ISSUE 06/2003 JUNE 13, 2003

CIVIL PROCEDURE NEWS

- Dispensing with service of claim form
- Naming defendant in claim form
- New hearings and re-hearings
- Amendments to Rules
- Changes to Practice Directions
- Recent cases

N BRIEF

Cases

■ BLOOMSBURY PUBLISHING GROUP LTD. v. NEWS GROUP NEWSPAPERS LTD. [2003] EWHC 1205 (Ch); 153 New L.J. 882 (2003) (Sir Andrew Morritt)
CPR, rr.1.1, 3.10 & 25.1(1)(a), Practice Direction (How to Start Proceedings—the Claim Form) para. 4.1, Form N1—publishers of book (C) bringing proceedings against newspaper (D1) and, as second defendants, "persons unknown" (D2)—judge granting C interim injunction against D2 requiring them to deliver up copies of the book—held, continuing the injunction, (1) a defendant may be joined in proceedings by description rather than by name, (2) the court has power to grant an injunction against such a person (see *Civil Procedure*, 2003, Vol.1, paras 1.3.2, 3.10.1, 7.2.1, 7PD.4 & 25.1.9)

■ CRANFIELD v. BRIDGEGROVE LTD. [2003] EWCA Civ 656; *The Times*, May 16, 2003, CA (Ward, Waller & Dyson L.JJ.)
CPR, rr.6.5(2), 6.9 & 7.6, Companies Act 1985, s.725(1)—in five unrelated county court appeals, issues as to interpretation and application of r.6.9 (Power of court to dispense with service) and r.7.6 (Extension of time for serving claim form) arising—held (1) "unable to serve" in r.7.6(3)(a) is not restricted to the situation where a court has tried to serve a claim form but has failed, (2) if a defendant has not given an address for service, a claimant may choose whether to serve his claim form under s.725(1) or by a method permitted by the CPR, (3) the discretion to make an order under r.6.9 dispensing with service of claim form may be exercised only in exceptional circumstances, (4) service on a party's last known address under the conditions specified in r.6.5(2) is good service, even though the party does not receive the document (see *Civil Procedure*, 2003, Vol.1, paras 6.2.3, 6.5.3, 6.9.1 & 7.6.1)

■ FOWLER DE PLEDGE v. SMITH [2003] EWCA Civ 703; *The Times*, May 27, 2003, CA (Schiemann, Brooke & Jonathan Parker L.JJ.)
CPR, rr.52.11 & 52.13, Practice Direction (Appeals) para. 9.1, Legal Aid Act 1988, s.17—district judge holding that legally aided defendant (D) should pay whole amount of costs ordered in favour of claimant (C)—circuit judge ordering new hearing—at new hearing, another circuit judge coming to same conclusion as district judge—High Court judge dismissing D's appeal—held, allowing D's appeal, the hearing before the second circuit judge was not a hearing on appeal (see *Civil Procedure*, 2003, Vol.1, paras 52.0.11, 52.3.8, 52.11.1)

■ ANTON DURBECK GMBH v. DEN NORSKE BANK ASA [2003] EWCA Civ 147; [2003] 2 W.L.R. 1296, CA (Lord Phillips M.R., Brooke & Laws L.JJ.)
CPR, rr.3.1(2)(f) & 11, Civil Jurisdiction and Judgments Act 1982, Sched.3C (Lugano Convention) art. 5—German company (C) bringing action in tort against Norwegian company (D)—claim form served on London branch of D—C alleging that D, as mortgagees of vessel, wrongly interfered with C's contracts for the carriage of cargo by arresting vessel in Panama—D contending that, as secured creditors, they were entitled to enforce their security without regard to effects on third parties (*e.g.* C)—judge holding (1) the English courts had no jurisdiction under art. 5 to entertain C's claim, and (2) in any event, the claim should be stayed on forum non conveniens grounds—held, allowing C's appeal (1) the loan for which security over the vessel was taken was negotiated in London by D's London branch, (2) a decision taken by that branch lead to the arrest of the vessel, (3) accordingly, C's claim was "a dispute arising our of the operation of a branch" within the meaning of para. 5 of art. 5, (4) whereas the other paragraphs of art. 5 are directed at specific causes of action, para. 5 is of general application, (5) para. 5 is designed to cover situations where the connection of the claim with the activities of the branch is such as to make it appropriate in the interests of justice to permit suit to be brought in the State where the branch is situated, however, (6) on forum non conveniens grounds, the claim should be stayed in favour of proceedings in Panama (see *Civil Procedure*, 2003, Vol.1, para. 11.1, and Vol.2, para. 5-170 & 9A-161)

■ BERRY TRADE LTD. v. MOUSSAVI [2002] EWCA Civ 715; *The Times*, June 3, 2003, CA (Peter Gibson & Tuckey L.JJ. and Nelson J.)
CPR, r.32.1—claimants (C) seeking summary judgment against one of several defendants (D) on counterclaim made by D—judge stating that it would not be appropriate to resolve factual disputes at that interlocutory stage—on ground that there was a serious and substantial risk of perjury, judge giving C permission to adduce in evidence statements allegedly made by D in without prejudice meetings—held, allowing D's appeal, evi-

dence of statements made in without prejudice discussions may be admitted only where there is unambiguous impropriety and a very clear case of abuse of a privileged occasion—Court observing that, in a case such as this, it would not be appropriate for a court to direct that the issue whether the statements alleged to have been made were made as this would give rise to undesirable "satellite litigation"—*Unilever plc. v. Procter and Gamble Co.* [2000] 1 W.L.R. 2436, CA, ref'd to (see *Civil Procedure*, 2003, Vol.1, paras 31.3.40 & 32.1.1)

■ CLEESE v. CLARK [2003] EWHC 137 (QB); February 6, 2003, unrep. (Eady J.)
CPR, r.36.19(2), Practice Direction (Defamation) paras 3.1 to 3.3, Defamation Act 1996, s.3—in defamation claim, claimant (C) accepting offer of amends made by defendant—in unsuccessful effort to agree compensation, parties making offers and counter-offers—parties applying to court for determination of compensation under s.3(5)—at hearing, parties revealing to judge the substance of their "without prejudice" communications—held, (1) C's starting point of £30,000 and D's of £3,000 were, respectively, too high and too low, (2) the offer of £10,000 made by D late on in the proceedings was nearer the mark, (3) in the circumstance, the compensation should be £13,500, (4) ordinarily it will be preferable (except where para. 3.3(2)(e) applies) for the figures offered by the parties not to be disclosed to the judge—judge noting distinction between r.36.19(2) (Pt 36 payment not to be revealed) and para. 3.3(2)(e) (any amount paid as compensation to be included in supporting written evidence)—observations on assessing compensation under s.3 (see *Civil Procedure*, 2003, Vol.1, paras 36.19.1 & 53PD.12)

■ CREAM HOLDINGS LTD. v. BANERJEE [2003] EWCA Civ 103; [2003] 2 All E.R. 318, CA; *The Times*, February 28, 2003, CA (Simon Brown, Sedley & Arden L.JJ.)
CPR, r.25.1(1)(a), Human Rights Act 1998, s.12(3) judge granting claimant injunction restraining defendants from publishing certain confidential information pre-trial—freedom of expression—question arising as to meaning of "likely" in s.12(3)—held, (1) in deciding whether or not to grant prior restraint of media publication, the new test under s.12(3) is whether there was a real prospect of success, convincingly established, that an applicant would establish at trial that publication should not be allowed (see *Civil Procedure*, 2003, Vol.1, para. 25.1.13, and Vol.2, para. 3D-18.1)

■ DOUGLAS v. HELLO! LTD. [2003] EWHC 55 (Ch); [2003] 1 All E.R. 1087; 153 New L.J. 175 (2003) (Sir Andrew Morritt V.-C.)
CPR, rr.3.4(2), 17.1 & 31.8—application by claimant (C) to strike out defendant's (D) defence—relevant documents disposed of by D before proceedings commenced—question arising whether disposal amounted to attempt to pervert the course of justice—C also applying for permission to amend statement of case—held, dismissing C's application, (1) the criterion for the court's intervention in this type of case is whether disposal amounted to an attempt to pervert the course of justice, (2) in respect of documents disposed of after the commencement of the proceedings the question was whether a fair trial is achievable and if not what to do about it, (3) on the facts, a fair trial was still possible (see *Civil Procedure*, 2003, Vol.1, paras 3.4.3 & 31.8)

■ DOUGLAS v. HELLO! LTD. [2002] EWHC 2560 (Ch); November 8, 2002, unrep. (Laddie J.)
CPR, r.6.21—in claim by C against D, judge granting C permission to amend claim form and particulars of claim to raise claims against additional defendant, including R, an American citizen resident in the United States—judge also granting C permission to serve proceedings on R at an American address—master dismissing R's application to set service aside—held, allowing R's appeal, the claims against R were of insufficient weight to justify service out of the jurisdiction (see *Civil Procedure*, 2003, Vol.1, paras 6.21.16)

■ DUBAI ALUMINIUM COMPANY LTD. v. SALAAM [2002] UKHL 48; [2003] 1 All E.R. 97, HL
Civil Liability (Contribution) Act 1978, s.2, Partnership Act 1890, s.10—claimant company (C) victim of a fraud by which it had been induced to pay a large sum of money under a consultancy contract—C alleging that A, a solicitor, though not receiving any of the proceeds of the fraud, had dishonestly assisted in the fraud—questions arising whether (a) A's partners, though personally innocent, were vicariously liable under s.10, and, the participants having settled the claims brought against them by C, (b) the partners could claim contribution from the participants under s.2—on appeal from Court of Appeal ([2000] 3 W.L.R. 910, CA), held (1) the phrase "wrongful act or omission" in s.10 of the 1890 Act was not limited to common law torts and was wide enough to include dishonest participation in a fraudulent scheme, (2) the personal innocence of a per son vicariously liable for the wrongful act of his employee or partner was not relevant for the purpose of determining contribution proceedings between that person and another wrongdoer, even in cases of dishonesty—observations by Lord Nicholls and Lord Millett on the interpretation of s.2 (see *Civil Procedure*, 2003, Vol.2, para. 9B-291.2)

■ FAY v. CHIEF CONSTABLE OF BEDFORDSHIRE POLICE [2003] EWHC 673 (QB); *The Times*, February 13, 2003 (Davies J.)
CPR, rr.3.4 & 51.1, Practice Direction (Transitional Arrangements) para. 19(1)—application to strike out claim automatically stayed—held, even in cases of inordinate and inexcusable delay, the court should only strike out a claim as an abuse of process where there is a real risk that the matter can no longer be fairly tried and the interest of justice so requires—*Grovit v. Doctor* [1997] 1 W.L.R. 640, HL; *Costello v. Chief Constable of Derbyshire Constabulary* [2001] EWCA Civ 381; [2001] 1 W.L.R. 1437, CA; *Taylor v. Lawrence* [2002] EWCA Civ 1680; *The Times*, November 22, 2002, CA, ref'd to (see *Civil Procedure*, Autumn 2002, Vol.1, paras 3.4.3 & 51.2.2)

■ FLIGHTLINE LTD. v. EDWARDS [2003] EWCA Civ 63; [2003] 1 W.L.R. 1200, CA (Ward, Laws & Jonathan Parker L.J.)
CPR, r.25.1(1)(f)—creditor (C) agreeing to discharge of freezing order in his favour on payments being made on debtor's (D's) behalf into a bank account in the joint names of parties' solicitors—agreement expressed to be subject to strict undertakings by D—held, the agreement failed to confer on C any security rights in the money in the account (see *Civil Procedure*, 2003, Vol.1, para. 25.1.27)

■ FRANKSON v. SECRETARY OF STATE FOR THE HOME DEPARTMENT [2003] EWCA Civ 655; *The Times*, May 12, 2003, CA (Pill & Scott Baker L.JJ. and Wilson J.)
CPR, r.31.17—prisoner (C) bringing county court claim against Home Office (D1)—C claiming that he was assaulted by prison officer (D2)—D2 joined as interested party—D2 making statement under caution to police (P) investigating allegation—C applying under r.31.17 for order that P disclose D2's statement to C—judge granting application, but imposing stringent conditions on the extent and manner of disclosure—held, dismissing D2's appeal, (1) the court, in exercising its discretion, had to balance certain public interest considerations, (2) in the circumstances, the public interest in ensuring a fair trial for C's claim outweighed that of protecting the confidentiality of D2's statement—*Attorney-General v. Guardian Newspapers Ltd. (No. 2)* [1990] A.C. 109, HL; *Woolgar v. Chief Constable of Sussex Police* [2000] 1 W.L.R. 25, CA, ref'd to (see *Civil Procedure*, 2003, Vol.1, para. 31.3.33 & 31.17.1)

■ GLIDDON v. LLOYD MAUNDER LTD. 153 New L.J. 318 (2003), SCCO (Master O'Hare)
CPR, r.44.3, Collective Conditional Fee Agreement Regulations 2000, reg. 4(2), Supreme Court Act 1981, s.51—injured worker (C) bringing personal injury claim against employers (D) with assistance of his trade union (A)—A and C's solicitors (B) parties to collective conditional fee agreement (CCFA)—county court giving judgment for C with a finding of 40% contributory negligence—at detailed assessment hearing, D contending (1) that although A may be liable to remunerate B for their costs in acting for C, C himself was not liable for those costs and, therefore (2) they were not liable to indemnify C for the costs—held (1) the 2000 Regulations (a) do not provide an exception to the indemnity principle, but (b) did require B to explain to C the consequences of the CCFA so far as he was concerned, (3) D had failed to show a breach of the contractual provision to explain the agreement which was required by reg. 4(2) (see *Civil Procedure*, Autumn 2002, Vol.1, para. 47.14.15, and Vol.2, paras 7A-23 & 9A-265)

■ I.B.S TECHNOLOGIES LTD. v. A.P.M. TECHNOLOGIES S.A., April 7, 2003, unrep. (Mr Michael Briggs QC)
CPR, rr.1.1 & 3.9—in copyright infringement claim, defendants (D) applying for order that claimants (C) provide security for their costs—application granted on terms that in default the claim be struck out and the action dismissed—after C failing to provide bank guarantee within time fixed court making unless order—D not satisfied by guarantee then provided—held (1) D were reasonably entitled to be dissatisfied with the guarantee offered, (2) accordingly, in the absence of relief under r.3.9 C's claim would fall to be dismissed, (3) such relief should be granted because (a) C's default was not intentional, (b) there were serious issues to be tried, and (c) on balance it would be unjust for C to be deprived of a trial because of a procedural failure which had not caused serious prejudice to D (see *Civil Procedure*, 2003, Vol.1, para. 3.9.1)

■ INSURED FINANCIAL STRUCTURES LTD. v. ELEKTROCIEPLOWNIA TYCHY S.A. [2003] EWCA Civ 110; [2003] 1 W.L.R. 656, CA (Lord Woolf L.C.J., Hale & Latham L.JJ.)
CPR, r.11, Civil Jurisdiction and Judgments Act 1982, Sched.3C (Lugano Convention), art. 17.1—English company (C) entering into contract with state-owned Polish company (D) to provide financial advisory services—contract providing that "each party agrees" to the "non-exclusive jurisdiction "of the courts of Poland (a Contracting State) in connection with any dispute arising—D failing to make payments and C bringing claim against D—judge allowing C's appeal against Master's ruling that English courts had no jurisdiction over C's claim—held, dismissing D's appeal, (1) art. 17.1 states that, if parties agree that the courts of a Contracting State are to have

jurisdiction, those courts shall have exclusive jurisdiction, (2) by implication, the agreement between C and D, whilst identifying expressly one State (Poland), conferred jurisdiction on other Contracting States in accordance with the Lugano Convention, (3) the combined effect of that agreement and art. 17.1 did not confer exclusive jurisdiction on the Polish courts, (4) the benefit of the express reference to Poland in the contract was that the courts of that country were to have non-exclusive jurisdiction even if, in the absence of such reference, they would not have such jurisdiction under the provisions of the Lugano Convention (see *Civil Procedure*, 2003, Vol.2, para. 5-174)

■ JOSEPH v. BOYD & HUTCHISON [2003] EWHC 413 (Ch); *The Times*, April 28, 2003 (Patten J. & assessors)
CPR, r.51.1, Practice Direction (Transitional Arrangements) para. 18(2), RSC O.62, r.18, Solicitors Indemnity Rules 2001, r.27—judge ordering that, as costs of claimant (C) were incurred before April 26, 1999, they should be taxed under O.62—costs judge ruling that C was "a practising solicitor" under r.18 (Litigants in person) and was therefore entitled to charge for her time as a solicitor—defendants (D) appealing on ground that C had not practised as a solicitor since April 1, 1996, as since then she had practised under r.27—held, allowing appeal, (1) under para. 18(2) a party had a right to recover any costs incurred before April 26, 1999, if such costs would have been allowed on a taxation under O.62, (2) a solicitor with a limited practice, who had no indemnity cover and was not permitted to charge for her time, could not be regarded as a practising solicitor within the meaning of r.18(6) (see *Civil Procedure*, 2003, Vol.1, para. 51PD.18, *Supreme Court Practice 1999*, Vol.1, paras 62/18/2 & 62/B/139)

■ MATTHEWS v. MINISTRY OF DEFENCE [2002] UKHL 4; [2003] 2 W.L.R. 435, HL
Crown Proceedings Act 1947, s.10, Human Rights Act 1998, Sched.1, Pt I, art. 6—former serviceman (C) bringing proceedings against Ministry of Defence in respect of personal injury caused by exposure to asbestos dust—Crown (D) relying on immunity from proceedings in tort conferred by s.10—question arising as to whether the immunity was compatible with art. 6—held, dismissing appeal from Court of Appeal ([2002] EWCA Civ 773; [2002] 1 W.L.R. 2621, CA), (1) the bar to proceedings in s.10 is substantive not procedural, and (2) therefore art. 6 does not apply (see *Civil Procedure*, 2003, Vol.2, para. 9B-319)

■ MERSEY CARE NHS TRUST v. ACKROYD [2003] EWCA Civ 663; May 16, 2003, CA, unrep. (Ward, May & Carnwath L.JJ.)
CPR, r.24.2, Contempt of Court Act 1981, s.10, Human Rights Act 1998, Sched.1 Pt I, art. 10—following House of Lords decision (*Ashworth Security Hospital v. MGN Ltd*. [2002] UKHL 29; [2002] 1 W.L.R. 2003, H.L.), journalist obliged to disclose that he obtained notes relating to patient in hospital (C) not from an employee of C but through an intermediary (D)—notes used as basis for published article—C bringing claim against D for order requiring him to disclose his source—judge granting C's application for summary judgment—held, allowing D's appeal, (1) D had a real prospect of defending the claim notwithstanding the decision of the House of Lords as there were real differences between that case and this, (2) the public interest issues involved were not appropriate for determination on an application for summary judgment—*Norwich Pharmacal v. Commissioners of Customs and Excise* [1974] A.C. 133, HL, ref'd to (see *Civil Procedure*, 2003, Vol.1, para. 24.2.4, 31.18.3, and Vol.2, paras 3C-25 & 3C-27)

■ NATIONAL BANK OF EGYPT v. OMAN HOUSING BANK SOAC [2002] EWHC 1760 (Comm); September 27, 2002, unrep. (David Steel J.)
CPR, rr.32.1, 33.7, Civil Evidence Act 1972, s.4—London subsidiary (C) of Egyptian bank bringing claim against Omani bank (D) for repayment of monies advance under placement and/or restitution—in April 2001, in proceedings to which C did not submit, Omani courts holding (at first instance and on appeal) that, by operation of *lex fori* D did not have capacity into placement and that the transaction was *ultra vires*—C's claim that the transaction was not *ultra vires* ordered to be tried as a preliminary issue—judge (1) ruling that (a) as there was Omani authority directly in point, the parties should not be permitted to call expert evidence as to foreign law, (b) C's purpose in seeking to adduce such evidence was to persuade the court that the holding of the Omani courts was wrong, and (2) holding that C's loan to D could be recovered in restitution (see *Civil Procedure*, 2003, Vol.1, paras 32.1.1 & 33.7.1, and Vol.2, para. 9B-263)

■ PICKERING v. DEACON [2003] EWCA Civ 554; *The Times*, April 19, 2003, CA (Potter & Dyson L.JJ. and Wilson J.)
CPR, rr.16.5 & 32.1—householder (C) bringing claim in contract against builders (D) for defective works relating to house extension—in giving evidence at trial, C (1) giving innocent explanation of payment made to him by D, but (2) stating facts from which it might be concluded that cost of job

had been inflated by conspiracy between C and D and a third party (S) to defraud local authority making disabled facilities grant to C—on third day of trial, judge refusing C's application to allow S to give evidence—although illegality not pleaded by D, judge holding that contract was unenforceable on the ground of illegality—held, allowing C's appeal, (1) where unpleaded allegations come before the court only as evidence, it is important that the court should not act on them unless it is satisfied that the whole of the circumstances are before it, (2) the court could not do so if such evidence came at a late stage, (3) the judge should not have taken the illegality point on his own and should not have allowed the evidence of one party, when illegality had not been pleaded, to be used (see *Civil Procedure*, 2003, Vol.1, paras 16.5.1 & 32.1.2)

■ PIGGOTT v. AULTON [2003] EWCA Civ 24; *The Times*, February 19, 2003, CA (Simon Brown, Sedley & Arden L.JJ.)
CPR, r.19.8, Limitation Act 1980, s.33—claimant (C) commencing action against estate of a deceased person—no representative of the estate appointed—C's solicitors failing to obtain an order under r.19.8(2)(b)(ii)—proceedings discontinued and new proceedings issued—underwriter (D) appointed to represent estate—D contending that the service of the new proceedings were an abuse of process under the rule in *Walkley v. Precision Forgings* [1979] 1 W.L.R. 606—held, (1) an action in damages brought by issuing proceedings against the personal representatives of the estate of a deceased person where no personal representatives had been appointed was an action brought against a person without legal personality, (2) thus, where a second action was then issued against a person appointed by the court to represent the estate in the defence of the proceedings, that action was not against the same defendant and s.33 could apply to allow the action to proceed (see *Civil Procedure*, 2003, Vol.1, para. 19.8, and Vol.2, para. 8-71)

■ R. (DWR CYMRU CYFNGEDIG) v. ENVIRONMENT AGENCY FOR WALES [2003] EWHC 336 (QB); *The Times*, April 29, 2003 (Harrison J.)
CPR, rr.32.1 & 54.16—Environment Agency (D) determining that water company (C) under duty to provide public sewer—C bringing claim for judicial review on ground that D had not carried out adequate inquiries—question arising whether fresh evidence should be adduced by C to show what would have been revealed had adequate inquiries been made—held, dismissing claim, (1) the grounds for judicial review are not closed, (2) nevertheless, in this developing are of law the principles stated in *R. v. Secretary of State for the Environment, Ex p. Powis* [1981] 1 W.L.R. 584, CA, provide a sensible basis for admitting fresh evidence, (3) in judicial review proceedings it is dangerous to admit fresh evidence which was not before the decision-maker arriving at the decision challenged (see *Civil Procedure*, 2003, Vol.1, paras 32.1.1 & 54.16.6)

■ R. (M.) v. SECRETARY OF STATE FOR HEALTH *The Times*, April 25, 2003 (Maurice Kay J.)
CPR, r.40.20, Human Rights Act 1998, s.4 & Sched.1, Pt I, art. 8, Mental Health Act 1983, ss.3, 26 & 29—application by a person detained (C) under s.3 for a declaration under s.4 that ss.26 and 29 are incompatible with art. 8—Secretary of State (D) admitting incompatibility—in *J.T. v. United Kingdom (Application No. 26494/95), The Times*, April 5, 2000, U.K. undertaking to amend the offending legislation—held, granting the application, the court's jurisdiction to grant a declaration as a matter of discretion was not affected by the admission of incompatibility or the undertaking to amend (see *Civil Procedure*, 2003, Vol.1, para. 40.20.2, and Vol.2, paras 3D-10.1 & 3D-36)

■ R. (N) v. SECRETARY OF STATE FOR THE HOME DEPARTMENT *The Times*, March 7, 2003 (Silber J.)
CPR, r.54.1, Human Rights Act 1998, ss.2, 3 & 8 and Sched.1, Pt I, arts. 3 & 8—asylum-seeker (N) bringing claim for judicial review against Secretary of State (D)—N seeking (1) declaratory relief, and (2) damages under the 1998 Act, on grounds that D, principally by his omissions, had infringed his rights under art. 3 (degrading treatment) and art. 8 (respect for private life)—N specifically alleging that he had suffered in his health and financially—in order to succeed, N had to show (1) that his complaint fell within art. 3 and/or art. 8, and (2) that there had been an interference with his rights in the form of an actionable omission by D—D contending (1) the matters complained of did not fall within art. 3 and/or 8, and (2) in any event (a) no positive obligation on D could be implied, and (b) because of the restrictive provisions of s.8, N was not entitled to damages—D also submitting (1) principles of English law are relevant to claims for relief under the 1998 Act, and (2) D was entitled to the benefit of the application of the principle that courts should show deference to the democratic powers of the state ("margin of appreciation")—held, allowing N's application in part (1) omission or inactivity can form the basis of a breach of a claimant's rights under art. 3 and 8, (2) English common law is, subject to limited exceptions, not binding on an English court determining a cause of action under the 1998 Act (see *Civil Procedure*, 2003, Vol.1, para. 54.1.20, and Vol.2, paras 3D-91, 3-14.1, 3D-31 & 3D-36)

■ RIGG v. ASSOCIATED NEWSPAPERS [2003] EWHC 710 (QB); April 7, 2003, unrep. (Gray J.)
CPR, rr.1.1, 31.12 & 31.14, Practice Direction (Defamation) para. 3.1, Defamation Act 1996, s.2—claimant (C) bringing defamation claim against newspaper (D) publishing article by journalist (J)—good faith of J put in issue in C's statement of claim—in their defence, D quoting extensively from J's contemporaneous notes—D making offer of amends under s.2— D offering to disclose notes to C but only on condition that C first accepted their offer of amends—on C's application, Master ordering disclosure of notes under r.31.14—held, dismissing D's appeal, (1) where extracts from a document are quoted in a statement of case the document is not "mentioned" within the meaning of r.31.14 and therefore no right to inspect arises under that rule, however (2) in the circumstances it was reasonable and fair and in accordance with the overriding objective for the court to make an order for specific disclosure under r.31.12 (see *Civil Procedure*, 2003, Vol.1, paras 1.3.3, 31.12.2, 31.14.1 & 53PD.12)

■ STEAMSHIP MUTUAL UNDERWRITING (BERMUDA) LTD. v. OWNERS OF CARGO LATELY LADEN ON JUTHA RAJPRUEK [2003] EWCA Civ 378, *The Times*, March 19, 2003, CA (Lord Phillips M.R., Sedley & Longmore L.JJ.)
CPR, Pt 61, Supreme Court Act 1981, ss.20 & 21, Brussels Convention 1952, art. 7—held (1) the phrase "a competent court", in a letter of undertaking from a protection and indemnity club, refers to a court competent to entertain the subject matter of the claim *in rem*, (2) it therefore includes the Admiralty Court which has jurisdiction under ss.20 and 21 (see *Civil Procedure*, Autumn 2003, Vol.1, para. 2D-139)

Statutory Instruments

■ ACCESS TO JUSTICE ACT 1999 (COMMENCEMENT NO. 10) ORDER 2003 (S.I. 2003 No. 1241)
Supreme Court Act, s.51(2), Access to Justice Act 1999, s.31—brings s.31 into force with effect from June 2, 2003, amending s.51(2)—permits making of rules of court limiting or regulating rule that costs payable to receiving party restricted to costs liability to his legal representative actually incurred (the indemnity principle)—in force June 2, 2003 (see *Civil Procedure*, 2003, Vol.2, paras 7A-2 & 9A-264)

■ CIVIL PROCEDURE (AMENDMENT NO. 2) RULES 2003 (S.I. 2003 No. 1242)
amend Civil Procedure Rules 1998—adds election petitions to proceedings listed in table following r.2.1 (Application of the Rules)—amend r.3.7 (Sanctions for non-payment of certain fees) to permit reasonable time for payment where claimant not present—amend r.43.2 (Definitions and application) to provide that Pts 42 to 48 apply notwithstanding indemnity principle where client has benefit of conditional fee agreement (entered into on or after June 2, 2003)—revokes Sched.1, CCR O. 6, r.6—in force June 02, 2003 (see *Civil Procedure*, 2003, Vol.1, paras 2.1.1, 3.7.2 & 44.3.5)

■ CIVIL PROCEDURE (AMENDMENT NO. 3) RULES 2003 (S.I. 2003 No. 1329)
amend Civil Procedure Rules 1998—amends para. (3) of r.43.2 (Definitions and application) to ensure consistency with Pts.44 to 48 and conditional fee agreement regulations—omits para. (5) of, and amends para. (3)(a) of r.54.22 (Application for statutory review) to reflect extension of scope of Nationality, Immigration and Asylum Act 2002, s.101—in force June 9, 2003 (see *Civil Procedure*, 2003, Vol.1, paras 43.2 & 54.20.1)

■ CONDITIONAL FEE AGREEMENTS (MISCELLANEOUS AMENDMENTS) REGULATIONS 2003 (S.I. 2003 No. 1240)
amend Conditional Fee Agreements Regulations 2000 (S.I. 2000 No. 692) by inserting reg. 3A and making minor consequential amendment to reg. 6(a)—amend Collective Conditional Fee Agreements Regulations 2000 (S.I. 2000 No. 2988) regs. 4 & 5—abrogate, in relation to specified types of conditional fee agreements, the principle that the amount which can be awarded to a party in respect of costs is limited to an indemnity (the indemnity principle)—in force June 2, 2003 (see *Civil Procedure*, 2003, Vol.2, paras 7A-6, 7A-19)

■ COURT FUNDS (AMENDMENT NO. 2) RULES 2003 (S.I. 2003 No. 720)
Court Funds Rules 1987—amend r.34 (Range of investments)—enable money under the control of, or subject to the control of, the court (other than that of the Court of Protection) to be invested in shares of an open-ended investment company—remove a reference to the Public Trustee having power concurrently to direct investment of money under the control of or subject to the Court of Protection—in force April 8, 2003 (see *Civil Procedure*, 2003, Vol.2, paras 6A-83)

■ MAXIMUM NUMBER OF JUDGES ORDER 2003 (S.I. 2003 No. 775)
Supreme Court Act, s.4—amends s.4(1)(e) for purpose of increasing maximum number of puisne judges of the High Court from 106 to 108—in force March 20, 2003 (see *Civil Procedure*, 2003, Vol.2, paras 9A-14 & 9A-15)

IN DETAIL

Dispensing with service of claim form

CPR, r.6.9(1) states that the court "may dispense with service of a document". In *Godwin v. Swindon Borough Council* [2001] EWCA Civ 641; [2002] 1 W.L.R. 997, CA, it was held that a court cannot dispense with service of a document in the form of a claim form under r.6.9 (or r.6.1) where such a dispensation would constitute a retrospective extension of the time for service permitted by r.7.5(2). The reasoning was that to do otherwise would be contrary to r.7.5(3). That provision states that, where a claimant applies to extend time, and makes his application after the end of the period specified by r.7.5, the court may grant the application "only if" one or other of the conditions stated in paras (a) to (c) of r.7.6(3) applies.

In *Anderton v. Clwyd County Council* (*No. 2*) [2002] EWCA Civ 933; [2002] 1 W.L.R. 3174, CA, however, the Court added a gloss to this by holding that, in the exercise of its discretion under r.6.9, a court may dispense with service where (1) a claimant had sought to serve the claim form by a permitted method of service, and (2) the form had in fact been received by the defendant before (but not after) the end of the period for service stipulated by r.7.5. In the note of this case in *Issue 07/02* of the *CP News* it was said: "It is to be feared that a disproportionate amount of time and effort may have to be expended by procedural judges dealing with applications based on this aspect of the Anderton case". In *Wilkey v. British Broadcasting Corporation* [2002] EWCA Civ 1561; [2003] 1 W.L.R. 1, CA, the Court of Appeal recognised this risk and attempted to give clear answers to two related questions; they were (1) should a court (in these circumstances) ordinarily or exceptionally, dispense with service? and (2) should that depend upon whether service of the proceedings in fact occurred before or after July 3, 2002 (the date of the decision of the Court of Appeal in the Anderton case)? Simon Brown L.J. said that, where service in fact occurred before July 3, 2002, the r.6.9 dispensing power should ordinarily be exercised in the claimant's favour, unless the defendant could establish either that he would suffer prejudice, apart from his loss of his limitation defence, or some other good reason why the power should not be exercised. Where, however, service in fact occurred after July 3, 2002, the r.6.9 dispensing power should ordinarily not be exercised in the claimant's favour. In those cases a strict approach should be adopted as a court, quite logically, would be readier to reject the claimant's explanation for the late service and to criticise his conduct of the proceedings.

In the recent case of *Cranfield v. Bridgegrove Ltd*. [2003] EWCA Civ 656; *The Times*, May 16, 2003, CA, in giving the judgment of the Court Dyson L.J. (sitting with Ward and Waller L.JJ.) said that, despite several attempts by the Court to elucidate the relevant principles (in Wilkey and other cases), the interpretation and application of r.6.9 and r.7.6 "continues to cause difficulty". On this appeal, there were before the Court five appeals raising several issues relating to these two rules. In all of the cases before the Court, the time for service of the claim form expired before July 3, 2002; thus they were all pre-Anderton cases. Each of the appeals raised the following four questions:

(1) where the claim form is to be served by the court (see CPR, r.6.3), is the court "unable to serve" it within the meaning of CPR, r.7.6(3)(a) if, simply through oversight on its part, it fails to serve it in time?

(2) if the words "unable to serve the claim form" cannot be construed to embrace the circumstances described in (1), should the court be willing in principle to dispense with service in such a case?

(3) can a claim form be served on a defendant limited company at its registered office pursuant to the Companies Act 1985, s.725(1) where the defendant has previously notified the claimant that its solicitors will accept service under CPR, r.6.4(2)?

(4) where a claim form is purportedly served in time, by a method of service permitted by CPR, r.6.2, but on the wrong person (not being in accordance with CPR, r.6.4) (e.g., in a negligence case, on an insurer rather than on the insured), are there any, and if so what, circumstances in which the court ought to be willing in principle to dispense with service (under r.6.9)?

Put briefly, the answers that the Court gave to these four questions were as follows.

(1) Among the "only if" circumstances in which time for service of a claim form may be extended stated in r.7.6(3) is the circumstance that "the court has been unable to serve the claim form." The Court held that "unable" in this context is not restricted to the situation in which a court has tried to serve the claim form but has failed. The words "unable to serve" include all cases where a court has failed to serve, including mere oversight on its part.

(2) In the light of the answer given to question (1), question (2) does not arise.

(3) A claimant may serve his claim form on a defendant company either by leaving it at, or by sending it by post to, the company's registered office, or by serving it in accordance with one of the methods permitted by the CPR. The two methods are true alternatives (see CPR, r.6.2(2)). There are differences between the two methods (e.g., service under s.725(1) of the 1985 Act may be by second class post). If a defendant has not given an address for service, a claimant may choose whether to follow the s.725(1) or the CPR route for service, and this is so whether or not the defendant has notified the claimant that his solicitors will accept service under r.6.4. It is possible for the parties to make a binding contract whereby the claimant agrees to serve the claim form by the CPR route rather than under s.725(1) or vice versa. But a mere agreement between the parties to the effect that, if the claimant decides to effect personal service under CPR, r.6.4, then they would serve on the defendant's solicitors rather than on the company under CPR, r.6.4(4), is not such a binding contract.

(4) The jurisdiction of the court to make an order dispensing with service of claim form in these circumstances was recognised in the Anderton case. In the instant case the Court of Appeal was content to deal with this question simply by stressing that the discretion may be exercised only in exceptional circumstances, and the court should be very slow indeed to dispense with service retrospectively in circumstances falling outside those specifically mentioned in the Anderton case.

In the course of dealing with the several conjoined appeals in this appeal, the Court had to deal with some particular questions apart from the generic questions discussed above. One such question was the meaning and effect of r.6.5(6) where service is effected on an individual at his "last known address", as stated in the table attached to that provision. In the *White Book* at para. 6.5.3 it is said: "The CPR do not make it clear whether service by post to a defendant's last known address at which he no longer resides, and the defendant does not in fact receive the claim, is good service." The Court disapproved of this comment. The Court said (para. 102):

"In our judgment, the position is clear.There are two conditions precedent for the operation of the provisions of CPR, 6.5(6), namely that (a) no solicitor is acting for the party to be served, and (b) the party has not given an address for service. If those conditions are satisfied, then the rule states that the document to be sent must be sent or transmitted to, or left at, the place shown in the table. In the case of an individual, that means at his or her usual or last known residence. The rule is plain and unqualified. We see no basis for holding that, if the two conditions are satisfied, and the document is sent to that address, that does not amount to good service. The rule does not say that it is not good service if the defendant does not in fact receive the document. If that had been intended to be the position, the rule would have said so in terms. Nor can we see any basis for holding that, if the claimant knows or believes that the defendant is no longer living at his or her last known residence, service may not be effected by sending the claim form, or leaving it at, that address. That would be to fly in the face of the clear words of the rule. The rule is intended to provide a clear and straightforward mechanism for effecting service where the two conditions precedent to which we have referred are satisfied."

New hearings and re-hearings

In *Fowler De Pledge v. Smith* [2003] EWCA Civ 703; *The Times*, May 27, 2003, CA, solicitors (C) brought a claim in a county court against their former client (D) for unpaid fees. D was legally aided and defended the claim on the basis that C had been negligent in acting on his behalf. The claim was compromised on terms that D should pay C a lump sum of £25,000 with costs and the court made a consent order to that effect.

In making the consent order, a circuit judge directed that the determination of the issue of D's liability for costs (as an assisted party) under the Legal Aid Act 1988, s.17 (Limit on costs against assisted party), should be determined by a district judge. The amount of costs was determined by a district judge under a default costs certificate as 26,183. In dealing with the s.17 issue, another district judge ruled that it was reasonable that D should pay the whole amount of assessed costs (liability decision).

D was able to pay C the £25,000 lump sum payable under the consent order, but disputed the liability decision made by the district judge and applied for permission to appeal against that decision. Unfortunately, at the hearing at which the liability decision was made, the court's recording equipment was not working properly and, as a result, there was no adequate note of the district judge's judgment. In the circumstances, in dealing with D's application for permission to appeal, a circuit judge (circuit judge A) granted permission and treated the hearing before him as the appeal. In disposing of the appeal the circuit judge held that the question of D's liability for costs should be reheard by a different circuit judge. Accordingly, subsequently another circuit judge (circuit judge B) conducted a rehearing and in the event came to the same decision on the s.17 issue as had

the district judge. Circuit judge B began his judgment by observing that the proceedings before him consisted of an appeal *de novo* against the order of the district judge, but when the order was drawn up it simply directed that the sum of £36,136, being the amount of the original default costs certificate (£26,183) with accumulated interest and additional sums ordered to be paid as costs, be paid.

D determined to appeal against the decision of circuit judge B and some confusion then arose as to whether his appeal should go to the Court of Appeal or to the High Court. In the event, D's appeal was lodged in the High Court. Thereupon, C applied to the High Court for an order declaring that D's proposed appeal was a second-tier appeal and that the correct jurisdiction for any further appeal, and hence application for permission to appeal, would be the Court of Appeal. On June 18, 2002, Garland J. heard C's submissions on the jurisdiction point and went on to determine the merits of D's appeal. His lordship held (1) that the rehearing before circuit judge B was not limited to a review of the district judge's decision but was a hearing at appeal court level (r.52.11), and (2) that D should pay C the total amount awarded in the costs certificate.

D then determined to appeal to the Court of Appeal against the decision of Garland J., and so the point that C had anticipated as to whether any further appeal would be a first or second appeal arose directly. The Master of the Rolls directed that, whether or not the Court of Appeal determined that the decision of Garland J. on the jurisdiction issue was right, D's appeal against the order of circuit judge B on the s.17 issue should be heard by the Court of Appeal.

Rule 52.13 states that permission is required from the Court of Appeal "for any appeal to that court from a decision of a county court or the High Court which was itself made on appeal". The Court of Appeal (Schiemann, Brooke & Jonathan Parker L.JJ.) held that Garland J. was wrong on the jurisdiction point. Brooke L.J. said the order of circuit judge A could not have been clearer. After granting D permission to appeal he treated the hearing before him as the hearing of the appeal. In so doing he was exercising his power under r.52.10(2)(a) to set aside the order made by the district judge on the costs liability issue, and under r.52.10(2)(c) he was ordering a "new hearing" of D's application before a circuit judge, not a district judge. It was clear that circuit judge A had allowed D's appeal. In those circumstances, contrary to what Garland J. had found, D's appeal from the decision of circuit judge B was a first tier appeal, as the proceedings before that circuit judge were not a hearing at an appeal court level.

Brooke L.J. went on to say that it is important that judges, when dealing with appeals, should make clear on the face of their orders whether they are (1) ordering a rehearing at appeal court level (r.52.11(1)(b)), in which case any subsequent appeal would be a second appeal, or (2) ordering a rehearing of the original application at first instance (r.52.10(2)(c)). In this case, the order of circuit judge A was clear in this respect. Confusion appears to have arisen because the effect of that order was not unambiguously reflected in the judgment of circuit judge B or in the order carrying his judgment into effect.

In turning to the merits of D's appeal, the Court of Appeal allowed the appeal. The Court said that, in considering the liability of a legally aided individual to pay costs under s.17, what is important is his financial resources (*Chaggar v. Chaggar* [1997] 1 All E.R. 104, CA). In their lordships' opinion, circuit judge B was overly influenced by the adverse view he took of D's conduct and paid insufficient attention to his duty to make explicit findings as to D's means.

Naming defendant in claim form

In *Friern Barnet UDC v. Adams* [1927] 2 Ch. 25, CA, Atkin L.J. said that, under the Rules of the Supreme Court (as they had existed since the coming into effect of the Judicature Acts 1871-73) it is necessary to the proper constitution of an action that the defendants should be named, and that it is contrary to the rules "to issue a writ against defendants whom you do not know by describing them". The consequences of this general rule are worked out in a variety of ways in English civil procedure; for example, in the special arrangements (first introduced in the 1970s) enabling claimants to bring possession claims against trespassers as "persons unknown" (see now r.55.3(4)). Further, the need for accuracy in identifying defendants is reflected in the law relating to the amendment of originating process where it transpires, after the relevant limitation period has expired, that the "wrong" defendant has been sued.

In *Bloomsbury Publishing Group Ltd. v. News Group Newspapers Ltd.* [2003] EWHC 1205 (Ch); *The Times*, June 5, 2003, the publishers (C) of a keenly-awaited book in the Harry Potter series, in advance of publication brought proceedings against a newspaper (D) and, as second defendants, against "persons unknown" for an injunction. C feared that copies of the book had been offered to D by the second defendants. The evidence clearly established that at least three copies of the book had been taken away from the printers without authority

and offered to the press at varying prices. Laddie J. granted an interim injunction against the second defendants, requiring them to deliver up all copies of the book.

The question whether the injunction should be continued, notwithstanding that the second defendants were not described by name, came before Sir Andrew Morritt V.-C. The Vice-Chancellor held that, under the CPR it is permissible to join a defendant in proceedings by description rather than by name, and that the court has power to grant an injunction against such person. His lordship concluded that the decision of the Court of Appeal in Friern is not applicable to proceedings brought under the CPR. Para. 4.1 of Practice Direction (How to Start Proceedings—the Claim Form) states that a claim form must be headed with the title of the proceedings and the title "should state", amongst other things, "the full name of each party" (see also Form N1). His lordship regarded it as significant that under the CPR there is no requirement that a defendant must be named in a claim form, merely a direction that he "should" be (see also r.16.2 (Contents of the claim form)).

CPR UPDATE

By the Civil Procedure (Amendment No. 2) Rules 2003 (S.I. 2003 No. 1242), and the Civil Procedure (Amendment No. 3) Rules 2003 (S.I. 2003 No. 1329), both published in May 2003, amendments were made to the CPR. Most of these amendments came into effect on June 2, 2003.

By TSO CPR Update 32 (May 2003), a number of amendments were made to existing Practice Directions supplementing particular CPR Parts. Most of these amendments came into effect on June 2, 2003.

These rule and practice direction changes are explained below with the exception of practice direction changes not coming into effect until July 31, 2003, or later (which will be included in the July edition of *CP News*).

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

AMENDMENTS TO RULES

para. 2.1, p.33

In the Table following para. (2) of CPR, r.2.1 (Application of the Rules), add at the end of the first column "7. Election petitions in the High Court" and add at the end of the second column "Representation of the People Act 1983, s.182"

This amendment makes it clear, as was explained in *Ullah v. Pagel* [2002] EWCA Civ 1793; December 12, 2002, CA, unrep., that the CPR do not apply directly to election petitions in the High Court, although the apply indirectly and with modifications by virtue of the Election Petition Rules 1960, r.2(4).

para. 3.7, p.86

For para. (7) of CPR, r.3.7 (Sanctions for non-payment of certain fees) substitute the following two paragraphs:

"(7) If—

(a) a claimant applies to have the claim reinstated; and

(b) the court grants relief,

the relief shall be conditional on the claimant either paying the fee or filing evidence of exemption from payment or remission of the fee within the period specified in paragraph (8).

(8) The period referred to in paragraph (7) is—

(a) if the order granting relief is made at a hearing at which a claimant is present or represented, 2 days from the date of the order;

(b) in any other case, 7 days from the date of service of the order on the claimant."

para. 43.2, p.980

After para. (1) of CPR, r.43.2 (Definitions and application) delete the cross-reference, and after para (2) of this rule add the new paragraphs ((3) and (4)) set out immediately below. These new provisions have effect only where the conditional fee agreement which is in issue was entered into on or after June 2, 2003. For further explanation, see the comments made below in relation to Vol.2, para. 9A-264, p.1890.

"(3) Where advocacy or litigation services are provided to a client under a conditional fee agreement, costs are recoverable under Parts 44 to 48 notwithstanding that the client is liable to pay his legal representative's fees and expenses only to the extent that sums are recovered in respect of the proceedings, whether by way of costs or otherwise.

(4) In paragraph (3), the reference to a conditional fee agreement is to an agreement which satisfies all the conditions applicable to it by virtue of section 58 of the Courts and Legal Services Act 1990."

It may be noted that paras (3) and (4) of r.43.2 were inserted the Civil Procedure (Amendment No. 2) Rules 2003 (S.I. 2003 No. 1242), with effect from June 2, 2003, but by the Civil Procedure (Amendment No. 3) Rules 2003 (S.I. 2003 No. 1329), para. (3) was subject to a minor amendment (the substitution of "proceedings" for "litigation") with effect from the slightly later date of June 9, 2003.

Rule 54.22

As was explained in *Issue 04/03* of *CP News*, Section II (Statutory Review under the Nationality, Immigration and Asylum Act 2002) was added to Pt 54 (rr.54.21 to 54.25), by the Civil Procedure (Amendment) Rules 2003 (S.I. 2003 No. 364). The new Section will be included in Supplement 1 of *Civil Procedure* 2003.

With effect from June 9, 2003, para. (5) (which defined "decision" for the purposes of this rule) is omitted from that rule and sub-para. (a) of para. (3) is substituted as a consequence. These changes anticipate new transitional provisions for the 2002 Act where it is proposed to extend the scope of s.101 to apply in cases where the adjudicator's decision was made in an appeal under legislation which preceded the 2002 Act. As a result, in its entirety r.54.22 now reads as follows:

"Application for review

54.22—(1) An application under section 101(2) of the Act must be made to the Administrative Court.

(2) The application must be made by filing an application notice.

(3) The applicant must file with the application notice—

(a) the immigration or asylum decision to which the proceedings relate, and any document giving reasons for that decision;
(b) the grounds of appeal to the adjudicator;
(c) the adjudicator's determination;
(d) the grounds of appeal to the Tribunal together with any documents sent with them;
(e) the Tribunal's determination on the application for permission to appeal; and
(f) any other documents material to the application which were before the adjudicator.

(4) The applicant must also file with the application notice written submissions setting out—

(a) the grounds upon which it is contended that the Tribunal made an error of law; and
(b) reasons in support of those grounds."

para. cc6.6, p.1792

CPR, Sched.2, CCR O. 6, r.6 is revoked. Practice Direction (Consumer Credit Act Claim) para. 7.1 (see para. 7BPD.7, p.255) states the matters that the claimant must state in his particulars of claim where the procedure described as "Consumer Credit Act procedure" is used. As is explained in the commentary in para. cc6.6.3, this paragraph repeats the provisions of CCR O. 6, r.6 now revoked.

para. 7A-14, p.1628

The Conditional Fee Agreements Regulations 2000 (S.I. 2000 No. 692) have been amended by the Conditional Fee Agreements (Miscellaneous Amendments) Regulations 2003 (S.I. 2003 No. 1240) by the addition after reg. 3 of new reg. 3A (however, the statutory instrument mistakenly refers to the new regulation as reg. 3). For further explanation, see the comments made below in relation to Vol.2, para. 9A-264, p.1890. As inserted, reg. 3A states as follows:

"3A-(1) This regulation applies to a conditional fee agreement under which, except in the circumstances set out in paragraph (5), the client is liable to pay his legal representative's fees and expenses only to the extent that sums are recovered in respect of the relevant proceedings, whether by way of costs or otherwise.

(2) In determining for the purposes of paragraph (1) the circumstances in which a client is liable to pay his legal representative's fees and expenses, no account is to be taken of any obligation to pay costs in respect of the premium of a policy taken out to insure against the risk of incurring a liability in the relevant proceedings.

(3) Regulations 2, 3 and 4 do not apply to a conditional fee agreement to which this regulation applies.

(4) A conditional fee agreement to which this regulation applies must—

(a) specify—
(i) the particular proceedings or parts of them to which it relates (including whether it relates to any appeal, counterclaim or proceedings to enforce a judgment or order); and
(ii) the circumstances in which the legal representative's fees and expenses, or part of them, are payable; and
(b) if it provides for a success fee—
(i) briefly specify the reasons for setting the percentage increase at the level stated in the agreement; and
(ii) provide that if, in court proceedings, the percentage increase becomes payable as a result of those proceedings and the legal representative or the client is ordered to disclose to the court or any other person the reasons for setting the percentage increase at the level stated in the agreement, he may do so.

(5) A conditional fee agreement to which this regulation applies may specify that the client will be liable to pay his legal representative's fees and expenses whether or not the sums are recovered in respect of the relevant proceedings, if the client—

(a) fails to co-operate with the legal representative;
(b) fails to attend any medical or expert examination or court hearing which the legal representative reasonably requests him to attend;
(c) fails to give necessary instructions to the legal representative; or
(d) withdraws instructions from the legal representative.

(6) Before a conditional fee agreement to which this regulation applies is made, the legal representative must inform the client as to the circumstances in which the client may be liable to pay the legal representative's fees and expenses, and provide such further explanation, advice or other information as to those circumstances as the client may reasonably require."

para. 7A-17, p.1629

In para. (a) of reg. 6, for "regulations 2, 3 and 5" substitute "regulations 2, 3, 3A and 5"

paras 7A-23 & 7A-24, pp.1631-32

The Collective Conditional Fee Agreements Regulations 2000 (S.I. 2000 No. 2988) have been amended by the Conditional Fee Agreements (Miscellaneous Amendments) Regulations 2003 (S.I. 2003 No. 1240) as explained immediately below. For further explanation, see the comments made below in relation to Vol.2, para. 9A-264, p.1890.

After para. (1) of reg. 4, insert:

"(1A) The circumstances referred to in paragraph (1) may include the fact that the legal representative's fees and expenses are payable only to the extent that sums are recovered in respect of the proceedings, whether by way of costs or otherwise."

After para. (3) of reg. 5, insert:

"(4) Sub-paragraphs (b) and (c) of paragraph (2) do not apply to a collective conditional fee agreement under which, except in the circumstances set out in paragraph (6), the client is liable to pay his legal representative's fees and expenses only to the extent that sums are recovered in respect of the proceedings, whether by way of costs or otherwise.

(5) In determining for the purposes of paragraph (4) the circumstances in which a client is liable to pay his legal representative's fees and expenses, no account is to be taken of any obligation to pay costs in respect of the premium of a policy taken out to insure against the risk of incurring a liability in the relevant proceedings.

(6) A collective conditional fee agreement to which paragraph (4) applies may specify that the client will be liable to pay his legal representative's fees and expenses whether or not the sums are recovered in respect of the relevant proceedings, if the client—

(a) fails to co-operate with the legal representative;
(b) fails to attend any medical or expert examination or court hearing which the legal representative reasonably requests him to attend;
(c) fails to give necessary instructions to the legal representative; or
(d) withdraws instructions from the legal representative."

para. 9A-264, p.1890

Section 51(2) of the Supreme Court Act 1981 was amended by the Access to Justice Act 1999, s.31 from a day to be appointed. That amendment made it possible for rules of court to be made for securing that the amount of costs to be awarded to a party "in respect of the costs to be paid by him" to legal or other representatives "is not limited to what would have been payable by him to them is he had not been awarded costs". As is explained in the commentary in para. 9A-264, this amendment to s.51(2) paved the way for rules limiting or regulating the effect of the rule in *Gundry v. Sainsbury*, sometimes called the "indemnity principle" (see para. 7A-2).

In the Explanatory Note attached to Civil Procedure (Amendment No. 2) Rules 2003, it is explained as follows:

"The Lord Chancellor has made amendments to the Conditional Fee Agreements Regulations 2000 [adding reg. 3A] and the Collective Conditional Fee Agreements Regulations 2000 [adding para. (1A) to reg. 4 and para. (4) to (6) to reg. 5] which, when combined with the amendment to rule 43.2 of the Civil Procedure Rules made by rule 5(b) of these Rules [adding para. (3) and (4) to r.43.2], will abrogate the indemnity principle in relation to the type of conditional fee agreement governed by the amended Regulations. Solicitors will to this extent be able to agree lawfully with their clients not to seek to recover by way of costs anything in excess of what the court awards, or what it is agreed will be paid, and will no longer be prevented from openly contracting with their clients on such terms. The new CPR rule 43.2(3) and (4) provides that costs whose recovery is limited in this way are nevertheless recoverable costs for the purposes of CPR Parts 44 to 48."

AMENDMENTS TO PRACTICE DIRECTIONS

These amendments came into effect on June 2, 2003, except where otherwise indicated.

Practice Direction (Service Out of the Jurisdiction)

para. 6BPD.1, p.209

In para. A1.1, for "judical and extrajudical" substitute "judicial and extrajudicial"

Practice Direction (How to Make Claims in Schedule Rules and Other Claims)

para. 16PD.6, p.361

In para. 6.2(1), for "paragraph 7.1(1) to (6) above" substitute "paragraph 6.1(1) to (6) above"

Practice Direction (Appeals)

para. 52PD.2A, p.1284

For para. 2A.2 substitute

"Where the decision to be appealed is a final decision—

(a) in a Part 7 claim allocated to the multi-track; or
(b) made in specialist proceedings (under the Companies Act 1985 or 1989 or to which

Sections I, II or III of Part 57 or any of Parts 58 to 63 apply)

the appeal is to be made to the Court of Appeal (subject to obtaining any necessary permission).”

This amendment came into effect on April 1, 2003, and accompanied the coming into force of the Civil Procedure (Modification of Enactments) Order 2003. The effect of that statutory instrument was explained in the Issue *04/03* April 11, 2003, of the *CP News*.

Practice Direction (References to the European Court)

para. 68PD.3, p.1448

The Information Note on References by National Courts for Preliminary Rulings issued by Court of Justice of the European Communities, which was inadvertently omitted from the version of this practice direction as published in TSO CPR Update 29 (October 2002), is now added.

Practice Direction (Traffic Enforcement)

para. 75PD.1, pp.1557-1558

The following changes came into effect on May 1, 2003.

For para. 1.1, substitute

“1.1 In this Practice Direction—

(1) “the 1991 Act” means the Road Traffic Act 1991;

(2) “the 1996 Act” means the London Local Authorities Act 1996;

(3) “the Road User Charging Regulations” means the Road User Charging (Enforcement and Adjudication) (London) Regulations 2001;

(4) “the Vehicle Emissions (England) Regulations” means the Road Traffic (Vehicle Emissions) (Fixed Penalty) (England) Regulations 2002;

(5) “the Vehicle Emissions (Wales) Regulations” means the Road Traffic (Vehicle Emissions) (Fixed Penalty) (Wales) Regulations 2003.”

In sub-para. (4) of para. 1.2, for “Vehicle Emissions Regulations” substitute “Vehicle Emissions (England) Regulations”

At end of sub-para. (5) of para. 1.2, delete “and”

After sub-para. (6) of para. 1.2, add

“; and

(7) increased fixed penalties to which regulation 17(6) of the Vehicle Emissions (Wales) Regulations refer.”

In sub-para. (2)(c) of para. 1.3, for “Vehicle Emissions Regulations” substitute “Vehicle Emissions (England) Regulations”

At end of sub-para. (2)(c) of para. 1.3, delete “or”

After sub-para. (2)(d) of para. 1.3, add

“; or

(e) a fixed penalty notice issued under regulations [sic] 20 or 13 of the Vehicle Emissions (Wales) Regulations.”

In sub-para. (3)(d) of para. 1.3, for “Vehicle Emissions Regulations” substitute “Vehicle Emissions (England) Regulations”

At end of sub-para. (3)(e) of para. 1.3, delete “or”

After sub-para. (3)(f) of para. 1.3, delete “and” and add

“or

(g) regulation 21 of the Vehicle Emissions (Wales) Regulations; and”

para. 75PD.4, p.1558

For sub-para. (2) of para. 4.1, substitute

“(2) the court under—

(a) paragraph 23(3) of the Vehicle Emissions (England) Regulations; and
(b) paragraph 23(3) of the Vehicle Emissions (Wales) Regulations.”

para. 75PD.5, p.1558

In para. (3) of para. 5.1, for “Vehicle Emissions Regulations” substitute “Vehicle Emissions (England) Regulations”

At end of sub-para. (3) of para. 5.1, delete “or”

After sub-para. (4) of para. 5.1, insert

“; or

(5) regulation 23(3) of the Vehicle Emissions (Wales) Regulations,”

FORMS

Form N20 (Witness summons) is replaced

The Conditional Fee Agreements Conference 2003

Current Law and Practice: where are we now after the Claims Direct and TAG test cases?

Thursday 3rd July 2003

The Cavendish Conference Centre
Duchess Mews
London W1

Delegate Fee: £299 + VAT
Registered for 6.5 CPD hours

This important, one-day conference examines the turmoil currently surrounding Conditional Fee Agreements. A number of the speakers were intimately involved in recent landmark cases and are uniquely placed to discuss them in the context of the rapidly evolving law and practice.

It is the ideal opportunity to bring yourself up-to-date with the latest developments in this confusing area.

Chairman:

Master John O'Hare, Taxing Master and Costs Judge. Prepared the report into After The Event Insurance referred to in *Callery v Gray*. Sat as an informal assessor in *Sarwar v Alam*.

Speakers:

Nigel Tomkins, Associate Professor of Civil Litigation, College of Law
Patrick Allen, President of APIL (2002-3)
Michael Bacon, Legal costs consultant, Fellow of the Association of Law Costs Draftsmen
Jason Rowley, President of the Forum of Insurance Lawyers
Martin Seaward, Member of the Bar Council's CFA Panel

www.sweetandmaxwell.co.uk/conferences

For further information:

Call (020) 7393 7859 **Email:** conferences@sweetandmaxwell.co.uk

EDITOR: **Professor I. R. Scott**, University of Birmingham.
Published by Sweet & Maxwell Ltd, 100 Avenue Road, London NW3 3PF.
ISSN 1470-2525

© Sweet & Maxwell Ltd 2003 Typeset by Sweet & Maxwell Ltd
All rights reserved Printed by St Austell Printing Company
St Austell, Cornwall