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IN BRIEF

Cases

■ FACTORTAME LTD. v. SECRETARY OF STATE FOR TRANSPORT, LOCAL GOVERNMENT AND THE REGIONS [2002] EWCA Civ 22; 152 New L.J. 171 (2002), CA (Simon Brown, Waller & Sedley, L.JJ.)
CPR rr.36.11, 36.20 & 44.3—C not accepting D's payment into court within period fixed by r.36.11(2)—towards end of trial, D permitting C to accept payment in, but not agreeing costs—judge ruling that C entitled to recover part only of their costs—held, dismissing C's appeal, (1) the presumption that a claimant who fails to better a payment in should be treated as the unsuccessful party as from the date fixed for acceptance can be dislodged in special circumstances, for example (2) where D has withheld material and had not allowed C to make a proper appraisal of D's case, but (3) there is no principle that a defendant at fault for failing to amend his case timeously should in effect provide the claimant with additional time for accepting a payment in (see *Civil Procedure*, Autumn 2001, Vol. 1, paras 36.10.1, 36.11.2 & 36.20.1)

■ HORNE-ROBERTS v. SMITHKLINE BEECHAM PLC. [2001] EWCA Civ 2006; *The Times* January 10, 2002, CA (Dame Elizabeth Butler-Sloss P, Hale & Keene L.JJ.)
CPR r.19.5, Limitation Act 1980, ss.11A & 35(3), Consumer Protection Act 1987—in August 1999, C bringing defective product claim under 1987 Act against M for vaccine damage—after expiry of limitation period fixed by s.11A, C realising that he had mistakenly identified M, instead of D, as the manufacturers of the relevant batch of vaccine—judge granting C's application to substitute D as defendants to the claim—held, dismissing S's appeal, amendment may be permitted where it is possible to identify the defendant by reference to a description which is specific to the particular case, in this case, the manufacturers of the vaccine administered to C (see *Civil Procedure*, Autumn 2001, Vol. 1, paras 17.4.5 & 19.5.1, and Vol. 2, paras 8-18 & 8-87)

■ ROERIG v. VALIANT TRAWLERS LTD. [2002] EWCA Civ 21; 152 New L.J. 171 (2002), CA (Simon Brown, Waller & Sedley L.JJ.)
CPR r.26.5 & Pt 52, Practice Direction (Appeals), paras 2A.1 to 2A.4, Access to Justice Act 1999 (Destination of Appeals), Order 2000, arts. 1 to 4, Access to Justice 1999 s.56, Supreme Court Act 1981, s.16(1)—in wrongful death claim proceeding in a county court, circuit judge ruling favour of C on point of law dealt with as a preliminary issue—held, dismissing appeal on substantive point, (1) the decision appealed was, within art. 1(3)(a) (and para. 2A.4(a)), a "final decision" of a county court in a claim allocated to the multi-track, therefore (2) appeal against the decision lay to the Court of Appeal (see *Civil Procedure*, Autumn 2001, Vol. 1, paras 52.0.17 & 52PD-002A, and Vol. 2, 9A-885)

■ AUDERGON v. LA BAGUETTE LTD.[2002] EWCA Civ 10, *The Times* January 31, 2002, CA (Pill, Tuckey & Jonathan Parker L.JJ.)
CPR r.51.1, Practice Direction (Transitional Arrangements) para. 19(1)—claimant (C) commencing claim before CPR brought into force—proceedings not coming before a judge between April 26, 1999, and April 25, 2000—proceedings automatically stayed by operation of para. 19(1)—Master refusing C's application under para. 19(2) for stay to be lifted—judge allowing C's appeal—judge relying on matters listed in Annodeus Entertainment Ltd. v. Gibson The Times, March 3, 2000, as being relevant to applications of this type—in allowing D's appeal, Court of Appeal stating (1) the value of relying on judicially created checklists which do not appear in a CPR provision to be applied itself is doubtful, (2) inherent in such an approach is the danger that a body of "satellite authority" might be built up leading in effect to the re-writing of the provision through the medium of judicial authority (as occurred in relation to dismissal for want of prosecution under the RSC) (see *Civil Procedure*, Autumn 2001, Vol. 1, paras 1.3.9, 2.3.1, 51.1.2 & 51PD-019)

■ BARCLAYS BANK PLC. v. MARTIN & MORTIMER September 19, 2001, unrep. (Judge Seymour QC)
CPR rr.1.1 & 36.11—bank (C) bringing claim for professional negligence against valuers (D)—C not accepting within time limit fixed by r.36.11 D's Part 36 payment made in March 2000—after disclosure by C of certain documents, in August 2000 C alerted by D of their intention to apply for permission to re-amend their defence—in January 2001, court granting D permission to re-amend their defence—in August 2001, after date in October 2001 fixed for trial, C applying for permission to accept D's Part 36 payment—held, dismissing the application, (1) it cannot be said that, since the coming into force of the CPR, the question whether permission should be granted in these circumstances is answered simply by reference to pre-CPR Court of Appeal decisions, (2) it was necessary to consider the position of D as well as that of C, and in partic-

ular whether the circumstances had changed since the Part 36 payment was made and, if so, what was the occasion of that change, (3) this was not a case in which, as a result of further thoughts, defendants re-formulated a case of which they were always aware or would have been aware had they considered particular aspects of material already available to them (see *Civil Procedure*, Autumn 2001, Vol. 1, para. 36.11.1)

■ B.I.C.C. LTD. v. CUMBRIAN INDUSTRIALS LTD & PARKMAN CONSULTING ENGINEERS [2001] EWCA Civ 1621, October 30, 2001, CA, unrep. (Henry & Robert Walker L.JJ. and Sir Anthony Evans)
Supreme Court Act 1981, s.51, Civil Liability (Contribution) Act 1978, ss.2 & 6—company (C) bringing action in contract and tort against consulting engineers (D1) and construction company (D2)—D1 commencing contribution proceedings against D2—D1 agreeing to pay C £1.95m (inclusive of £600,000 costs) in settlement of all claims brought by C against them—C's action against D2 withdrawn—in contribution notice, D1 claiming against D2 £1.35m exclusive of £600,000 costs—judge holding that, under the 1978 Act, D1 should recover 50% of both sums from D2—held, dismissing D2's appeal (1) the judge was entitled to order a contribution under the 1978 Act in respect of the full sum paid by D1 to C, inclusive of any part referable to C's costs, as ss.2 and 6 do not preclude the making of a contribution order in respect of such part, (2) the judge had power to make a costs order under s. 51(3) which could be to the like effect, as the discretion given by that section is not limited so as to exclude an order in contribution proceedings in respect of a sum paid to the original claimants in respect of their costs—*J. Sainsbury plc. v. Broadway Malyan* [1998] 61 Con.L.R. 31, ref'd to (see *Civil Procedure*, 2001, Vol. 2, paras 9A-265 & 9B-289)

■ DARDANA LTD. v. YUKOS OIL COMPANY *The Times* February 4, 2002 (Judge Chambers QC)
CPR r.25.12, Arbitration Act 1996, ss.101 & 103, Practice Direction (Arbitration), paras 31.2 & 31.3—C applying under para. 31.2 for permission to enforce under s.101 foreign arbitration award against D—under s.103, D contending that award should not be enforced—D applying for order for security of costs against C—held, (1) D were not attacking the award, but its enforcement, and were, in effect, defendants in the proceedings, consequently (2) the court had jurisdiction to order C to provide security for costs, (3) the court had jurisdiction to make such order whether or not it gave directions under para. 31.3 as to the service of the enforcement form (see *Civil Procedure*, Autumn 2001, Vol. 1, para. 25.12.3, and Vol. 2, paras 2B-61 & 2B-333)

■ ROPAIGEALACH v. ALLIED IRISH BANK PLC. [2001] EWCA Civ 1790; November 12, 2001, CA, unrep. (Hale & Rix L.JJ.)
CPR r. 52.13(2)(a), Sched. 1, RSC Ord. 50, rr.1 & 3, County Courts Act 1984, s.86, Charging Orders Act 1979, s.1—in legal proceedings brought by D against bank (C), D ordered to pay C's costs—C applying for charging order to enforce the order—after order nisi, district judge making order for payment of debt by instalments—subsequently, and before D had defaulted on any instalment payment, district judge making order absolute—circuit judge dismissing D's appeal—D obtaining permission to make second appeal on ground that important point of practice raised—held, dismissing D's appeal, (1) for the purposes of s.86, "execution" by charging order is "issued" when it is issued nisi, therefore (2) the court had jurisdiction to make the charging order absolute, as the order nisi had been obtained before the instalment order was made, (3) the existence of the instalment order was one of the circumstances to be considered by the court in exercising its discretion, (4) in many circumstances it may be entirely sensible and satisfactory from both parties' points of view for an instalment order and an order absolute to co-exist, particularly where a long-running instalment order is made—*Haly v. Barry* (1868) L.R. 3 Ch. 452, ref'd to (see *Civil Procedure*, Autumn 2002, Vol. 1, paras 53.3.21, sc50.1.20 & sc50.1.24, and Vol. 2, paras 9A-671 & 9B-217)

■ TAYLOR v. LAWRENCE [2002] EWCA Civ 90; 152 New L.J. 221 (2002), CA (Lord Woolf LCJ, Lord Phillips MR, and Ward, Brooke & Chadwick L.JJ.)
CPR rr.52.10 & 52.11(2), Supreme Court Act 1991, s.15—C bringing boundary dispute claim against D in a county court—at trial, deputy judge revealing that he was a client of C's solicitors—deputy judge giving judgment for C—D's appeal to Court of Appeal on ground of appearance of judicial bias dismissed (see [2001] EWCA Civ 119)—after judgment of Court perfected, D applying for permission to appeal again to Court of Appeal and to introduce additional evidence as to bias—held by Full Court, granting permission but dismissing appeal, (1) the Court has an implied jurisdiction to do that which is necessary to achieve its objectives as a court of justice, accordingly, (2) in exceptional circumstances, the Court has power to re-open an appeal to avoid real injustice where there is no alternative effective remedy, (3) one circumstance in which it may be appropriate to exercise this jurisdiction is where it is alleged that a decision was invalid because the court which made it was biased—procedure for ensuring that exceptional jurisdiction to re-consider judgment is invoked only where appropriate outlined—*In re Barrell Enterprises* [1973] 1 W.L.R. 19, CA, ref'd to (see *Civil Procedure*, Autumn 2001, Vol. 1, paras 40.2.1 & 52.11.2 and Vol. 2, para. 9A-45)

Practice Directions

■ PRACTICE DIRECTION (FAMILY DIVISION : VIDEO CONFERENCING) [2002] 1 W.L.R. 406, Fam.Div.
outlines procedure to be followed for purpose of making use of video conferencing facilities in hearings in proceedings pending in Principal Registry of the Family Division (see *Civil Procedure*, Autumn 2001, Vol. 1, para. 1.4.13)

■ PRACTICE STATEMENT (ADMINISTRATIVE COURT : ANNUAL STATEMENT) [2002] 1 All E.R. 633
CPR Pt 54—states that claims for judicial review lodged on or after March 4, 2002, must indicate that the pre-action protocol for judicial review has been complied with and reasons for non-compliance must be given in the claim form—issues new form (to be used forthwith) for renewing applications for permission to apply (requiring applicant to give single judge's reasons for refusal)—states new procedure for urgent applications for permission and for interim injunctions (Annex B)—sets out listing policy of the Court (re-introducing short warned list) (see Annex C) (see *Civil Procedure*, Autumn 2001, Vol. 1, paras 54.3.8, 54.12.1 & 54.16.4)

■ PRACTICE DIRECTION (ARBITRATION) HMSO CPR 26th Supplement January 2002
supplements CPR Pt 62—starting claim under 1996 Act—arbitration claim form—acknowledgment of service or making representations by arbitrator or ACAS—supply of documents from court records—case management—securing attendance of witnesses—interim remedies—applications under 1996 Act, ss.32 & 45—decision without a hearing—variation of time—applications for permission to appeal— starting claim under Pt 62, Sect. II—registration of awards under Arbitration (International Investment Disputes) Act 1966—App. A (arbitration claim form) in effect March 25, 2002

■ PRACTICE DIRECTION (CHARGING ORDERS, STOP ORDERS AND STOP NOTICES) HMSO CPR 26th Supplement January 2002
supplements CPR Pt 73—application notice—High Court and county court jurisdiction—transfer—enforcement of charging order by sale—Appendix A (sample form order for sale)—Appendix B (sample form of stop notice)—in effect March 25, 2002

■ PRACTICE DIRECTION (COMMERCIAL COURT) HMSO CPR 26th Supplement January 2002
supplements CPR Pt 58—starting proceedings—applications before proceedings are issued—transferring proceedings—acknowledgment of service—default judgment and admissions—variation of time limits—amendments—service of documents—case management—pre-trial review evidence for applications—judgments and orders—Appendix A (issue of claim form by fax)—in effect March 25, 2002

■ PRACTICE DIRECTION (MERCANTILE COURTS) HMSO CPR 26th Supplement January 2002
supplements CPR Pt 59—starting proceedings—applications before proceedings are issued—transferring proceedings —default judgment and admissions—variation of time limits by agreement—case management—pre-trial review and questionnaire—evidence for applications—files for applications—judgments and orders—Apps. A to C (case management information sheet, draft directions order, pre-trial check list)—in effect March 25, 2002

■ PRACTICE DIRECTION (GENERAL RULES ABOUT ENFORCEMENT OF JUDGMENTS AND ORDERS) HMSO CPR 26th Supplement January 2002
supplements CPR Pt 70—methods of enforcing money judgments—transfer of proceedings—enforcement of High Court judgment or order in a county court—enforcement of other awards and decisions—interest on judgment debts—payment of debt after issue of enforcement proceedings—in effect March 25, 2002

■ PRACTICE DIRECTION (ORDERS TO OBTAIN INFORMATION FROM JUDGMENT DEBTORS) HMSO CPR 26th Supplement January 2002
supplements CPR Pt 71—application notice—order to attend court—attendance at court—failure to comply with order—suspended committal order—breach of suspension terms—Appendix A (Record of examination (individual)) (Form EX140)—Appendix B Form (Record of examination (officer of company or corporation)) (Form EX141)—in effect March 25, 2002

■ PRACTICE DIRECTION (TECHNOLOGY AND CONSTRUCTION COURT CLAIMS) HMSO CPR 26th Supplement January 2002
supplements CPR Pt 60—TCC claims—how to start a claim—applications before proceedings are issued—transfer of proceedings—assignment of a claim to a judge—applications—case management conference—pre-trial review—listing—trial—Apps. A to D (case management information sheet, case management directions form, pre-trial review questionnaire, pre-trial review directions form)—in effect March 25, 2002

■ PRACTICE DIRECTION (THIRD PARTY DEBT ORDERS) HMSO CPR 26th Supplement January 2002
supplements CPR Pt 72—application notice—interim third party debt order—interest relating to bank etc. accounts—transfer—applications for hardship payment orders—final orders relating to building society accounts—in effect March 25, 2002

■ PRACTICE DIRECTION (RECIPROCAL ENFORCEMENT OF JUDGMENTS) HMSO CPR 26th Supplement January 2002
CPR Sched. 1 RSC Ord. 71—substitutes new supplementing practice direction—applies only to provisions of Pt V, as added to Ord. 71 by Civil Procedure (Amendment No. 5) Rules 2001—recognition or enforcement of judgment in a Regulation State—explains consequences of Judgments Regulation art. 38(2)—evidence needed in support of an application under Pt V—in force March 1, 2002 (see *Civil Procedure*, Autumn 2001, Vol. 1, para. scpd71-001)

Statutory Instruments

■ COUNTY COURT FEES (AMENDMENT) ORDER 2002 (S.I. 2002 No. 223)
County Courts Act 1984 s. 128—amends County Court Fees Order 1999 (S.I. 1999 No. 689)—takes account of new terms for oral examinations and garnishee orders in the rules on enforcement, introduced by the Civil Procedure (Amendment No. 4) Rules 2001 (S.I. 2001 No. 2792) and coming into force on March 25, 2002—also, with effect from March 1, 2002, substitutes a new fee 4.10 (fee payable in traffic enforcement cases)—makes no change to the amount of any fee (see *Civil Procedure*, Autumn 2001, Vol. 2, para. 10-13, p. 2111)

■ SUPREME COURT FEES (AMENDMENT) ORDER 2002 (S.I. 2002 No. 222)
Supreme Court Act 1981, s.130—amends Supreme Court Fees Order 1999 (S.I. 1999 No. 687)—takes account of new terms for oral examinations and garnishee orders in the rules on enforcement, introduced by the Civil Procedure (Amendment No. 4) Rules 2001 (S.I. 2001 No. 2792) and coming into force on March 25, 2002—also, as a consequence of the Council Regulation (EC) No. 4/2001 of 22nd December 2000, with effect from March 1, 2002, extends fee 3.5 to include a fee payable for a certificate of judgment for use abroad—makes no change to the amount of any fee (see *Civil Procedure*, Autumn 2001, Vol. 2, para. 10-1, p. 2099)

IN DETAIL

New rules and practice directions

When, in March 1994, Lord Mackay L.C. requested Lord Woolf to undertake a review of civil justice it was said that the review would first consider the procedural rules "with the objective of producing a single procedural code covering general High Court and county court business, with provisions for specialist jurisdictions and procedure in each court". Unfortunately, Lord Woolf and his small team of experts never came close to achieving that objective.

As enacted in 1998 and brought into effect on April 26, 1999, the CPR consisted of 48 Parts dealing with "general High Court and county court business", but the rules in these Parts did not cover the field. Further, they did not attempt to make provision "for specialist jurisdictions and procedure in each court". It should also be noted that, although the bulk of the two sets of rules which the single procedural code was intended to replace (the RSC and the CCR) consisted of rules about the enforcement of judgments and orders, the harmonisation and improvement of these rules lay outside Lord Woolf's terms of reference.

These deficiencies were made up by CPR practice directions and by the enactment in Scheds. 1 and 2 of the CPR of many former RSC and CCR rules. Para. 6 of Sched. 1 to the Civil Procedure Act 1997 states that the CPR may, instead of providing for any matter, "refer to provision made or to be made about that matter by directions". This power was used for the purpose of providing, what were in effect, rules of court for a number of specialist proceedings.

Slowly but surely, the rule committee is completing the task of producing a single procedural code covering general High Court and county court business, with provisions for specialist jurisdictions and procedure in each court. The amendments to the CPR and new practice directions coming into effect on March 25, 2002, mark significant progress in this endeavour in two respects; first in relation to specialist proceedings, and second in relation to enforcement of judgments and orders.

Specialist proceedings

Rule 49(2) states that the CPR shall apply to the proceedings listed in r.49(2) "subject to the provisions of the relevant practice direction which applies to those proceedings". Most of the specialist proceedings to which r.49 applied have now been brought in from the cold (as it were) and are dealt with in new CPR Parts supplemented by practice directions. (Contentious probate proceedings were brought in some time ago (see CPR Pt 57). Specialist proceedings remaining within r. 49 are Patents Court business, and proceedings under the Companies Act 1985 etc.)

With effect from March 25, 2002, (1) Admiralty proceedings, (2) arbitration proceedings, (3) commercial and mercantile actions, and (4) Technology and Construction Court business, are no longer subject to "relevant" practice directions as provided for by r.49. Accordingly, the following are revoked:

> Practice Direction 49C (Technology and Construction Court) (see Vol. 2, paras 2E-1 *et seq*.)
>
> Practice Direction 49D (Commercial) (see Vol. 2, paras 2C-1 *et seq*.)
>
> Practice Direction 49F (Admiralty) (see Vol. 2, paras 2A-1 *et seq*.)
>
> Practice Direction 49G (Arbitration) (see Vol. 2, paras 2B-1 *et seq*.)
>
> Practice Direction 49H (Mercantile Courts and Business Lists) (see Vol. 2, paras 2C-292 *et seq*.)

In their place, new Parts listed below have been added to the CPR by the Civil Procedure (Amendment No. 5) Rules 2001 (S.I. 2001 No. 4015), and each Part is supplemented by a practice direction (as indicated). All of the practice directions, with the exception of that supplementing Pt 61 (Admiralty Claims), were published in HMSO CPR Supplement 26 (January 2002). The result is that, whereas previously these specialist proceedings were dealt with by provisions found in the practice directions now revoked, henceforward they are found in a combination of CPR rules and supplementing practice directions. The effects are largely the same. However, in making new provision for these specialist proceedings, some changes have been made (not always simply for the purpose of bringing the rules and directions into line with amendments made elsewhere to the CPR).

> Pt 58 Commercial Court; supplemented by Practice Direction (Commercial Court)
>
> Pt 59 Mercantile Courts; supplemented by Practice Direction (Mercantile Courts)
>
> Pt 60 Technology and Construction Court Claims; supplemented by Practice Direction (Technology and Construction Court Claims)
>
> Pt 61 Admiralty Claims; supplemented by Practice Direction (Admiralty Claims)
>
> Pt 62 Arbitration; supplemented by Practice Direction (Arbitration)

It may be noted that, as published in HMSO CPR Supplement 26 (January 2002), the appendix to Practice Direction (Arbitration), the three appendices to Practice Direction (Mercantile Courts), and the four appendices to Practice Direction (Technology and Construction Court Claims) have been left out.

Enforcement of judgments and orders

As explained above, large proportions of the RSC and CCR consisted of rules dealing with the enforcement of judgments and orders. With some minor amendments, these rules were re-enacted in Scheds. 1 and 2 of the CPR. To an extent, different enforcement regimes applied and have continued to apply in the High Court, on the one hand, and the county courts, on the other.

In the RSC, the enforcement provisions begin with Ord. 45 (Enforcement of Judgments and Orders : General), and this Order is followed by a series of Orders dealing with particular forms of enforcement; including Ord. 48 (Examination of Judgment Debtor, Etc.), Ord. 49 (Garnishee Proceedings), and Ord. 50 (Charging Orders, Stop Orders, Etc.).

In the CCR there is a similar structure. The enforcement provisions begin with Ord. 25 (Enforcement of Judgments and Orders : General). Rules relating to the oral examination of debtors are found within this Order. After that come Ord. 30 (Garnishee Proceedings), and Ord. 31 (Charging Orders).

A start has now been made on bringing together in new CPR Parts the RSC and CCR rules dealing with (1) oral examinations, (2) garnishee orders, and (3) charging orders, stop orders, etc. Parts 70 to 73 were added to the CPR by the Civil Procedure (Amendment No. 4) Rules 2001 (S.I. 2001 No. 2792). These new Parts, and the practice directions supplementing them, come into effect on March 25, 2002. (The practice directions were published in HMSO CPR Supplement 26, January 2002.)

The new Parts are introduced by Pt 70 (General Rules About Enforcement of Judgments and Orders). In the CPR, this Part plays the introductory role formerly played by RSC Ord. 45 and CCR Ord. 25. However, as the recent amendments do not cover the whole field of enforcement of judgment and orders, a number of the rules in RSC Ord. 45 and CCR Ord. 25 remain in effect. Pt 70 is supplemented by Practice Direction (Enforcement of Judgments and Orders for the Payment of Money). Para. 1.1 of this direction lists the methods a judgment creditor may use for the purpose of enforcing a judgment or order for the payment of money and in so doing refers, not only to the new CPR Parts referred to below, but also to RSC and CCR provisions still to be found in Scheds. 1 and 2 of the CPR (for example those dealing with writs of *fieri facias* and warrants of execution). The effect of r.8(3) of CCR Ord. 37, which provides that, where a re-hearing is ordered, any execution issued on the judgment or order set aside shall cease to have effect unless the court orders otherwise is preserved by r. 70.6.

RSC provisions dealing with oral examinations have been found in Ord. 48 (Examination of Judgment Debtor, Etc.). This Order is now revoked entirely. Comparable CCR provisions have been found in rr.3 to 5 of Ord. 25 (Enforcement of Judgments and Orders : General). They also are now revoked. Henceforward, orders for oral examinations are to be known as orders "to obtain information from judgments debtors". In effect, the revoked provisions are replaced by Pt 71

(Orders to Obtain Information from Judgment Debtors), supplemented by Practice Direction (Orders to Obtain Information from Judgment Debtors). Form EX140 (Record of examination (individual)), Form EX141 (Record of examination (officer of company or corporation)) are annexed to this practice direction.

The RSC and CCR Orders dealing with garnishee orders (*viz*. Ords. 49 and 30) are revoked entirely. Henceforward, garnishee orders are to be known as "third party debt orders". In effect, the revoked Orders are replaced by Pt 72 (Third Party Debt Orders), supplemented by Practice Direction (Third Party Debt Orders).

The RSC and CCR Orders dealing with charging orders etc. are also revoked entirely. In effect, they are replaced by Pt 73 (Charging Orders, Stop Orders and Stop Notices), supplemented by Practice Direction (Charging Orders, Stop Orders and Stop Notices). A sample order for sale and a sample form of stop notice are annexed to this practice direction. The effect of r.5A of RSC Ord. 88 (Mortgage Claims), which deals with claims for the enforcement of charging order by sale, is preserved by r.73.10 and paras 4.1 to 4.5 of the practice direction.

Appeal from a "final decision"

The law relating to appeals to the Court of Appeal from the High Court is found in a mixture of statutory provisions (primary and delegated), rules of court, practice directions, and case law.

The Supreme Court Act 1981, s.16(1) states that, subject to certain exceptions, the Court of Appeal (Civil Division) "shall have jurisdiction to hear and determine appeals from any judgment or order of the High Court" (see *Civil Procedure*, 2001, Vol. 2, para. 9A-49, p 1757). The County Courts Act 1984, s.77(1) states that, subject to certain exceptions, if any party to any proceedings in a county court is dissatisfied with the determination of the judge or jury, he may appeal to the Court of Appeal (*ibid*. para. 9A-656). For purposes of exposition, these rules may be called "the general appeal rules".

Some of the exceptions to the general appeal rules are made possible by the Access to Justice 1999, s.56, which states that the Lord Chancellor may by Order provide that appeals which would otherwise lie to the Court of Appeal shall lie instead to another court (see *Civil Procedure*, 2001, Vol. 2, para. 9A-866, p 1943). The marginal note to this section refers to this power as the "power to prescribe alternative destination of appeals". The Access to Justice Act 1999 (Destination of Appeals) Order 2000 (2000 No. 1071) was made by the Lord Chancellor in exercise of this power (see *Civil Procedure*, 2001, Vol. 2, para. 9A-884, p 1951). (Section 56 of the 1999 Act and the 2002 Order implement recommendations made in the Bowman Report.)

Arts. 2 and 3 of this Order provide for various exceptions to the general appeal rules, that is to say, they provide for various "alternative destinations" for appeals. Art. 2 states, amongst other things, that, where "the decision to be appealed" is made by a Master or by a district judge of the High Court, the appeal shall lie, not to the Court of Appeal, but to a different "destination", in this case "to a judge of the High Court". Art. 3 states that an appeal from a decision of a county court shall lie, not to the Court of Appeal, but "to the High Court". In this context, a "decision" includes any "judgment, order or direction" (art. 1(2)(a)).

Arts. 2 and 3 are expressed as subject to art. 4 of the Order. Art. 4 states that an appeal shall lie to the Court of Appeal where the decision appealed is a "final decision" (a) made in a claim allocated by a court to the multi-track under CPR r.26.5 (or in part of a claim so allocated under rr.12.7 or 14.8), or (b) made in proceedings to which CPR r.49(2) refers (that is to say, is made in "specialist proceedings"). It may be noted, because it is relevant to the discussion of the case explained below, that in para. (a) of art. 4, "a court" includes both a county court as well as the High Court. Thus, where the decision appealed is a final decision made in a multi-track claim by a Circuit judge sitting in a county court, appeal lies to the Court of Appeal.

For these purposes, "final decision" is defined by arts. 1(1)(c) and 1(3) of the 2000 Order. Art. 1(1)(c) states that a "final decision" is a decision of a court "that would finally determine the entire proceedings whichever way the court decided the issues before it" (subject to any possible appeal or detailed assessment of costs). And art. 1(3) states that a decision of a court is to be treated as a "final decision" for these purposes where it (a) is made at the conclusion of "part of a hearing or trial which has been split into parts", and (b) would, if it had been made at the conclusion of that hearing or trial have been a final decision. (This definition may be contrasted with former RSC Ord. 59, r.1A, see further below.)

So the position is that we have (1) general appeal rules, to which exceptions are made by (2) alternative destination rules, to which in turn exceptions are made (restoring the general appeal rules in part) by (3) final decision in multi-track and specialist proceedings rules.

The provisions of Pt 52 of the CPR apply to appeals to the Court of Appeal, including of course, appeals from county courts (insofar as they are possible) and appeals from the High Court (see r.52.1(1)). Pt 52 is subject to any rule, enactment or practice direction which sets out special provisions with regard to any particular category of appeal" (r.52.1(4)). Pt 52 is supplemented by Practice Direction (Appeals) (see *Civil Procedure*, Autumn 2001, Vol. 1, para. 52PD-001).

When the exceptions to the general appeal rule introduced by the 2000 Order came into effect, paras 2A.1 to 2A.6 were added to the Practice Direction. These paragraphs do not break new ground or add any gloss to arts. 1 to 4 of the 2000 Order. What they attempt to do is to recite those articles. Para. 2A.1 of the Practice Direction in effect recites arts. 2 and 3 of the 2000 Order, but in doing so does not exactly replicate art. 3. As explained above, art. 3 states that an appeal from a decision of a county court shall lie, not to the Court of Appeal, but "to the High Court". In contrast, para. 2A.1 says the appeal shall lie, to a "High Court judge". Obviously, there is a difference between an appeal to the High Court and an appeal to a judge of that court. Whether the difference is meant to be significant in this context, or whether it is simply a matter of the recital of art. 3 in para. 2A.1 being lax is not clear.

Para. 2A.2 of the Practice Direction in effect recites what is said in art. 4 of the 2000 Order about appeals to the Court of Appeal where the decision appealed is a "final decision". The "final decision" definitions stated in arts. 1(2)(c) and 1(3) are recited, respectively, in paras 2A.3 and 2A.4 of the Practice Direction.

The meaning of "final decision" in this context, fell for consideration in the recent case of *Roerig v. Valiant Trawlers Ltd.* [2002] EWCA Civ 21; 152 New L.J. 171 (2002), CA. The facts were that the widow of a foreign national (C) brought a wrongful death claim against her deceased's husband's employers (D). The claim was handled in a county court and was allocated to the multi-track. A question whether, in assessing damages, certain benefits should be disregarded under the Fatal Accidents Act 1976, s.4, was dealt with by the Circuit judge as a preliminary issue. The short point was whether English law or foreign law should be applied in determining whether the benefits should be disregarded. The judge ruled in favour of C. D wished to appeal, but to which "destination", to a High Court judge, or to the Court of Appeal? To which court should D apply for permission to appeal? The Court of Appeal decided that, in the circumstances of this case, the proper destination was the Court of Appeal and that was the court from which D should seek permission to appeal.

The answer which the general appeal rules would give would be that the appeal should go to the Court of Appeal. But the alternative destination exception to these rules imposed by art. 3 of the 2000 Order would dictate that the appeal should go "to the High Court"; unless (this being a multi-track case) the "final decision" provisions of art. 4 of that Order applied, in which event the appeal would go to the Court of Appeal. So the question was whether the judge's decision was a "final decision" as defined in arts. 1(2)(c) and art. 1(3) of the 2001 Order, and recited in paras 2A.3 and 2A.4 of the Practice Direction.

Before the new law as to appeals came into effect, following the enactment of the Access to Justice Act 1999 and the 2000 Order and the consequential amendments to CPR Pt 52, the distinction between "final" and "interlocutory" appeals was of some importance. For obvious reasons, the circumstances in which an appeal from an interlocutory judgment or order could be made were more restricted than those in which an appeal could be made from a final judgment or order. (The Supreme Court Act 1981, s.60 expressly permitted the making of rules of court providing for the distinction.) The law could have taken a strict view and said that a decision is not final unless it has the effect (perhaps in combination with other developments in the case) of completely disposing of the proceedings between the parties. But for sound practical reasons (including the case management advantages that can accrue from directing a separate trial of an issue), the law has opted, not for absolute finality, but for (what can be called) constructive finality and in doing so, necessarily has confronted the courts with the task of deciding where the line should be drawn.

RSC Ord. 59, r.1A(3) stated that a judgment or order should be treated as final "if the entire cause or matter would have (subject only to any possible appeal) have been fully determined whichever way the court below had decided the issues before it". And r.1A(4) stated that, for this purpose, "where the final hearing or the trial of a cause or matter is divided into parts, a judgment or order made at the end of any part shall be treated as if made at the end of the complete hearing or trial". These rules of court were largely declaratory of earlier case law, and were in turn themselves subject to judicial interpretation. In some of the cases the courts dealt with the question whether an appeal following a decision made in a split trial, or at the trial of a preliminary issue, was a "final" appeal, which was precisely the question facing the Court of Appeal in the *Roerig* case (see *Supreme Court Practice* 1999, Vol. 1, para. 59/1A/4).

In modern times, the trend has been towards restricting appeals from decisions made in interlocutory proceedings, and the device of requiring parties to obtain permission to appeal has been used to achieve this end. Nowadays, the "final" and "interlocutory" appeal distinction as such does not figure in the law of appeals. However, as explained above, for certain purposes, the distinction between "final decisions" and decisions not so defined remains important. It is obvious, that the draftsman of the 2000 Order drew inspiration from RSC Ord. 59, rules 1A(3) and 1A(4) when drafting the definitions of "final decision" contained in arts. 1(1)(c) and 1(3) of the Order.

In giving the judgment of the Court of Appeal in *Roerig v. Valiant Trawlers Ltd.*, Waller L.J. noted that in *Tanfern Ltd. v. Cameron-Macdonald* [2000] 1 W.L.R. 1311, CA (a case decided after the new appeal rules had come into

effect), Brooke L.J. said that a "final decision" could be a decision made at the trial of a preliminary issue or of part of a claim directed to be tried separately. Waller L.J. noted that the case law on rules 1A(3) and 1A(4) went deeper than that and attempted to discover what kind of a decision made at such a hearing would be a "final decision" and what not. However, he found these cases to be "of little assistance" in interpreting arts. 1(1)(c) and 1(3) of the 2000 Order. It is right that the earlier cases had in some respects a different focus. They were concerned with a distinction that no longer plays the role it did in the law relating to appeals in civil cases, and they were as much concerned about defining "interlocutory" as "final". However, the earlier cases dealt very sensibly with the problem of constructive finality and said all that there is to be said about the matter. Consequently, it is not surprising to find that Waller L.J., whilst saying that the earlier decisions were of little assistance, in fact derived considerable assistance from the judgment of Bingham L.J. in *Holmes v. Bangladesh Biman Corp.* [1988] 2 Lloyd's Rep. 120, CA. Bingham L.J. said that where issues are tried separately "a broad common sense test should be applied, asking whether (if not tried separately) the issue would have formed a substantive part of the final trial".

Waller L.J. adopted this test. In deciding that, in the circumstances of this case, the proper destination for the appeal was the Court of Appeal, his lordship asked himself the question: "if no preliminary issue had been ordered, would the final decision as to the appropriate law to be applied to section 4 of the 1976 Act have formed a substantive part of the final decision on damages?" In his lordship's opinion the answer to that question was undoubtedly "yes", and in those circumstances appeal would have lain to the Court of Appeal. The fact that an issue was sensibly taken separately should not deprive parties of their right to go to the Court of Appeal. Furthermore, it would be an active discouragement to parties to support the trial of preliminary issues if the result was to so deprive them. That was a principle that the new rules found in the CPR sought to uphold.

In conclusion it may be commented that the result reached in this case, and the reasoning used to achieve it, are very much in accord with the law as it stood before the recent reforms to the law of civil appeals.

Correcting mistake as to party in claim form

In *Horne-Roberts v. Smithkline Beecham Plc.* [2002] EWCA Civ 2006, *The Times* January 10, 2002, CA, the facts were that, in June 1990, an infant (C) was vaccinated with the MMR vaccine. At that time, that particular pharmaceutical product was manufactured by several companies, including D and M .

In August 1999, by his litigation friend C brought a defective product claim under the Consumer Protection Act 1987 for vaccine damage. C had identified the number of the batch of vaccines from which the particular vaccine administered to him had been taken. To be precise, it was vaccine batch No. 108A414. That information was sufficient to direct him, without room for doubt, to the company that had manufactured it. C's claim form named M as defendants. In August 2000, after the expiry of the 10-year limitation period fixed by the Limitation Act 1980, s.11A, C realised that he had made a mistake in his choice of defendants. It was not M who had manufactured that numbered batch of vaccine, but S. This was a mistake that C ought not to have made. It was not a matter of the mistake becoming apparent in the light of new information coming to C after he had issued the claim form. A judge granted C's application to substitute D as defendants to the claim. The Court of Appeal dismissed D's appeal.

There were two points to the appeal. The first was rather technical and concerned the meaning of the phrases (a) "any time limit under this Act" within s.35(3) of the 1980 Act, and (b) "a period of limitation" under the 1980 Act within r.19.5(1)(a). D argued that these words did not include the 10-year limitation period imposed by s.11A(3) (a provision inserted in the 1980 Act by the 1987 Act). The Court of Appeal (Dame Elizabeth Butler-Sloss P., Hale & Keene L.JJ.) rejected this argument.

The second point was that C's error in naming the wrong company as defendant was not a "mistake" as to "name" within s.35(6)(a) of the 1980 Act (see *Civil Procedure*, 2001, Vol. 2, para. 8-79) and CPR r.19.5(3)(a) such as to permit, exceptionally, the substitution after the expiry of the relevant limitation period of one party for another. Put shortly, of two extant legal entities (M and D), C had chosen to sue the wrong one. The case raised a familiar problem: was this a case of mistaken identity or a case of misdescription? did it involve the substitution of a party or the mere correction of a misnomer?

If C's description of the defendant could be regarded as a mere misnomer it could be corrected without the substitution of a party. If it was a matter of mis-identification it could not. Neither the English courts nor the courts of other jurisdictions where the same distinction is drawn have been willing to maintain it strictly. As ever, where limitation provisions bite and no refuge in discretion is available, judges become uneasy. The matter was discussed in the comment in CP *News* Issue 8/2000 on the case of *Gregson v. Channel Four Television Corporation The Times*, August 11, 2000, CA. It was explained there (and need not be repeated here) that rules of court in the RSC carrying s.35(3) of the 1980 into effect were unsatisfactory and that the problems have been carried forward into CPR r.19.5.

Keene L.J. said that, if one were approaching s.35(6)(a) free from authority, one might be tempted to see it as allowing no more than a change of name. For example, where "Peter Michael Jones" has been named as a defendant whereas the true name of the defendant is "Peter Martin Jones". However, a review of the authorities demonstrated that in s.35(6)(a) and r.19.5(3)(a) "mistake" as to "name" is not to be taken literally. His lordship explained that it is clear that s.35(6)(a) is intended to go beyond merely correcting a misnomer as it is, after all, a provision which expressly allows the substitution of a new party for the original named party.

Keene L.J. referred to the analysis of the authorities in *The "Al Tawwab" and "Sardinia Sulcis"* [1991] 1 Lloyd's Rep. 201, CA. In that case Lloyd L.J. noted that in many of the reported cases where permission to correct a mistake as to a party had been granted "it was possible to identify the intending plaintiff or intended defendant by reference to a description which was more or less specific to the particular case". For example, the identity of the person to be sued was their description as the claimant's employers (*Mitchell v. Harris Engineering Co.* [1987] 2 Q.B. 703, CA), or current landlords (*Evans Construction Co. Ltd. v. Charrington & Co. Ltd.* [1983] 1 Q.B. 810, CA), or proprietor of a business (*Thistle Hotels Ltd. v. Sir Thomas McAlpine* April 6, 1989, unrep.), or cargo-owners (*The "Joanna Borchard"* [1988] 2 Lloyd's Rep. 274), or driver of a particular car (*Rodriguez v. R.J. Parker* [1967] 1 Q.B. 116). Keene L.J. explained that, what could be called, the "identification by reference to a description" approach has been followed in later cases, including *International Bulk Shipping and Services Ltd. v. Minerals and Metals Trading Corporation of India* [1996] 1 All E.R. 1017, CA, and *Crook v. Aaron Dale Construction Ltd.* November 27, 1995, unrep. The argument runs that mistakes of the type illustrated by these cases, though they are not mere misnomers (and therefore clearly within s.35(6)(a)), are not obviously mis-identifications either. The identity is clear enough, the defendant is identified as the claimant's employer or landlord, etc. The argument is at its best where, before the cause of action arises, the parties stand in a contractual relationship.

In *The "Al Tawwab" and "Sardinia Sulcis"* case, Lloyd L.J. noted that, in one sense, there is never any doubt as to the person a claimant intends to sue because he "always intends to sue the person who is liable for the wrong which he has suffered". It is obvious that the test for substitution of one party as defendant for another cannot be so wide as to permit substitution whenever a claimant can say, in effect: "I always intended to sue the person who is liable for the wrong which I have suffered; I now realise that that person is X and not Y". If that were the test, leave to substitute would always be given. The test must be narrower than that. In the instant case, the Court of Appeal held that the narrower test is found in the "identification by reference to a description" approach.

In applying this approach, Keene L.J. said it was possible for the Court to hold that C came within s.35(6)(a) (and r.19.5(3)(a)) because he always intended to sue, not simply the persons who were (as Lloyd L.J. had put it) "liable for the wrong which he has suffered", but, more precisely, the manufacturers of vaccine batch No. 108A414. Just as in the reported cases referred to above, in this case C's intention "was to sue the person meeting a particular description specific to the case", that is to say, his intention was to sue the company described as the company who manufactured that batch of vaccines.

Keene L.J. acknowledged that this test is capable of permitting the substitution of a new defendant "in the form of a party unconnected with the original defendant and unaware of the claim until after the expiry of the limitation period". His lordship said that any potential injustice in this respect could be successfully avoided by the exercise of the court's discretion under s.35.

Costs consequences where claimant fails to do better that a Part 36 payment

In *Factortame Ltd. v. Secretary of State for Transport, Local Government and the Regions* [2002] EWCA Civ 22; 152 New L.J. 171 (2002), CA, the facts were that, before trial of damages, on December 17, 1999, the defendants (D) made payment into court. The claimants (C) did not accept the payment within the period fixed by r.36.11(2). Towards the end of the trial (April 13, 2000), Judge Toulmin QC ruled as admissible certain evidence of D that might have the effect of reducing the damages recoverable by C. D then permitted C to accept payment in on April 17, 2000, but there was not agreement between the parties as to costs. D conceded that figures in the admitted evidence (given to C on April 5, 2000) had, through error on their part, not been supplied to C as early as they should have been (and might have been supplied before payment in). The judge ruled that C were entitled to recover part only of their costs.

C was given permission to appeal. It was said that the case raised a point of principle in relation to the approach of the court to Pt 36 payments. On the appeal, C suggested that the point of principle can be expressed in this way:

> "Where (a) a defendant makes a Pt 36 payment which the claimant does not accept, (b) the defendant then makes a significant amendment to his case on the basis of information which had always been available to him, and (c) the claimant then promptly accepts the Pt 36 payment which he has previously refused, in general the answer should be that the claimant is the successful party."

The Court of Appeal (Simon Brown, Waller and Sedley L.JJ.) held that there was no such principle and dismissed the appeal. Judge Toulmin, in his ruling as to costs, set out the manner in which he directed himself. The Court of Appeal said that the direction could not be faulted.

After noting that the application of the overriding objective (r.1.1) involves, as far as is practicable, ensuring that the parties are on an equal footing, Judge Toulmin said that the detailed rules relevant to the issue confronting him are found in Pt 44 (General Rules About Costs) and Pt 36 (Offers to Settle and Payments Into Court). These rules may be summarised as follows.

1. The court has an overall discretion as to whether costs are payable by one party to another, and if payable the amount of those costs and when they are to be paid (r.44.3 (1)(a)(b) and (c)).

2. If the court decides to make an order, the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, but the court may make a different order (r.44(3)(2)(a) and (b)). It is to be inferred from r.36.20 and the case of *Findlay v. Railway Executive* [1950] 2 All E.R. 969 that a party which accepts a Pt 36 payment after the expiry of time for accepting such a payment becomes from that date the unsuccessful party when considering the general rule.

3. In deciding what order to make, the court must have regard to all the circumstances, including: (a) the conduct of the parties, (b) whether a party has succeeded on part of his case, even if he has not been wholly successful, and (c) any payment into court or admissible offer to settle made by a party (whether or not made in accordance with Pt 36) (see r.44.3(4)).

4. The conduct of the parties includes all conduct, both before and during the proceedings (r.44.3(5)).

5. A Pt 36 offer or payment requires the permission of the court if it is an offer to settle part of the claim or has been accepted more than 21 days after the offer of payment is made, unless the parties have agreed costs. In such cases, the liability for costs shall also be decided by the court (see r.36.11(3) and r.36.15).

6. Although it is expressed only to apply at trial, r.36.20 provides guidance where a party accepts a Pt 36 offer or payment after the 21 days. It provides that where at trial a claimant (a) fails to better a Pt 36 payment or (b) fails to obtain a judgment which is more advantageous than a defendant's Pt 36 offer, unless it considers it unjust to do so, the court will order the claimant to pay any costs incurred by the defendant after the latest date on which the payment or offer could have been accepted without needing the permission of the court. In reaching a conclusion on this issue, the court must take into account the circumstances set out in r.36.21(5).

7. Although a party which fails to accept a Pt 36 payment until after the expiry of time for accepting such a payment is deemed to be the unsuccessful party, this is only a starting point. The court must take into account all the circumstances in which the payment is made, and in particular the circumstances in r.36.21(5) in deciding whether it would be unjust to award the defendant its costs from that date.

8. The particular circumstances set out in r.36.21(5) are: (a) the terms of any Pt 36 offer, (b) the stage in the proceedings when any Pt 36 offer or Pt 36 payment was made, (c) the information available to the parties at the time when the Pt 36 offer or Pt 36 payment was made, (d) the conduct of the parties with regard to the giving or refusing of information for the purposes of enabling the offer or payment to be made or evaluated.

In further directing himself, Judge Toulmin referred to two Court of Appeal decisions; *Ford v. G.K.R. Construction Limited* [2000] 1 W.L.R. 1397, CA, and *Jones v. Jones The Times* November 11, 1999, CA. In particular, the judge referred to passages from the judgment of Lord Woolf M.R. in the former case, and from the judgment of Chadwick L.J. in the latter case. The judge concluded from these passages that, in considering whether or not it would be unjust to penalise a claimant for the late acceptance of a Pt 36 payment, he should take into account any failure by the defendants to provide documents and information which they should have provided under the rules or which was material to the claimant's consideration of the Pt 36 payment.

As noted above Waller L.J. said no fault could be found in the manner in which the judge directed himself. In dismissing C's appeal, Waller L.J. made the following additional points: (1) an appellate court will not interfere with a judge's exercise of discretion as to costs merely because it might have exercised that discretion differently; (2) the presumption that a claimant who fails to better a payment in should be treated as the unsuccessful party as from the date fixed for acceptance can be dislodged in special circumstances, e.g. where D has withheld material and had not allowed C to make a proper appraisal of D's case; (3) where a defendant is permitted to make a late amendment to his case, the judge may be justified in placing firmly on him an onus of demonstrating that the presumption should apply; (4) in assessing (a) who is in fact the unsuccessful party, and (b) whether special circumstances apply, a full scale trial (examining privileged material and evaluating *ex post facto* justification) should be avoided.

CPR UPDATE

AMENDMENTS TO EXISTING CPR PRACTICE DIRECTIONS

A number of amendments have been made to practice directions supplementing CPR Parts, principally for the purpose of reflecting changes to rules made by recent statutory instruments. Except where otherwise indicated, these amendments come into effect on March 25, 2002.

Page and paragraph references are to *Civil Procedure*, Autumn 2001, Vol. 1.

Practice Direction (Service Out of the Jurisdiction)

The amendments to this practice direction come into effect on March 1, 2002.

p 150 *para.* 6BPD-002

In para. 1.1, after "Rule 6.19(3)" insert:

> where the court has power to determine the claim under the 1982 Act

p 151 *para.* 6BPD-002

In para. 1.4, for "1.1, 1.2 or 1.3" substitute "1.1, 1.2, 1.3, 1.3A, 1.3B or 1.3C"

Before para. 1.4, insert new paras 1.3A, 1.3B and 1.3C as follows:

> "1.3A The usual form of words of the statement required by Rule 6.19(3) where the Judgments Regulation applies should be:—
>
> 'I state that the High Court of England and Wales has power under Council Regulation (EC) No 44/2001 of 22nd December 2000 (on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters) to hear this claim and that no proceedings are pending between the parties in Scotland, Northern Ireland or any other Regulation State as defined by section 1(3) of the Civil Jurisdiction and Judgments Act 1982.'
>
> 1.3B However, in proceedings to which Rule 6.19(1A)(b)(ii) applies, the statement should be:—
>
> 'I state that the High Court of England and Wales has power under Council Regulation (EC) No 44/2001 of 22nd December 2000 (on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters), the claim having as its object rights *in rem* in immovable property or tenancies in immovable property (or otherwise in accordance with the provisions of Article 22 of that Regulation) to which Article 22 of that Regulation applies, to hear this claim and that no proceedings are pending between the parties in Scotland, Northern Ireland or any other Regulation State as defined by section 1(3) of the Civil Jurisdiction and Judgments Act 1982.'
>
> 1.3C And in proceedings to which Rule 6.19(1A)(b)(iii) applies, the statement should be:—
>
> 'I state that the High Court of England and Wales has power under Council Regulation (EC) No 44/2001 of 22nd December 2000 (on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters), the defendant being a party to an agreement conferring jurisdiction to which Article 23 of that Regulation applies, to hear this claim and that no proceedings are pending between the parties in Scotland, Northern Ireland or any other Regulation State as defined by section 1(3) of the Civil Jurisdiction and Judgments Act 1982.'"

p 152 *para.* 6BPD-006

In para. 5.2, omit sub-paras, (5) and (6) and, without re-numbering following sub-paras, add after sub-para. (10) (in effect January 14, 2002):

> (11) The Financial Services and Markets Act 2000

p 153 *para.* 6BPD-008

In para. 7.1, at end of sub-para. (1) add:

> ; and where Rule 6.22(4) applies, the period will be calculated in accordance with paragraph 7.3 having regard to the Table below

In para. 7.1, at end of sub-para. (2) add:

> and where Rule 6.23(4) applies, the period will be calculated in accordance with paragraph 7.4 having regard to the Table below"

p 154 *para.* 6BPD-010

Para. 9.1 (Civil Jurisdiction and Judgements Act 1982) is deleted, but following paragraph are not re-numbered as a consequence.

Practice Direction (How to Start Proceedings—The Claim Form)

The amendments to this practice direction come into effect on March 1, 2002.

p 185 *para*. 7PD-003

After para. 3.5, insert new para. 3.5A:

> "3.5A Where a claim form which is to be served out of the jurisdiction is one which the court has power to deal with under Council Regulation (EC) No 44/2001 of 22nd December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, the claim form and, when they are contained in a separate document, the particulars of claim must be endorsed with a statement that the court has power under that regulation to deal with the claim and that no proceedings based on the same claim are pending between the parties in Scotland, Northern Ireland or another regulation State."

Practice Direction (Production Centre)

p 195 *para*. 7CPD-001

In para. 1.3(2)(f) delete ", in the circumstances to which CCR, Order 25, rule 2 (transfer for enforcement applies),"

Practice Direction (Part 8)

pp 210 *to* 211 *para*. 8BPD-006

In Table 1, delete all references to RSC Ord. 50, and also delete references to RSC Ord. 93, r.20(2) & (with effect from January 14, 2002) r.23(2)(a).

p 213 *para*. 8BPD-007

In Table 2, delete references to RSC Ord. 56, r.8(1) & 10(1).

In Table 2, in the reference to RSC Ord. 93, r.22(3), delete "(Applications by inspectors under section 94 or 178)" and for "Financial Services Act 1986" substitute "Financial Services and Markets Act 2000" (in effect January 14, 2002).

p 215 *para*. 8BPD-007

In Table 2, delete reference to CCR Ord. 31, r.4(1).

Practice Direction (Default Judgment)

The amendments to this practice direction come into effect on March 1, 2002.

p 243 *para*. 12PD-001

In para. 1.2, delete sub-paras (3) and (4) (but see amendment to para. 1.3 below).

For para. 1.3, substitute:

> "1.3 Other rules and practice directions provide that default judgment under Part 12 cannot be obtained in particular types of proceedings. Examples are:
>
> (1) admiralty proceedings;
>
> (2) arbitration proceedings;
>
> (3) contentious probate proceedings;
>
> (4) claims for provisional damages;
>
> (5) possession claims."

pp 244 *to* 245 *para*. 12PD-004

In para. 4.3(1), after "Judgments Act 1982," add "or the Judgments Regulation,"

In para. 4.3(2), after "Convention Territory" add "or Regulation State"

In para. 4.3(2), sub-paras (1), (2) and (3) are re-numbered as (a), b) and (c)

In sub-para. (b) of para. 4.3(2), as re-numbered, after "under the Act" add "or Judgments Regulation"

In sub-para. (c) of para. 4.3(2), as re-numbered, after "of the Act" add "or Article 26 of the Judgments Regulation"

Practice Direction (Statements of Case)

pp 284 *to* 285 *para*. 16PD-001

In para. 1.2, for "In relation" to "those claims" substitute

> "Where special provisions about statements of case are made by the rules and practice directions applying to particular types of proceedings"

After para. 1.2, insert new para. 1.3 as follows:

> "1.3 Examples of types of proceedings with special provisions about statements of case include -
>
> (1) defamation claims (Part 53);
>
> (2) possession claims (Part 55);
>
> (3) probate claims (Part 57)."

Practice Direction (Further Information)

p 308 *para*. 18PD-005

As a consequence of the recent amendment to CPR r.44.13(1), in para. 5.8(2) after "provides that" insert "the general rule is that"

Practice Direction (Statements of Truth)

p 375 *para*. 22PD-001

Para. 1.1 is amended to reflect the recent amendments to CPR r.22.1 and now reads in full as follows:

"1.1 Rule 22.1(1) sets out the documents which must be verified by a statement of truth. The documents include:

(1) a statement of case,

(2) a response complying with an order under rule 18.1 to provide further information,

(3) a witness statement,

(4) an acknowledgment of service in a claim begun by the Part 8 procedure,

(5) a certificate stating the reasons for bringing a possession claim or a landlord and tenant claim in the High Court in accordance with rules 55.3(2) and 56.2(2),

(6) an application notice for -

(a) a third party debt order (rule 72.3),

(b) a hardship payment order (rule 72.7), or

(c) a charging order (rule 73.3)."

p 377 *para*. 22PD-003

In para. 3.11, in the sentence following the heading "Insurers and the Motor Insurers' Bureau" for "the insured claimant", substitute "the insured party"

Practice Direction (Interim Injunctions)

p 461 *para*. 25PD-002

In para. 2.4 delete the third (final) sentence and after "available to the court" insert:

in a format compatible with the word processing software used by the court

Practice Direction (Disclosure and Inspection)

p 603 *para*. 31PD-004

In para. 4.3, after "disclosing party", add:

or the basis upon which he makes the statement on behalf of the party

p 604 *para*. 31PD-006

After para. 5.4, insert new para. 5.5 as follows:

"5.5 An order for specific disclosure may in an appropriate case direct a party to—

(1) carry out a search for any documents which it is reasonable to suppose may contain information which may—

(a) enable a party applying for disclosure either to advance his own case or to damage that of the party giving disclosure; or

(b) lead to a train of enquiry which has either of those consequences; and

(2) disclose any documents found as a result of that search."

p 604 *para*. 31PD-007

As a consequence of the recent amendments to CPR r.31.14, in the heading before para. 7, "Rule 31.14(2))" is substituted for "rule 31.14(e)", and para. 7 is replaced by paras 7.1 and 7.2 as follows:

"7.1 If a party wishes to inspect documents referred to in the exert report of another party, before issuing an application he should request inspection of the documents informally, and inspection should be provided by agreement unless the request is unreasonable.

7.2 Where an expert report refers to a large number or volume of documents and it would be burdensome to copy or collate them, the court will only order inspection of such documents if it is satisfied that it is necessary for the just disposal of the proceedings and the party cannot reasonably obtain the documents from another source."

p 604 *para*. 31PD-008

Before para. 8 insert the heading "False disclosure statement"

Practice Direction (Written Evidence)

p 630 *para*. 32PD-026

After para. 26.3 insert the following heading and new paras 27.1 and 27.2:

"Agreed bundles for hearings

27.1 The court may give directions requiring the parties to use their best endeavours to agree a bundle or bundles of documents for use at any hearing.

27.2 All documents contained in bundles which have been agreed for use at a hearing shall be admissible at that hearing as evidence of their contents, unless—

(1) the court orders otherwise; or

(2) a party gives written notice of objection to the admissibility of particular documents."

pp 630 *to* 631 *para*. 32PD-027

Re-number paras 27.1 to 27.4 as para. 28.1 to 28.4

Practice Direction (Experts and Assessors)

As a consequence of the amendments to CPR rr.35.12 and 35.14, a number of changes are made to this practice direction. In particular a new section headed "Expert evidence—General requirements" is inserted at the beginning (containing para. 1.1 to 1.6) and, what was para. 1.2 and is now para. 2.2, is substantially altered. As a result of the insertion of new paras 1.1 to 1.6, re-numbering of all of the paragraphs in this Practice Direction is required. Some internal cross-referencing should also have been adjusted but these have been missed by the draftsman; in particular, in what have become paras 4 and 5.1 respectively, "paragraph 1.2(8)" and "paragraphs 1.2 to 1.5" should now read "paragraph 2.2(3)" and "paragraphs 2.2 to 2.5".

p 685 *para*. 35PD-001

Before the heading "Form and contents of expert's report", insert the following:

> **"Expert evidence—general requirements**
>
> 1.1 It is the duty of an expert to help the court on matters within his own expertise: rule 35.3(1). This duty is paramount and overrides any obligation to the person from whom the expert has received instructions or by whom he is paid: rule 35.3(2).
>
> 1.2 Expert evidence should be the independent product of the expert uninfluenced by the pressures of litigation.
>
> 1.3 An expert should assist the court by providing objective, unbiased opinion on matters within his expertise, and should not assume the role of an advocate.
>
> 1.4 An expert should consider all material facts, including those which might detract from his opinion.
>
> 1.5 An expert should make it clear:
>
> (a) when a question or issue falls outside his expertise; and
>
> (b) when he is not able to reach a definite opinion, for example because he has insufficient information.
>
> 1.6 If, after producing a report, an expert changes his view on any material matter, such change of view should be communicated to all the parties without delay, and when appropriate to the court."

After the heading "Form and contents of expert's report", re-number para. 1.1 as para. 2.1, and for para 1.2 substitute a new para. 2.2 as follows:

> "2.2 An expert's report must—
>
> (1) give details of the expert's qualifications;
>
> (2) give details of any literature or other material which the expert has relied on in making the report;
>
> (3) contain a statement setting out the substance of all facts and instructions given to the expert which are material to the opinions expressed in the report or upon which those opinions are based;
>
> (4) make clear which of the facts stated in the report are within the expert's own knowledge;
>
> (5) say who carried out any examination, measurement, test or experiment which the expert has used for the report, give the qualifications of that person, and say whether or not the test or experiment has been carried out under the expert's supervision;
>
> (6) where there is a range of opinion on the matters dealt with in the report -
>
> (a) summarise the range of opinion, and
>
> (b) give reasons for his own opinion;
>
> (7) contain a summary of the conclusions reached;
>
> (8) if the expert is not able to give his opinion without qualification, state the qualification; and
>
> (9) contain a statement that the expert understands his duty to the court, and has complied and will continue to comply with that duty."

Re-number para. 1.3 as 2.3 and in that paragraph for "paragraph 1.2(7) and (8) above" substitute "paragraph 2.2(8) and (9) above"

Re-number para. 1.4 as 2.4 and for the statements of truth therein substitute the following:

> "I confirm that insofar as the facts stated in my report are within my own knowledge I have made clear which they are and I believe them to be true, and that the opinions I have expressed represent my true and complete professional opinion."

Re-number paras 1.5 and 1.6 as 2.5 and 2.6

pp 686 *to* 687 *paras* 35PD-002 *to* 35PD-006

Re-number paras 2, 3, 4.1, 4.2, 4.3, 5, 6.1, 6.2, 6.3 and 6.4 as, respectively, paras 3, 4, 5.1, 5.2, 5.3, 6, 7.1, 7.2, 7.3 and 7.4, and note that in what have become paras 4 and 5.1 respectively, "paragraph 1.2(8)" and "paragraphs 1.2 to 1.5" should now read "paragraph 2.2(3) and "paragraphs 2.2 to 2.5".

Practice Direction (Miscellaneous Provisions Relating to Hearings)

pp 726 *to* 727 *para*. 39PD-001

In para. 1.5(5) for "garnishee order" substitute "third party debt order", and in para. 1.5(6) for "an oral examination" substitute "an order to attend court for questioning"

Practice Direction (Costs)

p 783 *para*. 43PD-001

Para. 1.6, which was inserted in the July 3, 2000, edition of this practice direction, and indicated substantive amendments made by that edition, has served its purpose and is now deleted.

p 906 *para*. 48PD-001

As a consequence of the recent amendment to CPR r.48.4 (Limitation of court's power to award costs in favour of trustee or personal representative), after para. 50.4(3) a new section containing paras 50A.1 to 50A.3 is inserted as follows:

> **"Section 50A—Limitation on court's power to award costs in favour of trustee or personal representative: Rule 48.4**
>
> 50A.1 A trustee or personal representative is entitled to an indemnity out of the relevant trust fund or estate for costs properly incurred, which may include costs awarded against the trustee or personal representative in favour of another party.
>
> 50A.2 Whether costs were properly incurred depends on all the circumstances of the case, and may, for example, depend on-
>
> (1) whether the trustee or personal representative obtained directions from the court before bringing or defending the proceedings;
>
> (2) whether the trustee or personal representative acted in the interests of the fund or estate or in substance for a benefit other than that of the estate, including his own; and
>
> (3) whether the trustee or personal representative acted in some way unreasonably in bringing or defending, or in the conduct of, the proceedings.
>
> 50A.3 The trustee or personal representative is not to be taken to have acted in substance for a benefit other than that of the fund by reason only that he has defended a claim in which relief is sought against him personally."

Practice Direction (Appeals)

p 996 *para*. 52PD-002

Para. 2A.2(b) is substituted as follows:

> (b) made in proceedings to which rule 49(2) refers or to which any of Parts 57 to 62 apply

Practice Direction (Reciprocal Enforcement of Judgments)

p 1316 *para*. *scpd*71-001

CPR Sched. 2, RSC Ord. 71 (Reciprocal Enforcement of Judgments Etc.) is divided into four Parts. It was explained in CP News 01/2002 that the Civil Procedure (Amendment No. 5) Rules 2001 (S.I. 2001 No. 4015) added a fifth Part to this Order. This is one of the consequences of the Council Regulation (EC) No. 44/2001 of 22nd December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("the Judgments Regulation"). Pt V (rr.45 to 57) comes into effect on March 1, 2002.

Practice Direction (Reciprocal Enforcement of Judgments) supplements RSC Ord. 71 and consists of two paragraphs (see *Civil Procedure*, Autumn 2001, Vol. 1, para. scpd71-001). Para. 1 is not necessary and para. 2 has been overtaken by amendments made to r.33 of the Order. Consequently, this practice direction is revoked. However, a new practice direction comes into effect on March 1, 2002. The new direction carries the same title as the direction revoked but is confined in its application to supplementing the new Pt V of the Order.

The Practice Direction explains the background to the rules now found in Pt V of RSC Ord. 71 and makes one important point of practice. By way of explanation it is said that, where a judgment is to be recognised or enforced in a Regulation State (*i.e.* any Member State except Denmark), the Judgments Regulation applies (para. 1.1). As a consequence of Article 38(2) of the Judgments Regulation, the provisions in Chapter III of that Regulation relating to declaring judgments enforceable are the equivalent, in the United Kingdom, to provisions relating to registering judgments for enforcement (para. 1.2). The Judgments Regulation is supplemented by the Civil Jurisdiction and Judgments Order 2001. The Order also makes amendments, in respect of that Regulation, to the Civil Jurisdiction and Judgments Act 1982 (para. 1.5).

The important point of practice is stated in para. 1.4 of the new practice direction. The rules in Pt V of RSC Ord. 71 provide for the making of various applications (*e.g.* for registration of a judgment, and for recognition of a judgment). Para. 1.4 states: "Sections 2 and 3 of Chapter III of the Judgments Regulation (in particular articles 40, 53, 54, 55 and Annex V) set out the evidence needed in support of an application."

Chapter III of, and Annex V to, the Judgments Regulation are annexed to this practice direction (para. 1.3).

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