CIVIL PROCEDURE NEWS

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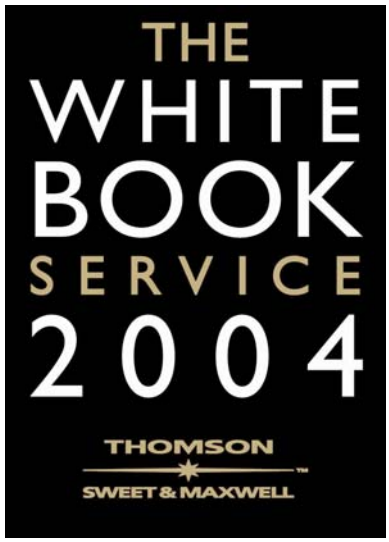

IN BRIEF

■ **KESSLAR v. MOORE & TIBBITS** [2004] EWCA Civ 1551, November 3, 2004, CA (Buxton, Sedley & Latham L.JJ.)

CPR r.19.5(3)(a), Sched. 1 RSC Ord. 81, r.1, Limitation Act 1980 s.35(6)—solicitor partnership (X) acting for purchaser (C) of property—subsequently, X acquired by another partnership (D), but none of partners in X becoming partners in D—C complaining to D about negligent handling of the property purchase, and D referring matter to their insurers—shortly before expiry of limitation period, C commencing proceedings against D for professional negligence—after expiry of that period, D disputing that C had a cause of action against them—C then applying to have X substituted for D as defendants under s.35(6) and r.19.5(3(a)—district judge dismissing application and C's appealed dismissed by county court judge—held, allowing C's appeal, C always intended to sue X and D were named in the claim form in mistake for *X—Horne-Roberts v. SmithKline Beecham* [2001] EWCA Civ 2006, [2002] 1 W.L.R. 1662, CA ref'd to (see ***Civil Procedure 2004*** Vol. 1 paras 19.5.1 & sc81.4.1, and Vol. 2 para. 8-86)

■ **DEG-DEUTSCHE INVESTITIONS-UND ENTWICKLUNGSGESELLSCHAFT MBH v. KOSHY** [2004] EWHC 2896 (Ch), January 7, 2005 (Hart J.)

CPR rr. 3.1(7), 25.3 & 40.12—in proceedings commenced in 1996, claimant (C) obtaining freezing order against defendant (D)—D applying to set order aside on ground of material non-disclosure by C—procedural judge's order (1) dismissing C's application, and (2) ordering D to pay C's costs in any event, entered in March 1998 (before CPR in effect)—at trial of action in 2001, judge dismissing C's claim—on basis that certain findings of trial judge revealed that (contrary to the findings of procedural judge) there had been material non-disclosure by C in their application for the freezing order, D appealing to Court of Appeal - following dismissal of this appeal, by which time March 1998 costs order against D amounting to £360,000, D applying to High Court for order setting aside the March 1998 order—on preliminary issues, held, (1) the court (a) had no inherent jurisdiction to make the order sought on D's application, and (b) had no jurisdiction under r.3.1(7), as that rule did not apply to orders made before the CPR came into effect, (2) as a result of the proceedings in the Court of Appeal, it would be an abuse of process to allow C's application to proceed (see ***Civil Procedure 2004*** Vol. 1 paras 3.1.9, 40.9.1 & 40.9.2)

■ **AKRAM v. ADAM** [2004] EWCA Civ 1601, *The Times*, December 29, 2004, CA (Brooke, Jonathan Parker & Keene L.JJ.)

CPR rr.1.1, 6.5(6), 13.3 & 39.3(5), Human Rights Act 1998 Sched. 1 Pt 1 art. 6—landlord (C) bringing fresh possession proceedings against protected tenant (D)—C serving claim form by first class post, sent to D's usual or last known address within r.6.5(6), being the address of the tenanted premises—D, who was not represented, not acknowledging service—in absence of D, court making order for possession—after execution of warrant, D applying successfully for order to be set aside on ground that he had not received notice of the proceedings—on C's appeal, county court judge finding that D had no defence and upholding order for possession—held, dismissing D's appeal, (1) where an unrepresented defendant claims he received no notice of proceedings, the court has a discretion, but not the duty, to set aside the judgment against him, (2) r.6.5 was drafted with the intention of overcoming known difficulties in the previous rules as to service, and is to be interpreted without reference to earlier case law, (3) the rules, by permitting service by post on an individual at his usual or last known address, and allowing such service to stand as good service unless it is known before a default judgment is entered that that method of service was ineffective, complies with the fair trial guarantees of art.6—***Cranfield v. Bridgegrove Ltd***. [2003] EWCA Civ 656, [2003] 1 W.L.R. 2441, CA, ***Hackney LBC v. Driscoll*** [2003] EWCA Civ 1037, [2003] 1 W.L.R. 2602, ref'd to (see ***Civil Procedure 2004*** Vol. 1 paras 6.5.3, 13.3.1 & 39.3.7)

■ **CAPITAL BANK PLC. v. STICKLAND** [2004] EWCA Civ 1677, December 10, 2004, CA, unrep. (Mance, Keene & Longmore L.JJ.)

CPR rr.1.1, 36.5, 36.12, 36.19(2) & 36.21—mortgagee bank (C) bringing claim alleging defendant (D) interfered with their right to possession of vessel—C making Pt 36 offer to settle case—time for acceptance within r.36.12 expiring on July 1, 2003—at start of trial in February 27, judge dismissing D's application under r.36.5(6)(b)(ii) (which was opposed by C) for permission to accept that offer—judge proceeding to hear case and giving judgment for C in sum exceeding C's offer—judge also ordering D to pay C's costs after July 1 on indemnity basis with interest at 10 per cent over base—held, (1) it is not illogical to allow a claimant to retain the benefit of an existing Pt 36 offer while refusing a defendant permission to accept it late, therefore (2) there is no justification for requiring a claimant to withdraw or reduce his offer as a condition of his opposing a defendant's application for late acceptance, (3) the court's discretion under r.36.5(6)(b)(ii) should be as wide as possible so as to advance the overriding objective, (4) a change of circumstance may be the

most important factor to take into account, (5) the judge was entitled to take into account (a) the lateness of D's application and his pre-trial conduct, and (b) that the application was made so late in the day that the court's normal wish to encourage settlement (so that other litigants can have their cases more speedily decided) had been effectively discounted, (6) the order as to interest on costs was not unjust within r.36.21(4)—relevance of pre-CPR authorities referred to—judge refusing to recuse himself on basis of bias created by his knowledge of payment in—***Cumper v. Pothecary*** [1941] 2 K.B. 58, CA, ***Garner v. Cleggs*** [1983] 1 W.L.R. 862, CA, ***Black v. Doncaster MBC*** [1999] 1 W.L.R. 53, CA, ***Flynn v. Scougall (Practice Note)*** [2004] EWCA Civ 873, [2004] 1 W.L.R. 3069, CA (see ***Civil Procedure 2004*** Vol. 1, paras 1.3.7, 1.3.9, 2.3.1, 36.5.1, 36.13.1, 36.13.2, 36.19.1, 36.21.1, 36.21.2, and Vol. 2, para. 9A-44.1)

- **COTTRELL v. GENERAL COLOGNE RE UK LIMITED** [2004] EWHC 2402 (Comm), October 20, 2004, unrep. (Morison J.)

CPR rr. 3.1(2)(a), 3.8, 33.2(4)(a) & 33.4(1) Civil Evidence Act 1995 s.2— Lloyd's syndicate (C) bringing contract claim against reinsurance company (D)—claim involving allegations of misrepresentation and non-disclosure—one allegation relating to what was said at meeting between parties attended by persons (W1 and W2) representing D—in exchange of witness statements by particular date in accordance with case management directions, D including statement of W1 but not of W2—subsequently, after the date for exchange, D serving on C two witness statements of W2 (now no longer employed by D)—in course of trial, D applying for extension of time for giving notice under r.33.2 of intention to rely on W2's statements as hearsay evidence, as W2 abroad and (for genuine personal and business reasons) not available to attend trial—held, refusing application (1) a party intending to rely on hearsay evidence must comply with r.33.2, (2) therefore he must serve notice no later than the latest date for serving witness statements (r.33.2(4)(a)), (3) although s.2(4) provides that failure to comply with rules of court does not affect the admissibility of hearsay evidence, the court has a discretion to refuse to admit hearsay evidence where there is a failure to comply with r.33.2(4)(a)), (4) as no sanction for breach of r.33.2(4)(a) is provided for by the rule, rr.3.8 and 3.9 do not apply, (5) the court has a general discretion to extend time for giving notice under r.33.2 (r. 3.1(2)(a)), (6) receiving W2's hearsay statements in evidence would unfairly prejudice C as they had been deprived of the opportunity to make an application under r.33.4 to have W2 called for cross-examination simply because D chose not (a) to take a statement from W2 initially, (b) to exchange it with their other statements, and (c) to serve their hearsay notice in time if minded to do so (see ***Civil Procedure 2004*** Vol. 1 paras 3.8.1, 33.2.3 & 33.4.1, and Vol. 2 para. 9B-272)

- **R. (on the application of MATHIALAGAN) v. SOUTHWARK LBC** [2004] EWCA Civ 1689, The Times, December 21, 2004, CA (Waller & Carnwath L.JJ. and Sir William Aldous)

CPR r. 39.3, Magistrates Courts Act 1980 s.142—on application of local authority (D), magistrates' court making liability orders against property owner (C) for non-payment of domestic rates—orders made in absence of C and his legal advisers—High Court judge refusing C's application to quash decision—held, dismissing C's appeal, (1) the power given in s.142 to re-hear a case applied to the magistrates' court's criminal jurisdiction, (2) certain authorities recognised a power to re-hear at common law and without statutory power being invoked, (3) but no general power exists at common law for a magistrates' court to reopen and re-hear a civil case—observations on contrast between s.142 and r.39.3 in this respect—***Liverpool City Council v. Pleroma Distribution Ltd.***, *The Times*, November 21, 2002, ***R. v. Secretary of State for the Home Department, Ex p. Al-Mehdawi*** [1990] 1 A.C. 876, H.L., ref'd to (see ***Civil Procedure 2004*** Vol. 1 para. 39.3.1)

- **SHAH v. IMMIGRATION APPEAL TRIBUNAL** [2004] EWCA Civ 1665, *The Times*, December 9, 2004, CA (Ward, Sedley & Carnwath L.JJ.)

CPR rr. 54.22 & 11(4)—adjudicator in Scotland rejecting asylum seeker's (C) claim—both Immigration Appeal Tribunal and judge refusing C permission to apply for judicial review of this decision—C making renewed application for such permission to Court of Appeal—on this appeal, for first time Secretary of State (D) challenging jurisdiction of High Court and Court of Appeal in this matter—in refusing C permission to apply for judicial review, held, (1) the procedure for disputing jurisdiction is laid down in CPR Pt 11, (2) D had not complied with r.11(4) and it was too late to dispute jurisdiction on the appeal, (3) on a timely application under r.11(1) in a case such as this, jurisdiction would be determined in accordance with the decision of the Court in ***R. (Majead) v. Immigration Appeal Tribunal***, [2003] EWCA Civ 615, *The Times*, April 24, 2003, CA (see ***Civil Procedure 2004*** Vol. 1 paras 11.1.1 & 54.22.1)

- **READ v. EDMED**, *The Times*, December 13, 2004 (Bell J.)

CPR rr. 36.21 & 44.3—claimant (C) bringing claim for personal injuries arising out of road accident—liability issue ordered to be tried as preliminary issue—C making Pt 36 offer to settle this issue on 50:50 basis—offer not accepted by D—at trial, judge holding that C equally responsible for accident and should recover 50 per cent of her damages—C applying for order for costs giving her (1) costs on standard basis up to time for acceptance of the offer, and (2) on an indemnity basis thereafter—held, where, in a relatively uncomplicated claim for damages for personal injury and consequential loss, the claimant (1) made a valid Pt 36 offer,

or other admissible offer, to settle an issue of liability, and (2) the court gave judgment for that amount, the claimant should be entitled to the benefit of an award of indemnity costs from the time of the expiry of the offer, just as would if r.36.21 had applied to the matter—judge recalling judgment under ***Pittalis v. Sherefettin*** [1986] Q.B. 868, CA, jurisdiction (see ***Civil Procedure 2004*** Vol. 1 paras 36.21.1, 40.2.1)

■ **S. (A CHILD) (CONTACT DISPUTE: COMMITTAL), RE** [2004] EWCA Civ 1790, *The Times*, December 9, 2004, CA (Thorpe, Arden & Neuberger L.JJ.)

CPR Sched. 2, CCR Ord. 29, r. 1—mother (D) ordered to permit between child of the family (X) and X's father (C)—D failing to comply with order—C applying for D's committal for contempt for failing to comply with order—county court judge, granting application, committing D to prison, suspended for seven days on condition that D comply with the contact order—C applying for interim residence order in his favour during any period when D was in prison for breach of the contempt order—this latter application stayed pending D's appeal to the Court of Appeal against the contempt order—held, dismissing appeal, (1) faced with the persistent defiance of D, the judge had no realistic option other than to commit D for contempt, (2) committal is justified as a means of enforcing the rule of law and as a last resort to ensure compliance with court orders (see ***Civil Procedure 2004*** Vol. 1 paras 52.1.1 & cc29.1.4)

■ **TAIN INVESTMENTS LIMITED v. LOXLEYS** [2004] EWHC 2708 (Ch), July 22, 2004, unrep. (Blackburne J.)

CPR rr.35.1 & 35.4, Practice Direction (The Multi-Track) para. 5.1(4)—purchasers (C) of property bringing claim for professional negligence against solicitors (D) acting for them on sale—C alleging that particular clause in transfer was highly unusual and that D did not advise them properly about it—at case management conference, master refusing C's application for permission to call a solicitor expert to give evidence on unusual nature of clause—C granted permission to appeal on condition that C obtain draft report from such an expert—C obtaining such report from experienced conveyancing solicitor—held, dismissing C's appeal, (1) the point at issue was whether the proposed inclusion of the clause was something which D ought to have brought to C's attention, (2) the fact that a conveyancer may have regarded the clause as unusual or abnormal would not of itself be important—judge approving master's observation that the court resists the introduction of expert evidence from solicitors in relation to transactions except where the transaction in question is one which is likely to be entirely outside the sphere of knowledge of the judge and where the court would be assisted by the production of expert evidence—***X. v. Woolcombe Yonge*** [2001] Lloyd's Rep. P.N. 274, ref'd to (see ***Civil Procedure 2004*** Vol. 1 paras 35.4.1 & 29PD.5)

■ **WOOD v. CHIEF CONSTABLE OF WEST MIDLANDS POLICE** [2004] EWCA Civ 1638, *The Times*, December 13, 2004, CA (May, Dyson & Wall L.JJ.)

CPR r. 17.4, Limitation Act 1980 s.32A—claimant (C) bringing claim for libel—claim tried by judge and jury—during trial, after the defendant (D) had closed his case and given all his evidence, because he had failed to establish publication, C applying to amend case to add a claim in slander—application made after end of relevant limitation period—judge granting application—judge granting application and jury awarding C damages—held, dismissing D's appeal, (1) the judge had to decide whether it was equitable in all the circumstances, in particular those stated in s.32A(2), to allow the slander action to proceed and to permit the very late amendment to C's statement of case, (2) it was relevant, although not determinative that the condition in r.17.4(2) was fulfilled (see ***Civil Procedure 2004*** Vol. 1 para. 17.4.4, and Vol. 2 para. 8-66)

Practice Direction

■ **PRACTICE DIRECTION (PERIODICAL PAYMENTS UNDER THE DAMAGES ACT 1996) TSO CPR** Update 37 (December 17, 2004)

CPR Pt. 41, Damages Act 1996 s.2—supplements Section II of Pt 41 (as inserted by Civil Procedure (Amendment No. 3) Rules 2004)—factors to be taken into account when making a periodical payments award under s.2—matters to be specified in an order (including ensuring continuity of payment)—assignment or charge by beneficiary of order—settlement (including child or patient settlement)—Practice Direction (Structured Settlements) is revoked —in force on date of entry into force of Courts Act 2003 s.100 (Periodical payments) (see ***Civil Procedure 2004*** Vol. 1 paras 40CPD.1 & 41PD.7)

Statutory Instruments

■ **CIVIL PROCEDURE (AMENDMENT NO. 3) RULES 2004 (S.I. 2004 No. 3129)**

CPR Pts 36 & 41—insert Section II in Pt 41 to make provision about the exercise of court's jurisdiction under Damages Act 1996 s.2 to order periodical payments where award of damages for pecuniary loss made in personal injury action—amend Pt 36 to ensure that scheme for offers to settle and payments into court can work in cases in which periodical payments may be awarded—in force on date of entry into effect of Courts Act 2003 s.100 (Periodical payments) (see ***Civil Procedure 2004*** Vol. 1 paras 36.2.2 & 41.3.3)

CIVIL PROCEEDINGS FEES ORDER 2004 (S.I. 2004 No. 3121)

Courts Act 2003 ss.92 & 108(6), Insolvency Act 1986 ss.414 & 415—replaces Supreme Court Fees Order 1999 and County Court Fees Order 1999—fees to be taken listed in Sched. 1—Table of Comparison sets out where fees have been increased or new fees introduced—see also Courts Act 2003 (Commencement No. 8, Savings and Consequential Provisions) Order 2004 (S.I. 2004 No. 3123) art. 3 & Sched. Pt 1—in force January 4, 2005 (see ***Civil Procedure 2004*** Vol. 2 paras 10-1 & 10-13)

COURTS ACT 2003 (COMMENCEMENT NO. 8, SAVINGS AND CONSEQUENTIAL PROVISIONS) ORDER 2004 (S.I. 2004 No. 3123)

Courts Act 2003—brings into force on January 4, 2005, s.92 (Fees)—repeals Supreme Court Act 1981 s.130 (Fees to be taken in Supreme Court) and County Courts Act 1984 s.128 (Fees)—amends s.147(1) of 1984 Act — revokes Supreme Court Fees Order 1999 and County Court Fees Order 1999, except as to (1) any fee or other sum due under, or (2) refund of fees due or payable, or (3) any reduction or remission of fees, under such Orders before January 4, 2005 (see ***Civil Procedure 2004*** Vol. 2 paras 9A-429, 9A-760, 10-1 & 10-13)

IN DETAIL

Substituting new party where mistake

Sub-section (6)(a) of s.35 of the Limitation Act 1980, and the rules of court authorised by that section, CPR r.19.5(3)(a), continue to cause trouble. The Court of Appeal wrestled with these provisions in ***Kesslar v. Moore & Tibbits*** [2004] EWCA Civ 1551, November 3, 2004, C.A., and earlier in ***Parsons v. George*** [2004] EWCA Civ 912, [2004] 1 W.L.R. 3264, C.A. In both cases it was said that the law is as stated in ***Horne-Roberts v. SmithKline Beecham plc***. [2001] EWCA Civ 2006, [2002] 1 W.L.R. 1662, C.A., so it is important that what was said in that case is properly understood.

How does the trouble arise? The main problem is this. Let us imagine that, in January, a claimant (C) brings a claim against a defendant (D), and then, in October, C decides to bring in those proceedings what s.35 calls a "new claim", and that claim involves "the substitution of a new party". Section 35(1) states that in these circumstances the new claim against the new party (X) shall be deemed to be a separate action and to have been commenced, not in October when the joinder is made, but "on the same date as the original action", that is to say, in January. This is an example of the operation of the doctrine of "reference back", and it avoids a lot of procedural problems.

Now let is imagine further that by the time October rolled around, X had a limitation defence which had accrued to him in May. In English law, such a defence does to extinguish C's cause of action against X, but merely operates as a procedural bar.

What is X going to say to C? He is going to say: "your proceedings against me must be stayed because I have a limitation defence. What is D going to say to X? He is going to say: "that doesn't matter because, by operation of the doctrine of reference back (which I have suddenly learned to know and love) my claim against you is deemed to have been commenced in January, and at that date, time had not run in your favour".

If X then investigates the matter more thoroughly he will discover that s.35 has anticipated his difficulty and throws him a life-line. Section 35(5)(a) states that the court may not permit the substitution of him as a new party unless the substitution "is necessary for the determination of the original claim".

The policy consideration underlying this provision is a recognition of the fact that limitation defences are not to be lightly brushed aside and that the doctrine of reference back (whatever its merits in other respects) can operate unfairly where a party has an accrued limitation defence.

So the next question is: when may it be said that is "necessary" for the determination of the original claim? Section 35(6) states that in the case of a new claim involving a new party (such as our friend X) the substitution shall not be regarded as necessary unless one of the two conditions stated in that sub-section are fulfilled.

The condition mentioned in subs. (6)(a), and repeated (in slightly different terms) in r.19.5(3)(a), is that the new party is substituted for a party "whose name was given in any claim made in the original action in mistake for the new party's name". In r.19.5(3)(a) it is said that the court has to be satisfied that the new party is to be substituted "for a party who was named in the claim form in mistake for the new party".

Whenever issues of mistake arise in the law (whether in contract, tort or crime), the law flounders. Mistake in this context is no exception. The case law, both pre- and post-CPR is extensive and difficult to understand. The problem is that logic offers no single answer, and fairness considerations can offer many.

What is involved here is not simply a case management exercise. It is submitted that the problem cannot be approached on the basis that it is just a matter of interpreting r.19.5(3(a) in the light of the overriding objective, and dredging around in r.1.1 for some element that supports the desired result (and studiously ignoring others).

And it is not a matter of simply taking into account the kind of considerations that may be relevant when the court is only considering some routine procedural matter such as whether time should be extended for exchanging witness statements, or whether a late amendment to pleadings should be permitted (perhaps involving the addition of a further claim involving the same parties), or whether escape from a procedural sanction should be allowed.

Here we are concerned with the question whether an accrued limitation defence should be stifled on the basis of a necessary condition imposed not by rule but by statute and of which the court must be satisfied. Further, the court should not imagine that it is simply exercising some broadly based "toss of the coin" discretion. However, if the court decides that the necessary mistake condition is satisfied, it may decide that, in the exercise of a residual discretion, the substitution should nevertheless not be permitted.

As indicated above, recent decisions suggest that the definitive ruling on mistake in this context is to be found in the Horne-Roberts case, where the Court of Appeal applied the approach adopted by the Court in the pre-CPR

case of ***The Sardinia Sulcis*** [1991] 1 Lloyd's Rep. 201, C.A. What does the Horne-Roberts case say? It is submitted that the points to be derived from the case are these:

(1) r.19.5(3)(a) (and s.35(6)) allows more than the mere correction of the name of a party as it is, after all, a provision that allows the substitution of a new party for the original named party;

(2) in one sense, a claimant always intends to sue the person who is liable for the wrong that he has suffered; but the test cannot be that he has made a mistake which may be corrected where he sues another person, otherwise leave to substitute would always be granted;

(3) so there must be a test that includes, but is broader than, mere correction of name but narrower than substitution of the person intended to be sued for the person actually sued;

(4) the test is: is it possible to identify the intended defendant "by reference to a description more or less specific to the particular case"?; if it is, it is a mistake of the type covered by s.35(6)(a) as implemented by r.19.5(3)(a);

(5) thus, if the claimant gets the right description but the wrong name for his intended defendant, there is unlikely to be any doubt as to the identity of the person intended to be sued; but if he gets the wrong description, it will be otherwise;

(6) this test might allow the substitution of a new defendant, unconnected with the original defendant and unaware of the claim until after the expiry of a relevant limitation period; but any potential injustice can be avoided by the exercise of the court's discretion under s.35.

The Court of Appeal applied this "identification by description" test in ***Parsons v. George***, op. cit. (where the pre- and post-CPR authorities are extensively reviewed and explained by Dyson L.J. at paras 8 to 20), and in ***Kesslar v. Moore & Tibbits***, op. cit.. In the latter case, Buxton L.J. noted that a striking feature of the test is that it permits, subject to the court's discretion, the substitution of a completely new defendant who had no connection with the party originally impleaded. It is submitted that, in doing so, his lordship identified the nub of the problem. There is a world of difference between, for example, the situation where party X is a holding company for D or an assignee of D's rights and liabilities and was aware of the original claim, and where X has no connection with D at all and had no knowledge of the original claim. But these are extremes; the hard cases fall in between.

In conclusion, it may be noted that cases in which, though a party was mis-named, his identity was made clear by reference to a description which is specific to the particular case, and which therefore may be regarded as examples of the application of the test stated by the Court of Appeal in the Horne-Roberts case are:

Mitchell v. Harris Engineering Co. Ltd. [1967] 2 Q.B. 703, C.A. (claimant's employers)

Rodriguez v. R.J. Parker (Male) [1967] 1 Q.B. 116 (driver of a particular car)

Evans Construction Co. Ltd. v. Charrington & Co. Ltd. [1983] Q.B. 810, C.A. (competent landlord)

Thistle Hotels Ltd. v. Sir Robert McAlpine & Sons Ltd., *The Times*, April 11, 1989, C.A. (proprietor of an hotel)

The Sardinia Sulcis [1991] 1 Lloyd's Rep. 201, C.A. (merger of companies)

Crook v. Aaron Dale Construction and Roofing Ltd. [1997] P.I.Q.R. P36, C.A. (claimant's employer)

Horne-Roberts v. SmithKline Beecham plc. [2001] EWCA Civ 2006, [2002] 1 W.L.R. 1662, C.A. (manufacturers of a specifically identified batch of vaccine)

Parsons v. George [2004] EWCA Civ 912, [2004] 1 W.L.R. 3264, C.A. (competent landlord)

Kesslar v. Moore & Tibbits [2004] EWCA Civ 1551, November 3, 2004, C.A., unrep. (professional advisers)

Revoking pre-trial order

In ***DEG-Deutsche Investitions und Entwicklungsgesellschaft mbh v. Koshy*** [2004] EWHC 2896 (Ch), The Times, January 7, 2005, the facts were, that as long ago as November 1996, the claimant (C) applied ex parte and obtained a freezing order against the defendant (D). At the substantive hearing, that order was continued by consent with a right reserved to D to apply to discharge it without showing any change of circumstances. C's claim was for an account of profits and involved allegations of a dishonest breach of trust and the misapplication of company assets.

In the following month D exercised his reserved right and applied to have the freezing order set aside on the ground of material non-disclosure by C. In 1997, after a 12 day hearing a judge dismissed that application and ordered D to pay C's costs of the application in any event. D did not appeal against that decision. The order was not perfected until March 1998. The costs order remained unsatisfied, and by the end of 2004 with interest amounted to £360,000.

At the trial of the action in 2001, the judge dismissed C's claim ([2002] 1 B.C.L.C. 478). The freezing order was accordingly discharged and D was given liberty to apply for an inquiry on C's cross-undertaking as to damages. After the trial, D was granted permission to appeal against the freezing order. D contended that certain findings made by the trial judge revealed that (contrary to the finding of the judge in 1997) there had been material non-disclosure by C in their application for the freezing order. D's aim in making the appeal was to secure the cancellation of the costs order attached to the March 1998 order, or at least the substitution of a costs order more favourable to him.

At the outset of the appeal, the Court of Appeal offered D the opportunity to elect either to continue with the appeal or to have the issue of material non-disclosure remitted to a Chancery judge for determination. He chose to continue with the appeal. In the event, the Court dismissed the appeal ([2003] EWCA Civ 1718, November 24, 2003, unrep.).

In dismissing the appeal the Court said that, if the exercise of discretion is to be reviewed in circumstances of alleged material non-disclosure with a view to making a different order as to costs, it can only be fairly and satisfactorily done by an application at first instance, in which the issues of fact are defined and on which evidence can be adduced by both sides as to the circumstances in which the orders were made, including the orders for costs.

Undeterred by the lack of success of his appeal, D then issued an application in the Chancery Division to set aside the freezing order. A judge ordered that two preliminary issues be determined: (1) whether the court had jurisdiction to make the order sought on D's application, and (2) whether D was entitled to relief he sought as a result of his election before the Court of Appeal on July 2002.

These issues fell to be determined by Hart J. At the hearing D appeared in person. His lordship held against D on both issues. In relation to the second the judge said it would be an abuse to grant D the relief he sought because before the Court of Appeal he was given the opportunity "to litigate the exact issue which he now seeks to raise by this application in a manner which was not discernibly different from the manner in which (if it is permitted to proceed) it will now be determined" (para. 31).

In relation to the first issue, Hart J. considered whether the court had an inherent jurisdiction to revoke the freezing order. His lordship reviewed the authorities and said (para. 10 *et seq.*) that it is well established that, subject to a limited number of exceptions (or apparent exceptions), none of which applied in this case, a court of first instance has no power to review, revoke or vary an order made by another first instance court.

Hart J. then considered whether the court had jurisdiction under CPR r.3.1(7). That rule states that "a power of the court under these Rules to make an order includes a power to vary or revoke the order". His lordship held that, if it were the case that the court had jurisdiction under this provision, it did not assist D because it did not apply to the freezing order in this case because it did not apply to orders made before the CPR came into effect. His lordship said (para. 19) that "the order" in r.3.1(7) must mean an order which he court has power to make "under these Rules" and not "an order of the type which might have been made under these Rules".

It may be commented that the confusion surrounding r.3.1(7) is unfortunate. Hart J. referred to a conflict in the few first instance cases decided since the CPR came into effect and appears to have approached the matter on the assumption that the rule marked a significant change in the law. However, it is submitted that it is very doubtful whether it was ever intended to modify the general rule that, subject to limited exceptions, a court of first instance has no power to review, revoke or vary an order made by another first instance court (see ***White Book*** commentary paras 3.1.9, 40.9.1 & 40.9.2).

It would seem that the better view is that the rule is an attempt to simplify the rules of court by bringing into one place various provisions that existed in the former RSC and CCR and which gave the court powers to vary and revoke orders in certain circumstances. Certainly, as was said by ***Waller L.J. in SCT Finance Ltd v. Bolton***, [2002] EWCA Civ 56, [2003] 3 All E.R. 434, C.A., the rule should not be construed as conferring a power allowing any court at any time "simply to reverse itself if it happens to change its mind".

It may be commented that the source of the confusion is the fact that the CPR adopts far too wide a view of what is meant by case management, drawing in virtually all of the powers that the court may exercise at the pre-trial stage, including powers in relation to interim remedies. There is every reason for giving the court the power to vary or revoke pre-trial orders in the circumstances in which they had such powers under the former rules and for the purpose of exercising those powers introduced by the CPR that enable the court to maintain court control over case progress. But there was no need to go further than that.

CPR UPDATE

AMENDMENTS TO RULES

Various amendments have been made to the CPR by the Civil Procedure (Amendment No. 3) Rules 2004 (S.I. 2004 No. 3129).

As the Explanatory Note to this statutory instrument indicates, a new Section II is inserted in CPR Pt. 41 to make provision about the exercise of the court's powers under the Damages Act 1996 s.2(1) (as inserted by the Courts Act 2003 s.100).

Under that section, a court, when awarding damages for pecuniary future loss in respect of personal injury, may order that the damages are wholly or partly to take the form of periodical payments (instead of the form of a lump sum), and may do so whether the parties consent or not. Amendments are also made to CPR Pt 36 to ensure that the scheme for offers to settle and payments into court can work in cases in which periodical payments may be awarded. The amendments to Pt 36 are set out below. Paragraph and page references are to Vol. 1 of the ***White Book 2004***.

These amendments come into force on the day of entry into force of the Courts Act 2003 s.100 (Periodical payments).

para. 36.0.1, p.922

After r.36.2, insert:

"36.2A Personal injury claims for future pecuniary loss para. 36.2A"

para. 36.2.2, p.926

After this commentary paragraph, insert new r.36.2A as follows:

"Personal injury claims for future pecuniary loss

36.2A-(1) This rule applies to a claim for damages for personal injury which is or includes a claim for future pecuniary loss.

(2) An offer to settle such a claim will not have the consequences set out in this Part unless it is made by way of a Part 36 offer under this rule and where such an offer is or includes an offer to pay the whole or part of any damages in the form of a lump sum, it will not have the consequences set out in this Part unless a Part 36 payment of the amount of the lump sum offer is also made.

(3) Where both a Part 36 offer and a Part 36 payment are made under this rule -

(a) the offer must include details of the payment, and

(b) rules 36 11(1) and (2) and 36 13(1) and (2) apply as if there were only a Part 36 offer.

(4) A Part 36 offer to which this rule applies may contain an offer to pay, or an offer to accept -

(a) the whole or part of the damages for future pecuniary loss in the form of—

(i) either a lump sum or periodical payments, or

(ii) both a lump sum and periodical payments,

(b) the whole or part of any other damages in the form of a lump sum.

(5) A Part 36 offer to which this rule applies—

(a) must state the amount of any offer to pay the whole or part of any damages in the form of a lump sum;

(b) may state what part of the offer relates to damages for future pecuniary loss to be accepted in the form of a lump sum;

(c) may state, where part of the offer relates to other damages to be accepted in the form of a lump sum, what amounts are attributable to those other damages;

(d) must state what part of the offer relates to damages for future pecuniary loss to be paid or accepted in the form of periodical payments and must specify—

(i) the amount and duration of the periodical payments,

(ii) the amount of any payments for substantial capital purchases and when they are to be made, and

(iii) that each amount is to vary by reference to the retail prices index (or to some other named index, or that it is not to vary by reference to any index); and

(e) must state either that any damages which take the form of periodical payments will be funded in a way which ensures that the continuity of payment is reasonably secure in accordance with section 2(4) of the Damages Act 1996 or how such damages are to be paid and how the continuity of their payment is to be secured.

(6) Where a Part 36 payment includes a lump sum for damages for future pecuniary loss, the Part 36 payment notice may state the amount of that lump sum.

(7) Where the defendant makes a Part 36 offer to which this rule applies and which offers to pay damages in the form of both a lump sum and periodical payments, the claimant may only give notice of acceptance of the offer as a whole."

para. 36.3, p.926

In r.36.3(1), after "rules" insert "36.2A(2),"

para. 36.4, p.926

In paras (2)(a), (3)(b) and (4) of r.36.4, after "Part 36 payment" insert "or Part 36 offer made under rule 36.2A"

In para. (3) of r.36.4, after "Part 36 payment notice" insert "or Part 36 offer made under rule 36.2A"

In para. (3) of r.36.4, after "the Part 36 offer", in both places insert "made under this rule"

para. 36.10, p. 931

In para. (3) of r.36.10, for "If the offeror" subject "Subject to paragraph (3A), if the offeror"

After para. (3) of r.36.10, insert new para (3A) as follows:
"(3A) In a claim to which rule 36.2A applies, if the offeror is a defendant who wishes to offer to pay the whole or part of any damages in the form of a lump sum—
(a) he must make a Part 36 payment within 14 days of service of the claim form; and
(b) the amount of the payment must be not less than the lump sum offered before proceedings began."

In para. (4)(b) of r.36.10, after "paragraph (3)" insert "or (3A)"

para. 36.20, p.937

In para. (1)(a) of r.36.20, delete "or" and in para. (1)(b) after "offer" insert "; or" then add new sub-para. (c) as follows:
"(c) in a claim to which rule 36.2A applies, fails to obtain a judgment which is more advantageous than the Part 36 offer made under that rule."

para. 36.21, p.937

In para (1) of r.36.21, after "Part 36 offer" insert "(including a Part 36 offer made under rule 36.2A)"

para. 36.23, pp.939 and 940

In para. (4) of r.36.23, for "rule 36.20" substitute "rule 36.20(1)(a)"

After para. (4) of r. 36.23, insert:
"(4A) For the purposes of rule 36.20(1)(c), where the court is determining whether the claimant has failed to obtain a judgment which is more advantageous than the Part 36 offer made under rule 36.2A, the amount of any lump sum paid into court which it takes into account is to be the amount of the gross sum specified in the Part 36 payment notice."

para. 41.0.1, p.1031

In heading to Pt 41, delete "Provisional"

para. 41.1, p.1031

Before r.41.1 insert new heading:
"I. Proceedings to which section 32A of the Supreme Court Act 1981 or section 50 of the County Courts Act 1984 applies"

In para. (1) of r.41.1, for "This Part" substitute "This Section of this Part"

In para. (2) of r.41.1, for "Part" substitute "Section"

para. 41.3.3, p.1033

After this commentary paragraph, insert new Section II for Pt 41 as follows:

"II. Periodical payments under the Damages Act 1996

Scope and interpretation
41.4-(1) This Section of this Part contains rules about the exercise of the court's powers under section 2(1) of the 1996 Act to order that all or part of an award of damages in respect of personal injury is to take the form of periodical payments.
(2) In this Section—
(a) "the 1996 Act" means the Damages Act 1996;
(b) "damages" means damages for future pecuniary loss; and
(c) "periodical payments" means periodical payments under section 2(1) of the 1996 Act.

Statement of case
41.5-(1) In a claim for damages for personal injury, each party in its statement of case may state whether it considers periodical payments or a lump sum is the more appropriate form for all or part of an award of damages and where such statement is given must provide relevant particulars of the circumstances which are relied on.
(2) Where a statement under paragraph (1) is not given, the court may order a party to make such a statement.
(3) Where the court considers that a statement of case contains insufficient particulars under paragraph (1), the court may order a party to provide such further particulars as it considers appropriate.

Court's indication to parties
41.6. The court shall consider and indicate to the parties as soon as practicablewhether periodical payments or a lump sum is likely to be the more appropriate form for all or part of an award of damages.

Factors to be taken into account
41.7. When considering—
(a) its indication as to whether periodical payments or a lump sum is likely to be the more appropriate form for all or part of an award of damages under rule 41.6; or
(b) whether to make an order under section 2(1)(a) of the 1996 Act,
the court shall have regard to all the circumstances of the case and in particular the form of award which best meets the claimant's needs, having regard to the factors set out in the practice direction.

The award
41.8-(1) Where the court awards damages in the form of periodical payments, the order must specify—

(a) the annual amount awarded, how each payment is to be made during the year and at what intervals;
(b) the amount awarded for future—
(i) loss of earnings and other income; and
(ii) care and medical costs and other recurring or capital costs;
(c) that the claimant's annual future pecuniary losses, as assessed by the court, are to be paid for the duration of the claimant's life, or such other period as the court orders; and
(d) that the amount of the payments shall vary annually by reference to the retail prices index, unless the court orders otherwise under section 2(9) of the 1996 Act

(2) Where the court orders that any part of the award shall continue after the claimant's death, for the benefit of the claimant's dependants, the order must also specify the relevant amount and duration of the payments and how each payment is to be made during the year and at what intervals.
(3) Where an amount awarded under paragraph (1)(b) is to increase or decrease on a certain date, the order must also specify—
(a) the date on which the increase or decrease will take effect; and
(b) the amount of the increase or decrease at current value.
(4) Where damages for substantial capital purchases are awarded under paragraph (1)(b)(ii), the order must also specify—
(a) the amount of the payments at current value;
(b) when the payments are to be made; and
(c) that the amount of the payments shall be adjusted by reference to the retail prices index, unless the court orders otherwise under section 2(9) of the 1996 Act.

Continuity of payment
41.9-(1) An order for periodical payments shall specify that the payments must be funded in accordance with section 2(4) of the 1996 Act, unless the court orders an alternative method of funding.
(2) Before ordering an alterative method of funding, the court must be satisfied that—
(a) the continuity of payment under the order is reasonably secure; and
(b) the criteria set out in the practice direction are met.
(3) An order under paragraph (2) must specify the alternative method of funding.

Assignment or charge
41.10 Where the court under section 2(6)(a) of the 1996 Act is satisfied that special circumstances make an assignment or charge of periodical payments necessary, it shall, in deciding whether or not to approve the assignment or charge, also have regard to the factors set out in the practice direction."

AMENDMENTS TO PRACTICE DIRECTIONS

TSO CPR Update 37 (December 17, 2004) amends Practice Direction (Children and Patients), Practice Direction (The Multi-Track), Practice Direction (Offers to Settle and Payments Into Court), Practice Direction (Appeals), and Practice Direction (Applications under the Companies Act 1985, etc.).
The details of these changes are set out below. References are to paragraphs and pages in Vols 1 and 2 of the White Book 2004 and in the Second Supplement as indicated.
In addition TSO CPR Update 37 adds Practice Direction (Periodical Payments Under the Damages Act 1996), supplementing new rules in Pt 21, and as a consequence, revokes Practice Direction (Structured Settlements), which previously supplemented Pt 40.

PRACTICE DIRECTION (CHILDREN AND PATIENTS)

para. 21PD.6, pp.478 to 479

At end of heading before para. 6.1, add "prior to the start of proceedings"

In sub-para. (3) of para. 6.1, insert at beginning "subject to paragraph 6.4"

In para. 6.3, after sub-para. (2) add new sub-para. as follows:
"(3) A copy or record of any financial advice must also be supplied to the court."
For para. 6.4, substitute:
"**6.4** Where in any personal injury case a claim for damages for future pecuniary loss is settled, the provisions in paragraphs 6.4A and 6.4B must in addition be complied with."

After para. 6.4, insert paras 6.4A and 6.4B as follows:
"**6.4A** The court must be satisfied that the parties have considered whether the damages should wholly or partly take the form of periodical payments.
6.4B Where the settlement includes provision for periodical payments, the claim must—
(1) set out the terms of the settlement or compromise; or
(2) have attached to it a draft consent order;
which must satisfy the requirements of rules 41.8 and 41.9 as appropriate."
In para. 6.5, delete the first bracketed cross-reference.

After para. 6.5, insert new paras 6.6 to 6.9 as follows:
"Settlement or compromise by or on behalf of a child or patient after proceedings have been commenced
6.6 Where in any personal injury case a claim for damages for future pecuniary loss, by or on behalf of a child or patient, is dealt with by agreement after proceedings

have been commenced, an application should be made for the court's approval of the agreement.
6.7 The court must be satisfied that the parties have considered whether the damages should wholly of partly take the form of periodical payments.
6.8 Where the settlement includes provision for periodical payments, an application under paragraph 6.6 must—
(1) set out the terms of the settlement or compromise; or
(2) have attached to it a draft consent order,
which must include the requirements of rules 41,9 and 41.9 as appropriate.
6.9 The court must be supplied with—
(1) an opinion on the merits of the settlement or compromise given by counsel or solicitor acting for the child or patient, except in very clear cases; and
(2) a copy or record of any financial advice."

PRACTICE DIRECTION (THE MULTI-TRACK)

para. 29PD.3A, p.696

In heading before para. 3A, for "structured settlement" substitute "periodical payments".

For text of para. 3A substitute:
"**3A** Attention is drawn to Practice Direction 41B supplementing Part 41 and in particular to the direction that in a personal injury claim the court should consider and indicate to the parties as soon as practicable whether periodical payments or a lump sum, is likely to be the more appropriate form for all or part of an award of damages for future pecuniary loss."

PRACTICE DIRECTION (OFFERS TO SETTLE AND PAYMENTS INTO COURT)

para. 36PD.1, p.941

In sub-para. (2) of para. 1.1, after "a Part 36 offer" insert "(including an offer under rule 36.2A)".

para. 36PD.5, p.942

After para 5.3, insert new para 5.3A as follows:
"5.3A The contents of a Part 36 offer to which rule 36.2A applies must comply with the requirements of rule 36.2A(5)."

para. 36PD.7, pp.943 to 944

After para. 7.2, insert new para. 7.2A as follows:
"7.2A Where a Part 36 payment is made as part of a Part 36 offer made under rule 36.2A, the payment is ignored for the purposes of determining the times set out in rules 36.11 and 36.13."

In para. 7.11, where (in both places) "Part 36 payment" appears insert afterwards "or Part 36 offer made under rule 36.2A"

para. 36PD.11, p.947

After para. 11, insert new para. 12.1 to 12.3 as follows:

"Personal injury claims for future pecuniary loss
12.1 A Part 36 offer to settle a claim for damages (whether in the form of a lump sum or periodical payments or both) for personal injury which includes a claim for future pecuniary loss must contain the details of the offer which are set out in rule 36.2A.
12.2 Section 2(4) of the Damages Act 1996 sets out the circumstances on which the continuity of periodical payments will be taken to be secure. Section 2(8) and (9) of the Act deal with the index-linking of periodical payments.
12.3 Except where otherwise stated in this Practice Direction, the rules in Part 36 will apply to offers to settle made under rule 36.2A as they apply to other Part 36 payments and to Part 36 offers.

PRACTICE DIRECTION (STRUCTURED SETTLEMENTS)

para. 40CPD.1, p.1022

This practice direction is revoked.

PRACTICE DIRECTION (APPLICATIONS UNDER THE COMPANIES ACT 1985 AND OTHER LEGISLATION RELATING TO COMPANIES)

para. 2G-1, Vol. 2, p.551

In the title for this practice direction, add at end: "AND OTHER LEGISLATION RELATING TO COMPANIES"

In sub-para. (1) of para. 1 after the definitions of "the Act", "the court" and "the Rules" insert, respectively, the following additional definitions:
""the CJPA" means the Criminal Justice and Police Act 2001;
"the EC Regulation" means Council Regulation (EC) No. 2157/2001 of October 8, 2001 on the Statute for a European company (SE);
"SE" means a European public limited-liability company (Societas Europaea) within the meaning of Article 1 of the EC Regulation."

para. 2G-2, Vol. 2, pp.551 and 552

In para. 2(1), delete "and" at the end of sub-para. (a) and insert after "Part VII FISMA" out a semi-colon and then add:
"(c) every application under Articles 25 and 26 of the

EC Regulation; and
(d) every application under section 59 of the CJPA,"
For para. 3, substitute as follows:
"3. All High Court applications to which this practice direction applies shall be assigned to the Chancery Division."

para. 2G-3, Vol. 2, p.552

After para. 3A insert new para. 3B as follows:

"Applications under the EC Regulation
3B. (1) An application for a certificate under Article 25(2) of the EC Regulation must—
(a) be issued in the Chancery Division of the High Court;
(b) identify the pre-merger acts and formalities applicable to the applicant company, and be accompanied by evidence that those acts and formalities have been completed;
(c) be accompanied by copies of:
(i) the draft terms of merger as provided for in Article 20 of the EC Regulation;
(ii) the entry in the Gazette containing the particulars specified in Article 21 of the EC Regulation;
(iii) a report drawn up and adopted by the directors of the applicant company containing the same information as would be required by paragraph 4 of Schedule 15B to the Act if there were to be a scheme of arrangement under sections 425 and 427A of the Act;
(iv) the expert's report to the members of the applicant company drawn up in accordance with paragraph 5 of Schedule 15B to the Act or Article 22 of the EC Regulation; and
(v) the resolution of the applicant company approving the draft terms of merger in accordance with Article 23 of the EC Regulation.
(2) Attention is drawn to Article 26(2) of the EC Regulation. Where it is proposed that the registered office of an SE should be in England or Wales, each of the merging companies is required, within 6 months after a certificate is issued in respect of that company under Article 25(2), to submit the certificate to the High Court in order that it may scrutinise the legality of the merger.
(3) Where a merging company is required to submit a certificate to the High Court under Article 26(2) of the EC Regulation, if no other merging company has commenced proceedings under Article 26, that company shall commence such proceedings by issuing a claim form in the Chancery Division.
(4) The claim form must—
(a) identify the SE and all of the merging companies;
(b) be accompanied by the documents referred to in paragraph 3B(6); and
(c) be served on each of the other merging com panies.
(5) Where a merging company is required to submit a certificate to the High Court under Article 26(2) of the EC Regulation and proceedings under Article 26 have already been commenced, that company shall—
(a) file an acknowledgment of service not more than 14 days after service of the claim form, and serve an acknowledgment of service on each of the other merging companies; and
(b) file the documents referred to in paragraph 3B(6) within the time limit specified in Article 26(2), and serve copies of those documents on each of the other merging companies.
(6) Each merging company must file and serve the following documents in proceedings under Article 26 of the EC Regulation—
(a) the certificate issued under Article 25(2) in respect of that company;
(b) a copy of the draft terms of the merger approved by that company;
(c) evidence that arrangements for employee involvement have been determined by that company pursuant to Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees; and
(d) evidence that the SE has been formed in accordance with the requirements of Article 26(4) of the EC Regulation.
(7) Proceedings under Article 25 and Article 26 of the EC Regulation will be heard by a High Court judge.
(8) Paragraphs 10 to 13 of this practice direction apply to proceedings under Article 25 and 26 of the EC Regulation."

para. 2G-10, Vol. 2, p.556

In para. 10, for "under the Act or under Part VII FISMA" substitute "to which this practice direction applies".

para. 2G-13, Vol. 2, p.557

After para. 13, insert new para. 14 as follows:

"Applications under section 59 of the CJPA
14. (1) This paragraph applies to applications under section 59 of the CJPA in respect of property seized in the exercise of the power conferred by section 448(3) of the Act (including any additional powers of seizure conferred by section 50 of the CJPA which are exercisable by reference to that power).
(2) An application to which this paragraph applies should be made to a judge of the Chancery Division.
(3) The defendant to an application under section 59(2) or 59(5)(c) of the CJPA shall be the person for the time being having possession of the property to which the application relates.
(4) On an application under section 59(2) or 59(5)(c) of the CJPA, the claim form and the claimant's evidence must be served on—
(a) the person for the time being having posses-

sion of the property to which the application relates;
(b) in the case of an application under section 59(2) for the return of seized property, the person specified as the person to whom notice of such an application should be given by an notice served under section 52 of the CJPA when the property was seized;
(c) in the case of an application under section 59(5)(c), the person from whom the property was seized (if not the claimant); and
(d) in all cases, any other person appearing to have a relevant interest in the property within the meaning of section 59(11) of the CJPA.

(5) An application under section 59(2) or 59(5)(c) of the CJPA must be supported by evidence—
(a) that the claimant has a relevant interest in the property to which the application relates within the meaning of section 59(11) of the CJPA; and
(b) in the case of an application under section 59(2), that one or more of the grounds set out in section 59(3) of the CJPA is satisfied in relation to the property.

(6) The defendants to an application under section 59(5)(b) of the CJPA by a person for the time being in possession of seized property shall be—
(a) the person from whom the property was seized; and
(b) any other person appearing to have a relevant interest in the property to which the application relates within the meaning of section 59(11) of the CJPA.

(7) If an application to which this paragraph applies would not otherwise be served on the person who seized the property, and the identity of that person is known to the applicant, notice of the application shall be given to the person who seized the property.

(8) In all applications to which this paragraph applies, when the court issues the claim form it will fix a date for the hearing."

PRACTICE DIRECTION (APPEALS)

para. 52PD.49, Supp. 2, p.79

For the heading before para. 13.2 and for the text of that paragraph, substitute the following:

"Procedure for consent orders and agreements to pay periodical payments involving a child or patient

13.2 Where one of the parties is a child or patient—
(1) a settlement relating to an appeal or application; or
(2) in a personal injury claim for damages for future pecuniary loss, an agreement reached at the appeal stage to pay periodical payments,

requires the court's approval."

para. 52PD.52, Supp. 2, p. 79

For the heading before para. 13.5 and for the text of that paragraph, substitute the following:

"*Periodical payments*

13.5 Where periodical payments for future pecuniary loss have been negotiated in a personal injury case which is under appeal, the documents filed should include those which would be required in the case of a personal injury claim for damages for future pecuniary loss dealt with at first instance. Details can be found in the Practice Direction which supplements Part 21."

para. 52PD.117, Supp. 2, p.103

In para. 23.2, after "the Land Registration Act 2002" replace the full-stop with a semi-colon and then add:
"(18) regulation 74 or the European Public Limited-Liability Company Regulations 2004.

para. 52PD.124, Supp. 2, p.107

After para. 23.8B, insert new para. 23.8C as follows:

"Appeals under regulation 74 of the European Public Limited-Liability Company Regulations 2004

23.8C (1) In this paragraph—
(a) "the 2004 Regulations" means European Public Limited-Liability Company Regulations 2004;
(b) "the EC Regulation" means Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE);
(c) "SE" means a European public limited-liability company (Societas Europaea) within the meaning of Article 1 of the EC Regulation.

(2) This paragraph applies to appeals under regulation 74 of the 2004 Regulations against the opposition—
(a) of the Secretary of State or national financial supervisory authority to the transfer of the registered office of an SE under Article 8(14) of the EC Regulation; and
(b) the Secretary of State to the participation by a company in the formation of an SE by merger under article 19 of the EC Regulation.

(3) Where an SE seeks to appeal against the opposition of the national financial supervisory authority to the transfer of its registered office under Article 8(14) of the EC Regulation, it must serve the appellant's notice on both the national supervisory authority and the Secretary of State.

(4) The appellant's notice must contain an application for permission to appeal.

(5) The appeal will be a review of the decision of the Secretary of State and not a re-hearing. The grounds of review are set out in regulation 74(2) of the 2004 Regulations.

(6) The appeal will be heard by a High Court judge."

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