of discretion, D's application should be granted (see *Civil Procedure*, Autumn 2001, Vol. 1, para. sc47.1.1)

■ TARAJAN OVERSEAS LTD. v. KAYE [2001] EWCA Civ 1859, *The Times* January 22, 2002, CA (Tuckey L.J. & Pitchford J.)
CPR rr.1.4(2)(e) & 3.1(2)(c)—claim brought by foreign company (C)—in exercise of powers under r.3.1(2)(c), by order judge requiring C's directors to attend adjourned case management hearing—on C's appeal, held, the order should be varied by substituting, for the directors, representatives of C's U.K. agents—Court observing such an order (1) may be made with a view (a) to making an ADR order (though the attendance of any party is not required for this purpose) or (b) to otherwise facilitate settlement, but (2) should not be made for the purpose of putting pressure on the party to discontinue the proceedings (see *Civil Procedure*, Autumn 2001, Vol. 1, paras 1.4.11 & 3.1.1)

Practice Directions

■ PRACTICE DIRECTION (JUDGMENTS : NEUTRAL CITATION) [2002] 1 W.L.R. 346, Sup.Ct.
extends neutral citation arrangements announced in Practice Direction (Judgments : Form and Citation) [2001] 1 W.L.R. 194, to all judgments given by judges in the High Court in London—numbering system for judgments explained—citations for judgments delivered outside London to be supplied on request—in effect January 14, 2002 (see *Civil Procedure*, Vol. 1, para. 40.2.6)

■ PRACTICE DIRECTION (DECLARATORY PROCEEDINGS : INCAPACITATED ADULTS) [2002] 1 W.L.R. 325, Fam.D.
CPR r.7.1, Supreme Court Act 1981, s. 61—provides for exercise by judges of the Family Division of the High Court jurisdiction to grant declarations as to the best interests of incapacitated adults—such proceedings are civil proceedings to which the CPR apply—permanent vegetative state case should be issued in the Principal Registry and will be determined by the President or a nominated judge—other cases may be commenced in any registry and must be determined by a judge of the Division—Practice Note (Declaratory Proceedings : Medical and Welfare Decisions for Adults who lack Capacity, May 1, 2001, issued by the Official Solicitor, is annexed to this Practice Direction (see *Civil Procedure*, Autumn 2001, Vol. 1, para. 7.1.1, and Vol. 2, para. 9A-299)

Statutory Instruments

■ CIVIL COURTS (AMENDMENT) ORDER 2001 (S.I. 2001 No. 4025)
amends Civil Courts Order 1983 (S.I. 1983 No. 713), Scheds. 1 & 3—with effect from April 1, 2002, closes Chepstow and Monmouth county courts—provides that Newport (Gwent) county court shall have jurisdiction in proceedings commenced in those county courts before that date (see *Civil Procedure*, Autumn 2001, Vol. 2, para. 11-7)

■ CIVIL JURISDICTION AND JUDGMENTS (AUTHENTIC INSTRUMENTS AND COURT SETTLEMENTS) ORDER 2001 (S.I. 2001 No. 3928)
European Communities Act 1972 s. 2, Civil Jurisdiction and Judgments Act 1982 s. 48—applies specified provisions of the Civil Jurisdiction and Judgments Order 2001 (S.I. 2001 No. 3929) to authentic instruments (e.g. notarised agreements) and court settlements from other Member States bound by Council Regulation (EC) No. 44/2001 of 22nd December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters—by Chp. IV of the Regulation, such instruments and settlements are enforceable in the same manner as judgments—in force March 1, 2002 (see *Civil Procedure*, Autumn 2001, Vol. 1, para. 6.32)

IN DETAIL

Disclosure of documents in detailed assessment proceedings

As a general rule, an order for costs made at the end of legal proceedings will be order to the effect that the losing party should compensate the successful party for the costs the latter incurred in pursuing the claim. This is sometimes called "the indemnity rule"; the point being that the winner is entitled to be indemnified by the loser for his own costs liabilities.

A rule that follows as a consequence from the indemnity rule in this sense is the rule that the costs recoverable by the winner from the loser should be restricted to those costs that the receiving party in fact has paid or is obliged to pay to his own legal representatives in relation to the claim. Confusingly, this corollary of the indemnity rule is itself sometimes called "the indemnity rule". (To add to the confusion, the receiving party may be entitled to have some of his costs paid, not on the "standard basis", but on the more generous "indemnity basis", see CPR r.44.4.) For purposes of analysis, the rule in its first sense could be called "the primary indemnity rule", and in its second sense, "the secondary indemnity rule".

Until recently, lawyers could agree with their clients engaged in legal proceedings either (1) to act for the party for nothing (whatever the outcome of the case), or (2) to act on the basis that (win or lose) the client would be obliged to pay them fees for their efforts and to re-imburse them for money expended on their account in conducting the proceedings. The primary and secondary rules assume that the winning (receiving) party has retained lawyers to act for him on second of these two bases. With the relaxation of the rules relating to retainers, permitting lawyers to enter into arrangements with their clients stipulating that fees will not be payable except under certain conditions (*e.g.* only in the event of the client being successful in the proceedings) has placed the secondary indemnity rule under stress.

Paying parties have become suspicious and want to be assured that they are not compensating their opponents for costs that they have in fact not incurred. Lawyers habitually acting for clients on a conditional fee basis feel that the secondary indemnity rule is outdated and should be abolished (but how that could be done without abolishing the primary indemnity rule is not clear). Paying parties seek means for prying into the retainer arrangements between their opponents and lawyers acting for them. The latter seek means for resisting having to reveal documents relating to their retainer and the waiver and loss of privilege involved (see *Civil Procedure*, Autumn 2001, Vol. 1, paras 31.3.27 & 47.14.3). Amongst other things, this battle has brought into play parts of Practice Direction (Costs), in particular, those parts supplementing CPR r.47.14 (Detailed assessment hearing). Para. 40.14 of the Practice Direction states (see *Civil Procedure*, Autumn 2001, Vol. 1, para. 47PD-013, p 880):

> "The court may direct the receiving party to produce any document which in the opinion of the court is necessary to enable it to reach its decision. These documents will in the first instance be produced to the court, but the court may ask the receiving party to elect whether to disclose the particular documents to the paying party in order to rely on the contents of the document, or whether to decline disclosure and instead rely on other evidence."

In a number of cases, judges have been taxed with problems arising when, in detailed assessment proceedings, paying parties having objected to the receiving parties bills of costs on the ground that they infringed the secondary indemnity rule. A good deal of legal ingenuity has been displayed. Two recent first instance cases are: *Dickinson v. Rushmer* 152 New L.J. 58 (2002), and *South Coast Shipping Co. Ltd. v. Havant Borough Council* 152 New L.J. 59 (2002). In both cases, judgment was given on December 21, 2001, and in both arguments based on art. 6(1) of the European Convention on Human Rights, as scheduled to the Human Rights Act 1998, were deployed (right to a fair trial) (see *Civil Procedure* 2002 Vol. 2, para. 3D-34). In the first case an appeal by a paying party was upheld, in the second it was dismissed.

In *Dickinson v. Rushmer* 152 New L.J. 58 (2002), the claimant (C), who had succeeded against the defendant (D) in an action for damages and an account of profits, proceeded to a detailed assessment of his bills of costs. In their points of dispute, D raised, as a preliminary issue, a question as to whether the costs claimed by C were in breach of the secondary indemnity rule. D asserted that C could not have assumed a personal liability to pay costs of the order claimed in his solicitors' bills. At the hearing of the preliminary issue, C's solicitors produced to the costs judge, but not to D, various documents apparently directed at proving that there was no breach of the secondary indemnity rule (including bills, calculations relating to how much the C had actually paid, and a client care letter). C produced the documents to the judge voluntarily and without requiring the judge to direct them to so under para. 40.14. The judge held in favour of C. D appealed. Rimer J. (sitting with assessors) allowed the appeal.

On the appeal, D contended, *inter alia*, that the procedure adopted by the judge had been unfair. C relied on para. 40.14 of the Practice Direction. In addition, C

argued that the judge was entitled to conclude from the signature to the C's bill of costs that the secondary indemnity rule had not been offended. Further, C accepted that art. 6(1) of the Convention could apply to detailed assessment proceedings, but said that it was only engaged if there was a dispute which was "genuine and of a serious nature" (see *Benthem v. Netherlands* (1985) 8 EHRR 1, at para. 32).

Rimer J. said that he was not convinced that para. 40.14 was of any direct relevance in the instant case. The costs judge did not direct the production to him of the relevant documents, and so the procedure contemplated by that rule was strictly not engaged at all. The judge saw the documents because the claimant voluntarily chose to hand them to him in support of his case. (The judge's view on this point may be contrasted with that of Pumfrey J. in the South Coast Shipping case explained below.)

Rimer J. held that the issue raised by D was a "genuine issue". His lordship said, faced with D's assertions, C had a choice as to what course to follow. He could have asked the costs judge to direct whether he regarded D as having raised an issue on which he (C) needed to provide further evidence. Alternatively, he could, as he did, pre-empt any decision by the judge on that point and anyway tender what he regarded as positive proof of his liability to his solicitor for the costs sought to be recovered from D. The fact that the claimant thought it appropriate to adopt the latter course was perhaps the best indication that the issue D had raised was a genuine one. His lordship added, the situation therefore involved an issue of fact which the costs judge had to decide. It was obvious that as soon as it became clear that C was proposing to support his own case on the point by reference to documents which he was not willing to disclose to D, the costs judge should have considered whether that course was consistent with one of the most basic principles of natural justice, namely the right of each side to know what the other party's case was and to see the documentary material that he was relying on so that he could make his own comments on it. It followed that the procedure adopted by the costs judge had been unfair and that the appeal would be allowed.

In *South Coast Shipping Co. Ltd. v. Havant Borough Council*, the facts were very similar to those in the Dickinson case. D (the losing party in a long-running arbitration) raised the question whether C were claiming costs in breach of the secondary indemnity rule. In the course of the hearing, the costs judge was shown various documents by C (including interim bills, cheques and correspondence) which, on the grounds that they were privileged, were not provided to D. The costs judge held that D had not rebutted the presumption that there had been an agreement between C and their solicitors to pay the solicitors' costs, and accordingly there had been no breach of the secondary indemnity rule. D appealed, but was unsuccessful.

On D's appeal, Pumfrey J. analysed the relevant rules of court and case law (including *Pamplin v. Express Newspapers Ltd.* [1985] 1 W.L.R. 689) and listed the conclusions to be drawn from them. In doing so, his lordship said that a costs judge has no power to order disclosure of a privileged document by a receiving party to a paying party, but he may put the receiving party to his election between (a) not relying upon the document and offering to prove the fact of which the document was evidence by some other means, and (b) showing it to the paying party. A costs judge should exercise his discretion to put the receiving party to his election having regard to the requirements of fairness and justice; in particular, whether disclosure could be made to the party's legal representatives only; whether irrelevant privileged matter could be excised; and the importance of the document in establishing the disputed fact. The paying party is not obliged to make privileged material available to the paying party for the purpose of enabling the latter to test any evidence put forward by the former as the lawfulness of the retainer. Any waiver by the receiving party of privilege in a document is for the purpose of the detailed assessment only and the document remains otherwise privileged.

Pumfrey J. then considered the impact of the European Convention on the conclusions he had drawn. His lordship held that, if a costs judge, following the guidance in *Pamplin's* case and para. 40.14 of the Practice Direction (Costs), and having seen the documents in question, required the receiving party to elect between giving secondary evidence of the retainer and waiving the privilege, there was no incompatibility with the principles articulated by the Convention. That was not intended to suggest that the costs judge should put the receiving party to its election in respect of every document relied on, regardless of its degree of relevance. In the great majority of cases the paying party would be content to agree that the costs judge alone should see privileged documents. Only where it was necessary and proportionate should the receiving party be put to his election.

In applying the law as he had analysed it to the facts of this case, Pumfrey J. concluded that, although the costs judge had not applying para. 40.14 quite correctly, he was right when he concluded on the strength of the documents shown to him that there was nothing deserving of investigation.

Mediation in judicial review claims

The courts with civil jurisdiction deal with proceedings that may properly be described as "litigation". They do much else besides. For example, they deal with applications for judicial review. Such applications are not litigation. In applications for judicial review there is no *lis* between the parties. (Sadly, nowadays even criminal proceedings are sometimes described by people who should know better as "criminal litigation".)

The culmination of the litigation process is an adjudication, not any old adjudication, but an adjudication by a judge; that is to say, a trial at law at which factual issues are determined, the relevant law identified, if necesssary clarified, and then applied. Most litigation is settled by the parties involved through direct negotiation. By its very nature, litigation lends itself to settlement. Increasingly, parties may engage the help of a third party in the negotiation process, most commonly in the role of a mediator, and are encouraged to do so by the courts. (Mediation may be seen, not only as an alternative to the continuation of litigation and ultimate adjudication, but also as an alternative to, or at least as a supplement to, direct party negotiations.)

The higher judiciary appear to have become increasingly alarmed by their perception that the recent massive reforms in civil procedure may not have had the expected effect of substantially reducing the costs to parties in legal proceedings. As a consequence, calls for parties, whether involved in litigation properly so-called or in other forms of legal proceedings, to engage in mediation or other forms of alternative dispute resolution, have become increasingly urgent.

In *Cowl v. Plymouth City Council, The Times*, January 8, 2002, CA, the facts were that residents of a care home (C) made a claim for judicial review for an order (1) quashing the decision of a local authority (D) to close the home, and (2) requiring D to carry out assessments of their care needs. The judge dismissed the application and the Court of Appeal (Lord Woolf LCJ, Mummery & Buxton L.JJ.) dismissed C's appeal.

As Lord Woolf LCJ pointed out, this was a dispute of a not unfamiliar kind in that it was a dispute between a public authority and members of the public for whom the authority was responsible. It was a case in which both sides were publicly funded and in which large legal costs were being run up. The best outcome that C could hope for was that the decision to close their home should be re-considered and made in conjunction with a proper assessment of their needs and "care plans". In reality, there was no legal principle which divided the parties and the facts were clear. It was common ground that there had to be the fullest assessment of the effect of a possible move on C before a decision whether to move them could be reached.

Lord Woolf explained that there was a complaints procedure which C could invoke. However, it appeared that one reason why the application for judicial review was made and carried forward was that both parties were under the impression that, unless they agreed otherwise, C were entitled to proceed with their application unless the complaints procedure on offer technically constituted an alternative remedy which would fulfil all the functions of judicial review. His lordship said that that was a mistaken impression. Today, under the CPR, parties do not have a right to have a resolution of their respective contentions by judicial review "in the absence of an alternative procedure which would cover exactly the same ground as judicial review". The courts should not permit, except for good reason, proceedings for judicial review to proceed if a significant part of the issues between the parties could be resolved outside the judicial review process. In this case, the parties should have been able to come to a sensible conclusion as to how to dispose of the issues which divided them. If they could not do that through the standing complaints procedure and without help, then an independent mediator should have been recruited to assist.

Looking to the future, Lord Woolf said that the courts should scrutinise extremely carefully applications for judicial review in cases of this type (i.e. disputes between public authorities and members of the public for whom they are responsible). The courts should then make appropriate use of their ample powers under the CPR to ensure that the parties tried to resolve the dispute with the minimum involvement of the courts. (The legal aid authorities should cooperate in support of that approach.) In a given case, to achieve that objective the court might have to hold, on its own initiative, an *inter partes* hearing at which the parties could explain what steps they had taken to resolve be asked why a complaints procedure or some other form of alternative dispute resolution had not been used or adapted to resolve or reduce the issues in dispute. Where adjudication of applications is necessary the courts should deter the parties from adopting an unnecessarily confrontational approach to the procedure.

Unfortunately, throughout his judgment Lord Woolf insisted on referring to applications for judicial review as "litigation". This is unfortunate, not only because it is an inaccurate use of settled legal terminology, but because it adds confusion to the debate about the role ADR may play in legal proceedings. In that debate it is important to distinguish between the various types of legal proceedings that may arise in the civil courts. The role that ADR may play in relation to applications for judicial review is in many respects subtly different from that in relation to litigation. The word "litigation" has become a pejorative and frequently the litigation process is set up as an Aunt Sally, a defenceless target to be shot at. Equating the judicial review process with the litigation process is tendentious and probably unfair to one process or the other, as each has a different mission.

Further, one suspects that there are many who view with dismay the vast growth of the judicial review legal "industry" since the reforms of 1977, and who would like to see the judicial review genie put back in its bottle. If this is to be done, judicial review remedies and judicial review procedures will have to be reformed on a broad front. It should not be done by the enthusiastic use by judges on a case by case basis of any powers they may have under the CPR to stay proceedings for judicial review on the ground that the parties should use alternative means for resolving their differences.

CPR UPDATE

CIVIL PROCEDURE (AMENDMENT NO. 5) RULES 2001

In Issue 01/2002 of CP *News* it was explained that important additions and amendments, coming into effect on January 14, March 1 and 25, 2002, have been made to the CPR by the Civil Procedure (Amendment No. 5) Rules 2001 (S.I. 2001 No. 4015). In that issue it was explained that the primary purpose of this amending statutory instrument is to add (with effect from March 25) new Parts to the CPR (superseding the specialist proceedings practice directions referred to in r.49); they are Pt 58 (Commercial Court) (rr.58.1 to 58.15), Pt 59 (Mercantile Courts) (rr.59.1 to 59.12), Pt 60 (Technology and Construction Court Claims) (rr.60.1 to 60.6), Pt 61 (Admiralty Claims) (rr.61.1 to 61.13), Pt 62 (Arbitration Claims) (rr.62.1 to 62.21). In that issue the minor amendments that came into effect on January 14 were also explained.

The amendments coming into force on March 1 are a consequence of Council Regulation (EC) No. 44/2001 of 22nd December 2000 on jurisdiction and the recognition of judgments in civil and commercial matters and affect CPR provisions dealing with (1) service out of jurisdiction) (Sect. III of Pt 6), (2) default judgment (Pt 12), and (3) reciprocal enforcement of judgments (Sched. 1, RSC Ord. 71, and Sched. 2, CCR Ord. 35). The changes relating to the third of these topics were explained in CP News Issue 01/2002.

Subject to a few exceptions, the amendments coming into effect on March 25 are explained immediately below. The exceptions are the amendments to r.25.10 (Interim injunction to cease if claim stayed), and to Pts. I, II and III of Appendix B to Sched. 2, CCR Ord. 38 (Fixed Costs) which were explained on the "CPR Update" page of Issue 01/2002 of CP *News*, and the minor amendments to r.70.5 (Enforcement of awards of bodies other than the High Court and county courts), r.71.8 (Failure to comply with order), and rr.72.1 and 72.6 (Third party debt orders) (see respectively, Second Supplement to the 2001 Edition, pp. 16, 19, 20 & 21). Page references are to *Civil Procedure*, Autumn 2001, Vol. 1.

Page 231—Rule 11 (Procedure for disputing the court's jurisdiction)

The procedure for disputing the court's jurisdiction stated in r.11 is clarified. This rule states that a defendant who wishes to (a) dispute the court's jurisdiction to try the claim, or (b) argue that the court should not exercise its jurisdiction (for example, on the ground that service of the claim form on him out of the jurisdiction should not be permitted), may apply to the court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have. A defendant who wishes to make such an application must first file an acknowledgment of service in accordance with Part 10. A defendant who files an acknowledgment of service does not, by doing so, lose any right that he may have to dispute the court's jurisdiction.

Rule 11.1(4)(a) is now amended so as to provide that an application under this rule must "be made within 14 days after filing an acknowledgment of service" whereas previously the rule stated that application had to be made "within the period for filing a defence". As a consequence, the cross-reference to r.15.4 following r.11(4) is omitted, and in r.11(5), "the period specified in paragraph (4)" is substituted for "the period for filing a defence".

The provisions of Pt 15 (Defence and Reply) apply to ordinary claims; that is to say, claims made in accordance with Pt 7. However, Pt 15 does not apply to Pt 8 claims. Consequently, special arrangements had to be made for the situation where a defendant to such a claim wished to dispute jurisdiction. This was done by r.8.3(4) which related the time limits for making an application under r.11 to the filing of an acknowledgment of service (see p. 203, para. 8.3). In the light of the amendments to r.11, r.8.3(4) and r.11(10) are unnecessary and both provisions are omitted.

Rule 11(9) is substituted for the purpose of clarifying what a defendant should do after he has filed his acknowledgment of service. This provision now states:

> "(9) If a defendant makes an application under this rule, he must file and serve his written evidence in support with the application notice, but he need not before the hearing of the application file—
>
> (a) in a Part 7 claim, a defence; or
>
> (b) in a Part 8 claim, any other written evidence."

Page 344—Rule 20.6 (Defendant's claim for contribution or indemnity from co-defendant)

This rule is amended to restrict the right of a defendant to serve a contribution notice without requiring the permission of the court. The existing r.20.6 stands as r.26.6(1) and a sub-rule (2) is added in the following terms:

> "(2) A defendant may file and serve a notice under this rule—
>
> (a) without the court's permission, if he files and serves it—
>
> (i) with his defence; or

(ii) if his claim for contribution or indemnity is against a defendant added to the claim later, within 28 days after that defendant files his defence; or

(b) at any other time with the court's permission."

Page 369—Rule 22.1 (*Documents to be verified by a statement of truth*)

Rule 22.1(1) states that certain listed documents must be verified by a statement of truth. This provision has been amended by additions from time to time and the list has been extended to five varieties of documents (see sub-paras (a) to (e)). The list has never been exhaustive. Now a further sub-paragraph is added as follows:

"(f) any other document where a rule or practice direction requires."

Amongst other things, this addition takes care of any provision in the new CPR Parts replacing the "specialist proceedings" practice directions, and their supplementing practice directions, requiring particular documents to be verified.

Page 489—Rule 26.3 (*Allocation questionnaire*)

Rule 2.11 states that unless the rules or a practice direction provide otherwise or the court orders otherwise, the time specified by a rule or by the court for a person to do any act may be varied by the written agreement of the parties. Under r.26.3, the court may serve an allocation questionnaire on the parties. Rule 26.3(6) states that each party must file the completed allocation questionnaire no later than the date specified in it, which shall be at least 14 days after the date when it is deemed to be served on the party in question. Is this a time limit that may be varied by the written agreement of the parties? If anyone thought it was, they are now disabused by the addition to the rule of sub-rule (6A) which states:

"(6A) The date for filing the completed allocation questionnaire may not be varied by agreement between the parties."

Page 595—Rule 31.14 (*Documents referred to in a statement of case etc.*)

Rule 31.14 states that a party may, without requiring the permission of the court, inspect a document mentioned in (a) a statement of case, (b) a witness statement, (c) a witness summary, or (d) an affidavit. In addition, para. (e) of r.31.14 states that, subject to r.35.10(4), a party may inspect a document mentioned in an expert's report. An expert's report must state the substance of all material instructions, whether written or oral, on the basis of which the report was written, and r.35.10(4) states that such instructions shall not be privileged against disclosure but the court will not, in relation to those instructions (a) order disclosure of any specific document, or (b) permit any questioning in court, other than by the party who instructed the expert, unless it is satisfied that there are reasonable grounds to consider the statement of instructions to be inaccurate or incomplete.

In the Commercial Court, the procedure stated in para. H2.29 of the Commercial Court Guide, and not r.35.14(e), has governed the inspection of documents mentioned in an experts' report (see *Civil Procedure*, Vol. 2, para. 2C-155). The Guide explains that, in commercial cases, an expert's report may refer to a large number of sizeable documents, including published and unpublished papers and books which the expert has written, or to which he has contributed. The burden of collating and copying such material could be huge. Consequently, in the Commercial Court, a party wishing to inspect such a document should (failing agreement) make an application to the Court for that facility.

For the purpose of making the Commercial Court procedure applicable in all courts, para. (e) is now deleted from r.31.14. What remains of r.31.14 stands as r.31.14(1), and a new sub-rule (1) is a added, modifying the circumstances in which a party may inspect a document mentioned in an expert's report. Rule 31.14(2) states:

"(2) Subject to rule 35.10(4), a party may apply for an order for inspection of any document mentioned in an expert's report which has not already been disclosed in the proceedings."

It may be noted that para. H2.29 of the Commercial Court Guide states that the Court will not accede to an application for inspection of a document mentioned in an expert's report unless it is satisfied that inspection is appropriate for dealing with the case justly and that the document is not reasonably available to the party making the application from an alternative source. Para. H2.30 of the Guide states that, unless already provided at the inspection of documents stage, photographs, plans, analyses, measurements, survey documents or other similar documents, must be provided to all parties at the time when the report of the expert is served, and no application to the Court for the inspection of such documents should be necessary.

Page 679—Rule 35.12 (*Discussions between experts*)

Sub-rule (1) of this r.35.12 states that the court may, at any stage, direct a discussion between experts for the purpose of requiring the experts to (a) identify the issues in the proceedings, and (b) where possible, reach agreement on an issue. In the Commercial Court, the description of the purposes of the meetings of experts stated in para. H2.20 of the Commercial Court Guide has taken the place of the description given in r.35.12(1) (see *Civil Procedure*, Vol. 2, para. 2C-153). The

Guide explains that the purposes of such meetings are to give the experts the opportunity (a) to discuss the expert issues, and (b) to decide, with the benefits of that discussion, on which expert issues they share or can come to agree the same expert opinion, and on which expert issues there remains a difference of expert opinion between them (and what that difference is).

Rule 35.12(1) is now amended for the purpose of adopting generally the description of purposes used in Commercial Court proceedings. As amended, r.35.12(1) states as follows:

> "(1) The court may, at any stage, direct a discussion between experts for the purpose of requiring the experts to—
>
> (a) identify and discuss the expert issues in the proceedings; and
>
> (b) where possible, reach an agreed opinion on those issues."

Page 683—Rule 35.14 (*Expert's right to ask court for directions*)

Sub-rule (1) of r.35.14 states that an expert may file a written request for directions to assist him in carrying out his function as an expert. Sub-rule (2) states that an expert may request directions under sub-rule (1) "without giving notice to any party".

In the Commercial Court, the procedure stated in para. H2.16 of the Commercial Court Guide has taken the place of r.35.14 and has provided that any such request by an expert must be given on notice to the party instructing him and to all other parties (see *Civil Procedure*, Vol. 2, para. 2C-150). The Guide explains that the purpose of this variation in procedure is to reduce the risk of an expert accidentally informing the Court about, or about matters connected with, communications or potential communications between the parties that are without prejudice or privileged. (The expert may properly be privy to the content of such communications because he has been asked to assist the party instructing him to evaluate them.) This variation in the r35.14 procedure does not prevent the expert from filing a request for directions, but ensures that one or other party can approach the Court first if the request proposed by the expert would result in his accidentally informing the Court about such matters.

Sub-rule (2) of r.35.14 is now amended, with a consequential amendment to sub-rule (3), for the purpose of making the Commercial Court procedure applicable in all courts. Sub-rules (2) and (3) now read as follows:

> "(2) An expert must, unless the court orders otherwise, provide a copy of any proposed request for directions under paragraph (1)—
>
> (a) to the party instructing him, at least 7 days before he files the request; and
>
> (b) to all other parties, at least 4 days before he files it.
>
> (3) The court, when it gives directions, may also direct that a party be served with a copy of the directions."

It has been said that the expert witness rules are designed to ensure an open process (*Peet v. Mid-Kent Healthcare Trust* (*Practice Note*) [2001] EWCA Civ 1703; [2002] 1 W.L.R. 210, CA). These amendments are consistent with that objective and, in addition, help to protect the r.35.14 procedure from attack under art. 6 of the Human Rights Convention.

Page 712—Rule 37.5 (*Payment into court under enactments*)

There are various circumstances in which a party may pay money into court or may be required to do so by a judgment or order of the court. The best known is where a defendant makes an offer to settle a money claim by making a Pt 36 payment. Part 37 contains miscellaneous provisions about payments into court. After r.37.4, a new rule 37.5 is inserted as follows:

> "**Payment into court under enactments**
>
> 37.5 A practice direction may set out special provisions with regard to payments into court under various enactments."

Pages 809 & 892—Rule 44.13(1) (*No order as to costs*) *and rule* 48.4 (*Costs in favour of trustee*)

In certain circumstances, a trustee or personal representative is entitled to recover costs out of a trust fund or estate. (On this subject, see generally *Civil Procedure*, Autumn 2001, Vol. 1, paras 48.4.1 and 48.15.5, and Vol. 2, para. 9A-265, and note Practice Statement (Trust Proceedings : Prospective Costs Orders) [2001] 1 W.L.R. 1082 (explained in *CP News* Issue 06/2001).) Rule 44.13(1) and r.48.4(2) and (3) are now amended for the purpose of clarifying the manner in which this entitlement is dealt with by the CPR. (It is convenient to take these amendments in reverse order.)

Sub-rules (2) and (3) of r.48.4 apply where a person is or has been a party to any proceedings in the capacity of trustee or personal representative, and rule 48.3 (which is concerned with costs payable pursuant to a contract) does not apply (r.48.4(1)). Sub-rule (2) states that the general rule is that where he is entitled to be paid his costs of the proceedings, out of any fund held by him as trustee or personal representative, "those costs will be assessed on the indemnity basis". Sub-rule (3) states that the court may order otherwise "if a trustee or personal representative has acted for a benefit other than that of the fund".

These sub-rules are now re-cast and state as follows (r.48.4(1) remains as before):

> "(2) The general rule is that he is entitled to be paid the costs of those proceedings, insofar as they are not recovered from or paid by any other person, out of the relevant trust or estate.
>
> (3) Where he is entitled to be paid any of those costs out of the fund or estate, those costs will be assessed on the indemnity basis."

The entitlement to indemnity costs is no longer merely a "general rule". In terms, the express caveat formerly stated in sub-rule (3) has gone but is implied in the amended sub-rule (2).

Rule 44.13(1) states that, where the court makes an order that does not mention costs, no party is entitled to costs in relation to that order. This sub-rule is now qualified for the purpose of protecting the position of, amongst others, a person who is or has been a party to any proceedings in the capacity of trustee or personal representative. As amended r.44.13(1) states as follows:

> "(1) Where the court makes an order which does not mention costs—
>
> (a) the general rule is that no party is entitled to costs in relation to that order; but
>
> (b) this does not affect any entitlement of a party to recover costs out of a fund held by him as trustee or personal representative, or pursuant to any lease, mortgage or other security."

Pages 836 & 840—*Rules* 45.1 (*Scope of fixed costs*) *and* 45.6 (*Fixed enforcement costs*)

Pt 70 (General Rules About Enforcement of Judgments and Orders), Pt 71 (Orders to Obtain Information From Judgments Debtors), Pt 72 (Third Party Debt Orders), and Pt 73 (Charging Ords, Stop Orders and Stop Notices) were introduced into the CPR by the Civil Procedure (Amendment No. 4) Rules 2001 (S.I. 2001 No. 2792) and come into force on March 25, 2002. (These new Parts are printed in the Second Supplement to the 2001 Edition, p. 15 *et seq.*) As a result a number of RSC and CCR provisions re-enacted in Scheds. 1 and 2 of the CPR are revoked by that statutory instrument. Also, some changes are made by the Civil Procedure (Amendment No. 5) Rules 2001 to provisions as to the fixed costs recoverable in enforcement proceedings. In particular in Pt 45 (Fixed Costs), r.45.1 is amended (expanding the scope of that Part) and a new rule (r.45.6) is added (setting forth a new scale of fixed enforcement costs), and some provisions in RSC Ord. 62 and CCR Ord. 38 are omitted.

It is convenient to explain first the omissions. App. 3 of RSC Ord. 62 (in CPR Sched. 1) contains various scales of fixed costs. The scale in Pt III of this Appendix shows the amount to be allowed in respect of enforcement costs (see *Civil Procedure*, Autumn 2001, Vol. 1, para. sc62.A3.4). Para. 3 of this Part sets out certain costs payable where a garnishee order is made and para. 4 refers to costs payable and disbursements recoverable where a charging order is granted and made absolute. These paragraphs are now omitted.

App. B of CCR Ord. 38 (in CPR Sched. 2) also contains various Tables of fixed costs. The Table in Pt III of this Appendix, includes three paragraphs showing amounts to be allowed in respect of enforcement costs (see *Civil Procedure*, Autumn 2001, Vol. 1, para. cc38.B.3). Paras 7 and 8 show the fixed costs available in garnishee (and related) proceedings and on applications for charging orders, and para. 11 shows the costs payable on an oral examination. These three paragraphs are now omitted.

Pt 45 (Fixed Costs) sets out (in a combination of rules and three Tables) the amounts which, unless the court orders otherwise, are to be allowed in respect of solicitors' charges in the cases to which the Part applies (r.45.1(1)). Heretofore, r.45.1(2) has provided that Pt 45 has effect where (a) the only claim is a claim for a specified sum of money where the value of the claim exceeds £25, and one or other of the conditions listed in sub-paras (i) to (vi) of r.45.1(2) applies, or (b) the only claim is a claim where the court gave a fixed date for the hearing when it issued the claim and judgment is given for the delivery of goods and the value of the claim exceeds £25.

To these two bases upon which Pt 45 has effect is now added a third (inserted as sub-para. (c) in r.45.1(2)), that is, where "(c) a judgment creditor has taken steps under Parts 70 to 73 to enforce a judgment or order". Further, r.45.6 (headed "Fixed enforcement costs") is added to Pt 45 and contains a table of fixed enforcement costs (Table 4), in effect replacing the provisions now omitted from Pt III of App. 3 of RSC Ord. 62 and Pt III of App. B of CCR Ord. 38 (as explained above). Rule 45.6 states as follows:

> **"Fixed enforcement costs**
>
> 45.6 The table in this rule (Table 4) shows the amount to be allowed in respect of solicitors' costs in the circumstances mentioned. The amounts shown in Table 3 are to be allowed in addition, if applicable."

Page 1317—RSC *Ord.* 74 (*Applications and Appeals under the Merchant Shipping Act* 1995)

The sole surviving provision in this Order (r.1(1)) states that applications to the High Court under the 1995 Act are to assigned to the Queen's Bench Division and taken by the Admiralty Court. With the coming into effect of Pt 61 (Admiralty Claims), this Order is revoked.

Page 1516—CCR *Ord.* 28 (*Judgment Summonses*)

In certain circumstances, civil courts may make orders committing to prison a person who fails to comply with a judgment or order requiring him to do, or to abstain from doing, particular acts. Further, although the general rule is that an order for committal may not be made for disobedience to an order for payment of money, there are some circumstances in which imprisonment for civil debt remains (e.g. non-payment of maintenance orders and of certain taxes).

In *Newman v. Modern Bookbinders Ltd.* [2000] 1 W.L.R. 2559, CA (a case involving an application to commit for contempt under the County Courts Act 1984, s. 92(1) a respondent who had removed levied goods), the Court of Appeal anticipated the coming into force (on October 2, 2000) of the Human Rights Act 1998 and, in particular, the effect of art. 6 of the Convention on applications to commit, for whatever reason. Sedley L.J spelt out the requirement for clarity of procedure and also the requirement that a respondent should understand in detail the true nature and cause of the accusation against him. These matters are important because behaviour that might constitute a civil contempt may be classified as criminal proceedings for Convention purposes. (See further "In Detail" page of CP *News* 02/2001.) Subsequently, the judgment summons procedure used by family courts (see Family Proceedings Rules 1991 r.7.4) was found wanting in this respect (see *Cuff v. Quinn* [2001] EWCA Civ 36; January 15, 2001, CA, unrep., and note Practice Direction (Family Proceedings : Committal) [2001] 1 W.L.R. 1253, Fam.D.).

CPR Sched. 2, CCR Ord. 28 sets out the procedure to be followed in applications to county courts for a judgment summons against a debtor for the purpose of obtaining an order committing him to prison (insofar as that is permitted). In the circumstances provided for by section 110(2) of the County Courts Act 1984, a penalty may be imposed on a debtor who fails to attend the hearing of a judgment summons (see *Civil Procedure*, Vol. 2, para. 9A-720). For the purpose of ensuring that the Ord. 28 procedure is compliant with art. 6, rr.1 to 4 are now amended, and r.5 is substituted.

Several of these changes relate to matters of evidence. In r.1 (Application for judgment summons) a new sub-rule (3) is inserted as follows:

> "(3) The judgment creditor must file with the request all written evidence on which he intends to rely."

In r.2 (Mode of service) sub-rule (4) is substituted as follows:

> "(4) The written evidence on which the judgment creditor intends to rely must be served with the judgment summons."

In r.3 (Time for service) sub-rule (1) is amended to read:

> "(1) A judgment summons and written evidence must be served not less than 14 days before the day fixed for hearing."

And in r.5 "Evidence" is substituted for the existing title to the rule and the text of the rule now reads:

> "5.—(1) No person may be committed on an application for a judgment summons unless -
>
> (a) the order is made under section 110(2) of the Act; or
>
> (b) the judgment creditor proves that the debtor—
>
> (i) has or has had since the date of the judgment or order the means to pay the sum in respect of which he has made default; and
>
> (ii) has refused or neglected or refuses or neglects to pay that sum.
>
> (2) The debtor may not be compelled to give evidence."

Previously, r.5 provided that evidence by witness statement or affidavit was generally admissible without notice on behalf of the judgment creditor where he resided or carried on business out of the county court district from which the judgment summons was issued. Rule 10(8), which is now omitted, stated that a solicitor preparing such evidence could be treated as having attended the hearing and allowed costs under r.10(2) on that basis.

The other amendments to Ord. 38 are concerned with the enforcement of the attendance of the judgment debtor at the hearing of a judgment summons. In r.2(3), para. (b) is substituted and in its entirety the sub-rule now reads:

> "(3) Where a judgment summons has been served on a debtor in accordance with paragraph (2), no order of commitment shall be made against him unless—
>
> (a) he appears at the hearing; or
>
> (b) it is made under section 110(2) of the Act."

In r.4 (Enforcement of debtor's appearance), new sub-rules (1A) and (1B) are inserted after sub-rule (1) as follows:

> "(1A) An order made under section 110(2) of the Act must be served personally on the judgment debtor.
>
> (1B) Copies of—
>
> (a) the judgment summons; and
>
> (b) the written evidence,
>
> must be served with the order."

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