CIVIL PROCEDURE NEWS

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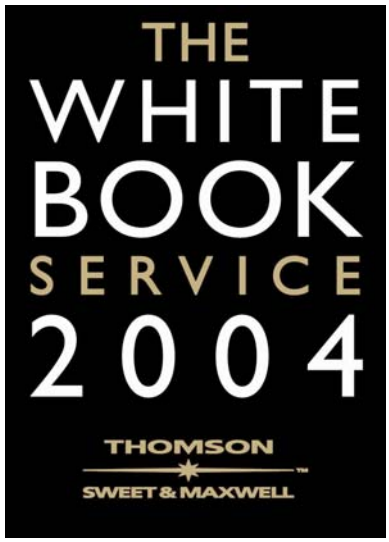

IN BRIEF

Cases

■ **MOAT HOUSING GROUP-SOUTH LTD v. HARRIS**, *The Times*, January 13, 2005, CA (Brooke & Dyson L.JJ.)

CPR rr.3.1(2)(f), 52.7, Supreme Court Act 1981 s.49(3)—social landlord (C) bringing possession proceedings against tenant (D1) of rented premises—D1 occupying premises with her four children by her partner (the second defendant) (D2)—county court judge (1) granting C possession order, and (2) making anti-social behaviour orders—all orders to take effect on December 17—ASBOs having effect (amongst other things) of excluding family from property owned by C—single lord justice granting D1 permission to appeal—on D1's application for stay of the orders pending hearing of the appeal, held, granting the application, (1) in determining whether to grant a stay pending appeal, regard is to be had to the potential prejudice to the parties, (2) in this case, the prospect of the children's lives being unnecessarily disrupted before the hearing of the appeal was a relevant consideration, (3) the stay was subject to undertakings made by D1 and D2 to the court as to the behaviour of the family—proper approach to stay pending appeal explained (see *Civil Procedure 2004* Vol. 1 paras 3.1.7 & 52.7.2, and Vol. 2 para. 9A-161)

■ **ARMSTRONG v. FIRST YORK LTD**, *The Times*, January 19, 2005, CA (Brooke, Arden & Longmore L.JJ.)

CPR Pt 35—following road traffic accident, claimant (C) bringing personal injury claim against bus company (D)—parties jointly instructing expert (X) in bio-mechanics and accident reconstruction—X's report not favourable to C, but C not attempting to contradict it by seeking to appoint second expert—at trial, effect of X's evidence (based on report and given orally) was that C's account of accident (partly supported by some medical evidence) could not be sustained—trial judge (1) finding that C was blameless and honest witness, but (2) also finding no fault in X's evidence—judge preferring evidence of C and giving judgment for him—held, dismissing D's appeal, (1) there is no principle of law to the effect that a judge has no choice and has to accept the evidence of an expert where he is unable to point to any error in it, (2) the judge was alert to the danger of plausible-seeming but dishonest claimant witnesses and had properly directed himself—***Coopers Payen v. Southampton Container Terminal Ltd*** [2003] EWCA Civ 1233, ref'd to (see ***Civil Procedure 2004*** Vol. 1 para. 35.1.1)

■ **COOKSON & CLEGG LTD v. MINISTRY OF DEFENCE** [2005] EWHC 38 (Admin), January 21, 2005, unrep. Bennett J.)

CPR rr.1.1 & 54.4, Public Supply Contracts Regulations 1995—company (C) supplying clothing to armed services (D)—D awarding new contract to another company—on the basis of the 1995 Regulations and of European provisions, C bringing claim under Pt 7 against D for (amongst other things) a declaration that award of contract to X was unlawful and for damages—on public law grounds, C also bringing claim for judicial review under Pt 54 to review the lawfulness of D's decision to award contract to X and for remedies similar to those claimed in the Pt 7 proceedings—on paper, judge refusing C permission to bring claim for judicial review—held, dismissing C's renewed application for permission, (1) the real issue was whether D had complied with the Regulations, (2) in the circumstances of this case, there was no possibility of the Court making an order in the Pt 54 proceedings that could not be obtained in the Pt 7 proceedings, (3) it is wrong (particularly in commercial disputes) to have two sets of proceedings running in parallel seeking the same relief (even where subsequent consolidation is possible) with potentially two sets of costs, because the pursuit of cumulative claims causes duplication of time, effort and resources, not only of the parties but also of the court—***R. (Sivasubramaniam) v. Wandsworth County Court*** [2002] EWCA Civ 1738; [2003] 1 W.L.R. 475, CA, ***Ealing Community Transport Ltd v. Ealing London Borough Council*** [1995] C.O.D. 492, CA, ref'd to (see ***Civil Procedure 2004*** Vol. 1 paras 1.4.15, 54.3.2, 54.4.2, 54.12.1)

■ **FRANCIS v. BARCLAYS BANK PLC**. [2004] EWHC 2702 (Ch), September 30, 2004, unrep. (Peter Smith J.).

CPR r.17.4(2), Limitation Act 1980 s.35(3)—loan by bank (D) to fund business secured by charges on borrower's (C) property and on plot of land owned by business—D demanding money in default of payment and appointing receivers (K) over the plot—D selling plot to developer on terms providing for overage payment if development took place within 10 years ("the 1995 agreement")—overage terms subsequently varied with C taking immediate cash payment instead ("the 1997 agreement")—after these transactions, C remaining indebted to D—on basis that D had not obtained the best price, C bringing proceedings against D—D bringing Pt 20 claim against K for indemnity and (on assumption that plot undersold) for damages and K entering defence—a fortnight before trial, C (who had not been represented throughout) applying to amend statement of claim to challenge K's case—proposed amendments for first time clearly distinguishing C's claim based on D's entering into (1) the 1995 agreement, and (2) the 1997 agreement—D and K opposing

application on ground that C's proposed amendments pleaded a new duty and constituted a new claim within s.35(3) and was now statute barred—held, allowing C's amendments based on the 1997 agreement, (1) the duty pleaded by C was the duty of D as mortgagee owed to those who might be affected by the power of sale, (2) C's amendments (a) merely raised in more detail the factors that ought to have led the bank not to enter into 1997 agreement, (b) did not raise a new cause of action, and (c) fell within r.17.4(2), (3) although C's application was made very close to trial, in the exercise of discretion, the amendments should be permitted as the trial date could be held and otherwise C would lose a valuable claim, (4) the amendments based on the 1995 agreement should not be permitted because of the clear prejudice that D and K would suffer if they were allowed, (5) D should be permitted to amend Pt 20 claim in light of amendments permitted to C's claim—***Brickfield Properties Ltd v. Newton***, [1971] 1 W.L.R. 862, CA, ***Welsh Development Agency v. Redpath Dorman Long Ltd***, [1994] 1 W.L.R. 1409, CA, ***Darlington Building Society v. O'Rourke***, [1999] P.N.L.R. 365, CA, ***Binks v. Securicor Omega Express Ltd***, [2003] EWCA Civ 993, [2003] 1 W.L.R. 2557, CA, ref'd to (see ***Civil Procedure 2004*** Vol. 1 para. 17.4.2, and Vol. 2 para. 8-85)

- **KYNASTON v. CARROLL** [2004] EWCA Civ 1434, October 5, 2004, CA unrep. (Clarke & Neuberger L.JJ.)

CPR r.52.3(1)(a)—in proceedings commenced in a county court, defendant (D) undertaking not to make abusive or defamatory comments about claimant (C) until trial—claim transferred to High Court, and civil restraint order made against D—at trial, C's claim compromised on terms including term that D pay C £15,000 damages—C applying to trial judge for order committing D for contempt for breach of his pre-trial undertaking and injunction—judge committing D to prison for two months, but suspending the order for two years—in his judgment on this application, judge making some criticisms of C—C (acting in person) applying to the Court of Appeal for permission to appeal against the suspension of the committal order and alleging breaches of the order—held, refusing permission to appeal (1) without reaching a firm conclusion on the point, under r.52.3(1)(a) it is only the alleged contemnor who can appeal without permission against a committal order and an applicant needs permission, (2) the suspended sentence was well within the range of permissibility, (3) breaches of a suspended order do not justify permission to appeal, as the applicant's remedy is to apply for the suspension to be lifted, (4) appeals are against orders and not against judgments, (5) the judge's criticisms of C did not feature as a reason for suspending the sentence, (6) if an appeal court had a jurisdiction to expunge from a judgment observations that ought not to have been made, it would be exercisable only in an exceptional case—***Government of Sierra Leone v. Davenport***, [2002] EWCA 230, ***Wilkinson v. S.***, [2003] EWCA Civ 95; [2003] 1 W.L.R. 1254, CA, ref'd to (see ***Civil Procedure 2004*** Vol. 1 para. 52.3.2)

- **LLOYDS BANK PLC. v. CASSIDY** [2004] EWCA Civ 1767, *The Times*, January 11, 2005, CA (Auld, Chadwick & Clarke L.JJ.)

CPR r.52.11—mortgagees (C) of landowner's (D) land putting in receivers (X) who sold the land—in 1992, C (who was legally aided) bringing action against D—D defending and making counterclaim (alleging, amongst other things, that D and X were in breach of duty) to which X joined as defendants—judge trying issues on C's counterclaim to D's counterclaim—D and X arranging for their counsel to have, during the 21 day trial, the facility of running transcripts of the proceedings—D and X providing judge with copy of transcripts but, apparently, this not known to C until day 17 of the trial—thereafter, C provided with transcripts at expense of D and X—save as to damages of £9,000, judge dismissing D's counterclaim and giving directions as to determination of amount owing by D on C's counterclaim —D applying for permission to appeal—held, refusing permission, (1) C's appeal against the judge's findings had no prospects of success, (2) the position as to the transcripts disclosed a procedural irregularity, but in the circumstances that caused no prejudice or injustice to D and therefore afforded no separate ground of appeal, (3) it is an important general principle that, save in exceptional circumstances, a party should not provide a document or other material to the judge without the other parties being provided with it, or at least given the opportunity to make representations about it (see ***Civil Procedure 2004*** Vol. 1 para. 52.11.3)

- **NORWICH CITY COUNCIL v. FAMUYLWA** [2004] EWCA Civ 1770, *The Times*, January 24, 2005, CA (Chadwick & Jacob L.JJ.)

CPR r. 55.8, Housing Act 1985 ss.84 & 85—housing authority (C) bringing possession claim against secure tenant (D)—county court judge (1) finding breach by D of anti-social conduct term of the agreement, (2) concluding that it would be pointless to make a suspended order, but (3) dismissing C's claim—held, allowing D's appeal, the judge had erred in overlooking the possibility that the circumstances of the case could be met by (1) making a possession order but (2) postponing date for possession until after a further application by C in the event of D's further breach of the agreement—(see ***Civil Procedure 2004*** Vol. 2 paras 3A-372, 3A-378, 3A-383 & 3A-708)

- **PELL v. EXPRESS NEWSPAPERS** [2005] EWCA Civ 46, January 28, 2005, CA, unrep. (Chadwick & Rix L.JJ.)

CPR rr. 1.1(2)(c), 36.15 & 52.3—in libel claim against newspaper (D), in week before trial claimant (C) applying for permission to re-amend his pleadings and for order requiring D to make further disclosures—judge refusing application and ordering C to pay

costs, assessed at £34,000—on basis of D's Pt 36 offer, claim settled on eve of trial on terms providing C with payment of £125,000 plus costs—out of time, C applying for permission to appeal against the judge's interlocutory order on ground that it was obtained by fraud, as evidence that ought to have been disclosed by D on that application was dishonestly suppressed—single lord justice adjourning application to enable it to be heard on notice—held, refusing permission, (1) the Court was prepared to assume (perhaps by operation of r.36.15(5)(b)) that the parties' settlement was not a formal bar preventing C from challenging on appeal the judge's order for costs on the interlocutory application, (2) C's application was made, not for the purpose of setting aside the settlement on the basis that it had been obtained by fraud, but merely to reverse that costs order, (3) it was of the highest significance that the overall litigation between C and D was settled on the basis of D's Pt 36 offer (with the result that C's claim was stayed) and without the underlying allegations, pleaded or unpleaded, being examined at a trial, (4) if the application were allowed, issues in C's claim covered by the settlement would have to be determined in the appeal process, all for the sake of the costs order, (5) this would be wholly disproportionate, contrary to the interests of justice, and an abuse of the appeal process—Court also ruling that time for making appeal should not be extended and that order permitting fresh evidence should not be made—***Couwenbergh v. Valkova*** [2004] EWCA Civ 676, May 27, 2004, CA, unrep., ***Sohal v. Sohal*** [2002] EWCA Civ 1297, July 30, 2002, CA, unrep., ***Ladd v. Marshall*** [1954] 1 W.L.R. 1489, CA, ***Jonesco v. Beard*** [1930] A.C. 298, H.L., ***Kuwait Airways Corporation v. Iraqi Airways Company (No. 2)*** [2001] 1 W.L.R. 429, H.L., ref'd to (see ***Civil Procedure 2004*** Vol. 1 paras 1.3.5, 36.15.1, 52.3.6)

- **SIVANANDAN v. ENFIELD LONDON BOROUGH COUNCIL** [2005] EWCA Civ 10, *The Times*, January 25, CA, unrep. Peter Gibson, Buxton & Wall L.JJ.)

CPR r. 3.4(2)—employee (C) bringing claim against employers (D) in employment tribunal for breach of contract and discrimination etc.—tribunal striking out all of C's claims on ground that her conduct was frivolous and vexatious—C bringing breach of contract claim against D in High Court—judge refusing D's application to strike out this claim—held, allowing D's appeal, (1) the tribunal had jurisdiction to entertain the breach of contract claim, (2) that claim was never withdrawn and was dismissed by the tribunal, (3) C's High Court claim was an abuse as in that claim she was attempting to re-litigate the same issues as had been before the tribunal—Court stating that good practice required that, if a claim was to be withdrawn from a tribunal, both the fact that it was being withdrawn and the reasons for its withdrawal were made clear and recorded (see ***Civil Procedure 2004*** Vol. 1 paras 1.4.15 & 3.4.3)

- **WALKER v. WALKER** [2004] January 27, 2005, CA, unrep. (Chadwick, Laws & Jonathan Parker L.JJ.)

CPR r. 38.6—company, of which husband (D1) and wife (D2) directors, going into creditors' voluntary liquidation with very substantial deficiency—in 1999, liquidator (C) bringing proceedings against D1 and D2 and firm's accountants for misfeasance (on basis of excessive directors' remuneration and wrongful trading) and obtaining freezing injunction—court directing that these proceedings and disqualification proceedings against D1 and D2 be tried together—after death of D2, court directing that C's application to commit D1 for breach of injunction be dealt together with the misfeasance claim—C having benefit of conditional fee agreement and D1 legally aided—in May 2004, at hearing of various interlocutory applications, judge (1) granting C's application to discontinue his claim (made on the basis that it was commercially worthless), and (2) making no order for costs ([2004] EWHC 1886 (Ch), June 17, 2004, unrep.)—held, allowing D1's appeal and ordering C to pay his costs, (1) there had been no change in circumstances between the date when C's claim was commenced and when his application to discontinue was made, (2) the commercial factors were clear at the outset and, if properly considered earlier by C, would have shown that the action was commercially worthless from the start, (3) in the circumstances it was not fair or just to depart from the normal rule that a discontinuing claimant should bear a defendant's costs of an action up to the date when notice of discontinuance was served (see ***Civil Procedure 2004*** Vol. 1 para. 38.6.1)

Statutory Instruments

- **CIVIL PROCEDURE (AMENDMENT NO. 4) RULES 2004 (S.I. 2004 No. 3419)**

amend Civil Procedure Rules 1998—substitutes Sect. I Pt 45 (Fixed Costs), thereby rationalising and amending the provisions on fixed costs—amends r.45.7, to clarify that fixed recoverable costs regime in Sect. II Pt 45 applies where court's approval of settlement in favour of infant is required (with consequential amendments to rr.21.10, 44.12A, 45.7, 45.14 & 48.5)—also clarifies r.45.18—adds new Pt 67 (Proceedings Relating to Solicitors)—amends r.22.1 (statements of truth), s.25.7 (categories of defendant against whom interim payment may be made)—makes minor amendments to r.40.1 and r.41.3—revokes Sched.1, RSC Ords 62 & 106, and Sched.2, CCR Ord.38—in force April 1, 2005 (see ***Civil Procedure 2004*** Vol. 1 paras 21.10, 22.1, 25.7, 40.1, 41.3, 44.12A, 45.1, 45.7, 45.14, 45.18, 48.5, sc62.A3, sc106.0.1 & cc38.18, and Vol. 2 para. 2F-68)

IN DETAIL

Fixed costs and success fees

After the CPR came into effect in 1999, and until not so long ago, CPR Pt 45 (Fixed Costs) consisted simply of five rules, rr.45.1 to 45.5, dealing with the amounts which are to be allowed in relation to solicitors' charges in proceedings where any of the circumstances referred to in paras (a) and (b) of r.45.1(2) applies. As is explained in the ***White Book*** commentary at para. 45.0.2, various former fixed costs rules found in RSC Ord.62 and CCR Ord.38 were retained in Sched.1 and Sched.2 to the CPR for the purpose of dealing with cases where default judgments were obtained in accordance with pre-CPR rules.

After Pts 70 to 73, which deal with the enforcement of judgments, had been inserted in the CPR by the Civil Procedure (Amendment No. 4) Rules 2001 (S.I. 2001 No. 2792), r.45.6 (fixed enforcement costs) was added to Pt 45 by the Civil Procedure (Amendment No. 5) Rules 2001 (S.I. 2001 No. 4015). At the same time, a consequential amendment was made to r.45.1(2) (adding para. (c)), and some provisions in Sched.1 RSC Ord.62 and Sched.2 CCR Ord.38 were revoked.

Since the end of 2003, Pt 45 has undergone very substantial changes brought about by four statutory instruments.

First the Civil Procedure (Amendment No. 4) Rules 2003 (S.I. 2003 No. 2113) added to Pt 45 a new Section, Sect. II (Road Traffic Accidents—Fixed Recoverable Costs in Costs-only Proceedings) (rr.45.7 to 45.14), and provided that rr.45.1 to 45.6 should stand as Sect. I (Fixed Costs). Sect. II introduced a scheme providing that only specified fixed costs are to be recoverable, other than in exceptional circumstances, where costs-only proceedings are issued under r.44.12A in relation to disputes arising out of road traffic accidents occurring on or after October 6, 2003, which are settled for an amount of agreed damages not exceeding £10,000.

Then the Civil Procedure (Amendment No. 5) Rules 2003 (S.I. 2003 No. 3361) amended r.45.10 (disbursements) (with effect from March 1, 2004) to clarify that, in costs-only proceedings brought under Sect. II of Pt 45 by a party funded by a body which indemnifies its members or other persons against liabilities for costs which they may incur in proceedings, the court may allow that party, as a disbursement, a sum not exceeding such amount as would be allowed under the Access to Justice Act 1999 s.30 (recovery where body undertakes to meet costs liabilities) (see ***White Book*** Vol. 2 para. 9A-863). This statutory instrument also amended r.45.11 (success fee) (with effect from February 1, 2004) to specify the amount of the success fee which a claimant may recover in proceedings under Sect. II of Pt 45 if he has entered into a conditional fee agreement or a collective conditional fee agreement which provides for a success fee.

Subsequently, Civil Procedure (Amendment) Rules 2004 (S.I. 2004 No. 1306) added a further Section to Pt 45, Sect. III (Fixed Percentage Increase in Road Traffic Accident Claims) (rr.45.15 to 45.19) (with effect from June 1, 2004). This Section made provision in road traffic accident claims for fixed percentage increases to apply to legal representatives' fees in respect of success fees, where the claimant has entered into a conditional fee agreement or a collective conditional fee agreement which provides for a success fee. Then the Civil Procedure (Amendment No. 2) Rules 2004 (S.I. 2004 No. 2072) added yet a further Section to Pt 45, Sect. IV (Fixed Percentage Increase in Employers Liability Claims) (rr.45.20 to 45.22), (with effect from October 1, 2004). This Section has an effect similar to Sect. III but applies to success fees in personal injury claims against an employer (other than claims relating to a disease or arising from a road traffic accident).

The most recent statutory instrument amending Pt 45 is the Civil Procedure (Amendment No. 4) Rules 2004 (S.I. 2004 No. 3419). This legislation substitutes Sect. I (Fixed Costs) (rr.45.1 to 45.6), with effect from April 1, 2005. As substituted, this Section rationalises the provisions on fixed costs by incorporating the provisions formerly found in CPR Sched.1 RSC Ord.62 and Sched.2 CCR Ord.38 (which are now revoked entirely). In addition, the fixed costs regime is extended to High Court possession claims under Pt 55 (Possession Claims) and fixed costs are applied to demotion claims under Pt 65 (Proceedings Relating to Anti-Social Behaviour and Harassment).

In addition, this statutory instrument makes some amendments to Sect. II (Road Traffic Accidents—Fixed Recoverable Costs in Costs-only Proceedings) and Sect. III of Pt 45 (Fixed Percentage Increase in Road Traffic Accident Claims) (coming into effect on April 1, 2005). The terms of these amendments (briefly explained immediately below), and those outside Pt 45 but related to them, are found in the CPR Update section of this issue of CP News.

The amendment to Sect. II is made for the purpose of clarifying that the fixed costs regime in that Section should be followed, not only where costs-only proceedings are issued under r.44.12A, but also where the court's approval

of a settlement in favour of an infant is required. This clarification is accomplished by an amendment to the text of r.45.7(1) and to the heading of r.45.14, and by consequential amendments to provisions outside Sect. II (viz. to rr.21.10, 44.12A and 48.5; see "CPR Update section of this issue of CP News). As amended, r.45.7(1) now reads (see ***White Book*** Vol. I para. 45.7, p.1140):

"This Section sets out the costs which are to be allowed in—(a) costs-only proceedings under the procedure set out in rule 44.12A; or (b) proceedings for approval of a settlement or compromise under rule 21.10(2)."

The amendment to Sect. III is made for the purpose of clarifying the circumstances in which a party may apply for an alternative percentage increase where the parties have agreed damages of £500,000 or less. This clarification is accomplished by an amendment to r.45.18. That rule provides for alternative circumstances in which a party may apply for a success fee percentage increase greater or less than the fixed amount of 12.5% allowed by r.45.16 or r.45.17. The current wording suggests that the particular circumstance provided for by para. (2)(c) applies only where, though the parties have agreed damages, there has been a finding by the court as to contributory negligence. The intention was that contributory negligence should be disregarded when applying the test in para. (2)(c). This provision is amended to restore this intention and now reads as follows (see ***White Book–Supplement 2*** para. 45.17, p.54):

"(c) the parties agree damages of £500,000 or less and it is reasonable to expect that if the court had made an award of damages, it would have awarded damages greater than £500,000, disregarding any reduction the court may have made in respect of contributory negligence."

Stay of execution pending appeal

CPR r.52.7 states (in part) that, unless the appeal court or the lower court orders otherwise, an appeal shall not operate as a stay of any order or decision of the lower court. This general rule is based on the view that a party who has won his case at first instance should not be deprived of the fruits of his victory merely because the losing party proposes to appeal.

In the recent case of ***Moat Housing Group-South Ltd v. Harris***, *The Times*, January 13, 2005, C.A., Brooke L.J. (with whom Dyson L.J. agreed) said that, in determining whether to grant a stay pending appeal, regard is to be had (amongst other things) to the potential prejudice to the parties. His lordship added that the correct approach as to prejudice was set out in ***Hammond Suddards Solicitors v. Agrichem International Holdings Ltd***, [2001] EWCA Civ 2065, December 18, 2001, unrep. (referred to at para. 52.7.2 in the ***White Book***).

In the ***Hammond Suddards*** case, pending the hearing of the substantive appeal by the Court, two judges sat to deal with (1) an application by the appellant for a stay of orders made by the judge for the payment of the judgment debt and costs, and (2) a cross-application by the respondents for an order for security for their costs of the appeal. In granting permission to appeal, a single lord justice refused a stay in relation to the order for costs. Before the Court, the appellant company renewed their application for a stay of the costs orders on the basis that, be cause it was in an extremely poor financial position, enforcement proceedings by the respondents could result in the appellant being unable to pursue its appeal.

The Court (Clarke L.J. and Wall J.) referred to r.52.7 and said (para. 22) that it followed from this rule that a court has a discretion whether or not to grant a stay. Whether an appeal court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. The particular questions are: (1) if a stay were to be refused, what were the risks of the appeal being stifled?, (2) if a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment?, (3) if a stay is refused and the appeal succeeds, and the judgment is enforced in the mean time, what are the risks of the appellant being able to recover from the respondent monies paid to the respondent?

In addition to stating the general rule discussed above, r.52.7 also states that an appeal from the Immigration Appeal Tribunal shall not operate as a stay. (This amendment reflects the statutory bar on removal pending appeal that is now contained in the Nationality Immigration and Asylum Act 2002 s.78.) In ***R. (Pharis) v. Secretary of State for the Home Department***, [2004] EWCA Civ 654, [2004] 1 W.L.R. 2590, C.A., the Court of Appeal said (para. 19) that the lodging of a notice of appeal in the Court in an immigration or asylum case where the refusal of a High Court judge to grant permission to apply for judicial review is under challenge should not be interpreted as a giving rise to an automatic stay of deportation process. An appellant wishing to seek a stay must make an express application for this purpose which the staff of the Civil Appeals Office must place before a judge of the Court for a ruling on paper, as also happens when a stay is sought in connection with possession proceedings when the execution of a warrant of possession is imminent (as in the Moat Housing case).

CPR UPDATE

AMENDMENTS TO RULES

Various amendments have been made to the CPR by the Civil Procedure (Amendment No. 4) Rules 2004 (S.I. 2004 No. 3419). They come into effect on April 1, 2005.

The most significant changes made by this statutory instrument are the substitution of Sect. 1 of Pt 45 (Fixed Costs), and the insertion of a new Part, Pt 67 (Proceedings Relating to Solicitors). The effect of the changes to Pt 45 Sect. 1 are explained in the "In Detail" section of this issue of ***CP News*** Pt 67 replaces CPR Sched.1 RSC O.106 (***White Book*** para. sc106.0.1, p.1912), which is revoked. The rules in Pt 67 make provision about certain types of proceedings against solicitors, including applications for a solicior to deliver a bill or cash account, applications for the assessment of solicitor's costs, and proceedings relating to intervention by the Law Society in a solicitor's practice.

All of the amendments made by the Civil Procedure (Amendment No. 4) Rules 2004 will be included in the 2005 edition of the ***White Book***. The details of these amendments, with the exception of the substitution of Sect. 1 of Pt 45 and the insertion of Pt 67, are set out below. Paragraph and page numbers refer to ***Civil Procedure 2004***, Vols 1 and 2, and Supp. 2, as indicated.

para. 21.10, p. 472

In r.21.10 add new sub-rule (3) as follows:

"(3) In proceedings to which Section II of Part 45 applies, the court shall not make an order for detailed assessment of the costs payable to the child or patient but shall assess the costs in the manner set out in that Section."

para. 22.1, p.484

In r.22.1(1), at the end of sub-para. (e), omit "and", and for sub-para. (f) substitute:

"(f) a certificate of service; and

(g) any other document where a rule or practice direction requires."

Since June 30, 2004, the requirement that a certificate of service should be verified by a statement of truth has been found in Practice Direction (Statements of Truth) para. 1.1 (see Supp. 2 para. 2PD.1, p.36). By this amendment it is brought into r.22.1.

Sub-rule (4) in r.21.10 is amended by the addition of para. (c) and now reads (in its entirety) as follows:

"(4) Subject to paragraph (5), a statement of truth is a statement that—

(a) the party putting forward the document; or
(b) in the case of a witness statement, the maker of the witness statement; or
(c) in the case of a certificate of service, the person who signs the certificate,

believes the facts stated in the document are true."

para. 25.7, pp.579 to 580

Rule 25.7 is amended for the purpose of meeting concerns about the inability of the courts to award interim payments against uninsured defendants in personal injury cases. The rule now reads in its entirety as follows:

"25.7—(1) The court may only make an order for an interim payment where any of the following conditions are satisfied—

(a) the defendant against whom the order is sought has admitted liability to pay damages or some other sum of money to the claimant;
(b) the claimant has obtained judgment against that defendant for damages to be assessed or for a sum of money (other than costs) to be assessed;
(c) it is satisfied that, if the claim went to trial, the claimant would obtain judgment for a substantial amount of money (other than costs) against the defendant from whom he is seeking an order for interim payment whether or not that defendant is the only defendant or one of a number of defendants to the claim; or
(d) the following conditions are satisfied—
  (i) the claimant is seeking an order for possession of land (whether or not any other order is also sought); and
  (ii) the court is satisfied that, if the case went to trial, the defendant would be held liable (even if the claim for possession fails) to pay the claimant a sum of money for the defendant's occupation and use of the land while the claim for possession was pending;
(e) in a claim in which there are two or more defendants and the order is sought against any one or more of those defendants, the following conditions are satisfied —
  (i) the court is satisfied that, if the claim went to trial, the claimant would obtain judg-

ment for a substantial amount of money (other than costs) against at least one of the defendants (but the court cannot determine which); and

(ii) all the defendants are either—

(a) a defendant that is insured in respect of the claim;

(b) a defendant whose liability will be met by an insurer under section 151 of the Road Traffic Act 1988 or an insurer acting under the Motor Insurers Bureau Agreement, or the Motor Insurers Bureau where it is acting itself; or

(c) the defendant is a public body.

(2) [Omitted]

(3) [Omitted]

(4) The court must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment.

(5) The court must take into account—

(a) contributory negligence; and

(b) any relevant set-off or counterclaim."

para. 40.1, p.985

In r.40.1, after "any other of these Rules" insert "or a practice direction"

para. 41.3, p.1033

At end of r.41.3, omit sub-rule (6)

para. 44.12A, p.1098

In para. (c) of r.44.12A(1) omit "except as referred to in paragraph (1A)"

In r.44.12A omit sub-rule (1A) and the cross-reference to r.21.10 following

These amendments (and the amendment to r.48.5 referred to immediately below) are a consequence of the amendment to Sect. II of Pt 45 explained in the "In Detail" section of this issue of ***CP News***.

para. 48.5, p.1205

In r.48.5(2) for para. (b) substitute—

"(b) on an assessment under paragraph (a), the court must also assess any costs payable to that party in the proceedings unless—

(i) the court has issued a default costs certificate in relation to those costs under r.47.11; or

(ii) the costs are payable in proceedings to which Section II of Part 45 applies."

para. 2F-68, Vol. 2 p.528

Rule 63.13 is amended so as to provide that it is not necessary that claims under the Trade Marks Act 1994 should be brought in the Chancery Division. As amended the rule now reads in its entirety as follows—

"63.13 (1) This Section of this Part applies to—

(a) claims relating to matters arising out of the 1994 Act; and

(b) other intellectual property rights as set out in the practice direction.

(2) [Omitted]

(3) Claims to which this Section of this Part applies must be brought in—

(a) the Chancery Division;

(b) a Patents County Court; or

(c) a county court where there is also a Chancery district registry."

para. sc62.A3, p.1861

In CPR Sched.1, RSC O.62 (Costs) is now revoked (including App. 3).

para. sc106.0.1, p.1912

In CPR Sched.1, RSC O.106 (Proceedings Relating to Solicitors : The Solicitors Act 1974) is now revoked, and in effect replaced by new Pt 67 (Proceedings Relating to Solicitors).

para. cc38.18, p.2043

In CPR Sched.2, CCR O.38 (Costs) is now revoked (including App. B)

EDITOR: **Professor I. R. Scott**, University of Birmingham.
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