CIVIL PROCEDURE NEWS

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Service of claim form—service by fax on defendant's solicitors—whether valid

CPR rr.6.3, 6.7, 6.15 and 7.5(1), Practice Direction A—Service Within the United Kingdom para.4.1. Claimants (C) serving claim form by fax on solicitors (S) acting for defendant (D). At that time, neither D nor S had advised C that S were authorised to accept service. D applying for declaration that service was not valid and C applying for alternative service order. **Held**, granting D's application and refusing C's application, (1) where either of the conditions stated in r.6.7 applies (and neither did in this case), the claim form must be served on the solicitors, but not otherwise, (2) para.4.1, insofar as it applies to service by fax or other electronic means on solicitors, is restricted to those circumstances where, by operation of r.6.7, the claim form must be served on the solicitors, (3) in the circumstances, there was no "good reason" for permitting the fax service to stand as good alternative service. Observations on rule headings as aids to interpretation of rules (para.17). ***Collier v Williams*** [2006] EWCA Civ 20; [2006] 1 W.L.R. 1945, CA; ***Anderton v Clwyd County Council*** [2002] EWCA Civ 933; [2002] 1 W.L.R. 3174, CA, ref'd to. (See ***Civil Procedure 2009*** Vol.1 paras 6.3.5, 6.7.1, 6.15.1, 6.15.3, 6.20.4 and 6APD.4, and Vol.2 para.12–43.)

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Discharge of freezing order—striking out notice of appeal

CPR rr.25.1(1)(f) and 52.9, Practice Direction—Interim Injunctions para.3. Claimants (C) succeeding at trial on claim 2, but failing on claim 1. Before trial, C obtaining freezing order on basis of claim 1. After trial, on grounds (1) that there had been material non-disclosure, and (2) that C had failed on the claim on which the orders were based, D applying for discharge of the orders and an inquiry as to damages on C's cross-undertaking. Judge refusing application ([2007] EWHC 1673 (Ch)). D granted permission to appeal. On basis that recently discovered documents revealed that D had failed to comply with their pre-trial disclosure obligations, C applying to strike out D's notice of appeal on ground of abuse of process. **Held**, (1) dismissing D's appeal, (a) although the normal approach of a court faced with material non-disclosure will be to discharge the freezing order, the court retains power to continue the order or to make a new order, (b) a claimant must bear the risk that if an amendment constitutes a new cause of action, and he fails on the original cause of action at trial, the freezing order may be discharged and the cross-undertaking enforced, (c) in the circumstances of this case the judge had not erred in the exercise of his discretion when he refused to discharge the freezing orders, and (2) dismissing C's application, (a) in circumstances such as these, r.52.9 contains an exhaustive statement of the Court's jurisdiction to strike out a notice of appeal, (b) that rule requires that there should be a compelling reason for striking out a notice and has the effect of ousting any inherent jurisdiction to set aside a notice because of abuse of process on some lesser basis, (c) D's breaches of disclosure obligations did not affect the conduct of the appeal, (d) there was no compelling reason for striking out. ***Yukong Line Ltd v Rendsburg Investments Corporation*** [2001] 2 Lloyd's Rep. 113, CA; ***Arrow Nominees Inc v Blackledge*** [2002] 2 B.C.L.C. 167, CA, ref'd to. (See ***Civil Procedure 2009*** Vol.1 paras 25.1.25.4, 25.3.5 and 52.9.2, and Vol.2 para.15–34.)

UL-HAQ v SHAH [2009] EWCA Civ 542; 159 New L.J. 897 (2009) CA (Smith, Moses & Toulson L.JJ.)

Striking out—abuse of process

CPR r.3.4(2). Following rear-end traffic accident, one driver (C1) and his passengers (C2 & C3) bringing claims against the other (D) for minor personal injuries. D admitting liability for causing the collision but alleging that C3 was not in the car and her claim was fraudulent. Judge (1) finding that C3's claim was fraudulent and that C1 and C2 had conspired with C3 to support it, and (2) holding that C1 and C2 had suffered injury and awarding damages accordingly. On second appeal to Court of Appeal, D contending that, because of their participation in C3's fraud, judge should have struck out C1 and C2's claims as an abuse of process. **Held**, dismissing the appeal, (1) r.3.4(2) does not grant a court power to strike out a claim at the end of trial where (as here) there is no suggestion that it has not been possible to hold a fair hearing, (2) the term "abuse of process" in r.3.4(2) is not defined and the categories of abuse are not closed. ***Arrow Nominees Inc v Blackledge*** [2001] B.C.L.C. 167, CA, ref'd to. (See ***Civil Procedure 2009*** Vol.1 paras 3.4.1, 3.4.3.6, 3.4.5 & sc52.9.3.)

BAKER v QUANTUM CLOTHING GROUP [2009] EWCA Civ 566, June 6, 2009, CA, unrep. (Sedley, Smith & Jacob L.JJ.)

Apparent judicial bias—application for recusal

Human Rights Act 1998 Sch.1, Pt I, art.6.1. Employee (C) bringing noise-induced deafness claims against defendant companies engaged in textile industry. Following trial of certain issues, appeal entertained by Court of Appeal consisting of a panel of three lord justices. At outset of the hearing, one lord justice (S) disclosing to parties that he was Honorary President of the British Tinnitus Association and none of the three respondents raising any objection to his sitting on the appeal. After judgment reserved, respondents (D) making application, on ground of apparent bias, for the appeal to be re-listed before another panel. Application raising issues not canvassed at the outset of the hearing and supported by evidence of links between the solicitors for C (X) and the BTA (much of it derived from the BTA's website). S declining to recuse himself and D's application considered by the other two lord justices. **Held**, dismissing the application, (1) the application was novel as D's complaint was not that there was a connection between S and C, but that there was an indirect link between S and X, (2) the connection was tenuous and in the circumstances would not be regarded by a well-informed observer as giving rise to a possibility of bias, (3) the fact that the solicitors for D, having found the material on which they relied in the application, delayed for a further five weeks before taking any action bore the inference that the matters relied on were not, at the time of discovery, seen as serious, (4) it is not open to a party which thinks it has grounds for asking for recusal to take a leisurely approach to raising the objection, (5) applications for recusal go to the heart of the administration and must be raised as soon as is practicable. ***Helow v Secretary of State for the Home Department*** [2008] UKHL 62; [2008] 1 W.L.R. 2416, HL, ref'd to. (See ***Civil Procedure 2009*** Vol.2 para.9A–48.)

IMPERIAL CANCER RESEARCH FUND v OVE ARUP & PARTNERS LIMITED [2009] EWHC 1453 (TCC), June 23, 2009, unrep. (Ramsey J.)

Service of claim form—application under r.7.5 for extension of time

CPR rr.2.11, 7.4, 7.5, 7.6 and 23.10, Pre-Action Protocol for Construction and Engineering Disputes para.6. Claimants (C) bringing professional negligence claim against consultant engineers (D), alleging damage for water ingress in a new build. C also proceeding against architects and contractors. Rule 7.5(1) having effect of requiring C to complete the "service step" appropriate for the method of service chosen for service of their claim form within four months after December 22, 2008. On April 15, 2009 (before the expiry of that period), claimants (C) applying without notice under r.7.6 for an order extending the period for compliance with r.7.5(1) from April 22 to July 22, 2009. Application made on ground that C required additional time in which to obtain the information necessary properly to particularise their claim. Court granting application and, on May 1, 2009, C serving application and order on D. On May 14, D applying under r.23.10 to have the order set aside. D (1) submitting that C should have served the claim form in time and then either sought agreement with D under r.2.11 for an extension of the time for separate service of the particulars of claim or applied to the court under r.3.1(2)(a) for such an extension, and (2) pointing out that relevant primary limitation periods had, or arguably had, expired. **Held**, dismissing D's application, (1) an application to set aside an order obtained without notice involves a re-hearing of the issue and not a review of the decision, (2) the authorities on r.7.6 depend on their particular facts, but they provide illustrations of the facts that fall in favour or against the grant of an extension of time, (3) C had to decide which of three potential defendants they should proceed against and, in particular, whether they could maintain a case against D, (4) to do so C needed to have an expert's report on investigations that were being undertaken and access to documents that the defendants had undertaken to retrieve and provide, (5) in the circumstances C behaved sensibly and responsibly in not wishing to serve their claim form until they were in a position where they knew, in the light of expert evidence, whether they had a viable particularised claim against a particular party, (6) in accordance with para.6, at the time when the claim form was issued C ought to have applied to the court for directions, but this breach should not determine the matter. General guidance derived from the authorities on correct approach to r.7.6 applications summarised and leading cases explained. ***Hashtroodi v Hancock*** [2004] EWCA Civ 652; [2004] 1 W.L.R. 3206, CA; ***Steele v Mooney*** [2005] EWCA Civ 96; [2005] 1 W.L.R. 2819, CA; ***Collier v Williams*** [2006] EWCA Civ 20; [2006] 1 W.L.R. 1945, CA; ***Hoddinott v Persimmon Homes (Wessex) Ltd*** [2007] EWCA 1203; [2008] 1 W.L.R. 806, CA, ref'd to. (See ***Civil Procedure 2009*** Vol.1 paras 7.6.2, 7.6.8 and C5–012.)

OFULUE v BOSSERT [2009] UKHL 16; [2009] 2 W.L.R. 749, HL

Acknowledgment of title—without prejudice communication as evidence of

CPR rr.32.1 and 51.1, Practice Direction (Transitional Provisions) para.19(1), Limitation Act 1980 ss.15 and 29. In 1982, D and her father (X) allowed into possession of property by the registered proprietor's (C) former tenant. In 1989, C bringing possession proceedings against D and X. In course of negotiations to settle those proceedings,

on January 14, 1992, solicitors for D and X sending without prejudice letter to C communicating an offer by their clients to purchase the freehold for £35,000. By operation of para.19(1) these proceedings automatically stayed on April 26, 2000. On February 1, 2002, C making application under para.19(2) to lift stay. Court dismissing this application and, on April 16, 2002, striking out C's claim. In September 2003, after death of X, C bringing fresh possession proceedings against D. D raising defence of adverse possession, alleging that C's right of action accrued more than 12 years ago and was therefore statute barred by s.15. In response C relying on s.29(2)(a), alleging that her right of action accrued on January 14, 1992, when B and X acknowledged her title in the letter of that date. County court judge accepting D's contention that she had been in adverse possession of the property for the requisite period, and rejecting C's contention that the running of time had been interrupted by any s.29 acknowledgment. Court of Appeal dismissing C's appeal ([2008] EWCA Civ 7; [2008] 3 W.L.R. 1253, CA). **Held**, dismissing C's further appeal, (1) it was common ground that, but for the without prejudice point, the offer to purchase in the letter would constitute an acknowledgment of C's title for purposes of s.29(2)(a), (2) a statement made by a party in correspondence written with a view to settling proceedings between him and another is not admissible in subsequent proceedings between the same parties, save where it was wholly unconnected with the issue in those proceedings, (3) it was indisputable that the letter was written with a view to settling the earlier proceedings, and that C can have been in no doubt but that the without prejudice rule was intended to apply to it, (4) the fact that the C's freehold title to the property was not directly in dispute in the earlier proceedings was not a good ground for admitting the without prejudice offer to purchase into evidence, (5) further, whilst it would be technically possible to say that the exclusion rule should not apply to statements in correspondence or negotiations which were to be treated, not as admissions, but as "acknowledgments" for the purposes of s.29(2)(a), such a distinction would be too subtle to apply in practice, (6) accordingly, in this case C should not be allowed to rely on the offer in the letter as an acknowledgment of title for such purpose. ***Rush & Tomkins Ltd v Greater London Council*** [1989] A.C. 1280, HL; ***Unilever Plc v The Procter & Gamble Co*** [2000] 1 W.L.R. 2436, CA; ***Bradford & Bingley Plc v Rashid*** [2006] UKHL 37; [2006] 1 W.L.R. 2066, HL, ref'd to. In dissenting, Lord Scott stating that the result of this appeal represents a marked extension of the without prejudice rule that previous judicial authority does not warrant and that public policy does not require. (See ***Civil Procedure 2009*** Vol.1 paras 31.3.40, 32.1.4 and 51PD.19, and Vol.2 para.8–79.)

- **PICKTHALL v HILL DICKINSON LLP** [2009] EWCA Civ 543, June 11, 2009, CA, unrep. (Laws and Thomas L.JJ. and Mann J.)

Wrong claimant commencing proceedings—subsequent assignment of claim—whether proceedings an abuse of process

CPR r.3.4(2)(b). Businessman (C) engaging solicitors (D) to act for him on sale of his interest in a company (X). Sale agreement entered into on February 6, 2001. Shortly afterwards X going into administration. Administrator commencing proceedings against C for breach of fiduciary duty, etc. and obtaining judgment. On October 6, 2001, C adjudicated bankrupt on his own petition. In April 2006, Official Referee becoming legal owner of the residual assets in the bankruptcy (if any). C discharged from bankruptcy on August 22, 2006. In early 2007, C requesting OR to assign to him a cause of action against D in the form of a claim for professional negligence in relation to the sale agreement for which six year limitation period expired on February 6, 2007. After considering the request and negotiating with C, OR assigning cause of action to C on June 20, 2007. In meantime, on February 5, 2007, C issuing claim form against D seeking damages for negligence and breach of contract, or alternatively a declaration that the defendants owed the same damages to the OR (joined as a defendant). Judge trying as a preliminary issue question whether, as D contended, C's claim should be struck out as an abuse of process and, on October 13, 2008, holding that it was not. **Held**, allowing D's appeal, (1) as a matter of law, C had no entitlement to an assignment of the cause of action from the OR, (2) C came to issue the proceedings against D at a time at which, to his knowledge, he did not have the cause of action vested in him, (3) as C was the wrong person to assert the cause of action the proceedings could immediately be subject to an irresistible application to strike out, (4) in these circumstances the proceedings were an abuse of process, (5) the fact that C had the intention to get in the cause of action, and indeed had a prospect of doing so made no difference. ***Aldi Stores Group Ltd v WSP Group Plc*** [2007] EWCA Civ 1260; [2008] 1 W.L.R. 748, CA; ***Nomura International Plc v Granada Group Ltd*** [2008] 1 Bus. L.R. 1; ***Steamship Mutual v Trollope & Colls (City) Ltd*** (1986) 33 B.L.R. 77, CA; ***Barton Henderson Rasen v Merrett and Ernst & Young*** [1993] 1 Lloyd's Rep. 540, ref'd to. (See ***Civil Procedure 2009*** Vol.1 para.3.4.3.6.)

■ **R. (A) v DIRECTOR OF ESTABLISHMENTS OF THE SECURITY SERVICE** [2009] EWCA Civ 24; *The Times* April 6, 2009, CA (Laws, Rix & Dyson L.JJ.)

Breach of Convention right claim—whether brought in appropriate court or tribunal

CPR r.7.11, Supreme Court Act 1981 s.19, Human Rights Act 1998 s.7 and Sch.1 Pt I Art.10, Regulation of Investigatory Powers Act 2000 s.65(2)(a), Investigatory Powers Tribunal Rules 2000 rr.2, 6, 9 and 13. Former member of Security Service (C), who was bound by a strict duty of confidentiality, seeking consent of Director of Establishments of the Security Service (D) to his publishing a manuscript containing, amongst other things, an account of his (C's) work for the Service. C granted permission to proceed with judicial review claim challenging D's refusal of consent. C alleging that the refusal violated his right of free expression guaranteed by Art.10, and was unreasonable and vitiated by bias. Judge conducting preliminary hearing on question, raised by D, whether court had jurisdiction to determine C's Art.10 claim. Judge deciding that issue in favour of C and granting D permission to appeal ([2008] EWHC 1512 (Admin); [2008] 4 All E.R. 511). **Held**, allowing D's appeal (Rix L.J. dissenting), (1) C's Art.10 claim was a claim within s.7(1)(a) for which proceedings were to be brought "in the appropriate court or tribunal", (2) ordinarily, unless the claim is in respect of a judicial act, "the appropriate court or tribunal" for a claim within s.7(1)(a) is, by force of r.7.11, "any court", (3) however, as C's claim (being within s.7(1)(a)) was brought "against any of the intelligence services" (s.65(3)(a)), by force of s.65(2)(a) the "appropriate court or tribunal" was the Investigatory Powers Tribunal (IPT), and the High Court had no jurisdiction in the matter, (4) the creation of Convention rights under the 1998 Act, and the assignment of disputes about them to the appropriate court or tribunal, were all part of the same legislative scheme coming into effect on the same date, (5) as neither the High Court nor any other court previously had jurisdiction to determine such disputes, no question of the jurisdiction of the courts being ousted by s.65(2)(a) arose. Dyson L.J. noting (at para.49) that, whereas the 2000 Rules contain detailed and elaborate provisions applicable in s.7 proceedings coming before the IPT, the CPR contain no corresponding provisions, and expressing opinion that this difference added support to D's submissions. (See ***Civil Procedure 2009*** Vol.1 para.7.11, and Vol.2 paras 3D–32, 3D–80 & 9A–71.)

■ **R. (RK (NEPAL)) v SECRETARY OF STATE FOR THE HOME DEPARTMENT** [2009] EWCA Civ 359, *The Times* May 11, 2009, CA (Waller, Moses and Aikens L.JJ.)

Removal directions —"in-country" appeal— injunction pending appeal

CPR rr.52.15 and 54.4, Immigration and Asylum Act 1999 s.10, Nationality, Immigration and Asylum Act 2002 ss.82 and 92, Immigration Rules r.323, Practice Direction (Applications) para.2.7. Secretary of State (D) (1) deciding that two non-British individuals (C) were liable to be removed from the UK because they were in breach of the conditions of their leave to enter and remain in the UK as students, and (2) giving removal directions to take effect on November 27, 2008. Those directions stating that C had no right to appeal against the decision whilst they were still in the UK. C granted interim injunction restraining D from carrying out the removal directions on ground that they apply promptly for judicial review. C issuing claim for judicial review of the decision and/or the statement that there was no in-country right of appeal against the decision to remove them. On paper, and on renewed application, High Court judges refusing C permission to proceed to judicial review. On February 18, C filing notice of application for permission to appeal to the Court of Appeal. On February 23, D giving C new removal directions to take effect on February 27. Late on the afternoon of that day, C applying to Court of Appeal ex parte for further interim injunction restraining D from carrying out removal directions. Single lord justice granting this application on conditions, including condition that C's solicitors should provide a statement explaining the delay in making the application. **Held**, refusing permission, (1) the relevant legislation stated that D could make a decision to remove a non-British citizen either under s.10(1) of the 1999 Act or by using the curtailment provision of the Immigration Rules, (2) if D decided to use the s.10(1) procedure then that could only be challenged by judicial review in very limited circumstances which did not apply in this case, (3) the immigration decisions against C were made under s.10(1)(a) and fell within s.82(2)(g) of the 2002 Act, (4) in these circumstances, by operation of s.92, C had no right of appeal to the AIT whilst still in the UK, (5) the decisions of which C complained could only be challenged by them by the appeal to the AIT from abroad process laid down in the 2002 Act. Court stating that solicitors for applicants should not delay making applications for injunctions restraining D from carrying out removal directions. In this case the delay raised the suspicion that the application was made late for tactical reasons; in effect forcing the court to grant an interim injunction without being able to consider the merits fully with the other side present. Such tactics were unacceptable. ***R. (Lim) v Secretary of State for the Home Department*** [2007] EWCA Civ 773; ***R. (CD (India)) v Secretary of State for the Home Department*** [2008] UKAIT 00055, July 17, 2008, unrep.; ***R. (Saleh) v Secretary of State for the Home Department*** [2008] EWHC 3196 (Admin), December 1, 2008, unrep., ref'd to. (See ***Civil Procedure 2009*** Vol.1 paras 23PD.2 and 54.1.3.)

■ **RED RIVER UK LTD v SHEIKH** [2009] EWCA Civ 643; *The Times* May 6, 2009, CA (Sir Anthony Clarke M.R., Arden and Lloyd L.JJ.)

Court of Appeal—respondent's concessions making full hearing unnecessary—effect on successful appellant's costs

CPR rr.1.3, 44.3 and 52.10(2). On December 15, 2008, defendants (D) granted permission to appeal against part of order made by judge on D's interim application. D thereupon amending their notice of appeal. In light of concessions made by the claimants (C) in their respondent's notice, parties entering into correspondence culminating in C stating (on February 5, 2009) that they would apply to amend their particulars of claim, and inviting D to withdraw their appeal. On March 19, 2009, judge granting C permission to amend their particulars. D continuing to pursue the appeal. In their skeleton, C submitting that permission to appeal had been granted on a variant basis, and that, as the only point raised by that ground of appeal had been met by their concession, there was therefore no reason for the appeal to proceed any further. At hearing of appeal on April 27, 2009, D (now acting in person) submitting that the principal issue was now one of costs. **Held**, (1) taking into account the conduct of the parties, including (a) the fact that D incurred a great deal of costs that was not attributable to the point on which they succeeded, and (b) that C made no offer as to costs when conceding, it was appropriate to order C to pay a modest amount of D's costs, (2) on summary assessment, the appropriate amount was £2,000. Arden L.J. stating (1) that the parties ought to have informed the Court in February that there was no point in a full hearing, thereby enabling the Court to direct that the matter of costs should be dealt with on paper by a single lord justice, (2) that parties to appeals should note that the costs awarded by the Court are likely to be reduced where they fail to keep one another and the Court fully informed of pre-hearing developments rendering a hearing ineffective. (See ***Civil Procedure 2009*** Vol.1 paras 1.3.1, 44.3.13, 52.12.9, and Vol.2 para.11–14.)

■ **SHARAB v PRINCE AL-WALEED** [2009] EWCA Civ 353, April 30, 2009, CA, unrep. (Arden, Richards & Rimer L.JJ.)

Appeal judgment reserved—appellant offering undertaking—effect of

CPR rr.6.36, 11(1) and 52.11, Practice Direction B (Service Out of the Jurisdiction) paras 3.1(6)(a) and 3.1(7). On ex parte application, claimant (C) granted permission under (what are now) r.6.36 and paras 3.1(6)(a) and 3.1(7) to serve claim form on defendant (D) out of the jurisdiction making claims against D for services rendered as an agent acting for D in an aircraft sale. Judge dismissing D's application under r.11(1) for order declaring that the court had no jurisdiction to hear the claim and that the appropriate forum was Libya. Judge finding that C had established a good arguable case that her claim fell within paras 3.1(6)(a) and 3.1(7). D granted permission to appeal. After the conclusion of the oral hearing of the substantive appeal (which in the event the Court dismissed) and the reserving of judgment thereon, by email D informing Court that he was prepared to give an undertaking that, should C bring proceedings in Libya he will submit to the jurisdiction of the Libyan courts. Court treating D's email as an application for the Court to accept the undertaking now offered and inviting submissions. **Held**, refusing the application, D's appeal was limited to a review of the judge's decision and was not a re-hearing, (2) the court has a discretion whether to receive fresh evidence or to permit a party to rely on a matter not contained in the notice of appeal, (3) that discretion should apply to the acceptance of an undertaking in much the same way as to the admission of fresh evidence properly so called, (4) the position adopted by D on the question of an undertaking had an important effect in shaping the arguments before the judge and on the appeal, (5) D had the clearest of opportunities to give or offer an undertaking at the time of the proceedings before the judge, (6) in the circumstances, for these and other reasons, the discretion should not be exercised in D's favour. ***Ladd v Marshall*** [1954] 1 W.L.R. 1489, CA; ***Hamilton v Al-Fayed (No.4)*** [2001] E.M.L.R. 15, CA; ***Al-Koronky v Time-Life Entertainment Group Limited*** [2006] EWCA Civ 1123, ref'd to. (See ***Civil Procedure 2009*** Vol.1 paras 6.37.34, 6BPD.3 and 52.11.2.)

■ **THOMPSON v COLLINS** [2009] EWCA Civ 525, April 6, 2009, CA., unrep. (Ward, Keene and Lawrence Collins L.JJ.)

Conversation between judge and solicitor—whether apparent bias

Human Rights Act 1998 Sch.1, Pt I, art.6.1. In boundary dispute, recorder (1) making declarations and ordering rectification, and (2) inviting claimants (C) and defendants (D) to agree part of boundary in accordance with his holdings so that a line could be drawn on a plan. Upon parties being unable to reach agreement, Ds' solicitor (X) telephoning recorder directly for purpose of explaining position. X then explaining to Cs' solicitor (Y) that he had taken this initiative (albeit without Y's knowledge or permission) and that the recorder had suggested that a telephone conference be arranged so that further directions could be given. On Cs' appeal (a) on the merits, and (b) on the ground that the proceedings were tainted by apparent bias, **held**, dismissing the appeal, (1) the conversation between the recorder and X should not have taken place, (2) the proper course was for X to correspond with the court and

ask that the correspondence be placed before the judge for his ruling upon it, (3) the evidence showed that there was nothing in the telephone call that gave the slightest hint of impropriety, apart from the fact that the call was held, (4) a fair-minded and informed observer would not conclude that there was a real possibility that the recorder was biased. The allegation of apparent bias "plainly resulted from the extreme bitterness of the dispute between the parties … and should never have been pursued on appeal" (per Lawrence Collins L.J., at para.39). In this day and age, "it would have been correct, but pompous to the point of rudeness" for the recorder to have terminated the call perfunctorily per Ward L.J. at para.32). ***Porter v Magill*** [2001] UKHL 67; [2002] 2 A.C. 357, HL, ref'd to. (See ***Civil Procedure 2009*** Vol.2 para.9A–48.)

Statutory Instruments

CIVIL PROCEEDINGS FEES (AMENDMENT) ORDER 2009 (SI 2009/1498)

Civil Proceedings Fees Order 2008 Schs 1 and 2. In Sch.1, amends descriptions of fees nos. 2.7, 2.10 and 4.1; amends descriptions and amounts payable for fees 5.1 to 5.6 (generally replacing separate Supreme Court and county court fees with single fee); substitutes fee 8.1 (warrants of execution) with fees no longer graduated according to amount sought to be recovered, and increases other fees relevant to enforcement proceedings in county courts (fees nos. 8.3, 8.4, 8.5, 8.7 and 8A). In Sch.2, increases the figures (in para.3) for gross annual income used to determine whether a party is eligible for fee remission, and the figures (in para.5) for calculating disposable monthly income. In force July 13, 2009 (See ***Civil Procedure 2009*** Vol.2 paras 10–7, 10–10 and10–12.)

SUPREME COURT RULES 2009 (SI 2009/1603)

Constitutional Reform Act 2005 s.45. Contains rules governing practice and procedure in the Supreme Court of the United Kingdom applicable to civil and criminal appeals to the Court and to appeals and references under the Court's devolution jurisdiction. Rules are divided into eight Parts (supplemented in certain respects by practice directions) as follows: 1. Interpretation and scope, 2. Application for permission to appeal, 3. Commencement and preparation of appeal, 4. Hearing and decision of appeal, 5. Further general provisions, 6. Particular appeals and references, 7. Fees and costs, and 8. Transitional arrangements. In Pt 8, r.55 states that, unless the Court or the registrar otherwise directs, these Rules shall apply, with any necessary modifications, to appeals which were proceeding, and petitions for leave which were lodged, in the House of Lords before commencement date. In force October 1, 2009. (See ***Civil Procedure 2009*** Vol.2, Sect.4.)

In Detail

SERVICE OF CLAIM FORM

According to para.(d) of CPR r.6.3(1), one of the methods by which a claim form may be served is "fax or other means of electronic communication in accordance with Practice Direction A". The relevant provision in the practice direction is para.4.1 (which is not confined to the service of documents in the form of claim forms). That paragraph lays down certain mandatory conditions. Paragraph 4.1(1) states that a claim form may be served by fax or other electronic means where either the party who is to be served or "the solicitor acting for that party" previously has "indicated in writing" to the party serving (a) a willingness to accept service by such means, and (b) the fax number, email address or other electronic identification to which it must be sent. Paragraph 4.1(2) states (in part) that, for these purposes where service of the claim form is to be by fax, "a fax number set out on the writing paper of the solicitor acting for the party to be served" is to be taken "as sufficient written indications for the purposes of paragraph 4.1(1)".

Rule 6.3(1)(d) and para.4.1 clearly contemplate that there are circumstances in which a claimant may validly effect service of a claim form by serving it (by an approved method) on a solicitor. Paragraph (a) of r.6.7 states that, subject to r.6.5(1) (which refers to mandatory personal service), where the defendant has given in writing the business address within the jurisdiction of a solicitor as an address at which the defendant may be served with the claim form, the claim form must be served at the business address of that solicitor. (This provision admits of the possibility that service on a solicitor will be valid even though the solicitor has not actually received from, or accepted instructions from, the defendant to accept service.) Paragraph (b) of r.6.7 states (again subject to r.6.5(1)) that where a solicitor acting for the defendant has notified the claimant in writing that the solicitor is instructed by the defendant to accept service of the claim form on behalf of the defendant at a business address within the jurisdiction, the claim form must be served at the business address of that solicitor.

The effects of r.6.3(1)(d) and para.4.1 and r.6.7 were in issue in the recent case of *Brown v Innovatorone Plc* [2009] EWHC 1376 (Comm), June 19, 2009, unrep. The facts were that several investors (C) commenced proceedings against corporate and individual defendants to recover losses incurred in investment schemes which C alleged were shams and a fraud upon those investing in them. The defendants included a firm of solicitors (D1) now dissolved and a former partner in that firm (D2). Before issuing the claim form, solicitors for C were in correspondence with solicitors for D1 (X) and solicitors for D2 (Y) and received letters from them on which fax numbers were included in the letterhead.

On February 17, 2009, at about two hours before the end of the four month period fixed by r.7.5(1) for the taking of the service step appropriate for the method of service adopted required by that provision, C faxed copies of the claim form to X and Y. At that time, neither X nor Y, nor their respective clients, had been asked by C whether their solicitors were instructed to accept service. Further, C had not been advised (either in writing or otherwise) by either D1 or D2 or by their solicitors that the solicitors were instructed to accept service (in fact, X had been so instructed, but Y had not).

D1 and D2 applied for declarations that the claim form was not validly and effectively served upon them. C contended that the service on D1 and D2 were valid and, on April 27, 2009, applied (1) for orders to that effect, and, in the alternative (2) for orders that the fax services should stand as good service by an alternative method (r.6.15).

Was the claim form validly served? No.

In support of their applications, D1 and D2 submitted:

(1) that a claim form may not be served on a solicitor unless r.6.7 requires that it be so served;

(2) in this case, D1 and D2 had not given in writing the business addresses of their solicitors as addresses at which they may be served with the claim form;

(3) further, X and Y had not notified C in writing that they were instructed by the respective defendants to accept service of the claim form on their behalf at a business address within the jurisdiction;

(4) rule 6.3 and para.4.1 are concerned with the method of service (as the heading to r.6.3 states); they are not about on whom there may be valid service or, more specifically, about when there may be valid service on a defendant's solicitor.

In opposing D's applications and in support of the first of their applications, C submitted:

(1) r.6.3(1)(d) and para.4.1 provide that a claimant may serve a claim form by fax on a defendant or his solicitor if the defendant or his solicitor has indicated in writing to the claimant that he is willing to accept service by fax;

(2) in the case of a solicitor who is acting for a defendant, a fax number set out on the solicitor's writing paper is to be taken to be a sufficient indication that he is willing to accept service by fax;

(3) accordingly, when, as here, a claimant's solicitor has received correspondence from a solicitor acting for a defendant on writing paper setting out the solicitor's fax number, a claim form may be validly served by transmitting it to the fax number;

(4) there is no need or justification for restricting the circumstances in which there can be valid service by fax upon a solicitor acting for a defendant;

(5) in particular, there is no justification for restricting the application of para.4.1 to cases in which the claim form is to be served upon the solicitor under r.6.7.

Andrew Smith J. granted the applications of D1 and D2 and dismissed the application of C. His lordship held that the expression "the solicitor acting for ... the party who is to be served" in para.4.1 refers to the situation where the solicitor is to be served under r.6.7, and found support for this conclusion in the judgment of the Court of Appeal in *Maggs v Marshall* (see *Collier v Williams* [2006] EWCA Civ 20; [2006] 1 W.L.R. 1945, CA.). His lordship stated (para.31) that C's argument that the claim forms had been validly served on D1 and D2 amounted to a contention that the recent amendments to CPR Pt 6 (taking effect in October 2008) introduced "a radical change allowing service on the solicitor by fax where the claimant had been given no reason to think that the defendant had authorised this". His lordship concluded that the claim form was not validly or effectively served upon either D1 or D2 on February 17, 2009 or within the four months' time limit stipulated by r.7.5(1), and indeed that it had not been served on them at all.

Should service by an alternative method be permitted? No.

As was explained above, C also applied for an order under r.6.15 (Service of the claim form by an alternative method or at an alternative place) having the effect of enabling the service by fax on X and Y to "stand as good service" of the claim form. Paragraphs (1) and (2) of r.6.15 state as follows:

(1) Where it appears to the court that there is good reason to authorise service by a method or at a place not otherwise permitted by this Part, the court may make an order permitting service by an alternative method or at an alternative place.

(2) On an application under this rule, the court may order that steps already taken to bring the claim form to the attention of the defendant by an alternative method or at an alternative place is good service.

C submitted that the judge could and should order that the steps that they took to bring the claim form to the attention of D1 and D2 by serving it by fax on their respective defendants was good service.

In reply, D1 and D2 submitted that the court did not have power to make the order sought by the claimants because the steps that C took were not steps "taken to bring the claim form to the attention of the defendant" within the meaning of r.6.15(2) because in order to fall within the rule the steps must in fact have brought the claim form to the attention of the defendant within the four months' period for its service provided for by r.7.5(1). Andrew Smith J. rejected that submission.

In the event, the outcome of C's application turned on the question whether there was "a good reason" within r.6.15(1) for permitting service by an alternative method. Andrew Smith J. held that there was none and dismissed the application. In his lordship's opinion, this was "simply a case of claimants' solicitors leaving service of a claim form until very late and then not observing the rules of service" (para.43). No reason was given by C in their evidence for leaving their attempts to serve the claim form so very late. There was no suggestion that D1 or D2 or their solicitors created difficulties about the service of the claim form, or were at all responsible for it not being properly served. And it was not suggested that C could not have served the claim form in accordance with the rules, or that it would have been exceptionally difficult or would have caused inordinate delay to do so.

In dealing with the rival submissions made by the parties as to the proper approach to r 6.15 Andrew Smith J. stated that "exceptional circumstances" are not required to justify a respective order under r.6.15, but the court should adopt a rigorous approach. His lordship added (para.40):

"After all, the rule does stipulate that an order should be made only where it appears that there is 'a good reason' to do so, and, while it might be said that this requirement adds nothing because the court should never exercise a discretionary power other than for good reason, this stipulation in itself seems to me to underline that the court should examine with

some care why it has come about that it is being asked to make an order. Furthermore, in my judgment the mere absence of prejudice to a defendant will not usually in itself be sufficient reason to make an order under rule 6.15."

In rejecting the submission made by D1 and D2 to the effect to that the "good reason" requirement shows that r.6.15 is directed to cases where the claimant has been attempting to effect service but come across some practical problem, or where the defendant has been evading service his lordship said (para.41):

"I do not consider that there is any proper basis for confining the circumstances in which there is 'a good reason' for making an order under rule 6.15 to specific and limited categories of cases: the expression is a general one. ... The very fact that the CPR expressly require that there be a good reason for the court to exercise the power to permit service by an alternative method and do not simply confer a discretion to permit it, serves to emphasise that the power should not be exercised over-readily."

CLAIM RELIED ON FOR FREEZING ORDER

It is provided by paras 3.1 and 3.3 of Practice Direction—Interim Injunctions (supplementing CPR Pt 25) that an application for a freezing injunction must be supported by affidavit evidence setting out "the facts on which the applicant relies for the claim being made against the respondent, including all material facts of which the court should be made aware" (see White Book 2009 Vol.1 para.25PD.3). These provisions reflect relevant case law. Their significance is illustrated in the single judgment delivered by the Court of Appeal in *Dadourian Group International v Simms* [2009] EWCA Civ 169; [2009] 1 Lloyd's Rep. 601, CA, where one of the interesting issues raised was whether the freezing order should be discharged because the claimant had failed on the claim for which it was sought and granted but had succeeded on another.

In this case the facts were that the claimants (C) commenced proceedings against several defendants (D), including two particular individuals (X), alleging that they were entitled to recover damages for fraudulent conduct. In February 2004, C were granted worldwide freezing orders against D and gave the usual cross-undertakings in damages. These orders applied to assets up to US$5.5m. At the return date hearing for C's application for the freezing orders the principal defendant appeared and made submissions but X did not. In April 2005, C's claim was amended by the addition of a claim in which it was alleged that they had suffered loss because X had falsely alleged that they were intermediaries (the intermediary representation claim) and in which they claimed damages for deceit. At trial, the judge dismissed all of C's claims with the exception of the intermediary representation claim and awarded damages and costs accordingly ([2006] EWHC 2973 (Ch) and [2007] EWHC 454 (Ch)).

After trial, the defendants (including X) applied to Warren J. for the discharge of the freezing orders made against them and sought orders for inquiries on the cross-undertakings. The case for the discharge of the orders was put on two distinct grounds. It was submitted (1) that as the claims by reference to which the freezing orders were obtained had failed they ought therefore not to have been granted, and (2) that there had been material non-disclosure by C when the without notice orders had been obtained from the judge.

In giving judgment on this application ([2007] EWHC 1673 (Ch)) Warren J. explained (paras 29 and 30) (1) that, although the normal approach of a court faced with material non-disclosure will be to discharge the freezing order, the court retains power to continue the order or to make a new order (whether or not on terms), and (2) that it does not follow that, because a defendant succeeds in obtaining the discharge of a freezing order that he is automatically entitled to an inquiry on the cross-undertaking. His lordship rejected D's submissions as to the first ground (paras 34 to 44) (see further below). In dealing with the second ground he found that C's failure to explain to the judge granting the freezing orders that there was no basis for making certain allegations against X amounted to material non-disclosure but held that, in the circumstances, the orders should not be discharged on this ground (paras 45 to 50). Accordingly, the judge dismissed D's application and continued the freezing orders post-judgment in support of the financial awards made in C's favour restraining D from disposing of assets up to the value of £2.5m. D were granted permission to appeal. (They were also granted permission to appeal on various grounds related to the merits of C's intermediary representation claim.)

The Court of Appeal (Arden, Hallett L.JJ. and Blackburne J.) held that the judge did not err in the exercise of his discretion when he refused to discharge the freezing orders made against D and dismissed D's appeal.

However, the Court did not agree with all that Warren J. had said in rejecting D's submissions as to the first ground upon which D's case for the discharge of the freezing orders was made. In dealing with those submissions his lordship gave the example of a hypothetical case in which the claimant had two closely related claims against the defendant, both leading to a similar measure of damage, and sought a freezing order on the basis of both claims but the judge regarded claim 1 as a strong but claim 2 as weak and not sufficient by itself to found a freezing order and

granted the order on that basis. His lordship said that, in his opinion, in these circumstances if, at trial, the claimant lost on claim 1 but won on claim 2 it would be contrary to principle if the injunction were discharged and an inquiry made on the cross-undertaking; it could not seriously be said that the injunction was wrongly granted (para.37). His lordship then posed the question whether the result should be any different where the facts were (as in the instant case) that claim 2 was added after the freezing order had been obtained and had never been mentioned before, albeit that many of the facts relevant to that claim had already been pleaded or were in evidence on the application. His lordship did not think that, in the circumstances of this second hypothetical example, the answer should be any different. His lordship explained (para.39):

"If the freezing order is to be discharged in these circumstances—perhaps a considerable time later, after trial—it would mean that, in order to protect its position, C ought to make a renewed application to the court for a further freezing order as soon as he adds his new cause of action. Assuming that he would inevitably get his order—because it would remain justified by claim 1—then D would at most be entitled to his costs of the first application and damages on the cross-undertaking up to the time of the second application. I say at most, because it must be very doubtful that he would obtain either a discharge or an order on the cross-undertaking. It cannot, I think, be right that C needs to make a fresh application in such circumstances."

Warren J. applied this reasoning to the facts of the instant case and concluded that the original injunction could not be categorised as having been wrongly made, notwithstanding that the causes of action originally pleaded had failed. His lordship added (para.41): "But even if that is wrong, this would be the sort of case where the court could clearly perfectly properly exercise its discretion by refusing to discharge the injunction."

The Court of Appeal stated that the judge's second hypothetical example was unsound, but held that his exercise of discretion was not perverse or wrong in principle. The Court explained (para.191):

"The judge was concerned that it may be very inconvenient for the claimant to return to the court each time he amends his particulars of claim. However, we do not consider that the inconvenience or cost of doing this would be significant. Moreover, we would not wish to encourage claimants who have obtained freezing orders on one basis to amend their claims to add claims on a new basis without going through the process of establishing before the court that the freezing order is properly made in support of the new claims as well as the old. The court ought to be informed of any material change of circumstance. In any event, it must be a matter of judgment for a claimant whether the amendment is sufficiently serious to justify going back to the court. The responsibility is clearly that of the claimant and the claimant must bear the risk that if the amendment constitutes a new cause of action and he fails on the original cause of action at trial the freezing order may be discharged and the cross-undertaking enforced."

The Court added (para.192):

"In this case, the judge was influenced by the fact that there was a relationship between the claims in the original particulars of claim and claim as amended to include the intermediary representation claim, on which the respondents succeeded at trial. This factor is bound to vary from case to case, making it difficult to lay down any general rule."

STRIKING OUT CLAIM AT TRIAL FOR ABUSE OF PROCESS

CPR r.3.4(2) states that, on various grounds, the court may strike out a statement of case. (See former RSC Ord.18, r.19 and CCR Ord.13, r.5, which stated that this power may be exercised "at any stage of the proceedings". Paragraph (b) of s.3.4(2) states that this power may be exercised if it appears to the court that the statement of case "is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings". The CPR Glossary states that "strike out" means "the court ordering written material to be deleted so that it may no longer be relied upon". Rule 3.4 replaced former RSC Ord.18, r.19 and CCR Ord.13, r.5. Those provisions expressly stated that this power may be exercised "at any stage of the proceedings". (In *Halliday v Shoesmith* [1993] 1 W.L.R. 1, CA, it was held that, generally, an application to strike out should be made before close of pleadings and should not be heard at the opening of a trial, except in exceptional circumstances.)

The extent of this case management power stated in r.3.4(2) was considered recently by the Court of Appeal in *Ul-Haq v Shah* [2009] EWCA Civ 542; 159 New L.J. 897 (2009), CA. In this case the facts were that, following a rear-end traffic accident, one driver (C1) and his passenger (C2) (C1's wife) brought claims against the other driver (D) for damage to C1's vehicle and for their minor personal injuries. C1's mother (C3), on the basis that she was a passenger in C1's car at the time and was injured, also brought a personal injury claim against D. C1 and C2 supported C3's claim. All three claims were brought in a single action in a county court. D admitted liability for causing the collision but alleged (1) that neither C1, C2 nor C3 had suffered injury, and (2) that C3 was not in the car at the time of the collision and her claim was fraudulent.

At trial, D submitted that if the judge found (1) that C1 and C2 had suffered injury, and (2) that C2's claim was fraudulent, then (3) because of their participation in C2's fraud, C1 and C2's claims should be struck out under r.3.4(2) as an abuse of process. The judge doubted but accepted (as it was common ground) that the court had such power. In his judgment the judge (1) found (a) that C3's claim was fraudulent, and (b) that C1 and C2 had conspired with C3 to support it, and (2) held that C1 and C2 had suffered injury and awarded them damages accordingly. On D's appeal a High Court judge held that the trial judge had erred in his exercise of discretion under r.3.4 but, in exercising the discretion afresh, dismissed the appeal ([2008] EWHC 1896 (QB), July 31, 2008, unrep.). A single lord justice granted D permission to make a second appeal to the Court of Appeal on the ground that the appeal raised a point of general importance; that was: whether it is possible under r.3.4(2) or at all to strike out a genuine claim on the ground that the claimants has been involved in a fraud upon the court in respect of an associated claim. The claimants were not represented and did not appear at either appeal.

Counsel for D stated that fraudulent claims on motor insurers had become endemic. He urged the Court to hold that the judge should have struck out the genuine claims of C1 and C2, thereby making it plain to the perpetrators of "phantom passenger" frauds that, if they were found out, not only would the fraudulent claim be dismissed but the other associated claims would be struck out, even if genuine. Counsel relied on *Arrow Nominees Inc v Blackledge* [2001] B.C.L.C. 167, CA (see *White Book 2009* Vol.1 para.3.4.3.1). The Court (Smith, Moses and Toulson L.JJ.) dismissed the appeal. In summary the Court held (1) it is well-established that a claimant will not be deprived of damages because he has fraudulently attempted to obtain more than his entitlement, (2) the position is no different where the claimant's attempted fraud consists of lying to support the claim of another person rather than lying to enhance his own claim, (3) r.3.4(2) does not grant a court power to strike out a claim at the end of trial where (as here) there is no suggestion that it has not been possible to hold a fair hearing, (4) r.3.4(2) focuses on pleadings and is primarily designed to permit a judge to strike out a claim before or at the beginning of the trial, (5) the term "abuse of process" in r.3.4(2) is not defined and the categories of abuse are not closed.

Smith L.J. stated that, as a matter of substantive law, the only circumstances in which a genuine claim would be dismissed by the court on account of dishonest exaggeration were where the claim was based on an insurance contract. It was not open to the Court to hold that the common law permits the court to deprive a claimant of the fruits of a genuine claim because he had lied either in exaggeration of his own claim or in support of another claim. Such a change would have to be a matter for Parliament. If the common law did so permit a court to deprive the claimant then it would not be necessary for find a "procedural peg" (such as r.3.4) on which to hang the decision; the court would simply dismiss the claim. The suggestion that the *Arrow Nominees* case gives support for the proposition that s.3.4(2) provides a power to strike out a claim at the end of a hearing where there is no suggestion that it has not been possible to hold a fair hearing was mistaken.

Smith L.J. concluded (para.29):

"I would add that the expression 'strike out' has a time-honoured use and is not apt to describe the decision that a judge makes at the end of the trial. At that stage, the judge either upholds the claim or dismisses it. He does not strike it out. The rule, as it appears to me, is primarily designed to permit a judge to strike out a claim before or at the beginning of the trial. The rule focuses on the statement of case—viz the particulars of claim or defence—in other words a pleading. The main objective seems to be to allow the court to deal summarily with a bad claim or defence before the expense of a trial is incurred. I can see that, in the kind of circumstances as arose in *Arrow Nominees*, the power to strike out may be deployed during a hearing where it becomes apparent either that it will not be possible to have a fair trial or because, without some corrupted evidence, which has to be disregarded, the claim cannot succeed. There again, the objective is to cut matters short so that further costs will not be wasted. I prefer to offer no view as to whether it would be appropriate for the judge to strike out the claim (as opposed to dismissing it) if, at the end of the evidence he concluded that he had been unable to conduct a fair trial, on account of one of the parties' conduct. The point is academic anyway because strike out at that stage would have the same effect as dismissal. But in the present case, there was no suggestion of an unfair trial. There was a great deal of wasted time and money, caused by the claimants' dishonesty but the recorder saw through that dishonesty and reached what are accepted to have been entirely proper findings."

ADMIRALTY AND COMMERCIAL COURTS GUIDE

The Admiralty and Commercial Courts Guide is printed in Volume 2 of the White Book at para.2A-39 et seq. This Guide was first published in 1986, and had gone through four editions before the CPR came into effect.

A new edition of this Guide (the 8th edition) was published in April 2009. It has the same structure as other recent editions, but makes significant changes in a number of respects, particularly in relation to the work of the Commercial Court.

Supplement 2 to the 2009 edition of the White Book will take account of the changes made by the new edition of the Guide.

Many of the additions and amendments to the Guide apparent in the new edition incorporate changes to Commercial Court practice based on experience gained during 2008 under the pilot scheme introduced for the purpose of testing recommendations made in the Report of the Long Trials Working Party published in December 2007 (see, in particular, the pre-trial checklist referred to in White Book 2009 Vol.1 para.2A–18.1). Sections of the Guide particularly affected are Section D (Case Management in the Commercial Court), Section E (Disclosure) and Section J (Trial).

TSO CPR Update 49, published in June 2009, contained Practice Direction (Electronic Working Pilot), a new practice direction supplementing CPR Pt 5 and coming into force on April 1, 2009 (see White Book 2009 Supplement 1 para.5CPD.1, p.3). This practice direction provides for a pilot scheme by which proceedings may be started and all subsequent steps may be taken electronically ("Electronic Working"). The Admiralty Court and the Commercial Court are among the courts participating in the scheme. Accordingly, the new Guide takes account of this (the practice direction is printed in Appendix 18 to the Guide together with an introductory note). In para.A1.9 of the Guide it is explained that it is intended to develop the scheme incrementally. Up-to-date information about the scheme will be available on the Commercial Court website.

In many places, the Guide has been updated to take account of developments in practice and procedure occurring since the last edition. For example, Appendix 15 (Service Out of the Jurisdiction) has been updated to take account of the changes made in October 2008 to CPR Pt.6.

As in previous editions of the Guide, Appendices 1 and 2 contain Parts 58 (Commercial Court), 61 (Admiralty Court) and 62 (Arbitration) of the CPR and their supplementing practice directions. Other material included in the CPR is found elsewhere in the Guide. For example, the video conferencing guide included in Annex 3 of Practice Direction—Written Evidence (supplementing CPR Pt 32) is found in Appendix 14 to the Guide.

Paragraph 6.1 of Practice Direction—Interim Injunctions, one of the practice directions supplementing CPR Pt 25, indicates that an example of a freezing injunction is annexed to the Practice Direction and para.6.2 states that this example may be modified as appropriate in any particular case. In particular, the court may, if it considers it appropriate, require the applicant's solicitors, as well as the applicant, to give undertakings (ibid). Paragraph 7.11 indicates that an example of a search order is also annexed to the Practice Direction, and further states that it may be modified as appropriate in any particular case.

As in previous editions, these examples are set out in Appendix 5 of the new Admiralty and Commercial Courts Guide, but their provenance is not clearly acknowledged. Paragraph F15.5 of the Guide refers to them as "standard forms of wording for freezing injunctions and search orders" and states that these forms "have been adapted for use in the Commercial Court". In fact, the differences between the "examples" as Annexed to the Practice Direction and the "standard forms of wording" as found in Appendix 5 to the Guide are very slight. In para.6 of the version of a freezing injunction found in the Guide assets frozen include, not only assets solely or jointly owned by the respondent (as provided by the Practice Direction version), but also assets in which he is "interested … legally, beneficially or otherwise". In Schedule E (Undertakings given by the supervising solicitor) of the example of a search order annexed to the Practice Direction it is expressly provided that the supervising solicitor shall not disclose to any person information relating to any items retained by him and shall keep the existence of such items confidential. This provision does not appear in the standard form of wording for a search order as found in Appendix 5 to the Guide.

COURT DRESS FOR BARRISTERS

On June 2, 2009, the Chairman of the Bar (Desmond Browne QC) wrote to members of the Bar giving Revised Guidance as to court dress for counsel. This Guidance reflects present practice in civil cases, but changes have been made to remove the distinction between different types of appeal in the Chancery Division and to clarify the position in the county courts. For the sake of completeness the existing position in criminal courts is restated. The operative parts of the new Guidance are set out immediately below.

In this Guidance:

"Business suits" means dark-coloured, formal non-court dress as appropriate

"court dress" means wigs, gowns, wing collars and bands or collarettes

"trials" include, for the avoidance of doubt, any final hearing of a CPR Part 7 claim, a Part 8 claim or a Petition

1. The Court of Appeal, the House of Lords and the Privy Council

As before, Counsel will wear court dress, save on bail applications heard in chambers

2. The High Court

As before, subject to the qualification in paragraph 7, Counsel will wear the following:

- Commercial Court and Admiralty Court: business suits on all occasions
- Technology and Construction Court: business suits on all occasions
- Chancery Division: court dress for all trials and appeals and business suits on all other occasions
- Family Division: business suits, save for contested divorce and nullity petitions when court dress will be worn
- Administrative Court: court dress on all occasions
- Queen's Bench Division: court dress for trials save on the occasions mentioned above; business suits on all other occasions

3. The County Courts

For hearings before Circuit Judges, Deputy Circuit Judges and Recorders, Counsel will wear business suits for applications (including all interim and final hearings in children and ancillary financial relief cases). They will wear court dress for trials (including contested divorce and nullity petitions).

In appeals in the county courts, Counsel will wear business suits for appeals from applications, and court dress for appeals from trials and appeals under sections 204 and 204A of the Housing Act 1996.

4. Masters, Registrars and District Judges

Counsel will wear business suits, save that court dress will be worn:

(1) in the Chancery Division where the hearing takes place in court (and not in the judge's room), and

(2) on winding-up hearings heard by District Judges in the County Courts

5. Magistrates' Courts

As before, Counsel will wear business suits

6. Crown Court

As before, Counsel will wear court dress, save on bail applications heard in chambers.

7. Cases involving the liberty of the subject

As before, Counsel will wear court dress in any case where the liberty of the subject is in issue, save in:

(1) the Magistrates' Courts, and

(2) the Crown Court when a bail application is heard in chambers

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LEGAL TAXONOMY
FROM SWEET & MAXWELL

The selection of headings in this index has been informed by Sweet & Maxwell's Legal Taxonomy. Subject headings in the index conform to keywords provided by the Legal Taxonomy. These keywords provide a means of identifying similar concepts in other Sweet & Maxwell publications and online services to which keywords from the Legal Taxonomy has been applied. Suggestions to taxonomy@sweetandmaxwell.co.uk.

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