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# CIVIL PROCEDURE NEWS

- Striking out “hopeless” claims
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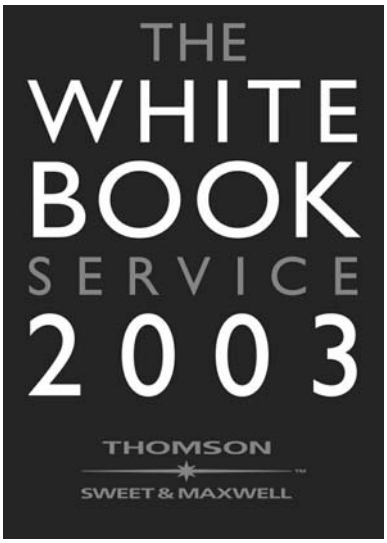

# N BRIEF

## Cases

■ BHAMJEE v. FORSDICK [2003] EWCA Civ 1113; *The Times*, July 31, 2003, CA (Lord Phillips MR, Brooke & Dyson L.JJ)
CPR rr.1.1(2)(e), 3.3, 3.4, 25.1(1)(a), Sched.1 RSC O.94, r.15—Court of Appeal dismissing three "hopeless" appeals brought by claimant (C) in several actions—at Court's invitation, defendants (D) in several pending actions brought against them by C applying for extended *Grepe v. Loam* orders to restrain C from bringing and continuing legal proceedings without permission of court—in granting applications Court re-stating law (arising from courts' inherent jurisdiction) and practice as to (1) "civil restraint orders", (2) orders striking out claims totally devoid of merit, and (3) restrictions on rights of appeal therefrom—observations on compliance with Convention rights—comparisons with civil proceedings orders (see *Civil Procedure* 2003, Vol.1, paras 1.3.7, 3.3.1, 3.4.3, 23.2.2, 25.1.5, sc94.15.2, and Vol.2, paras 9A-59 & 9A-161)

■ BECK v. MINISTRY OF DEFENCE [2003] EWCA Civ 1043; *The Times,* July 21, 2003, CA (Lord Phillips M.R., Simon Brown & Ward L.JJ.)
CPR rr.3.1(3), 35.1 & 35.4—in personal injury claim, defendant (D) arranging for claimant (C) to be examined by medical expert (X) appointed by D—D dissatisfied with X's report—judge (1) allowing D to substitute another expert (Y) for X, and (2) staying C's claim until he had undergone examination by Y—held, allowing C's appeal, the disclosure by D to C of X's report should be imposed as a condition for allowing D to substitute Y for X (see *Civil Procedure* 2003, Vol.1, paras 35.1.1 & 35.4.2, and Vol.2, para. 9A-163; see too Supreme Court Practice 1999, Vol.1, para. 25.6.4)

■ BINKS v. SECURICOR OMEGA EXPRESS LTD. [2003] EWCA Civ 993; July 16, 2003, CA, unrep. (Pill & Carnwath L.JJ and Maurice Kay J.)
CPR rr.1.1(1), 16.2, 17.1 & 22.1(1)(a), Practice Direction (Amendments to Statements of Case) para. 1.4—employee (C) bringing county court personal injuries claim against employers (D)—at trial, D's witnesses giving alternative version of accident different to that given by C (but that version arguably not inconsistent with negligence on D's part)—at end of evidence, counsel for C anticipating that judge may find that C had not given a truthful account of the accident and that this would prove fatal to C's pleaded case—accordingly, counsel submitting that judge ought to consider liability of D on the alternative version—judge rejecting submission and giving judgment for D—held, allowing C's appeal, (1) a statement of case must be verified by a statement of truth (r.22.1(1)(a)), but (2) an amendment to a statement of case need not be so verified if the court orders otherwise (r.22.1(2)), and (3) it would be appropriate to order otherwise to permit an amendment where (as here) it is derived from an opponent's documents, pleadings or evidence, further (4) the purpose and effect of r.22.1(1)(a) is not to exclude the possibility of pleading inconsistent factual alternatives and does not in all cases prevent a party from submitting or amending a pleading which includes an allegation which he is not putting forward as the truth, provided there is an evidential basis for it, and (5) it would not be consistent with the overriding objective to permit that rule to relieve a defendant of liability where his own evidence establishes a cause of action against him (see *Civil Procedure* 2003, Vol.1, paras 16.2.7, 17PD.1, 22.0.2, 22.1.2 & 22.1.8)

■ BUGGS v. BUGGS [2003] EWHC 1538 (Ch), June 27, 2003, unrep. (Mr Nicholas Davidson QC)
CPR r.19.7A(1)—in June 1998, ancillary relief proceedings resolved by consent order without prejudice to wife's (C's) claim for interest in a property on which C registered a Caution—property owned by husband's (D's) mother (X)—X dying in August 1999 and in will purporting to leave property to D (her executor) and another of her sons (Y) jointly—C directed to bring proceedings for purpose of determining whether Caution should be cancelled—in her claim against D, C contending that purchase of property by X funded in part by C and D, and claiming that property was held by X on trust for C and D jointly—held, in the circumstances, C's claim could be regarded as a claim against D as executor within r.19.7A(1) and could be brought even though Y (who stood most to lose if C succeeded) was not a party (see *Civil Procedure* 2003, Vol.1, para. 19.7A.1)

■ DEUTSCHE MORGAN GRENFELL GROUP PLC. v. COMMISSIONERS OF INLAND REVENUE [2003] EWHC 1779 (Ch); 153 New L.J. 1171 (2003) (Park J.)
Limitation Act 1980, ss.2 & 32(1)(c)—subsidiary company (C) paying advanced corporation tax in

accordance with UK law—parent company (X) of C resident in Member State other than UK—subsequently, in proceedings involving other parties (and of which C were aware), on similar facts ECJ declaring that application of UK law contrary to EC Treaty art. 52—C claiming restitution to recover the tax paid on ground that it was made under a mistake of law—held, the limitation period for C's claim began to run, not from the date when C were aware of the argument that succeeded in the ECJ, but from the later date of the relevant ECJ decision, since that was the date upon which the mistake became reasonably discoverable (see *Civil Procedure* 2003, Vol.2, para. 8-64)

■ G.K.N. WESTLAND HELICOPTERS LTD. v. KOREAN AIR LINES CO. LTD. [2003] EWHC 1120 (Comm); *The Times*, June 11, 2003 (Morison J.)
CPR rr.36.13, 36.14, 44.3 & 44.12, Warsaw Convention art. 22.4—in air carriage case, defendants (D) making offer to claimants (C) to settle and, subsequently, making payment into court—payment in exceeding offer—C accepting payment in—D applying for order that, notwithstanding C's acceptance of the payment in, they (C) were not entitled to their costs and a costs order in C's favour should not be deemed to have been made under r.44.12(1)(b)—held, refusing application (1) art. 22.4 declares that a domestic court may award a claimant costs, except where "the amount of damages awarded" does not exceed an offer made by a defendant carrier within a specified period, (2) D's payment in fell within "the amount of damages awarded" in art. 22.4, (3) the payment in exceeded D's previous offer, (4) the exception in art. 22.4 therefore did not apply and in the circumstances of this case there was no conflict between the Convention and CPR provisions (see *Civil Procedure*, Vol.1, paras 36.13.1 & 4.3.10)

■ GOVERNMENT OF THE UNITED STATES OF AMERICA v. MONTGOMERY (NO. 2) [2003] EWCA Civ 392; [2003] 1 W.L.R. 1916, CA (Lord Woolf C.J., Kennedy & Scott Baker L.JJ.)
CPR Sched.1, RSC O.115, rr.13 & 23(b), Human Rights Act 1998, s.6 & Sched.1, Pt I, art. 6, Criminal Justice Act 1988, s.97—following fraud trial in which US citizen convicted, US court making confiscation order against his spouse (D)—on D's appeal, US Court of Appeals applying fugitive disentitlement doctrine and dismissing appeal—US government (C) applying for that order to be registered by High Court as an external confiscation order under s.97—judge granting application ([2002] EWHC 1113 (Admin))—with permission of judge, D appealing on ground that, under s.97(1)(c), the judge had not been entitled to register the confiscation order since it would be contrary to the interests of justice to do so—held, dismissing appeal, (1) the application of the fugitive disentitlement doctrine in the US proceedings did not make it unjust to register the confiscation order, (2) it was significant that the US Court of Appeals had concluded that the application of the doctrine was the only available sanction that could achieve obedience to its order—Court observing that in most applications to register, it will be unnecessary to refer in detail to the art. 6 jurisprudence (see *Civil Procedure* 2003 Vol.1 para. sc115.13.2, and Vol.2 paras 3D-12 & 3D-34)

■ HACKNEY LONDON BOROUGH COUNCIL v. DRISCOLL [2003] EWCA Civ 1037, *The Times* August 29, 2003, CA (Kennedy & Brooke L.JJ. and Holman J.)
CPR r.39.3(5), Human Rights Act 1998 Sched. 1 Pt. I art. 6—local authority landlords (C) bringing possession proceedings against tenant (D)—at hearing attended by D, proceedings adjourned for a new date of which D to be notified—in event D not so notified—consequently, possession order made against D at trial which he failed to attend—district judge refusing D's application to set order aside and circuit judge dismissing D's appeal—held, dismissing D's further appeal, (1) there is a distinction between a case (a) where party has no notice of proceedings at all, and (b) where he had attended court in connection with them, but received no notice of the date appointed for trial, (2) the common law principles as to setting aside judgments stated in White v. Weston [1968] 2 Q.B. 647, CA, do not extend to a party such as D who fell into the second category, (3) the judge was right to apply r.39.3(5), (4) the criteria set out in para. (c) of that rule (whether reasonable prospect of success) does not offend any fundamental principle of justice or any principle of ECHR jurisprudence (see *Civil Procedure* 2003 Vol.1 paras 39.3.1 & 39.3.7, and Vol.2 para. 3E-12)

■ HACKNEY LONDON BOROUGH COUNCIL v. SIDE BY SIDE (KIDS) LTD. *The Times* August 5, 2003 (Stanley Burnton J.)
Housing Act 1980, s.89(1)—by consent order, charity (D) agreeing to give up possession of property to council (C) in return for alternative site—D not giving possession on ground that alternative site not fit—C issuing writ of possession—deputy master granting stay of execution—held, allowing C's application to set aside master's order, (1) the restrictions on discretion as to postponing possession imposed by s.89(1) apply to orders for possession made, not only in county courts, but also in the High Court, (2) s.89(1) applies whether the possession order is made by

consent or not—*Bain and Co. v. Church Commissioners for England* [1989] 1 W.L.R. 24, not foll'd to (see *Civil Procedure* 2003, Vol.1, para. 55.18.1, and Vol.2, para. 3A-299)

■ JAMES v. BAILY GIBSON & CO. [2003] EWCA Civ 1690; October 20, 2002, CA, unrep. (Judge & May L.JJ.)
CPR rr.1.1, 3.1.2(f), 3.1(2)(k) & 3.1(3) & 52.3, Access to Justice Act 1990, s.54(4), Human Rights Act 1998, Sched.1, Pt I, art. 6, Practice Direction (Appeals) para. 4.18—following loss of personal injuries action against her employers, claimant (C) bringing claim against her solicitors (D) for professional negligence—experts meeting and recommending that opinion of expert psychiatrist be obtained as it would be relevant to C's claim that she was suffering continuing pain—C refusing to attend for examination by nominated expert—on D's application, judge staying C's claim (r.3.1(2)(f))—single lord justice sitting in open court granting C permission to appeal limited to ground whether the loss of trial date, consequent upon the judge's order, constituted a violation of C's art. 6 rights—at hearing of appeal, C applying for re-consideration of single lord justice's refusal to grant permission to appeal on other grounds—held, allowing appeal, (1) the court has power in an appropriate case, and when it is reasonable, just and proportionate to do so, to stay proceedings if the claimant refuses to cooperate in a medical examination which the justice of the case reasonably requires, (2) in the circumstances of this case, the judge's order had the effect of denying C the opportunity of recovering damages, not only on the heads of claim to which psychiatric evidence would be relevant, but also on heads which were unaffected by such evidence, and to this extent the order was disproportionate, accordingly (3) in exercise of particular case management powers (rr.3.1(2)(k) & 3.1(3)), the stay should be lifted to the extent that C's claim should be allowed to proceed on those issues unaffected by the psychiatric evidence, (4) if, after an oral hearing of an application for permission to appeal, limited permission is given on one or more issues but refused on others, the applicant cannot renew the application on the issues on which permission has been refused at the hearing of the appeal—*Fieldman v. Markvoic, The Times*, July 31, 2001, ref'd to [Ed.: Former authorities on imposing stay pending medical examination (*e.g. Jackson v. Mirror Group Newspapers Ltd.*, *The Times*, March 4, 1994, CA) not referred to; this case decided before insertion of para. 4.21 (foreshadowed by Court) in *Gregory v. Turner* [2003] EWCA Civ 183; [2003] 1 W.L.R. 1149, CA] (see *Civil Procedure* 2003, Vol.1, paras 3.1.7, 35.1.1, 52.3.6, and Vol.2, paras 9A-161 & 9A-163)

■ LAWAL v. NORTHERN SPIRIT LIMITED [2003] UKHL 35; 153 New L.J. 1005 (2003), H.L.
Human Rights Act 1998, Sched.1, Pt I, art. 6.1—employee (C) bringing claim before employment tribunal against his employer (D) for racial discrimination—tribunal accepting D's argument that it had no jurisdiction to hear the claim—C appealing to EAT—on appeal, D represented by counsel (X) and C acting in person—X holding an appointment as a part-time judge of the EAT—EAT panel as constituted for C's appeal including a lay member who had previously sat with X in EAT—EAT dismissing C's objection to the constitution of the appeal tribunal—Court of Appeal dismissing C's appeal ([2002] EWCA Civ 1218)—held, a restriction on part-time judges appearing as counsel before a panel of the EAT consisting of one or two lay members with whom they had previously sat should be introduced, bringing EAT practice into line with that obtaining in employment tribunals—*Porter v. Magill* [2002] 2 W.L.R. 37, H.L., ref'd to (see *Civil Procedure* 2003, Vol.2, para. 9A-44.1)

■ LUCAS v. BARKING, HAVERING AND REDBRIDGE HOSPITALS NHS TRUST
[2003] EWCA Civ 1102; 153 New L.J. 1204 (2003) (Waller, Mantell & Laws L.JJ.)
CPR rr.31.14 & 35.10—in personal injury claim, claimant (C) serving experts' reports on defendants (D)—reports referring to C's witness statements and to previous expert's report—master granting D's application for order under r.31.14(2) for inspection of those documents—held, allowing C's appeal, the documents were part of the material instructions to C's experts within the meaning of r.35.10(3), consequently, (2) they were not privileged but their disclosure was restricted by r.35.10(4), and (3) there were no reasonable grounds for believing that the instructions were inaccurate or incomplete—*Taylor v. Bolton Heath Health Authority*, January 14, 2000, unrep., *Morris v. Bank of India*, January 15, 2001, unrep., ref'd to (see *Civil Procedure* 2003, Vol.1, paras 31.14.1, 35.10.3 & 35.10.5)

■ MOSCOW CITY COUNCIL v. BANKERS TRUST COMPANY *The Times*, September 1, 2003 (Cooke J.)
CPR rr.39.2 & 62.10, Arbitration Act 1996, s.68, Human Rights Act 1998, Sched.1, Pt I, art. 6—following arbitration of dispute between bank (D) and foreign local authority (C), D challenging award under s.68—D applying to judge for order that his judgment in these proceedings should not receive general publication—held, granting application, (1) the presumption of publication of judgments is not directly applicable to claims within r.62.10, nevertheless (2) although that rule disapplies r.39.2 in the proceedings to which it applies,

D's application was to be determined on equivalent criteria—*Scott v. Scott* [1913] AC 417, H.L., ref'd to (see *Civil Procedure* 2003, Vol.1, para. 39.2.1, and Vol.2, paras 2E-16 & 2E-240)

■ PANTMAENOG TIMBER CO. LTD., IN RE, [2003] UKHL 49; *The Times*, August 7, 2003, H.L.
Company Directors Disqualification Act 1986, s.7, Insolvency Act 1986, s.236—held, reversing decision of Court of Appeal made on hearing of consolidated appeals (see In re *Pantmaeong Timber Co. Ltd.*, [2002] Ch. 239, CA), a court has power on the application of the Official Receiver to make an order under s.236 for the production of documents in circumstances where the sole purpose of the application is to obtain documents for use as evidence in pending disqualification proceedings against a former director under the 1986 Act (see *Civil Procedure* 2003, Vol.1, para. 31.0.7)

■ ROYAL BANK OF CANADA v. SECRETARY OF STATE FOR DEFENCE [2003] EWHC 1841 (Ch); May 14, 2003, unrep. (Lewison J.)
CPR rr.1.1 & 44.3—government (D) taking lease of property from bank (C)—D giving C series of notices of surrender of lease—C bringing proceedings in which issues arising as to whether D entitled to serve notice and whether notices effective—C, but not D, willing to attempt to settle claim by mediation—at trial, judge holding that C's claim failed—on question of costs, held, there should be no order for costs, because (1) as the majority of the evidence was directed at an issue of fact on which D failed, it would not be right for D to recover the whole of their costs, (2) though the main issue was one of interpretation of a lease, the dispute was suitable for ADR, and (3) by their conduct, D did not abide by the Lord Chancellor's pledge of March 23, 2001, to the effect that government departments will use ADR in all suitable cases to settle disputes wherever the other party accepts it—*Dunnett v. Railtrack plc. (Practice Note)* [2002] EWCA Civ 303; [2002] 1 W.L.R. 2434, CA, ref'd to (see *Civil Procedure* 2003, Vol.1, paras 1.4.11 & 44.3.6)

■ SCT FINANCE LTD. v. BOLTON [2002] EWCA Civ 56; [2003] 3 All E.R. 434, CA (Waller & Rix L.JJ. and Wilson J.)
CPR rr.1.1(2)(c), 3.1(7), 44.3, 44.4, 44.5 & 47.6(2), Practice Direction (Costs) Sects.11.1 & 32.10(1)(c), Supreme Court Act 1981, s.51—hire purchase company (C) bringing claim in a county court against purchaser (D) of vehicle for arrears of instalments of £971—as a result of D bringing counterclaim against C (limited in amount to £10,000), Pt 20 claims brought (1) by C against car dealers (T1), and (2) by T1 against distributors (T2)—initially, claim allocated to fast track but subsequently re-allocated to multi-track—at trial, judge giving C judgment for £351 and dismissing D's counterclaim and the Pt 20 claims—as to costs, judge ordering (1) that T2's and T1's costs should be paid, respectively, by T1 and C, and (2) that C's costs (including those payable by C to T1) should be paid by D, subject to condition that D's costs liability, on detailed assessment on the standard basis, should not exceed £15,000—costs payable by C under the judge's order estimated at £50,000, including £42,000 payable to T1 (for T1's costs and for costs payable by T1 to T2, neither of which were subject to a ceiling)—C granted permission to appeal, but before appeal heard, final certificate issued following assessment proceedings for T1's costs—held, allowing C's appeal, (1) under s.51 and r.44.3, in the exercise of its discretion the court may make an order for costs quantified on a detailed assessment to be subject to a ceiling, (2) when assessed on the standard basis, costs can be allowed only if they are proportionate to the matters in issue (rr.1.1(2)(c), 44.4 & 44.5), (3) the condition imposed was unprincipled because it purported to make allowance for lack of proportion in circumstances where full allowance for this would be made in the process of assessment, further (4) the judge failed to take into account all that he was required to take into account—Court observing that D should have been served by T1 with notice of commencement of the detailed assessment of their bill, and in the event of his serving points in dispute, with notice of the assessment hearing (r.47.6(2) & Sect. 32.10(1)(c))—Court also (1) observing that where litigation has involved a chain of Pt. 20 parties (*e.g.* C, T1 & T2), and costs orders are made up the chain, with a final order being made incorporating all those costs against one party (*e.g.* D), all such costs should be assessed together, and (2) suggesting that where (as in this case) this has not happened, and a final certificate has been given in assessment proceedings arising from one of the costs orders and held in the absence of the ultimate paying party, that certificate might be set aside under r.3.1(7) (see *Civil Procedure* 2003, Vol.1, paras 1.3.5, 3.1.9, 44.3.6, 44.4.3, 44.5.4, 44PD.5, 47.6.1, 47PD.5)

■ SECRETARY OF STATE FOR HEALTH v. NORTON HEALTHCARE LTD *The Times*, August 26, 2003 (Lloyd J.)
CPR rr.1.1(2)(a) & 3.1(1)(f), Supreme Court Act 1981, s.49(3), Human Rights Act 1998, Sched.1, Pt I, art. 6—in claim brought by health authorities (C) against drug companies (D), C alleging that D operated unlawful price fixing cartel—SFO conducting investigation to discover whether criminal offence had been committed—as a consequence,

D not having access to any person who was employed by them at the time and who had knowledge of relevant events—D applying for stay of claim—held, refusing application, (1) witness availability is a risk inherent in all litigation, (2) there was no guarantee that the witnesses would become available at a later date, (3) the fact that C was an organ of the state and caused the unavailability of the witnesses did not prejudice C's right to a fair trial (see *Civil Procedure* 2003, Vol.1, paras 1.3.6 & 3.1.7, and Vol.2, paras 3D-34 & 9A-161)

■ SECRETARY OF STATE FOR TRADE AND INDUSTRY v. SWAN [2003] EWHC 1780 (Ch); *The Times*, August 18, 2003 (Laddie J.)
CPR r.32.1, Company Directors Disqualification Act 1986, ss.6 & 16, Practice Direction (Directors Disqualification Proceedings) para. 9.1—Secretary of State (C) bringing proceedings against director (D) under s.6—C not complying with s.16 (notice of intention to bring proceedings)—evidence in support of application consisting of affidavit by chief examiner (X) of the disqualification unit of the Insolvency Service—D applying to strike out the evidence in its entirety—held, dismissing the application, (1) failure to give 10 days notice as required by s.16(1), when taken with other factors, could render disqualification proceedings a nullity, (2) much of X's evidence did not support C's allegations and did not give a fair and balanced picture, (3) C's failure to give notice coupled with the overstatement and unfair assessment of X's evidence made the proceedings defective, unfair and harmful to D, however, (4) in these circumstances, D's remedy would be to apply either (a) to strike out the proceedings in their entirety if they were thereby rendered an abuse, or (b) to strike out only the offending passages of X's evidence (see *Civil Procedure* 2003, Vol.1, paras 32.1.1 & B1-009)

■ STAINES v. WALSH [2003] EWHC 1486 (Ch); *The Times*, August 1, 2003 (Laddie J.)
CPR r.25.1(1)(f)—claimant (C) granted freezing order, freezing defendant's (D's) assets at level of £180,000—C giving cross-undertaking in damages and disclosing to court property asset with £400,000 equity—subsequently, C re-mortgaging property, thereby substantially reducing equity (possibly below, £180,000)—C applying for variation of the freezing order, increasing financial level—held, dismissing the application, (1) it is inherent in the freezing order jurisdiction that a claimant must disclose to the defendant any change in his financial position affecting his ability to honour his cross-undertaking, (2) in the circumstances, it was wholly inappropriate to extend the freezing order (see *Civil Procedure* 2003, Vol.1, para. 25.1.27)

■ TSAVLIRIS RUSS (WORLDWIDE SALVAGE & TOWAGE) LTD. v. R.L. BARON SHIPPING CO. S.A. (THE "GREEN OPAL") [2003] 1 Lloyd's Rep. 523 (Tomlinson J.)
CPR rr.32.5, 33.2 & 33.4, Civil Evidence Act 1995, s.3—professional salvors (C) entering into contract with owners of cargo (D) on sunk ship—contract providing for representative of D (Y) to be present at site to monitor work carried out by C—C bringing claim against D for monies due under the contract and D counterclaiming for breach—witness statements signed by Y served by D on C—statements containing opinion evidence and accompanied by notices under r.33.2 indicating that D (1) intended to rely on the hearsay evidence contained in the statements but (2) did not intend to call Y to testify at the trial—however, after discussions between C and D, trial beginning on understanding that Y would be called by D to give evidence—nevertheless, shortly afterwards D announcing that they did not propose to call Y—C applying under r.33.4 for permission call and to cross-examine Y on his witness statements—thereupon, D withdrawing the witness statements from evidence—held, refusing C's application (1) r.33.4 does not permit, because s.3 does not permit, the cross-examination by one party of a person upon whom the other party had indicated he proposed to rely where that statement is not in the event adduced in evidence, (2) although it was made clear at the outset of the trial that D intended to rely on Y's witness statements, they had not at that stage irrevocably adduced it or put it in evidence and adopted it as part of their case—In *re Rex Williams Leisure Plc.* [1994] Ch. 1, *McPhilemy v. Times Newspapers Ltd.* (No. 2) [2000] 1 W.L.R. 1732, CA, ref'd to (see *Civil Procedure* 2003, Vol.1, paras 33.2.2 & 33.4.1, and Vol.2, para. 9B-273)

■ Y. v. ATTORNEY GENERAL [2003] EWHC 1462 (Ch); June 24, 2003, unrep. (Sir Andrew Morritt V.-C.)
CPR rr.5.4(2)(c) & 39.2(3)(c), Practice Direction (Miscellaneous Provisions Relating to Hearings) para. 1.5(10), Human Rights Act 1998, Sched.1, Pt I, art. 6—trustees of charity applying to court for directions in relation to certain pending proceedings—application heard in private in accordance with para. 1.5(10)—held (1) the court was entitled to pronounce judgment in private, (2) the trustees' application did not (within the meaning of art. 6.1) determine the civil rights of anyone, (3) even if it did, the pronouncement of judgment in public was not required by art. 6 because (a) the hearing in private was justified, (b) as a practical matter, the

court's judgment in this case could not be anonymised or abridged, and (c) copies of the judgment could be made available in accordance with r.5.4(2)(c)—observations on distinction between restrictions (a) on obligation to hold trial in public and (b) on obligation to pronounce judgment in public (see *Civil Procedure* 2003, Vol.1, paras 5.4.1, 39.2.1, 39.3.7, 39PD.1 & 40.2.5 and Vol.2, para. 3D-34)

## Practice Directions

■ PRACTICE NOTE (CHANCERY DIVISION : REMUNERATION OF JUDICIAL TRUSTEES) [2003] 3 All E.R.974, Ch.D.
Judicial Trustees Act 1896, s.1(5), Judicial Trustees Rules 1983 r.11—draft common form of order for assignment of remuneration to a judicial trustee under s.1(5) and r.11—practice and matters to be taken into account by court in determining reasonable remuneration (see *Civil Procedure* 2003, Vol.2, para. 6D-28)

## Statutory Instruments

■ CIVIL LEGAL AID (GENERAL) (AMENDMENT) REGULATIONS 2003 (S.I. 2003 No. 1312)
amend the Civil Legal Aid (General) Regulations 1989 (S.I. 1989 No. 339)—provides that in cases, other than where there is to be an assessment of costs payable by another party to the proceedings, the Area Director will carry out civil legal aid costs assessments where the total claim does not exceed £2,500 (in other cases the courts will make the assessment) (regs.2 & 3)—further provides that where the Area Director makes an assessment, the costs allowed do not have to be the same as those which the courts would allow (reg. 2)—also removes the requirement of an appellant in an appeal against a cost assessment in a publicly funded case to notify the Lord Chancellor of the appeal (reg. 4)—in force July 1, 2003

■ CIVIL PROCEDURE (AMENDMENT NO. 4) RULES 2003 (S.I. 2003 No. 2113)
amend CPR rr.20.7, 20.8 (Pt 20 claims), 30.1 (Transfer), 34.13 (Letter of request), 34.16 (Evidence for foreign courts), 44.12A (Costs-only proceedings), 45.1 (Fixed costs), 57.2 (Probate claims) and 70.5 (Enforcement of awards of bodies)—insert Sect. III in Pt 34 (rr.34.22 to 34.24) (Taking of evidence in member states of EU), Sect. II in Pt 45 (rr.45.7 to 45.14 (Fixed costs in costs-only proceedings in road traffic disputes), Sect. III in Pt 52 (r.52.7) (Re-opening appeals in High Court and Court of Appeal), and Pt IV in Sched.1, RSC O.115 (rr.37 & 38) (Registration for enforcement of International Criminal Court orders)—revoke Sched.1, RSC O.91, and Sched.2, CCR O.4, r.3, O.48D and O.49, rr.4A, 5 & 18B—in force October 6, 2003, January 1, and April 1, 2004

■ COURT OF PROTECTION (AMENDMENT) RULES 2003 (S.I. 2003 No. 1733)
increase various fees payable under Court of Protection Rules 2001 (S.I. 2001 No. 824)—amend paras 1, 1A, 2 & 3 of column 2 in Appendix—in force August 1, 2003 (see *Civil Procedure* 2003, Vol. 6B-318, pp 1494-95)

■ DISTRESS FOR RENT (AMENDMENT) RULES 2003 (S.I. 2003 No. 1858)
Law of Distress Amendment Act 1888, s.8 and Law of Distress Amendment Act 1895, s.3—amend Distress for Rent Rules 1988 (S.I. 1988 No. 2050) App 1—increase fees charged for levying distress for debts (under the Road Traffic Act 1991, s.78) and for rent, and for taking possession—substitute references to detailed assessment for taxation—in force August 15, 2003

■ DISTRESS FOR RENT (AMENDMENT NO. 2) RULES 2003 (S.I. 2003 No. 2141)
Law of Distress Amendment Act 1888, s.8 and Law of Distress Amendment Act 1895, s.3—clarify amendments made to para. 1 of App 1 to Distress for Rent Rules 1988 (S.I. 1988 No. 2050) by Distress for Rent (Amendment) Rules 2003 (S.I. 2003 No. 1858)—in force August 15, 2003

■ SECRETARY OF STATE FOR CONSTITUTIONAL AFFAIRS ORDER 2003 (S.I. 2003 No. 1887)
Ministers of the Crown Act 1975—transfers to Secretary of State for Constitutional Affairs certain functions of Lord Chancellor under enactments listed in Sched.1 and functions of First Secretary of State under Courts Act 1971, s.28—makes consequential amendments to legislation in Sched.2, including Courts Act 1971, s.27, Administration of Justice Act 1985, s.53, Courts and Legal Services Act 1990, ss.58, 58A & 113(1), Human Rights Act 1998, ss.1, 2, 7, 14, 15, 16 & 20, Access to Justice Act 1999, s.30—in force August, 2003 (see *Civil Procedure* 2003, Vol.2, paras 3D-3 to 3D-26, 9A-863, 9B-70, 9B-86, 9B-110, 9B-112 & 9B-131)

# IN DETAIL

## CIVIL RESTRAINT ORDERS

In *Bhamjee v. Forsdick* [2003] EWCA Civ 1113; *The Times*, July 31, 2003, CA, the Court of Appeal said that the law and practice relating to "traditional" and "extended" *Grepe v. Loam* orders should be modified and that, henceforward, such orders should be known as, respectively, "civil restraint orders" and "extended civil restraint orders". In addition, the Court introduced a new form of order, the "general civil restraint order" (see below). These orders may be made in exercise of the inherent jurisdiction and are designed to protect the courts processes from abuse. They are in addition to the civil proceedings orders which may be made under the Supreme Court Act 1981, s.42 (see also CPR Sched.1, RSC O.94, r.15) to restrict vexatious legal proceedings. To a large extent, proceedings relating to these orders will be conducted on paper only. Collectively, these orders (including orders under s.42) may be known as "protective measures". They are Convention compliant.

This judgment of the Court of Appeal is a reaction to what the Court described the "very serious contemporary problems" created by the activities of litigants (usually subject to no court fees disincentive) "bombarding" the courts "with applications that have no merit at all". For some time, courts at various levels have been dealing with these problems in ways that were perhaps not obviously consistent with their powers.This case brings clarification and legitimacy. The Court's judgment is extensive and has to be "unpacked" and put back together again if it is to be properly understood. In what follows, an attempt is made to do that.

In addition to explaining the law and practice as to the protective measures, the Court encourages the courts to make greater use of their powers under CPR r.3.4 to strike out proceedings on abuse of process grounds and to do so of its own initiative at an early stage (r.3.4). That, of course, is quite different from imposing an order preventing a person from bringing or continuing proceedings without permission. The Court's guidance on that matter is dealt with in a separate part of this section of *CP News* (see "Striking out claims totally devoid of merit" below).

### Civil restraint order (simple form)

The Court explained that it is now well-settled that orders that came to be known as "*Grepe v. Loam* orders" (see *Grepe v. Loam* (1887) 37 Ch. 168) (customarily made in the Chancery Division) may be made by any court in the exercise of its inherent jurisdiction to protect its process from abuse (for the jurisdiction of the county court, see *Ebert v. Venvil* [2000] Ch. 484, CA, at p.490 *per* Lord Woolf MR). Henceforward, such an order is to be known as a "civil restraint order". (At one point in the Court of Appeal's judgment, for the purpose of distinguishing this form of the order from the other civil restraint orders explained below, it is described as an order "in simple form".)

A civil restraint order will restrain the litigant from making any further applications in those proceedings without first obtaining the permission of the court. Any application issued without such permission shall stand dismissed without the need for the other party to respond to it.

The Court said (paras 39-40) a judge at any level of court should consider whether to make a civil restraint order if a litigant makes a number of vexatious applications in a single set of proceedings all of which have been dismissed as being totally devoid of merit.

Because the effect of a civil restraint order is limited to the particular proceedings in which it is made, it will ordinarily remain in effect for the duration of the proceedings unless a judge subsequently considers it appropriate to set the order aside. The order will identify the judge to whom the necessary applications should be made.

The Court added that the civil restraint order is only apt to prohibit the issue of further applications within a single set of proceedings without the permission of a judge. It is likely to be appropriate when the litigant's conduct has the hallmark of one who is content to indulge in a course of conduct which evidences an obsessive resort to litigation and a disregard of the need to have reasonable grounds for making an application to the court.

Normally the Court would not expect a civil restraint order to be made until after the litigant has made a number of applications in a single set of proceedings all of which have been dismissed because they were totally devoid of merit. The characteristics of "vexatious" conduct set out by Lord Bingham CJ in his judgment in *Attorney General v. Barker* [2000] 1 F.L.R. 759, D.C., may be a useful indicator of the need for a civil restraint order.In that case the Chief Justice said (para. 19):

> "The hallmark of a vexatious proceeding is in my judgment that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceeding

> may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process."

The other party or parties to the litigation may apply for a civil restraint order, and on such application the court should make an order that is proportionate to the mischief complained of (para. 52).

## Extended civil restraint order

In *Ebert v. Venvil* Neuberger J. made (what came to be known as) an "extended *Grepe v. Loam* order", and this order was approved by the Court of Appeal ([2000] Ch. 484, CA). In *Bhamjee v. Forsdick*, the Court said (para. 41), because the nuisance represented by vexatious litigants is steadily increasing, it considered that the courts should now be more willing to make orders of the "extended" Grepe v. Loam type (now to be known as extended civil restraint orders).

An extended civil restraint order will restrain the litigant from instituting proceedings or making applications in the courts identified in the order "in or out of or concerning any matters involving or relating to or touching upon or leading to the proceedings in which it is made" without the permission of a judge identified in the order. The order should be made for a period not exceeding two years. The order will identify the judge to whom written applications for the requisite permission should be made. Any application for permission should be made on paper and will be dealt with on paper.

The Court said (paras 41-42), if a litigant exhibits the hallmarks of persistently vexatious behaviour, a judge of the Court of Appeal or the High Court or a designated civil judge (or his appointed deputy) in the county court should consider whether to make an extended civil restraint order against him. The Court of Appeal may make such an order, if appropriate, restraining all such activity in the Court of Appeal, in any division of the High Court, and in any county court. A High Court judge may make an order restraining the litigant in any division of the High Court or in any county court. If a Master or a district judge in a district registry of the High Court considers that an extended civil restraint order may be desirable he should transfer the relevant proceedings to a High Court judge for consideration as to whether the order should be made. At county court level such an order should only be made by a designated civil judge or his appointed deputy, and must be restricted to the control of litigious activity within his designated county court districts.A district judge should transfer the proceedings to his designated civil judge if he considers that an extended civil restraint order may be called for.

By the time the order comes to be made the litigant for whom the further restraint has been adjudged necessary will have exhibited not only the hallmarks of vexatiousness as explained by Lord Bingham CJ in Attorney General v. Barker (see above), but also the hallmarks of persistent vexatiousness as explained by the Chief Justice in the same case. In that case the Chief Justice said (para. 22):

> "The hallmark usually is that the plaintiff sues the same party repeatedly in reliance on essentially the same cause of action, perhaps with minor variations, after it has been ruled upon, thereby imposing on defendants the burden of revisiting claim after claim; that the claimant relies on essentially the same cause of action, perhaps with minor variations, after it has been ruled upon, in actions against successive parties who, if they were to be sued at all should be joined in the same action; that the claimant automatically challenges every adverse decision on appeal, and that the claimant refuses to take any notice of or give any effect to orders of the court. The essential vice of habitual and persistent litigation is keeping on and on litigating when earlier litigation has been unsuccessful and when on any rational and objective assessment the time has come to stop."

Although the Chief Justice used the expression "habitual and persistent litigation" the Court in *Bhamjee v. Forsdick* said (para. 42) it would not include the word "habitual" among the necessary criteria for an extended civil restraint order, but there has to be an element of persistence in the irrational refusal to take "no" for an answer before an order of this type can be made. The duration of the order may have to be extended if this is considered appropriate, but it should not be extended for a period greater than two years on any given occasion.

The other party or parties to the litigation may apply for an extended civil restraint order, and on such application the court should make an order that is proportionate to the mischief complained of (para. 52).

## General civil restraint order

After dealing with the civil restraint order, and the extended civil restraint order, the Court in *Bhamjee v. Forsdick* said that the experience of the courts now

shows that an even wider form of order may be necessary for a particularly rare type of litigant. A civil restraint order and an extended civil restraint order can only restrain the litigant in the context of the litigation he is currently conducting and other litigation to like effect. The Court noted that in *Ebert v. Venvil* [2000] Ch. 484, CA (a s.42 case), the Court of Appeal stated (at pp. 496-97) that there was no reason in principle why the court's inherent jurisdiction to prevent abuse of its processes should not apply "to vexatious proceedings which are manifestly threatened but not yet initiated" and should not be exercised "to prevent the serious loss that anticipated but unidentified proceedings could cause the defendants to those proceedings". The Court said the time had no come to make it clear that such a power is vested in the High Court and the county courts, and is to be called a power to make a general civil restraint order.

A general civil restraint order will have the same effect as an extended civil restraint order except that it will cover all proceedings and all applications in the High Court, or in the identified county court, as the case may be. It, too, may be made for a period not exceeding two years, unless subsequently extended.

The Court stated (paras 43-47) that if an extended civil restraint order is found not to provide the necessary curb on a litigant's vexatious conduct, a judge of the High Court or a designated civil judge (or his deputy) in the county court should consider whether the time has come to make a general civil restraint order against him.

The Court said that at High Court level, a High Court judge may make an order generally restraining the litigant from instituting any action or making any application in the High Court without first obtaining the permission of an identified High Court judge in an all-paper proceeding. The purpose of such an order will be to protect the process of the High Court from abuse, so that the order may not be extended to include the county court. The order will identify the judge to whom any applications for the requisite permission should be made. Any application for permission should be made on paper and will be dealt with on paper.

At the county courts level, a designated civil judge (or his appointed deputy) will also have power in an appropriate case to make a general civil restraint order limited in effect to his own county court districts to protect the process of those courts from abuse.

The Court further explained that there is no need for such a power to be vested in the Court of Appeal since would-be appellants all require permission to appeal, and consideration is already being given by the Civil Procedure Rules Committee to a rule which would enable, among other things, a lord justice to dismiss an application for permission finally on paper if in his view it is totally devoid of merit. If he is of that opinion, he should be able to express his reasons for refusing permission in these terms without feeling himself obliged to give any longer reasons.

It was noted above that the Court said that "the other party or parties to the litigation" may apply for a civil restraint order or an extended civil restraint order, and on such application the court should make an order that is proportionate to the mischief complained of (para. 52). Such orders can only restrain the litigant in the context of the litigation he is currently conducting and other litigation to like effect. In these circumstances, the standing of "the other party or parties to the litigation" to apply for an order will be established by their involvement in the litigation. However, where a general civil restraint order may be merited this will not necessarily be the case. Where it is the case, the other party or parties may apply for a general civil restraint order.

## Civil restraint orders and restrictions on the right of appeal

A civil restraint order, an extended civil restraint order, and a general civil restraint order are similar in that they prevent the person subject to it from taking certain actions in relation to litigation without first obtaining the permission of the court. To this extent, these orders are similar to civil proceedings order which may be made on the application of the Attorney General to the High Court under the Supreme Court Act 1981, s.42 against litigants found to be vexatious. Section 42(4) states that where a person subject to a civil proceedings order applies to the court for permission to take a particular step in litigation and the court refuses the application, no appeal shall lie. Where a person is subject, not to a civil proceedings order, but to civil restraint order, an extended civil restraint order, or a general civil restraint order, and he applies to the court for permission to take a certain action in relation to litigation, he may be granted the permission. If he is not, he may well apply for permission to appeal against that refusal as no provision comparable to s.42(4) applies to him. In *Bhamjee v. Forsdick*, the Court of Appeal were attracted to the idea that, nevertheless, it ought to be possible for the court to place some restriction on the right of a party in this position to apply for permission to appeal against a refusal by the court to permit him to take the litigation step he wished to take.

The Court said (para. 51) that if a litigant subject to an extended civil restraint order or a general civil restraint order (but not merely to a civil restraint order) continues to make applications pursuant to the relevant order which are dismissed as being totally devoid of merit, a High Court judge or a designated civil judge (or his deputy) should consider, in the exercise of the court's inherent jurisdiction, whether it is appropriate to direct that if any further application is dismissed on the same grounds that decision will be final. If the court takes that step then, thereafter, an appeal court will have no jurisdiction to grant permission to appeal against any subsequent refusal of permission, made on the grounds that the application is totally devoid of merit, any more than it has jurisdiction to grant permission to appeal against an order made by a judge exercising his statutory powers under section 42(4) of the 1981 Act. Any such refusal of permission will not be susceptible of appeal unless the judge who refuses permission himself grants permission to appeal.

The Court added that it considered that if a litigant persists in instituting proceedings or making applications which are totally devoid of merit despite all the earlier efforts the court has made to restrain his litigious activities and to protect its process from abuse, then this will be a legitimate reason why the court should eventually deprive him of the ordinary right to seek to appeal to a higher level of court. It will be sufficient if any subsequent applications are considered once only.

## STRIKING OUT CLAIMS TOTALLY DEVOID OF MERIT

CPR r.3.4(2) states (in part) that the court may strike out a statement of case if it appears to the court that it discloses no reasonable grounds for bringing or defending the claim (para. (a)) or that it is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings (para. (b)).

Rule 3.3(1) states that, except where a rule or some other enactment provides otherwise, the court may exercise its powers on an application or of its own initiative. Rule 3.4(4) states that the court may make an order of its own initiative without hearing the parties or giving them an opportunity to be heard. However, in that event a party affecting by the order may apply to have it set aside, varied or stayed.

Generally, the power to strike out referred to in r.3.4(2) will be exercised by the court on the application of a party. However, as the Court of Appeal explained in *Bhamjee v. Forsdick* [2003] EWCA Civ 1113; *The Times*, July 31, 2003, CA, a court, acting of its own initiative as provided by r.3.3, may strike out a statement of case under r.3.4(2). Indeed, the Court went further and said that, for the purposes of protecting court processes from abuse and for ensuring that cases are allotted an appropriate share of court resources (see r.1.1(2)(e)), the courts should look for positive opportunities in which to strike out of its own initiative.

The Court of Appeal stated (para. 38) that if a Part 7 or Part 8 claim form, or an application in pending proceedings, is filed in a court office, and it appears to court staff to be "vexatious in character", the staff should consult a member of the judiciary in order to ascertain whether he considers that this might be a case in which it would be appropriate to exercise his powers under r.3.3 to strike out the claim or application as being totally devoid of merit, without troubling the other side (other than to notify them of the course the court is taking). Procedural judges should be alert to identify cases in which it may be appropriate for them to act in this manner before proceedings are served on the other party (para. 53). If the judge decides to take this course and he considers that the claim or application is totally devoid of merit, his order must record that it has been struck out because it is totally devoid of merit. It is desirable that a record can be drawn up of orders of this type both at a local level and on a national basis.

In conclusion, it may be commented that, where a court strikes out a party's statement of claim in these circumstances, it may be appropriate for the court to give consideration to the question whether a civil restraint order should be made against the party in accordance with the procedures appropriate for the imposing of those orders (see above).

# CPR UPDATE

## AMENDMENTS TO PRACTICE DIRECTIONS

In Issue 07/03 of *CP News* (July 2003), in the "CPR Update" section, various amendments to CPR Practice Directions were noted. Among them were changes to Practice Direction (Landlord and Tenant Claims and Miscellaneous Provisions About Land) (supplementing CPR Pt 56), arising as a result of the coming into force of the Commonhold and Leasehold Reform Act 2002. The changes to this Practice Direction included transitional provisions to take account of the fact that certain relevant provisions in the 2002 Act were about to come into effect in England but would not come into effect in Wales until a later (and as yet undecided) date. The date for commencement in England is September 3, 2003, and not July 31, 2003, as stated in that issue of *CP News*.

## AMENDMENTS TO RULES

The Civil Procedure (Amendment No. 4) Rules 2003 (S.I. 2003 No. 2113) make additions to and amend the CPR in various respects. The changes coming into effect on October 6, 2003, are set out below. Changes not coming into effect until January 1 and April 1, 2004, will be explained in later issues of *CP News*. All of the additions and amendments will be included in Supplement 2.

The significant changes made by this statutory instrument, and coming into effect on October 6, 2003, relate to CPR Pt 45 (Fixed Costs), Pt 52 (Appeals) and Sched.1, RSC O.115 (Confiscation and Forfeiture, Etc.). Those changes have required a few consequential amendments elsewhere in the CPR. Other changes make revocations that can now be safely made or correct minor errors.

It may be noted that three of the provisions inserted in the CPR by this statutory instrument pre-figure further provisions in supplementing practice directions (see rr.30.1(2), 45.9(2) and 52.17(8)). Doubtless these will appear before October 6.

In what follows, paragraph and page references are to *Civil Procedure* 2003, Vol.1.

### *para. 30.1, p.681*

In r.30.1, at the beginning, insert "(1)", and then after para (1), but before the cross-reference, insert—

"(2) The practice direction may make provision about the transfer of proceedings between the court and a tribunal."

### *para. 43.2, p.980*

In para (j) of r.43.2(1), for "in Part 45" substitute "in Section I of Part 45"

### *para. 44.12A, p.1021*

In r.44.12A, paras (1) and (4) and paras (1A) and (4A) are inserted, with the result that, in its entirety, this rule reads as follows

**"Costs-only proceedings**

44.12A—(1) This rule sets out a procedure which may be followed where—

(a) the parties to a dispute have reached an agreement on all issues (including which party is to pay the costs) which is made or confirmed in writing; but

(b) they have failed to agree the amount of those costs; and

(c) except as referred to in paragraph (1A), no proceedings have been started.

(1A) The procedure set out in this rule may be followed if the only proceedings that have been started are proceedings under rule 21.10 or any other proceedings necessitated solely by reason of one or more of the parties being a child or patient.

(Rule 21.10 makes provision for compromise etc. by or on behalf of a child or patient)

(2) Either party to the agreement may start proceedings under this rule by issuing a claim form in accordance with Part 8.

(3) The claim form must contain or be accompanied by the agreement or confirmation.

(4) Except as provided in paragraph (4A), in proceedings to which this rule applies the court—

(a) may—

(i) make an order for costs to be determined by detailed assessment; or

(ii) dismiss the claim;

and

(b) must dismiss the claim if it is opposed.

(4A) In proceedings to which Section II of Part 45 applies, the court shall assess the costs in the manner set out in that Section.

(5) Rule 48.3 (amount of costs where costs are payable pursuant to a contract) does not apply to claims started under the procedure in this rule.

(Rule 7.2 provides that proceedings are started when the court issues a claim form at the request of the claimant)

(Rule 8.1(6) provides that a practice direction may modify the Part 8 procedure)"

*para. 45.0.1, p.1051*

Pt 45 (Fixed Costs) is now divided into two Sections, with the existing rr.45.1 to 45.5 constituting Section I and headed "I Fixed Costs", and a new Section II headed "II Road Traffic Accidents—Fixed Recoverable Costs in Costs-Only Proceedings". The new Section II consists of rr.45.7 to 45.14. The Table of Contents for Pt 45 is amended accordingly.

The provisions of Section II introduce a scheme providing that only specified fixed costs are to be recoverable, other than in exceptional circumstances, where costs-only proceedings are issued under rule 44.12A in relation to disputes arising out of road traffic accidents which are settled for an amount of agreed damages not exceeding £10,000. (As explained above, r, 44,12A is also amended.)

It is important to note that the provisions of Section II shall not apply to any costs-only proceedings arising out of a dispute, where the road traffic accident which gave rise to the dispute occurred before October 6, 2003.

*para. 45.1, pp 1051-1052*

In the heading to r.45.1, and in sub-rules (1) and (2) for "Part" in each place that it occurs substitute "Section"

The cross-reference after para. (1) of r.45.1 is omitted

*para. 45.6, p.1060*

In Pt 45, after r.45.6, insert the following new Section II (rr.45.7 to 45.14)

## "II. ROAD TRAFFIC ACCIDENTS—FIXED RECOVERABLE COSTS IN COSTS-ONLY PROCEEDINGS

### Scope and interpretation

45.7—(1) This Section sets out the costs which are to be allowed in costs-only proceedings in cases to which this Section applies.

(Costs-only proceedings are issued using the procedure set out in rule 44.12A)

(2) This Section applies where -

(a) the dispute arises from a road traffic accident;
(b) the agreed damages include damages in respect of personal injury, damage to property, or both;
(c) the total value of the agreed damages does not exceed £10,000; and
(d) if a claim had been issued for the amount of the agreed damages, the small claims track would not have been the normal track for that claim.

(3) This Section does not apply where the claimant is a litigant in person.

(Rule 2.3 defines "personal injuries" as including any disease and any impairment of a person's physical or mental condition)

(Rule 26.6 provides for when the small claims track is the normal track)

(4) In this Section—

(a) "road traffic accident" means an accident resulting in bodily injury to any person or damage to property caused by, or arising out of, the use of a motor vehicle on a road or other public place in England and Wales;
(b) "motor vehicle" means a mechanically propelled vehicle intended for use on roads; and
(c) "road" means any highway and any other road to which the public has access and includes bridges over which a road passes.Application of fixed recoverable costs

45.8 Subject to rule 45.12, the only costs which are to be allowed are—

(a) fixed recoverable costs calculated in accordance with rule 45.9;
(b) disbursements allowed in accordance with rule 45.10; and
(c) a success fee allowed in accordance with rule 45.11.

(Rule 45.12 provides for where a party issues a claim for more than the fixed recoverable costs)

### Amount of fixed recoverable costs

45.9—(1) Subject to paragraphs (2) and (3), the amount of fixed recoverable costs is the total of -

(a) £800;
(b) 20% of the damages agreed up to £5,000; and
(c) 15% of the damages agreed between £5,000 and £10,000.

(2) Where the claimant—

(a) lives or works in an area set out in the relevant practice direction; and
(b) instructs a solicitor or firm of solicitors who practise in that area,

the fixed recoverable costs shall include, in addition to the costs specified in paragraph (1), an amount equal to 12.5% of the costs allowable under that paragraph.

(3) Where appropriate, value added tax (VAT) may be recovered in addition to the amount of fixed recoverable costs and any reference in this Section to fixed recoverable costs is a reference to those costs net of any such VAT.

### Disbursements

45.10—(1) The court—

(a) may allow a claim for a disbursement of a type mentioned in paragraph (2); but
(b) must not allow a claim for any other type of disbursement.
(2) The disbursements referred to in paragraph (1) are—

(a) the cost of obtaining -
(i) medical records;
(ii) a medical report;
(iii) a police report;
(iv) an engineer's report; or
(v) a search of the records of the Driver Vehicle Licensing Authority;
(b) the amount of an insurance premium;
(c) where they are necessarily incurred by reason of one or more of the claimants being a child or patient as defined in Part 21—
(i) fees payable for instructing counsel; or
(ii) court fees payable on an application to the court;
(d) any other disbursement that has arisen due to a particular feature of the dispute.
("insurance premium" is defined in rule 43.2)

### Success fee

45.11—(1) A claimant may recover a success fee if he has entered into a funding arrangement of a type specified in rule 43.2(k)(i).

(2) Where the parties have not agreed the amount of the success fee it shall be assessed by the court.

(Rule 43.2(k)(i) defines as funding arrangement as including a conditional fee agreement or collective conditional fee agreement which provides for a success fee)

### Claims for an amount of costs exceeding fixed recoverable costs

45.12—(1) The court will entertain a claim for an amount of costs (excluding any success fee or disbursements) greater than the fixed recoverable costs but only if it considers that there are exceptional circumstances making it appropriate to do so.

(2) If the court considers such a claim appropriate, it may—

(a) assess the costs; or
(b) make an order for the costs to be assessed.
(3) If the court does not consider the claim appropriate, it must make an order for fixed recoverable costs only.

### Failure to achieve costs greater than fixed recoverable costs

45.13—(1) This rule applies where -

(a) costs are assessed in accordance with rule 45.12(2); and
(b) the court assesses the costs (excluding any VAT) as being an amount which is less than 20% greater than the amount of the fixed recoverable costs.
(2) The court must order the defendant to pay to the claimant the lesser of—

(a) the fixed recoverable costs; and
(b) the assessed costs.

### Costs of the costs-only proceedings

45.14 Where—

(a) the court makes an order for fixed recoverable costs in accordance with rule 45.12(3); or
(b) rule 45.13 applies,
the court must—

(i) make no award for the payment of the claimant's costs in bringing the proceedings under rule 44.12A; and
(ii) order that the claimant pay the defendant's costs of defending those proceedings."

*para. 52.0.1, p.1253*

Pt 52 (Appeals), heretofore divided into two Sections, is now divided into three by the addition of a new Section III headed "Provisions About Re-Opening Appeals" and consisting of one rule (r.52.17). The Table of Contents at the beginning of Pt 52 is amended accordingly.

The provisions of Section III (set out below) prescribe the procedure for applications to the Court of Appeal or the High Court to reopen the final determination of an appeal or application for permission to appeal. They follow upon the decisions *Taylor v. Lawrence* [2002] EWCA Civ 90; [2002] 3 W.L.R. 640, CA, and *Seray-Wurie v. Hackney London Borough Council* [2002] EWCA Civ 909; [2003] 1 W.L.R. 257, CA, dealing with the powers of those Courts to reopen appeals in exceptional circumstances (see Civil Procedure 2003, Vol.1, para. 40.2.1).

*para. 52.16, p.1283*

After para. 52.16.2, add the following new Section

## "III Provisions about re-opening appeals

### Reopening of final appeals

52.17—(1) The Court of Appeal or the High Court will not reopen a final determination of any appeal unless—

(a) it is necessary to do so in order to avoid real injustice;
(b) the circumstances are exceptional and make it appropriate to reopen the appeal; and
(c) there is no alternative effective remedy.
(2) In paragraphs (1), (3), (4) and (6), "appeal" includes an application for permission to appeal.

(3) This rule does not apply to appeals to a county court.

(4) Permission is needed to make an application under this rule to reopen a final determination of an appeal even in cases where under rule 52.3(1) permission was not needed for the original appeal.

(5) There is no right to an oral hearing of an application for permission unless, exceptionally, the judge so directs.

(6) The judge will not grant permission without directing the application to be served on the other party to the original appeal and giving him an opportunity to make representations.

(7) There is no right of appeal or review from the decision of the judge on the application for permission, which is final.

(8) The procedure for making an application for permission is set out in the practice direction."

### *para. 57.2, p.1418*

Para. (3) of r.57(2) is substituted as follows

"(3) Probate claims in the county court must only be brought in—

(a) a county court where there is also a Chancery district registry; or
(b) the Central London County Court."

### *para. 70.5, pp 1462-63*

In para. (a) of r.70.5(1), after "money" insert "or other decision"

In para. (b) of r.70.5(1), at the end insert ", or that the decision may be enforced as if it were a court order"

Rule 70.5(2) is amended in several respects, and now reads in its entirety as follows

"(2) This rule does not apply to—

(a) any judgment to which Part 74 applies;
(b) arbitration awards; or
(c) any order to which RSC Order 115 applies.

(Part 74 provides for the registration in the High Court for the purposes of enforcement of judgments from other jurisdictions and European Community judgments)

(RSC Order 115 provides for the registration in the High Court for the purposes of enforcement of certain orders made in connection with criminal proceedings and investigations)"

In r.70.5(3), for "the award" substitute "an award of a sum of money"

Rule 70.5(8) is substituted as follows

"(8) If an enactment provides that an award or decision may be enforced in the same manner as an order of the High Court if it is registered, any application to the High Court for registration must be made in accordance with the relevant practice direction."

### *para. sc91.01, p.1691*

Sched.1, RSC O.91 (Revenue Proceedings) is revoked. The sole remaining rule in this Order was r.1 (Assignment to Chancery Division, etc.).

### *para. sc115.36, p.1776*

Sched.1, RSC O.115, heretofore divided into three Parts, is now divided into four by the addition of a new Pt. IV consisting of rr.37 and 38. The provisions of Section IV prescribe the procedure for the registration in the High Court for enforcement of orders of the International Criminal Court for the payment of fines, forfeitures and reparations. Note also references to RSC Ord. 115 in amendments to CPR r.70.5 explained above.

## "Part IV International Criminal Court Act 2001: fines, forfeitures and reparation orders

**Interpretation**

37. In this Part of this Order -

(a) "the Act" means the International Criminal Court Act 2001;
(b) "the ICC" means the International Criminal Court;
(c) "an order of the ICC" means -
(i) a fine or forfeiture ordered by the ICC; or
(ii) an order by the ICC against a person convicted by the ICC specifying a reparation to, or in respect of, a victim.

**Registration of ICC orders for enforcement**

38.—(1) An application to the High Court to register an order of the ICC for enforcement, or to vary or set aside the registration of an order, may be made to a judge or a Master of the Queen's Bench Division.

(2) Rule 13 and rules 15 to 20 in Part I of this Order shall, with such modifications as are necessary and subject to the provisions of any regulations made under section 49 of the Act, apply to the registration for enforcement of an order of the ICC as they apply to the registration of an external confiscation order."

### *para. cc4.3, p.1791*

Sched. 2 CCR Ord. 4 (Venue for Bringing Proceedings), r.3 (Proceedings relating to land) is revoked.

*para. cc48D.1, p.1875*

Sched. 2 CCR Ord. 48D (Enforcement of Fixed Penalties Under the Road Traffic (Vehicle Emissions) (Fixed Penalty) Regulations 1997) is revoked.

*paras cc49.4A & cc49.5, p.1878*

Sched.2, CCR O.49 (Miscellaneous Statutes), r.4A (Applications under Copyright, Designs and Patents Act 1988, ss.114, 204 & 231) and r.5 (Fair Trading Act 1973) are revoked.

*para. cc49.18B, p.1885*

Sched.2, CCR O.49 (Miscellaneous Statutes), r.18B (Applications under Trade Marks Act 1994, s.19) is revoked.



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