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CIVIL PROCEDURE NEWS

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N BRIEF

Cases

■ K.R. v. BRYN ALYN COMMUNITY (HOLDINGS) LTD. [2003] EWCA Civ 383; March 24, 2003, CA, unrep. (Auld, Waller & Mantell L.JJ.)
CPR, r.36.21—several claimants bringing claims for abuse suffered as children against care home run by company (in liquidation) and their insurers (D)—some claimants (C) making Pt 36 offers and bettering those offers at trial—in June 2001, judge ordering D to pay (1) enhanced interest on the general damages (r.36.21(2)) "to the date of judgment", and (2) C's costs on an indemnity basis (r.36.21(3)(a)), but refusing C's application (under r.36.21(3)(b)) for interest on those costs—in February 2003, Court of Appeal allowing in part appeals by several claimants against the levels of the awards of damages—on the matter of interest on damages and costs, held (1) the enhanced interest payable by D on the general damages ran to the date of the trial judge's judgment, and not to the later date of the Court of Appeal's judgment, (2) the judge was bound by r.36.21(4) to make an order under r.32.21(3)(b) for interest on the indemnity costs unless he considered it unjust to do so, (3) in the circumstances, interest of 4% above base rate should be awarded on those costs to the date of the judge's order—*P & O Nedlloyd BV v. Utaniko Ltd.* [2003] EWCA Civ 174; February 19, 2003, CA, unrep., *McPhilemy v. Times Newspapers Ltd.* (No. 2) [2001] EWCA Civ 933; [2002] 1 W.L.R. 934, CA, ref'd to (see *Civil Procedure*, Autumn 2002, Vol. 1, para. 36.21.1)

■ WILLIAMS v. DEVON COUNTY COUNCIL [2003] EWCA Civ 365; *The Times*, March 26, 2003, CA (Hale & Latham L.JJ.)
CPR, rr.36.20 & 36.23, Social Security (Recovery of Benefits) Act 1997 s.8 & Sched. 2—in personal injury claim, defendant's (D) Pt 36 payment not accepted by claimant (C)—at trial, judge apportioning liability and awarding C £23,000—D's Pt 36 payment notice stating gross compensation of £25,000 and net amount after deduction of benefits of £10,000—judge holding that C had not bettered Pt 36 payment and ordering C to pay D's reasonable costs from the date of the payment—on C's appeal, held, (1) C should have been awarded damages on a full liability basis (£34,500) as the judge was wrong to conclude that she had contributed in any way to the accident, (2) on any basis, costs should not have been awarded against C as the Pt 36 payment notice was ineffective because the calculations therein did not properly carry out the exercise required by s.8 (see *Civil Procedure*, Autumn 2002, Vol. 1, paras 36.20.1 & 36.23.1)

■ ABBEY NATIONAL PLC. v. MATTHEWS & SON *The Times*, March 31, 2003 (Mr Simon Berry QC)
CPR, r.20.2, Civil Liability (Contribution) Act 1978 s.2(1)—Bank (C) bringing claim against solicitors (D1)—D claiming contribution from chartered surveyors (D2)—previously, claim by C directly against D2 discontinued because statute-barred—C's claim against D1 compromised upon terms including that (1) D1 assigned his Pt 20 claim against D2 to C and (2) C released D1 from any liability in excess of that falling on D1 as a result of the Pt 20 proceedings against D2—D2 applying for summary judgment—held, granting the application, (1) the compromise imposed limitations on D1's liability to C but it did not extinguish it, because a relevant liability included a future liability imposed by the court, even where that liability has not yet been assessed, (2) in the circumstances, in the Pt 20 proceedings it was impossible to identify the just and equitable proportion of the claim for which D1 was liable—*Lister (R.A.) v. E.G. Thompson (Shipping) Ltd.* (No. 2) [1987] 1 W.L.R. 1614, ref'd to (see *Civil Procedure*, Autumn 2003, Vol. 2, para. 9B-291.2)

■ ABU v. M.G.N LTD. November 7, 2002, unrep. (Eady J.)
CPR Pt 53 & r.32.1, Practice Direction (Defamation Claims) paras 3.1 to 3.3, Defamation Act 1996 ss.2 to 4—defendants' (D) unqualified "offer of amends" made under s.2(3) accepted by claimant (C)—case coming before judge for directions with a view ultimately for determination by judge alone of unresolved issue as to damages—judge directing that, in the circumstances, there was no need for the parties to spend time editing witness statements to remove certain allegations against C as judge at compensation hearing will be able to deal with any objections to the evidence and to exclude any irrelevant or prejudicial material—background, purpose and prospects of "offer to amends" regime discussed (see *Civil Procedure*, Autumn 2002, Vol. 1, para. 53PD.29)

■ BANK OF SCOTLAND v. HENRY BUTCHER AND CO. [2003] EWCA Civ 67, *The Times*, February 20, 2003, CA (Aldous & Chadwick L.JJ. and Munby J.)
Practice Direction (Court of Appeal : Citation of

Authority) [1995] 1 W.L.R. 1096, CA; Practice Direction (Citation of Authorities) [2001] 1 W.L.R. 1002, CA; Practice Direction (Appeals) paras 5.6, 5.8 & 15.11—in action pursuant to a guarantee, trial judge giving judgment for claimant bank—in dismissing appeal, Court drawing attention to practice directions relating to the presentation and filing of documents for an appeal and the citation of authority, and stating that defendant's failure to comply with these directions "verged on the scandalous"—requirement that generally authorities should be cited to reports in official Law Reports referred to (see *Civil Procedure*, Autumn 2002, Vol. 1, paras 2.3.3.3, 52PD.15, 52PD.55, B4-001 & B5-001) [Ed.: the relevant parts of Practice Direction (Court of Appeal : Citation of Authority) [1995] 1 W.L.R. 1096, CA, and Practice Statement (Court of Appeal : Authorities) [1996] 1 W.L.R. 854, CA, are recited in para. 8 of Practice Statement (Supreme Court : Judgments) [1998] 1 W.L.R. 825; see *Civil Procedure*, Autumn 2002, Vol. 1, para. B5-001]

■ CLAIMS DIRECT CASES, IN RE [2003] EWCA Civ 136; *The Times*, February 18, 2003, CA (Brooke & Laws L.JJ. and Sir Anthony Evans)
CPR, rr.43.2 & 44.3A, Access to Justice Act 1999 s.29, Practice Direction (Costs) Sect. 11—personal injury claims brought by several claimants (C) concluding in circumstances where defendants (D) liable to pay C's costs—C benefiting from after-the-event insurance arranged through company (X) and placed with underwriters—amount paid to X by C for their services totalling £x—C claiming this amount as costs recoverable against D—D contending that not all of £x should be regarded as "costs in respect of the premium of the policy" within the meaning of s.29, because £x included, not only a premium, but also fees (including fees to claims managers)—costs judge holding that amount recoverable was £x-y only—held, dismissing C's appeal, (1) where a premium for litigation protection insurance includes sums other than for the underwriter's risk for liability for C's costs, those sums may not be recovered under a costs order, (2) it was not the intention of Parliament when enacting s.29 to overload the recoverable premium by adding the costs customarily embraced by a premium the costs which a company like X had to incur if underwriters were to accept the risk at all—*Callery v. Gray* [2001] EWCA Civ 1117; [2001] 1 W.L.R. 2112, CA; In *re Claims Direct Test Cases* [2002] EWCA Civ 428; *The Times*, April 4, 2002, CA; *Lownds v. Home Office* [2002] EWCA Civ 365; [2002] 1 W.L.R. 2450, CA, ref'd to (see *Civil Procedure*, Autumn 2002, Vol. 1, paras 44.3A.3 & 44PD.5, and Vol. 2, paras 7A-33.1 & 9A-862)

■ CROSBIE v. MUNROE [2003] EWCA Civ 350; *The Times*, March 25, 2003, CA (Schiemann, Brooke & Jonathan Parker L.JJ.)
CPR, rr.44.12A & 47.19, Practice Direction (Costs) para. 46.2—following road accident, one party's (C) claim against another (D) settled for £1,500 without commencement of proceedings—C serving bill of costs on D for £4,000—C commencing costs-only claim under r.44.12A against D to recover these costs—court making order for detailed assessment—C accepting D's offer of £2,650 to settle—district judge dismissing C's application for their costs in the r.44.12A proceedings, holding that the offer accepted by C included these costs—a circuit judge dismissed C's appeal—held, allowing C's appeal, (1) where (as here) there have been no prior substantive proceedings, an offer to settle "the proceedings which gave rise to the assessment proceedings" within the meaning of r.47.19(1)(a), means an offer to settle the r.44.12A proceedings, (2) as D's offer did not specify whether the sum offered was to include the costs of the preparation of the bill of costs, those costs were not included (see *Civil Procedure*, Autumn 2002, Vol. 1, paras 44.12A.1, 47.18.1 & 47PD.18)

■ HARPER v. STAFFORDSHIRE COUNTY COUNCIL [2003] EWHC 283 (QB); February 6, 2003, unrep. (Judge Wilkie QC)
CPR, rr.36.2, 36.10 & 36.21—employee (C) bringing claim against employers (D) for personal injuries—before claim commenced, C's offer to settle liability on basis of an 80:20 apportionment (r.36.10) not accepted by D—parties agreeing quantum, including interest—at trial on liability, judge finding D wholly liable—held (1) C's offer complied with r.36.10, (2) where a claimant makes such an offer, and in the event does better than the offer, the costs and other consequences should be the same as where the offer was a Part 36 offer, (3) applying r.36.21, (a) as interest had been agreed it would be unjust to award C an enhanced rate of interest under para. (2), but (b) under para. (3) C should have her costs on an indemnity basis at an interest rate of 10% above base rate—*Huck v. Robson* [2002] EWCA Civ 398; [2002] 3 All E.R. 263, CA, ref'd to (see *Civil Procedure*, Autumn 2002, Vol. 1, paras 36.10.2 & 36.21.1)

■ KABERRY v. FREETH CARTWRIGHT [2002] EWCA Civ 1966; December 19, 2002, CA, unrep. (Aldous & Chadwick L.JJ.)
CPR, rr.24.2 & 52.10—claimant (C) bringing professional negligence claim against his legal representatives (D), claiming (amongst other things) damages for loss of action against his medical adviser—after two-day hearing, judge granting D's

application for summary judgment, principally on ground that C had no prospect of succeeding on issue of causation (as limitation period had not expired when D ceased to act for C following the withdrawal of legal aid)—C, in person, appealing and applying for permission to amend particulars of claim—held, adjourning appeal (1) on a summary judgment application the court should not seek to resolve disputes as to primary or secondary fact, (2) in dealing with the issues of causation and foreseeability the judge reviewed at length the submissions of the parties as pleaded but in doing so did not conduct a mini-trial, (3) C should be given a further and final opportunity, with the benefit of legal advice from the pro bono unit, to amend his particulars of claim, (4) instead of sending the matter back to the judge, the matter should be retained by the Court so that it can consider whether summary judgment should be given against C on the amended claim on the ground that it has no real prospect of succeeding—*Swain v. Hillman* [2001] 1 All E.R. 91, CA, ref'd to (see *Civil Procedure*, Autumn 2002, Vol. 1, paras 24.2.3 & 52.10)

■ KASTOR NAVIGATION CO. LTD. v. AGF M.A.T. [2003] EWHC 472 (QB); *The Times*, March 29, 2003 (Tomlinson J.)
CPR, rr.36.2, 36.10, 36.21 & 44.3—owners (C) bringing claim against insurers (D) under fire policy to recover actual total cost for loss of ship—by amendment, C claiming indemnity for constructive total loss—C's offer to settle made under Pt 36 not accepted by D—at trial, judge giving judgment for C on the amended claim—judgment exceeding C's offer—held (1) C's making and pursuit of the original claim substantially lengthened the proceedings and increased the costs, (2) only a small part of the trial was concerned with the amended claim on which C obtained judgment, (3) the costs to which a claimant may be entitled where he does better at trial than in his Pt 36 offer are such costs as would ordinarily be awarded to him applying the principles set out in r.44.3, (4) in the circumstances, an issues-based costs order requiring D to pay 15% of C's costs and C to pay 85% of D's costs was appropriate—*Johnsey Estates (1990) Ltd. v. Secretary of State for the Environment* [2001] EWCA Civ 535; April 11, 2001, CA, unrep.; *Summit Property Ltd. v. Pitmans* [2001] EWCA Civ 2020; November 19, 2001, CA, unrep., ref'd to (see *Civil Procedure*, Autumn 2002, Vol. 1, paras 36.21.1 & 44.4.1)

■ KAYHE, IN RE *The Times*, March 11, 2003, CA (Lord Woolf C.J. & Scott Baker L.J.)
CPR, r.52.3, Practice Direction (Appeals) paras 4.13 & 21.7, Immigration and Asylum Act 1999, Sched. 4, para. 23—immigration appeal tribunal upholding Secretary of State's decision to refuse to grant applicant (C) asylum—C making renewed application for permission to appeal to Court of Appeal—in refusing application, Court stating (1) applications for permission to appeal from IAT decisions are only justified where points of law of substance are involved, (2) disagreements with the tribunal's fact-finding conclusions should not be dressed up as points of law, (3) solicitors and counsel should take care to ensure that rights of appeal are not abused (see *Civil Procedure*, Autumn 2002, Vol. 1, paras 52.3.10 & 52PD.87)

■ KHIABAN v. BEARD [2003] EWCA Civ 358; March 10, 2003, CA, unrep. (Ward & Dyson L.JJ.)
CPR, rr.1.1(2), 3.3, 3.4, 16.3, 26.8 & 52.14, County Court Fees Order 1999 Sched. 1, para. 1.1—in road traffic accident, vehicle of one party (C) suffering damage of £755—subject to £125 excess, this cost borne by C's insurers (C Co)—C Co bringing negligence claim in a county court against other driver (D) in name of C—claim limited to damages of £125 for the excess and court fee of £27 paid on commencement of proceedings in accordance with para. 1.1—C and D's insurers (D Co) entering into memorandum of understanding that, if the court found D liable (but not otherwise), D Co would pay the £755 cost of the damage repair—on own initiative (r.3.3), district judge ordering C to serve amended particulars of claim reflecting "the true value of the claim" and to pay the appropriate court fee (£80, assuming £755 claimed)—upon C failing to comply with this order, on own initiative district judge striking out claim under r.3.4(2)(c)—district judge dismissing C's application to set order aside but granting permission to appeal—circuit judge transferring appeal to Court of Appeal under r.52.14(1)(a)—held, allowing C's appeal (1) under r.16.3, a claimant is obliged to state in his claim form "the amount of money which he is claiming", but he is not obliged to include in his pleaded case all the claims which he could arguably advance against a defendant (though there are risks in failing to do so), (2) thus, for example, where an insurer is involved, he is not obliged to include subrogated as well as non-subrogated claims, (3) under r.26.8(1)(a) the court should have regard to "the financial value, if any, of the claim" when allocating a claim to an appropriate case management track, but the court has no power under this rule to increase the value of a claim or to include items of claim which the claimant has chosen not to include, (4) it is no part of the judicial function to force a claimant to claim more than he wishes to

claim in order to maximise court fees, (5) in this case, the real issue was liability and by arranging for the case to be dealt with inexpensively and proportionately the parties acted in accordance with the overriding objective—*Henderson v. Henderson* (1843) 3 hare 100, ref'd to (see *Civil Procedure*, Autumn 2002, Vol. 1, paras 1.3.4, 1.3.5, 3.3.1, 16.3.1 & 26.8.4, and Vol. 2, para. 10-22)

■ MOTOROLA CREDIT CORPORATION v. UZAN [2002] EWHC 2187 (Comm); October 18, 2002, unrep. (David Steel J.)
CPR, rr.25.1(1)(g) & 32.1, Practice Direction (Written Evidence) para. 29.1—American company (C) bringing proceedings in England and in U.S. against businessman (D) resident in Turkey and other defendants alleging massive fraud—in English proceedings, C granted worldwide freezing injunctions against defendants—in response to order for disclosure of assets, D making affidavit—C applying for order requiring D to attend for cross-examination on his affidavit—judge finding that D had made no adequate response to the disclosure order and granting C's application—judge ordering that, should C take of the order for cross-examination they must undertake (1) not to serve D, during his temporary presence in England to testify, with proceedings relating to any matter arising out of the substantive U.S. actions or collateral thereto, and (2) not to use, without the leave of the court, any material obtained from D's cross-examination for the purpose of bringing contempt proceedings against him—observations on whether D might testify by video-link (*Civil Procedure*, Autumn 2002, Vol. 1, paras 25.1.24, 32.1.5 & 32PD.21) [N.B.: appeal pending on judge's previous refusal to set aside freezing orders made against D's co-defendants; also appeal dismissed on issue whether disclosure orders made against co-defendants should be set aside; see [2002] EWCA Civ 989; *The Times*, July 10, 2002, CA]

■ MYERS v. DESIGN INC. (INTERNATIONAL) LTD. [2003] EWHC 103 (Ch); [2003] 1 All E.R. 1168 (Lightman J.)
CPR, r.25.1(1)(l)—deceased (X) selling property and lending proceeds to company (D)—X's personal representative (C) bringing claim against company (D) for repayment of loan—loan long since wholly or largely spent—D raising defences on merits—instead of applying for a freezing order to avoid risk of D becoming judgement-proof, C applying without notice for order under s.25.1(1)(l) requiring D to pay debt into court—judge granting order—D applying to set order aside, contending that the alleged debt did not constitute a "specified fund" within the meaning of the rule—held, setting order aside, (1) at the time when the order was made, there was (a) no "fund" in D's hands and (b) no dispute as to a party's proprietary right or entitlement to or interest in a fund, (2) the proceeds of the sale of the property might have constituted a "specified fund" when received by D, but that fund no longer existed, (3) any debt owed by D to C was a chose of action vested in C—judge observing that, if order were allowed to stand, it would have same effect as a conditional order on an application for summary judgment requiring payment of the sum in question into court, and might also elevate C to status of secured creditor (see *Civil Procedure*, Autumn 2003, Vol. 1, para. 25.1.31)

■ PARKER v. C.S. STRUCTURED CREDIT FUND LTD. [2003] EWHC 391 (Ch); *The Times*, March 10, 2003 (Mr Gabriel Moss QC)
CPR, r.25.1(1)(g)—claimant (C) bringing claim against defendant (D) for breach of share sale agreement—C, on basis of information received, suspecting that sales of property by D could be at an undervalue—before pleadings exchanged and date for case management conference set, C applying for order requiring D to disclose documents relating to those property sales—C contending that court had jurisdiction to make such order under (1) r.25.1(1)(g), or (2) r.31.5 (standard disclosure), or (3) r.31.12 (specific disclosure)—C's affidavit in support failing to disclose source of information—held, dismissing application (1) under r.25.1(1)(g), the court has jurisdiction, in advance of normal disclosure, to order a party to provide information about relevant property or assets which "may be" the subject of an application for a freezing injunction, but (2) there must be some credible evidence and grounds upon which to base such an application, (3) C could not use the rule as a fishing expedition to find out whether he had such grounds, (4) the court's jurisdiction to order general or specific disclosure ahead of its proper time should not be exercised in the absence of strong and credible evidence of impropriety making such disclosure urgent—*Gidrxslme Shipping Co. Ltd. v. Tantomar-Transportes Maritmos LD*A [1995] 1 W.L.R. 299, ref'd to (see *Civil Procedure*, Autumn 2002, Vol. 1, paras 25.1.24, 29.2.1, 31.5.1 & 31.12.1)

Practice Direction

■ PRACTICE NOTE (COURT OF APPEAL : LISTING WINDOWS) (NO. 2) [2003] 1 W.L.R. 838, CA
CPR, Pt 52, Practice Direction (Appeals) para. 15.7—Master of the Rolls announcing new

reduced targets for the Court of Appeal's hear-by dates and listing windows scheme stated in Practice Note (Court of Appeal : Listing Windows) [2001] 1 W.L.R. 1517, CA—arrangements for dealing with applications for expedition and for a hearing to be fixed beyond a hear-by date remain as described in the previous Practice Note (see *Civil Procedure*, Autumn 2002, Vol. 1, para. 52PD.53.1)

Statutory Instruments

■ CIVIL PROCEDURE (AMENDMENT) RULES 2003 (S.I. 2003 No. 364)
CPR Pt 54—re-titles Part as "Judicial Review and Statutory Review")—adds Section II (Statutory Review Under the Nationality, Immigration and Asylum Act 2002) (rr.54.21 to 54.27)—in force on commencement of Pt 5 of the 2002 Act (see *Civil Procedure*, Autumn 2002, Vol. 1, para. 54.20.1)

■ CIVIL PROCEDURE (MODIFICATION OF ENACTMENTS) ORDER 2003 (S.I. 2003 No. 490)
CPR Pt 52, Supreme Court Act 1981 ss.15 & 16, Access to Justice Act 1999 (Destination of Appeals) Order 2000—amends art.4 of 2000 Order in two ways—at present, art.4(a) provides that an appeal will lie to the Court of Appeal from a final decision in a claim which has been allocated to the multi-track under three specified rules of the CPR—art.4(a) now provides that where a claim is allocated to the multi-track under any provision of those Rules, an appeal will lie to the Court of Appeal—further, at present art.4(b) provides that an appeal from a final decision in specialist proceedings (r.49(2)) will lie to the Court of Appeal—with the exception of proceedings under the Companies Acts 1985 and 1989, such specialist proceedings are now contained in Sections I, II and III of Part 57 and in Parts 58 to 63 of the CPR—accordingly, art.4(b) now provides that in all of these proceedings appeal will lie to the Court of Appeal—in force April 1, 2003 (see *Civil Procedure*, Autumn 2003, Vol. 1, para. 52.0.15, and Vol. 2, paras 9A-50.1 & 9A-885.1)

■ COURT FUNDS (AMENDMENT) RULES 2003 (S.I. 2003 No. 375)
Court Funds Rules 1987—amend rr.2, 14 to 16, 25, 31 & 32, substitute r.19, and omit rr.21, 23 & 50—in effect provide that payments into court under Pts 36 and 37 of the CPR in claims proceeding in District Registries and county courts are treated in the same manner as payments into court in claims proceeding in the RCJ—payments will no longer be made to the court but direct to the Court Funds Office, subject to the exception where a litigant in person without a current account is making the payment (in which event cash may be paid into the appropriate District Registry or county court for forwarding to the CFO within one working day)—where an enactment directs payments to be made into a county court these payments may still be made at the appropriate court office, in cash or otherwise—in force April 1, 2003 (see *Civil Procedure*, Autumn 2002, Vol. 2 paras 6A-22, 6A-44, 6A-52, 6A-59, 6A-66, 6A-67, 6A-77, 6A-79 & 6A-112)

■ SUPREME COURT FEES (AMENDMENT) ORDER 2003 (S.I. 2003 No. 646) amends Supreme Court Fees Order 1999—restructures Fee 1.1 (Commencement of proceedings), adding additional band—extends discount period for fee payable on filing of pre-trial checklist to 14 days (Fee 2.2)—provides (1) single fee payable for appeal notices (Fee 2.3) but creates separate fee item for appeal against detailed assessment (Fee 10.4), (2) no fee payable on consent application for adjournment where made at least 14 days before hearing (Fee 2.5)—introduces new fees in insolvency proceedings to reflect new legislation (Fees 6.5 to 6.10)—increases various fees—Explanatory Note contains table summarising changes—in force April 1, 2003 (see *Civil Procedure*, Autumn 2002, Vol. 2, para. 10-1)

■ COUNTY COURT FEES (AMENDMENT) ORDER 2003 (S.I. 2003 No. 648) amends County Court Fees Order 1999—restructures Fees 1.1 and 1.2 (Commencement of proceedings)—provides no fee payable on filing of counterclaim (Fee 1.5) in contentious probate proceedings where this required by CPR (r.57.8)—extends discount period for fee payable on filing of pre-trial checklist to 14 days (Fee 2.2)—further provides (1) single fee payable for appeal notices, with a lower fee for claims allocated to small claims track (Fee 2.3), but creates separate fee item for appeal against detailed assessment (Fee 3.4), (2) no fee payable on consent application for adjournment where made at least 14 days before hearing (Fee 2.5)—introduces new fees in insolvency proceedings to reflect new legislation (Fees 8.5 to 8.10)—increases various fees—Explanatory Note contains table summarising changes—in force April 1, 2003 (see *Civil Procedure*, Autumn 2002, Vol. 2, para. 10-13)

IN DETAIL

Recoverable benefits and Pt 36 payment notices

Lawyers specialising in personal injury litigation are aware of the fact that, where a person (D) who is, or who is alleged to be, liable to another (C) to any extent in respect of an accident, injury or disease (1) makes a payment to that other, whether voluntarily, or in pursuance of a court order or an agreement, or otherwise, and (2) certain social security benefits have been, or are likely to be paid to or for the other in consequence of the accident, injury or disease, then the provisions of the Social Security (Recovery of Benefits) Act 1997 and the Social Security (Recovery of Benefits) Regulations 1997 will apply. In addition, where these circumstances prevail, particular glosses on a number of CPR provisions dealing with payments into court and the costs consequences of such payments may come into play.

The key feature of the statutory scheme is that it provides for the "clawback" by the State from torfeasors, through the agency of the Compensation Recovery Unit (CRU), of benefits paid by the State to injured persons. Before a defendant (D) makes a compensation payment to a claimant (C), whether proceedings have been commenced or not, he must apply to the Secretary of State for a certificate of recoverable benefits. Where D makes such a payment he (and not C) is liable to pay to the Secretary of State an amount equal to the total amount of the recoverable benefits. Obviously, where a claim for damages for personal injuries is settled on the basis of offers made by one party to another, D will have to bear in mind, not only the amount that he will have to pay to C, but also the magnitude of his liability to the CRU. And in considering an offer to settle, C will have to be careful to consider whether and to what extent D may be able to deduct from the damages offered amounts to be paid by D to the CRU as certified recoverable benefits. (The history of the way that state benefits have been treated in the calculation of damages in personal injury actions was set out by Lord Hope in *Wadey v. Surrey County Council* [2000] 1 W.L.R. 820, H.L.)

In its original form, the statutory scheme permitted D to deduct the amount of certified recoverable benefits from the total damages offered in settlement or awarded by the court. However, the scheme was amended by the Social Security (Recovery of Benefits) Act 1997. Now, by operation of s.8 and Sched. 2 of the 1997 Act, certain heads of compensation are "ring-fenced" and D may not set them off against his liability to the CRU. In Sched. 2, various heads of compensation are paired with various benefits for the purpose of demonstrating which recoverable benefits may be set off by D. It is clear that the recovery of benefits by the CRU from D should not impinge on the sum awarded to C for (for example) pain, suffering and loss of amenity, but may impinge on (for example) loss of earnings. (By the Social Security Act 1998 the arrangements in the 1997 Act for the reviewing of, and appeals against, certificates of recoverable benefits were altered.)

Under the CPR, provisions as to payments into court are found in Pt 36. Rule 36.23(3) states that a Pt 36 payment notice must state (a) the amount of gross compensation and (b) the name and amount of any benefit by which that gross amount is reduced in accordance with s.8 and Sched. 2 to the 1997 Act, and (c) that the sum paid in is the net amount after deduction of the amount of benefit. (This provision is reflected in the latter part of form N242A (Notice of Payment into court).) Rule 36.23(4) states that, for the purposes of r.36.20 (costs consequences where claimant fails to do better than a Part 36 payment), a claimant fails to better a Pt 36 payment if he fails to obtain judgment for more than the gross sum specified in the Pt 36 payment notice.

In *Williams v. Devon County Council* [2003] EWCA Civ 365; *The Times*, March 26, 2003, CA, the facts were that an employee (C) brought a personal injury claim against her employers (D). It was clear that D's case was that, if they were liable, they were not wholly liable, and that, in any event, the period for which they were liable for C's lost earnings was substantially shorter than that for which C was claiming. (Benefits received by C relevant to her loss of earnings consisted of disablement pension and income support.) At trial, on the issue of liability the judge found D two-thirds to blame and C one-third and apportioned the damages accordingly. The judge awarded C (in round figures) £23,000, made up of £16,000 in compensation treated as "ring-fenced" by s.8 and Sched. 2, and £7,000 which was not. The recoverable benefits for which D was liable to the CRU exceeded £7,000 by a considerable amount. Thus the amount which C would receive from D under the judgment was £16,000 (but it would have been larger again by half had the judge not found contributory negligence).

D had made a payment into court. The Pt 36 payment notice purported to say (again in round figures) that the gross sum was £25,000, of which £10,000 consisted of the amount actually paid in and £15,000 consisted of certified recoverable benefits. C did not accept this offer. Had she done so, she would have

received £10,000 from D and the £15,000 would have been paid by D direct to the CRU.

Not surprisingly, on the question of costs D contended that C had not bettered the payment in. The gross sum in the Pt 36 payment notice was £25,000, and the judge's award was £23,000. C had fallen short by £2,000. D's contention was that, had she accepted D's payment in she would have received £10,000 from D. Having fought on she would now receive £16,000. In that sense, she had bettered the payment in (by £6,000) and costs should follow the event in the normal way. The judge ruled in favour of D and ordered that C should pay D's reasonable costs from the date of the Pt 36 payment.

C appealed on two grounds; first, on the ground that the judge was wrong to conclude that she had contributed in any way to the accident, and secondly, on the ground that the judge was wrong to order her to pay the costs of the claim after the Pt 36 payment.

On the appeal, C succeeded on the first ground. The Court of Appeal (Hale & Latham L.JJ.) held that C should have recovered damages on a full liability basis (£34,500). In the light of this holding, C's second ground of appeal became academic as it was clear that she had bettered the payment in (by £9,500). However, having heard full argument on the point, the Court gave its opinion on the second ground.

On this aspect of the appeal, C argued that r.36.23(4) (see above) should be read as if the gross sum specified is not the amount of gross compensation stated in the Pt 36 payment notice, but the aggregate of the sum paid in and the amount of the recoverable benefit which D is entitled by s.8 and Sched. 2 to set off against the relevant head of compensation. The Court conceded that this would produce a just result in the context of the statutory scheme but was not inclined to read into r.36.23(4) "words that are simply not there".

However, the Court had a better solution (or solution in part) that required no straining of language. Latham L.J. explained (para. 27):

"Rule 36.23(3)(b) requires the payment notice to state 'the name and amount of any benefit by which that gross amount is reduced in accordance with section 8 and Schedule 2 to the 1997 Act'. It follows that the calculations must be made in accordance with section 8; in other words, the amount by which the sum is reduced must be no more than the amount appropriate for the head of damages against which the benefits can be off-set. If that exercise is carried out properly by a compensator, resulting in an appropriate payment for general damages then the process of calculation of the Part 36 payment equiparates to the way in which damages would be awarded were the matter to go to trial in a way which makes sense of the primary rule as to costs contained in Rule 36.20. It also enables the claimant to make a properly informed decision on whether or not to accept the payment."

His lordship then said (para. 28) that, in the present case, no attempt had been made by D in preparing the Pt 36 payment notice to carry out the exercise required by s.8 and Sched. 2. It was clear that D were arguing that there was contributory negligence, and that the period for which they were liable for lost earnings was substantially shorter than that which C was claiming. The effect of both these arguments was that the amount of the certificate of recoverable benefits was greater than the amount by which they could claim to be entitled to off set recoverable benefits against the overall damages awarded. The result was that the Pt 36 payment had not been calculated in accordance with the rule. The amount of recoverable benefits had clearly not been "reduced in accordance with section 8 and Schedule 2 to the 1997 Act". It was not a proper and, therefore, was not an effective Part 36 payment. Even if C's damages were limited to £23,000 (on the basis that she was one third liable) the costs consequences stated in r.36.20 would not follow because no valid Pt 36 payment for a greater sum had been made by D.

The Court's reasoning in this respect is important. It is probably true to say that there must be many extant Pt 36 payment notices which, if examined in the light of the above analysis, would have to be treated as ineffective. Practitioners should be alert to the fact that the information as to benefits that should be given in Form N242A may be much more elaborate than that form indicates on its face. It should be noted that the decision in this case was of a two-judge court on a point that was academic and this may affect its value as a precedent. It is likely that the problems revealed by this case (which exceed those explained above) will be remedied by amendments to the CPR.

Effect of pre-trial Pt 36 offer on appeal costs and interest on damages

In the "In Brief" section of Issue 03/2003 of the *CP News* (March 14, 2003), the case of *East West Corporation v. DKBS* 1912 (Costs) [2003] EWCA Civ 174; *The Times*, February 21, 2003, CA, decided by the Court of Appeal on February 19, 2003, was mentioned. This case involved multiple claimants and defendants and is sometimes referred to as *P & O Nedlloyd B.V. v. Utaniko Limited*. The decision of the Court of Appeal in this case was applied by the Court in *K.R. v. Bryn Alyn Community (Holdings) Ltd*. [2993] EWCA Civ 383; March 24, 2003, CA, unrep.

In the *East West Corporation* case, the facts were that cargo-owners (C) brought a claim against shipowners (D) for misdelivery of a container without presentation of bills of lading. On June 14, 2001, C made a Pt 36 offer but the offer was not accepted by D. At trial, the judge gave judgment in favour of C for a sum in excess of that proposed by C in their offer ([2002] EWHC 83 (Comm); [2002] 2 Lloyd's Rep. 182). Not surprisingly, C contended that they should have the benefit of the costs and other consequences allowed by r.36.21. The judge agreed and ordered that D should pay, from July 7, 2001, (1) enhanced interest on D's damages (r.36.21(2)), and (2) C's costs on an indemnity basis (r.36.21(3)).

D appealed to the Court of Appeal against the judgment on C's substantive claim. The appeal failed (February 12, 2003), whereupon C submitted that they again should have the benefit of r.36.21(3) and have their costs of the appeal on an indemnity basis. In particular, C argued that the word "trial" in r.36.21(1) means both the first instance proceedings and the hearing of the appeal. The Court of Appeal (Brooke, Laws & Mance L.JJ.) rejected this submission.

Brooke L.J. said that the natural meaning of r.36.21(1) is that, if a Pt 36 offer is made between the time of the commencement of proceedings and a date not less than 21 days before the start of the trial at first instance (see rr.36.5(6) and r.36.21(2) & (3)), the consequences set out in paras (2) to (4) of r.36.21 will generally follow if the defendant fails to "beat the offer". In his lordship's opinion, if a Pt 36 offer is made in appeal proceedings (as provided for by r.36.2(4)(b)), then the words "at trial" in r.36.21(1) must be interpreted as meaning "on the hearing of an appeal". His lordship added (para. 6) that Pt 36 provides a straightforward code whereby a claimant may protect himself against the costs of first instance proceedings, or the subsequent costs of an appeal, but a claimant may not "make a portmanteau Part 36 offer" which would provide him with the protection of the code in r.36.21 both at first instance and on a subsequent appeal. If he wants to protect himself as to the costs of an appeal, he must make a further offer in the appeal proceedings.

The question whether a pre-trial offer to settle ceases to have effect once the claim to which it relates has been the subject of a complete trial, but continues to have costs consequences for any appeal (or subsequent re-trial of the claim) is a familiar procedural conundrum and, in different jurisdictions has received different answers in the context of particular rules of court playing a similar role to CPR Pt 36 (*e.g. Ettinghausen v. Australian Consolidated Press Ltd*. (1995) 38 N.S.W.L.R. 404, and *Jones v. Kansa General Insurance Co*. (1992) 93 D.L.R.(4th) 481). A distinguishing feature of the CPR when compared with most procedural codes found elsewhere (and which assists in dealing with the problem) is that they make express provision (in r.36.2(4)(b)) for offers in appeal proceedings.

In *K.R. v. Bryn Alyn Community (Holdings) Ltd*., the question was not simply whether, as a result of C's Pt 36 offer, C was entitled under r.36.21(3)(a) to indemnity costs for the appeal. The question was whether the judge's order that, as a consequence of C's offer and by application of r.36.21(2), D should pay enhanced interest on the general damages down to "the date of judgment" meant that C was entitled to such interest to the date of the Court of Appeal's judgment. The Court (Auld, Waller & Mantell L.JJ.) held that the principle announced in the *East West Corporation* case prevailed. Unless a fresh Pt 36 offer is made in the appeal proceedings, the appeal court cannot make an order for enhanced interest on damages under r.36.21(2). The Court further held that, in the circumstances of this case, it was not prepared (in the light of C's pre-trial offer and other considerations) to award such interest in the exercise of its general discretion.

CPR UPDATE

By the Civil Procedure (Amendment) Rules 2003 (S.I. 2003 No. 364), published in early March 2003, amendments were made to the CPR.

By TSO CPR Update 31 (March 2003), a number of amendments were made to existing Practice Directions supplementing particular CPR Parts.

All of these changes came to hand too late to be included in the new edition of the White Book, *Civil Procedure*, 2003, published at the end of April 2003. The necessary updating will be included in the first supplement to the new edition.

The rule and practice direction changes are explained below.

Paragraph and page references are to the 2003 edition of *Civil Procedure*.

AMENDMENTS TO RULES

By the Civil Procedure (Amendment) Rules 2003 (S.I. 2003 No. 364), with effect from April 1, 2003, rules dealing with applications to the High Court under the Nationality, Immigration and Asylum Act 2002 s.101(2) for a review (on the ground of error of law) of a decision of the Immigration Appeal Tribunal on an application for permission to appeal from an adjudicator are added to the CPR. (Note also Immigration and Asylum (Procedure) Rules 2003.)

This is achieved by adding rules to CPR Pt 54. This Part is re-titled "Judicial Review and Statutory Review" and is now divided into two Sections. The existing rules (rr.54.1 to 54.20) stand as Section I under the title "Judicial Review", and the new provisions (rr.54.21 to 54.27) are added as Section II under the title "Statutory Review Under the Nationality, Immigration and Asylum Act 2002". Minor amendments are made to a number of the rules now found in Section I for the purpose of reflecting the fact that Part 54 is divided into Sections.

The rules in Section II deal with such matters as the manner in which applications for a review under s.101(2) should be made, including time limits (r.54.23), the service of the application (r.54.24), and the service of the court's order (r.54.26) and costs (r.54.27). Rule 54.25 contains a number of provisions dealing with the determining of an application by the High Court, including additional evidence and the manner in which the Court should proceed depending upon whether the Tribunal did or did not grant permission to appeal.

AMENDMENTS TO PRACTICE DIRECTIONS

By TSO CPR Update 31 (March 2003), a number of amendments are made to existing Practice Directions supplementing particular CPR Parts. All of these amendments were in force either on or before April 1, 2003.

Practice Direction (Appeals)

para. 52PD.81, p.1306

In the Table following para. 20.3, for "Competition Commission Appeal Tribunals" substitute "Competition Appeal Tribunal"

para. 52PD.93, p.1311

In the heading for para. 21.10, for "Appeal from Competition Commission Appeal Tribunal" substitute "Appeal from Competition Appeal Tribunal"

para. 52PD.90, p.1310

Para. 21.7 has been amended to take account of new primary and delegated legislation and now reads in its entirety as follows:

"Appeals from Immigration Appeals Tribunal

21.7 (1) This paragraph applies to appeals under section 103(1) of the Nationality, Immigration and Asylum Act 2002 (appeal on a question of law from a final determination of the Immigration Appeal Tribunal).

(2) The appellant's notice must be filed at the Court of Appeal within 28 days after the appellant is served in accordance with the Immigration and Asylum (Procedure) Rules 2003 with written notice of the Tribunal's decision to grant or refuse permission to appeal.

(3) The appellant must serve the appellant's notice in accordance with rule 52.4(3) on—

(a) the persons to be served under that rule; and

(b) the President of the Tribunal."

Practice Direction (Judicial Review)

para. 54PD.2, p.1369

In para 2.3, for "Law Courts, Cathays Park, Cardiff, CF10 3PG" substitute "Civil Justice Centre, 2 Park Street, Cardiff, CF10 1ET"

para. 54PD.5, p.1370

In para. 5.3, for "paragraph 16" substitute "paragraph 15"

In para. 5.9, for "paragraphs 4.6 and 4.7" substitute "paragraphs 5.6 and 5.7"

Practice Direction (Estates, Trusts and Charities)

para. 64PD.1, p.1437

In the heading for para. 1 and in sub-para. (1) of para. 1, for "rule 64.2(1)" substitute "rule 64.2(a)"

para. 64PD.3, p.1437

In the heading before para. 3.1, for "rule 64.2(2)" substitute "rule 64.2(b)"

para. 64PD.4, p.1438

In the heading before para. 4.1, for "rule 64.2(3)" substitute "rule 64.2(c)"

para. 64PD.5, p.1438

In the heading before para. 5, for "rule 64.2(4)" substitute "rule 64.2(d)"

para. 64PD.6, p.1438

In para. 6.1, for "rule 64.2(1)" substitute "rule 64.2(a)"

Practice Direction (Patents and Other Intellectual Property Claims)

Vol 2, para. 2F-83

In para. 11.4(1), sub-para. (b) is deleted and the paragraph re-cast accordingly with the result that it now reads as follows:

"(1) in the case of matter made available to the public by written description the date on which and the means by which it was so made available, unless this is clear from the face of the matter; and"

Sub-para. (2) of para. 11.4 remains as before.

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