CIVIL PROCEDURE NEWS

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Relief from procedural sanctions — conditions imposed — compliance with art.6

CPR rr.1.1 and 3.9, Human Rights Act 1998 Sch.1 Pt 1 art.6. Shipowners (C) bringing proceedings against charterers (D) claiming unpaid hire and damages of over US$3 million for wrongful repudiation of the charter by D. D bringing counterclaim for damages for breach of an express warranty by C. D not complying with unless order made by court at CMC having effect, if not complied with, of striking out D's defence and counterclaim. Accordingly, on October 17, 2008, court (1) striking out D's counterclaim, and (2) making further unless order having effect, if not complied with, of entitling C to judgment on their claim. Upon D's failure to comply with this further order, on October 31, 2008, court giving judgment on C's claim in the sum of US$3 million plus interest. On May 15, 2009, on D's applications, judge applying r.3.9 relief from sanction criteria and (1) refusing to set aside court's order of October 17, but (2) setting aside court's order of October 31 on conditions (which D failed to fulfil) that a part of C's claim (for unpaid hire of the vessel), costs to date and future costs of the action, be paid by D. Single lord justice granting D permission to appeal on limited grounds. **Held**, dismissing the appeal, (1) on the evidence, D had failed to show that the judge was wrong to reach the conclusion that the proposed counterclaim had no prospect of success, (2) where a judge is considering an application for relief against sanctions under r.3.9 and the consequence of a refusal to grant relief or to do so on terms will be that there will not be a trial on the merits or only if conditions are fulfilled, the judge should, ideally, state expressly in his judgment that he has considered the issues of legitimate aim and proportionality and essence of the right under art.6, (3) however, the fact that the judge has not expressly used such words in his judgment cannot, by itself, be a ground for a successful attack on the judge's conclusion and order, (4) the judge's decision to maintain the sanction imposed by the October 17 order constituted a legitimate aim, was proportionate in the circumstances and did not destroy D's art.6 rights, (5) the judge's decision to set aside the order of October 31, but on stringent conditions, also fulfilled a legitimate aim, (6) the aim of the conditions was to ensure that D (a) would be able to pursue its reasonably arguable defences, and (b) made good its past failures to obey court orders and would comply with future orders, (7) the conditions were proportionate because they were reasonably necessary to ensure fulfilment of that aim, (8) D's essential right of access to the court was not destroyed because it will be able to argue its defences if it complies with the orders laid down by the judge. ***CIBC Mellon Trust Co v Stolzenberg*** [2004] EWCA Civ 827, June 30, 2004, CA, unrep.; ***Momson v Azeez*** [2009] EWCA Civ 202, March 18, 2009, CA, unrep., ref'd to. (See ***Civil Procedure 2010*** Vol.1 para.3.9.1 and Vol.2 para.3D–76.)

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Claimant's Part 36 offer rejected — damages awarded in lump sum and periodical payments — sum to which enhanced interest should attach

CPR rr.36.14 and 41.8, Damages Act 1986 s.2. Person (C) suffering very substantial injures in road accident bringing claim against driver (D). Negligence of D not in issue but, as C was not wearing a seat belt, question arising as to C's contributory negligence. C's Pt 36 offer to apportion responsibility for the damage at 25/75 in his favour not accepted by D. Master ordering that there be judgment for C, subject to that question, and damages to be assessed. Subsequently, after D had abandoned their contention that the apportionment should be 50/50, judge ordering that the damages be assessed to the extent of 75 per cent of the full value of the claim. Judge also making order for costs which stated, reflecting r.36.14(3)(a), that D should pay enhanced interest (agreed by parties to be 5 per cent over base) "on 33% of the damages ultimately determined to be payable" for a particular period. Subsequently, parties agreeing that there be judgment for (1) damages in a lump sum of £2 million (of which £1.1 million had been paid by interim payments), and (2) index linked annual periodical payments for future loss of earnings and care totalling £125,000. Question arising as to how judge's costs order, insofar as it provided for enhanced interest on damages, should be applied to the proposed settlement. **Held**, (1) under r.36.14(3)(a), C was entitled to enhanced interest "on the whole or any part of any sum of money (excluding interest) awarded", (2) the true interpretation of the judge's order in the events that had occurred is that enhanced interest for the period stipulated by the judge should be applied to the lump sum element of the settlement only. ***Petrotrade Inc v Texaco Ltd*** [2000] EWCA Civ 512; [2002] 1 W.L.R. 947, CA; ***McPhilemy v Times Newspapers Ltd (No.2)*** [2001] EWCA Civ 933; [2002] 1 W.L.R. 934, CA; ***Pankhurst v White*** [2010] EWHC 311 (QB), February 18, 2010, unrep., ref'd to. (See ***Civil Procedure 2010*** Vol.1 paras 36.14.1 and 41.8.4.)

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Costs against funded party and LSC — jurisdiction and procedure — time limit for request

CPR rr.3.1(2)(a), 3.9 and 44.17, Community Legal Service (Costs) Regulations 2000 regs 9, 10 and 12, Community Legal Service (Costs Protection) Regulations 2000 reg.5, Access to Justice Act 1999 s.11, Costs Practice Direction Sects 21 to 23. In possession proceedings brought by landlord (C) against tenant (D) for non-payment of rent, district judge making possession order and circuit judge dismissing D's appeal. D's public funding certificate amended to enable him to make further appeal to Court of Appeal. On March 18, 2008, Court (1) dismissing this appeal, and (2) making costs order against D, with the protection afforded by s.11(1). On April 8, 2009, C serving on LSC bill of costs relating to the appeal. On June 11, 2009, C applying to SCCO under reg.10(2) for determination of the costs payable to him by D and the LSC. Costs judge dismissing application but granting C permission to appeal. **Held**, dismissing appeal, (1) the jurisdiction to make an order for costs against the LSC is governed by reg.5 and the procedure is governed by regs 9 to 12, (2) unless there is good reason for the delay, a non-funded party must make a request for a hearing under reg.10(2) within three months of the making of the s.11(1) order (see reg.5(3)(b)), (3) that time limit is mandatory and the court has no discretion to extend it, (4) the Regulations are not incorporated in the CPR via the Costs Practice Direction, (5) paras 21.16 to 21.20 of that practice direction summarise reg.5, but cannot have the effect of amending it, (6) accordingly the costs judge did not err in holding that he had no discretion to extend time under r.3.1(2)(a) or to grant relief from sanction under r.3.9, (7) C's request ought to have been made by June 18, 2008, (8) there was no good reason for the delay. ***R. (Gunn) v Secretary of State for the Home Department*** [2001] EWCA Civ 891; [2001] 1 W.L.R. 1634, CA, ref'd to. (See ***Civil Procedure 2010*** Vol.1 paras 3.1.2, 3.8.1, 44.17.2, 44PD.15 and 44PD.17 and Vol.2 paras 7D–14, 7D–70, 12–16 and 12–48.)

MIDGULF INTERNATIONAL LTD v GROUPE CHIMIQUE TUNISIEN [2010] EWCA Civ 66, *The Times* March 3, 2010, CA (Mummery, Toulson and Patten L.JJ.)

Arbitration — anti-suit injunction — skeleton arguments and documents for appeal

CPR r.25.1, Arbitration Act 1996 s.18, Senior Courts Act 1981 s.37. Cypriot company (C) applying (1) for order for appointment of arbitrator to determine a contractual dispute between itself and a Tunisian state-owned entity (D), and for (2) anti-suit injunction to restrain D from pursuing parallel proceedings in Tunisia. Judge holding that there was no arbitration agreement but giving C permission to appeal ([2009] EWHC 963 (Comm); [2009] 2 Lloyd's Rep. 411). **Held**, allowing C's appeal, and making an order under s.18 and granting an anti-suit injunction, (1) the conclusion to be drawn on the proper interpretation of a small number of communications between the parties was that the contract included an English law clause and an English arbitration clause, (2) the grant of anti-suit injunction in these circumstances was not incompatible with the New York Convention, (3) the decision of the ECJ in *The Front Comor* did not provide a good reason for taking a different view. Observations on proper approach to be taken by the English court on an application for an anti-suit injunction concerning a contractual dispute in circumstances where there were two possible putative laws governing the parties' contractual relations. Court expressing strong disapproval of the volume of papers with which the Court was presented by C. ***West Tankers Inc v Allianz SpA (The "Front Comor") (C-185/07)*** [2009] 1 A.C. 1138, ECJ; ***Raja v Van Hoogstraten (No.9)*** [2008] EWCA Civ 1444; [2009] 1 W.L.R. 1143, CA, ref'd to. See further "In Detail" section of this issue of *CP News*. (See ***Civil Procedure 2010*** Vol.1 paras 6.37.23 and 52.4.4 and Vol.2 paras 12–53 and 12–55.)

NATIONAL WESTMINSTER BANK PLC v RUSHMER [2010] EWHC 554 (Ch), March 19, 2010, unrep. (Arnold J.)

Order for sale of matrimonial property — effect of Convention right to respect for private and family life — procedural irregularity — re-hearing or review

CPR r.52.11, Trusts of Land and the Appointment of Trustees Act 1996 ss.14 and 15, Human Rights Act 1998 Sch.1 Pt I art.8. For purpose of enforcing guarantee, bank (C) obtaining final charging order over businessman's (D1) interest in property occupied by D1 and his wife (D2) with their family as their matrimonial home. Property subject to trust created by D1 and D2. C issuing proceedings for sale under s.14. On July 17, 2007, Master (1) declaring that C were entitled to an equitable charge on D1's interest in the property, and (2) after considering the matters referred to in s.15 (including welfare of children), making order for sale suspended on terms. On November 3, 2009, on applications by D2 and C for variation of the terms, Master making order requiring D2 to deliver up possession. D2 applying for permission to appeal to High Court judge on grounds (1) that Master's taking into account of letter sent to him by C but not copied to her was a serious procedural irregularity (r.52.11(3)(b)), and (2) that Master wrongly failed to consider or give effect to art.8. **Held**, granting D2 permission to appeal but dismissing appeal, (1) the Master's failure to give D2 a chance to respond to the letter and his reliance upon the letter as indicating that she had abandoned her alternative cases taken together amounted to a serious procedural irregularity, (2) this irregularity did not render the

Master's decision on D2's primary case unjust, but D2 was entitled to a decision on her alternative cases, (3) in the circumstances, it was appropriate for the appeal court to re-hear and to determine afresh the alternative cases, rather than merely to a review the Master's decisions on them (r.52.11(1)(b)), (4) the power to enforce a charging order under s.14 is compatible with the Convention, (5) however, the court's discretion under s.15 has to be exercised compatibly with the Convention rights of those affected by an order for enforcement, (6) generally, it will be sufficient for this purpose for the court to give due consideration to the factors specified in s.15, as that will ordinarily enable the court to balance the creditor's rights, which include its rights under art.1 of the First Protocol, with the art.8 rights of those affected by an order for sale, (7) there may be circumstances in which it is necessary for the court explicitly to consider whether an order for sale is a proportionate interference with the art.8 rights of those affected, but that will not always be necessary. ***Close Invoice Finance Ltd v Pile*** [2008] EWHC 1580 (Ch); [2009] 1 F.L.R. 873; ***C Putnam and Sons v Taylor*** [2009] EWHC 317 (Ch); [2009] B.P.I.R. 769, ref'd to. (See ***Civil Procedure 2010*** Vol.1 paras 52.11.1, 52.11.4 and 73.10.7 and Vol.2 para.3D–78.)

■ **NML CAPITAL LTD v REPUBLIC OF ARGENTINA** [2010] EWCA Civ 41, February 2, 2010, CA, unrep. (Mummery, Aikens and Elias L.JJ.)

Service out of jurisdiction — defendant state's non-immunity

CPR rr.3.10, 6.36, 6.37 [rr.6.20(9), 6.21] and 11.1, Practice Direction B (Service out of the Jurisdiction) para.3.1(10), Civil Jurisdiction and Judgments Act 1982 s.31, State Immunity Act 1978 ss.1, 2 and 11. Following debt default by sovereign state (D), Cayman Island company (C) (an affiliate of a New York-based hedge fund) bringing claim against D in US federal court (1) alleging breaches of an agreement between D and a bank pursuant to which a series of bonds were issued by D, and (2) seeking (a) accelerated payment of the principal amounts, and (b) interest due. C obtaining summary judgment and entering judgment for US$184 million. C bringing action on this judgment in High Court and applying for permission to serve the claim form out of the jurisdiction on ground that the claim was made to enforce a judgment. In draft particulars of claim exhibited to their witness statement, C asserting, on the basis of two particular grounds stated therein, that D was not immune from suit. Judge granting permission. Following service of the claim form, D applying (1) for order setting aside the judge's order, and (2) for a declaration that the High Court had no jurisdiction in respect of the claim. On this application, D contending that the two particular grounds relied on by C for demonstrating D's non-immunity were wrong. C conceding this but now in addition submitting that the foreign court's judgment was capable of being recognised and enforced in the United Kingdom by virtue of s.31 (as the foreign court had jurisdiction over D under sovereign immunity rules corresponding to those applicable in the United Kingdom). In reply, D submitting that, in resisting their application to set aside the judge's order, it was not permissible for C to rely on a basis for non-immunity that was not set out and relied on in their application for permission to serve out of the jurisdiction. Judge refusing D's application ([2009] EWHC 110 (Comm); [2009] 2 W.L.R. 1332). **Held**, allowing D's appeal, (1) s.31 was enacted against the background of the 1978 Act and did not introduce a new and comprehensive statutory framework for the recognition and enforcement in the UK courts of judgments of foreign courts against foreign states independent of the 1978 Act, (2) consequently, the UK courts will not have jurisdiction over a foreign state to recognise and enforce a judgment of a foreign court within the terms of s.31, and therefore will not have power to give permission for service out of the jurisdiction under r.6.36 of a claim form for proceedings brought for those purposes, unless it can be shown that, in respect of the state, one of the exceptions to immunity as set out in ss.2 to 11 of the 1978 Act has been fulfilled, (3) r.6.36 and para.3.1 make no express reference to service on foreign states, (4) where a claimant wishes to bring proceedings against a foreign state it must show that there is (at least) a good arguable case that the claim falls within one of the grounds stated in para.3.1, (5) also, the court has to be satisfied that there is (at least) a good arguable case that the foreign state is not absolutely immune from suit in respect of the proposed proceedings, (6) if, at the *inter partes* hearing, it is clear that the basis upon which lack of immunity was put by the claimant and accepted by the court at the ex parte hearing is erroneous, the order permitting service out of the jurisdiction would have to be set aside for lack of jurisdiction, (7) in those circumstances, the court has no discretion to permit the substitution of a different lack of immunity basis, (8) further, such error is not an "error of procedure" that could be rectified under r.3.10, (9) if the claimant wishes to proceed on a different basis it must make a fresh application under r.6.36 and para.3.1. ***AIC Ltd v The Federal Government of Nigeria*** [2003] EWHC 1357 (QB), June 13, 2003, unrep., ref'd to. (See ***Civil Procedure 2010*** Vol.1 paras 3.10.3, 6.33.11, 6.37.24, 11.1.1 and 40.10.2)

■ **R. (A) v DIRECTOR OF ESTABLISHMENTS OF THE SECURITY SERVICE** [2009] UKSC 12; [2010] 1 All E.R. 1149, SC.

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

CPR r.7.11, Senior Courts Act 1981 s.19, Human Rights Act 1998 s.7 and Sch.1 Pt I arts 6 and 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). Court of appeal allowing D's appeal ([2009] EWCA Civ 24; [2009] 3 W.L.R. 717, CA). House of Lords granting C's petition for leave to appeal (May 8, 2009). **Held**, dismissing C's appeal, (1) s.65(2)(a) conferred exclusive jurisdiction on the IPT for the purposes of s.7, (2) it was not possible to construe s.65(2)(a) as conferring exclusive jurisdiction on the IPT only in respect of proceedings arising out of the exercise of one of the investigatory powers regulated by the 2000 Act, (3) 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, (4) to construe s.65 as conferring exclusive jurisdiction on the IPT did not constitute an ouster of the ordinary jurisdiction of the courts and was not constitutionally objectionable on that ground, (5) the consequence that C's art.10 challenge to D's decision was to be made in proceedings in the IPT would not inevitably result in breaches of C's art.6 rights. ***Barraclough v Brown*** [1897] A.C. 615, HL; ***Farley v Secretary of State for Work and Pensions*** [2006] UKHL 31; [2006] 1 W.L.R. 1817, HL, ref'd to. (See ***Civil Procedure 2010*** Vol.1 para.7.11 and Vol.2 paras 3D–32, 3D–76, 3D–80, 9A–71 and 12–19.)

- **ENE KOS v PETROLEO BRASILEIRO SA (THE "KOS")** [2009] EWHC 1843 (Comm); [2010] 1 Lloyd' Rep. 87 (Andrew Smith J.)

Costs — expense of providing security — whether recoverable as costs "incidental to" proceedings

CPR rr.43.3, 44.3 and 44.7, Senior Courts Act 1981 s.51. Owners (C) withdrawing vessel for non-payment of hire. Charterers (C) contending that the withdrawal was wrongful and in breach of the charterparty. Upon C demanding that D give them security in the sum of US$18 million, failing which they "will take all necessary steps to secure their claims without further notice", and to avoid the vessel being arrested or their assets being attached, C providing bank guarantee. In action brought by C against D, judge (1) granting C summary judgment for declaration that the withdrawal was valid and lawful, (2) dismissing D's counterclaim for damages on this issue, and (3) making order requiring D to pay C's costs (including costs incurred in defending D's counterclaim). At trial of remaining issues in the action (as ordered by the judge), in particular the question whether the expenses incurred by C (before and after proceedings were commenced) in obtaining and servicing the bank guarantee were recoverable by C from D, **held**, (1) those expenses were not recoverable as damages for breach of an implied term in the charterparty, but (2) because the purpose of the guarantee was to provide security for a claim such as that brought by D in their counterclaim, the expenses were "incidental to" the present proceedings within the meaning of s.51 and were recoverable as costs, (3) the court's power to order a summary assessment of costs is not restricted to hearings at which it is exercising its discretion under r.44.3 to determine where costs are to fall, (4) accordingly, that power could be exercised at the conclusion of the trial of these remaining issues, should the court think it proper to make a summary assessment. History of the expression "costs of and incidental to" in s.51 traced and meaning explained. ***Re Gibson's Settlement Trusts*** [1981] Ch. 179, ref'd to. (See ***Civil Procedure 2010*** Vol.1 paras 43.3.1 and 44.3.5 and Vol.2 para.9A–201.)

- **NATIONWIDE BUILDING SOCIETY v DUNLOP HAYWARDS (DHL) LTD** [2009] EWHC 254 (Comm); [2010] 1 W.L.R. 258 (Christopher Clarke J.)

Contribution claim — meaning of "the damage in question"

Civil Liability (Contribution) Act 1978 ss.1 and 2. Building society (C), having suffered substantial losses as a result of making loans to a company in reliance on fraudulently overstated valuations, bringing a single action against the valuers (D1) in deceit and/or negligence and against their own solicitors (D2) in negligence. By way of defence, D2 alleging that C were contributorily negligent. C obtaining summary judgment against D1 with damages to be assessed, and accepting in settlement D2's Pt 36 offer of £5.5 million. D2 bringing a contribution claim against D1 (now in liquidation). On basis that C's contributory negligence was 50 per cent, the judge (1) finding that the amount for which both D1 and D2 would have been responsible to C was £6.6 million, and (2) holding (a) that in s.2(2) "the damage in question" is a reference to "the same damage" specified in s.1(1) in respect of which rights of contribution arise, and (b) that therefore £6.6 million was "the damage in question" in this case, rejecting D1's submission that such damage was the £5.5 million settlement figure. Judge further holding that D2 should be responsible for 20 per cent of the £6.6 million (£1.3 million) with the result that D1 should contribute £4.2 million to the £5.5 million paid by D2 to C (£5.5 less £1.3 million). ***Ball v Banner*** [2000] Lloyd's Rep, PN 569; ***Royal Brompton NHS Trust v Hammond*** [2002] 1 W.L.R. 1397, HL, ref'd to. (See ***Civil Procedure 2010*** Vol.2 para.9B–1092.)

R. (MOHAMED) v SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS [2010] EWCA Civ 65, *The Times* February 16, 2010, CA (Lord Judge L.C.J., Lord Neuberger M.R. and Sir Anthony May (PQBD))

Judgment reasons — redacting of in public interest

CPR rr.31.18, 39.2 and 40.2, Practice Direction 40E (Reserved Judgments) para.2. For purpose of defending himself in criminal proceedings brought in the United States, individual (C) applying for Norwich Pharmacal order to require disclosure of documents by Foreign Secretary (D). In dealing with application, a Divisional Court holding sittings in public and, because matters relating to national security were involved, in private. For same reason, case management directions (previously made by a judge) varying prospectively normal arrangements for pre-handing down circulation of draft judgments. In open judgment handed down on August 21, 2008, from which Court had redacted seven short sub-paragraphs pending further submissions from D and special advocates, Court granting C's application ([2009] EWHC 2048 (Admin)). Redacted paragraphs containing information relevant to the reasons for the Court's conclusion that D had knowledge of wrongdoing to an extent sufficient for grant of Norwich Pharmacal order. In particular, paragraphs containing a gist of reports made by the US Government to the UK Government in relation to the detention and treatment of C whilst in custody by or on behalf of the US Government. On same day, Court preparing a closed judgment dealing with evidence which had been given in closed session. Subsequently, on February 4, 2009, in a further open judgment, Court holding that certain of the redactions made to the earlier open judgment (on the basis of PII certificates issued by D) should not be restored ([2009] EWHC 152 (Admin)). C making application requesting Court to re-open the latter judgment and to reconsider its decision. In a judgment handed down on October 6, 2009, and revised on November 19, 2009, Court granting that application and restoring the redacted paragraphs, but granting D permission to appeal ([2009] EWHC 2549 (Admin)). **Held**, dismissing D's appeal, (1) in the circumstances the Divisional Court was plainly entitled to re-consider its decision, (2) in the absence of good reason to the contrary, it is axiomatic that a litigant should be able to see all the reasoning of the court in his case, that justice should be administered and dispensed openly and in public, and that the media should know, and be able to disseminate, all aspects of court proceedings, (3) but even this fundamental principle must occasionally yield to other factors, such as the need to safeguard children and other vulnerable people, the need to prevent the court's orders being thwarted, and the need to protect the public interest, (4) where a Minister has concluded that the public interest justifies excluding passages from the open version of a judgment, the court has to decide whether to adopt or to override that view, (5) this assessment involves two steps, (a) the first is to determine whether the publication of the passages would be against the national interest, (b) the second (which may not arise if the threat to the national interest would not exist or would be very significant) is to weigh that aspect of public interest against the public interest in the judgment being fully open, (6) where there is an appeal, that assessment falls to be made at the date of the appeal and not at the date of the lower court's decision, (7) in the circumstances of this case, and in particular in the light of developments since the Divisional Court's decision, there was no basis for holding that national security would be at risk if the redacted paragraphs were restored to the open judgment. Sir Anthony May stating (at [259]) that this case demonstrated that the court-ordered procedure which enables the Intelligence Services, through the Foreign Secretary, "to comb through a draft open judgment before it is published to request redactions which they consider to be required for national security reasons", and which appears to be becoming an entrenched procedure, can have unsatisfactory procedural consequences and may need re-examination. ***Scott v Scott*** [1913] A.C. 417, HL; ***R. v Chief Constable of the West Midlands, Ex p. Wiley*** [1995] A.C. 274, H., ref'd to. (See ***Civil Procedure 2010*** Vol.1 paras 31.18.6, 39.2.9, 40.2.1.A and 40.2.1.B.)

STEENBERG v ENTERPRISE INNS PLC [2010] EWCA Civ 201, March 10, 2010, CA, unrep. (Arden and Wilson L.JJ. and Henderson J.)

Abuse of process — procedure for determining re-litigation issue

CPR r.3.4. In January 1999, owners and occupiers of dwelling house (C1 and C2) commencing county court proceedings for private nuisance claim against corporate freeholders (D1) of neighbouring public house and licensee (D2) thereof. In July 2009, planning authority granting permission for certain developments of public house (in part for purpose of ameliorating nuisances), subject to conditions. On January 16, 2001, these proceedings stayed by Tomlin order. Terms scheduled to the order stating that defendants should pay claimants without admission as to liability the sum of £10,000 "in full and final settlement of all claims by either party howsoever arising of which either party are aware at the date". Any rights of claimants in respect of enforcement of any future breach which may arise from the planning conditions were expressly excluded from this agreement. On March 2, 2007, C1 and C2 commencing second action for private nuisance against D1 and D2, claiming an injunction and damages, including damages of £40,000 for alleged diminution in value of their property. By way of defence, D1 pleading (amongst other things) that the claim should be struck out as an abuse of process pursuant to r.3.4(2)(b) because it re-litigated matters settled by the consent order, or alternatively raised matters which could and should have been raised by C in the first action. D2 adopting this plea. C1 and C2 making no reply to any of the defences. At start of trial (scheduled for three days), judge declining invitation by D1 and D2 (who were separately

represented) to treat the abuse issue as a preliminary issue and proceeding with presentation of claimants' case. On second day of trial, judge (by then clearly concerned that trial would overrun) directing over opposition from claimants' counsel that, after conclusion of C1's evidence, and without hearing oral evidence of C2 and the claimants' expert (X), he would rule on the abuse of process issue. Judge proceeding accordingly and in a reserved written judgment (in which he referred to witness statements of D2 and X) giving judgment for the defendants on the issue, dismissing the claimants' claim, and refusing them permission to appeal. Single lord justice giving C1 and C2 permission to appeal. **Held**, allowing appeal and ordering retrial, (1) the judge had misconstrued the consent order as (a) under that order no party was to be precluded from bringing a future claim of which he was unaware on January 16, 2001, and (b) the acts and omissions upon which the claimants relied to establish actionable nuisance all post-dated the order and the facts relied upon bore no relation to the claims which were settled by the first action, (2) the procedure followed by the judge was seriously flawed as he reached the conclusion that, in effect, the claimants' claim should be struck out on the basis that it was bound to fail (a) partly on an erroneous construction of the consent order, and (b) partly on the basis of findings of fact made before the evidence was completed and the parties' submissions received, (3) in the circumstances, it would have been open to the judge (having declined the invitation to rule on the abuse of process question as a preliminary issue) to rule on a submission of no case to answer at the end of the claimants' case, in which event he would have heard all of the claimants' evidence. (See ***Civil Procedure 2010*** Vol.1 paras 3.4.3.2 and 32.1.6.)

■ **WHISTON v LONDON STRATEGIC HEALTH AUTHORITY** [2010] EWCA Civ 195, March 5, 2010, CA, unrep. (Dyson, Longmore and Smith L.JJ.)

Limitation — knowledge of cause of action — objective test

CPR r.3.4, Limitation Act 1980 ss.11, 14 and 33. In October 2006, person (C) suffering cerebral palsy caused by brain damage at birth in 1974, bringing clinical negligence claim against health authority (D). D denying negligence and pleading that limitation period expired in 1995 (three years after C reached the age of 18 years). Judge holding (in favour of C) that C's claim was brought within the three-year period fixed by s.11 because he did not have actual or constructive knowledge of his cause of action (as defined by s.14) until November 2005. Judge also holding (in favour of D), although it was not necessary to do so, that, had he not reached this conclusion, he would not have held that s.11 should be disapplied by exercise of the court's discretion under s.33. D appealing against the first holding, and C appealing against the second. **Held**, allowing D's appeal but also allowing C's appeal, (1) s.14(3) does not say that, if a claimant has knowledge that the injury in question is significant, he is fixed with knowledge of the facts that he would ascertain if he made inquiries about the cause of his injury, (2) the subsection (a) does not provide that actual or constructive knowledge that the injury is significant is determinative of the constructive knowledge issue, (b) but states that the issue of constructive knowledge should be determined by reference to the knowledge which a person might reasonably be expected to acquire, (3) thus the court should consider what is reasonably to have been expected of the claimant in all the circumstances of the case, (4) that is not to say that the court should overlook the fact that it must apply an objective test, (5) in the circumstances of this case, the court's discretion under s.33 should be exercised to disapply the s.11 time limit. ***Adams v Bracknell Forest Borough Council*** [2004] UKHL 29; [2005] 1 A.C. 76, HL; ***Khairule v North West Strategic Health Authority*** [2008] EWHC 1537 (QB), July 4, 2008, unrep., ref'd to. (See ***Civil Procedure 2010*** Vol.2 paras 8–34, 8–37 and 8–43.)

Statutory Instruments

■ **COMMUNITY LEGAL SERVICE (FUNDING) (AMENDMENT NO.2) ORDER 2010** (SI 2010/1109)

Community Legal Service (Funding) Order 2007. Amends Order for purpose of introducing new fee structures for family legal aid. Abolishes the Family Graduated Fee Scheme and introduces two new schemes; viz., the Family Advocacy Scheme and the Private Family Law Representation Scheme. These schemes will be introduced with the new civil contracts in October 2010. In force October 14, 2010. (See ***Civil Procedure 2010*** Vol.2 para.7D–1.)

■ **DAMAGES-BASED AGREEMENTS REGULATIONS 2010** (SI 2010/1206)

Courts and Legal Services Act 1990 ss.58AA(4), 119 and 120(3). Prescribe the requirements (additional to those provided in s.58AA (4)) with which an agreement between a "client" and a "representative" must comply in order to be an enforceable "damages-based agreement" in an "employment matter". A "client" is a person who has instructed the representative to provide advocacy services, litigation services (within the meaning of s.119) or claims management services (within the meaning of the Compensation Act 2006 s.4(20(b)) and is liable to make a payment for those services. A "representative" is a person providing the services to which the damages-based agreement relates. A "damages-based agreement" is a private funding arrangement between a representative and a client whereby the representative's fee is contingent upon the success of the case (usually determined as a percentage of the compensation received by the client). An "employment matter" is a matter that is, or could become, the subject of proceedings before an employment tribunal (s.58AA(2)). Provide that 35 per cent (including VAT) of the sum recovered by the client is the maximum amount which the representative may charge under the agreement (reg.5). In force April 8, 2010.

In Detail

LENGTH AND COMPLEXITY OF SKELETON ARGUMENTS

In *Midgulf International Ltd v Groupe Chimique Tunisien* [2010] EWCA Civ 66, *The Times* March 3, 2010, CA, the Court of Appeal allowed the claimants' appeal, holding that the parties had entered into an arbitration agreement, and granting an anti-suit injunction restraining the defendants from pursuing parallel proceedings in a foreign jurisdiction. The Court's judgment was given by Toulson L.J. (with whom Mummery and Patten L.JJ. agreed) (see "In Brief" section of this issue of *CP News*).

At the end of his judgment Toulson L.J. expressed strong disapproval of "the volume of papers" with which the Court was presented by the appellants. His lordship explained that there were 15 lever arch files and these included five volumes of authorities (totalling well over 100 authorities) and three files of documents ("to which almost no reference was made") in addition to the core bundle. The appellant's first "skeleton argument" ran to 132 pages. His lordship further explained that the single lord justice directed the appellants to produce a proper summary of its argument. This elicited a 15-page summary in which the appellants complained that they was unable to develop their argument in proper detail and referred the Court instead to the detailed argument contained in its previous document. (His lordship added that, in the circumstances, no complaint could be made of the fact that the respondent's skeleton ran to 23 pages.) The appellants served a supplementary skeleton argument running to 30 pages, in which it repeated many of its previous arguments and complained that the respondents had failed to address in their skeleton argument a number of the arguments advanced by appellants in their original skeleton argument. His lordship commented that, in that respect, counsel for the respondents had shown good judgment "because the matters either did not arise on the appeal or were of peripheral relevance".

Toulson L.J. stated (at [72] and [73]):

"I am afraid that the case is a grotesque example of a tendency to burden the court with documents of grossly disproportionate quantity and length. It is a practice which must stop. Far from assisting the court, it makes the work of the court infinitely harder. Hours had to be spent reading through Midgulf's voluminous skeleton arguments, and they were largely wasted hours. It will no doubt also have added greatly and unnecessarily to the costs of the appeal.

The central issue in this case was a very short one. As I said at the outset of the judgment, it turned on the effect of a small number of communications between the parties. All that the court needed in relation to that issue was to have the documents and a summary of each party's argument, which could have been provided in far less than 10 pages. The ordinary principles of contract law in this area are so well known there was no need for reference to authorities, let alone well over 100 authorities."

His lordship drew attention to what was said by Mummery L.J. in *Raja v Van Hoogstraten (No.9)* [2008] EWCA Civ 1444; [2009] 1 W.L.R. 1143, CA, at [125] to [128], about the role of skeleton arguments, where his lordship reminded practitioners that they should not be prepared "as verbatim scripts to be read out in public or as footnoted theses to be read in private" and are not "written briefs which are used in some jurisdictions as substitutes for oral advocacy" (see *CP News* Issue 01/2009). Toulson L.J. said that since the Raja case the problem has not lessened, and the instant case was "a particularly egregious example". When counsel for the appellants was asked to explain why the Court had been burdened with so many documents and such long skeleton arguments, he said that it was his intention to provide it with all the written materials which might bear on any point which might arise during the appeal and to provide a full statement of his argument in order that his oral argument could be brief. On this explanation his lordship commented (at [75]):

"That may accord with the practice in other jurisdictions, where it is customary for appellate courts to limit the time allowed for oral argument to a short period, but it is emphatically not the proper practice in this jurisdiction."

Ever since skeleton arguments were first put on a formal basis in practice directions (in the 1980s by Sir John Donaldson M.R.), judges of appeal courts have complained about the tendency of practitioners to flesh them out with full submissions and to over-burden them with references to authorities (see e.g., *Pauls Agriculture Ltd v Smith*, *The Times* January 4, 1990, CA; *R. v Brent London Borough Council, Ex p. King*, *The Times* June 14, 1991, DC). In response to this, the practice direction provisions relating to skeletons were tightened up. Nowadays, provisions as to the contents of an appellant's skeleton argument are found in para.5.10 of Practice Direction 52 (Appeals) (see *White Book* Vol.1 para.52PD.22). Subparagraphs (1) to (6) of that paragraph are of general application to appeals and state as follows:

"(1) A skeleton argument must contain a numbered list of the points which the party wishes to make. These should both define and con.ne the areas of controversy. Each point should be stated as concisely as the nature of the case allows.

(2) A numbered point must be followed by a reference to any document on which the party wishes to rely.

(3) A skeleton argument must state, in respect of each authority cited—(a) the proposition of law that the authority demonstrates; and (b) the parts of the authority (identified by page or paragraph references) that support the proposition.

(4) If more than one authority is cited in support of a given proposition, the skeleton argument must briefly state the reason for taking that course.

(5) The statement referred to in sub-paragraph (4) should not materially add to the length of the skeleton argument but should be sufficient to demonstrate, in the context of the argument—(a) the relevance of the authority or authorities to that argument; and (b) that the citation is necessary for a proper presentation of that argument.

(6) The cost of preparing a skeleton argument which—(a) does not comply with the requirements set out in this paragraph; or (b) was not filed within the time limits provided by this Practice Direction (or any further time granted by the court), will not be allowed on assessment except to the extent that the court otherwise directs."

A respondent's skeleton argument must conform to these directions, with any necessary modifications, and in it should, where appropriate, answer the arguments set out in the appellant's skeleton (para.7.8).

Paragraph 15.11A states that the appellant and the respondent may file supplementary skeleton arguments. All supplementary skeletons must comply with the requirements set out in para.5.10 (ibid). In *AIC Ltd v ITS Testing Services (UK) Ltd* [2006] EWCA Civ 1601; [2007] 1 Lloyd's Rep. 555, CA, Buxton L.J. stated that, in this context, "supplementary" means what it says. Paragraph 15.11A is designed to provide for lately decided or (within limits) discovered authority, changes of underlying factual circumstances, or the brief answering of points in the other side's argument that genuinely do not arise out of the original grounds of appeal. The rules do not provide for the late submission of a skeleton argument raising a completely revised and expanded case.

Where a court complains about the over-citation of authority it is likely that the party preparing the skeleton argument has failed to take seriously the directions that it must state, in respect of each authority cited, the proposition of law that the authority demonstrates, and if more than one authority is cited in support of a given proposition, must briefly state the reason for taking that course.

In recent times, the Court of Appeal has been particularly critical of skeletons in which numerous authorities are cited on issues that are highly fact-specific. For example, in *Straker v Rose* [2007] EWCA Civ 368, April 24, 2007, CA, unrep., where the question was whether a successful party should be denied some of his costs on the ground that he had pursued an exaggerated case, Waller L.J. said (at [10]):

"In the area of costs, where all cases are different and fact specific, I would suggest that authorities apart from those that lay down clear principles are of little assistance. It is to the rules that one should go, and it is by reference to the rules that one should test whether the judge has gone wrong in any particular case".

In other recent cases judges of the Court of Appeal, in deprecating over-citation, have said that authorities on the exercise of discretion as to costs will depend upon their own facts and "may not be very enlightening", whilst allowing that "occasionally one can find a useful statement of principle" (see e.g., *Widlake v BAA Ltd* [2009] EWCA Civ 1256, November 23, 2009, CA, unrep. at [21] per Ward L.J.) and *AXA Insurance Plc v Sulaman* [2009] EWCA Civ 1331, *The Times* January 25, 2010, CA, at [12] per Sedley L.J.).

The criticism that a skeleton argument cites several authorities where one would do, with the others being mere illustrations of the same principle at work, may be distinguished from the criticism that the skeleton is over-elaborate (though both criticisms may be justified in the same instance, as the *Midgulf International Ltd* case itself shows). In *Hedrich v Standard Bank Ltd* [2008] EWCA Civ 905, July 30, 2008, CA, unrep., a wasted costs case where the appellant's skeleton ran to 60 pages and the respondent's to 43, the Court's criticism was of the latter variety. Ward L.J. referred to the dictum of Lord Templeman in *Ashmore v Corporation of Lloyd's* [1992] 1 W.L.R 446, H.L., made as a protest against over-elaborate pleadings, to the effect that "it is the duty of counsel to assist the court by simplification and concentration and not to advance a multitude of ingenious arguments". In his lordship's opinion, counsel framing skeleton arguments for an appeal were under a similar duty.

Examples of complaints made by the Court of Appeal about over-documentation are legion and have become so common that they go unnoticed. Examples of complaints about non-compliance with the formal directions as to skeleton arguments are increasingly common. (It is not a problem confined to the civil side; see *R. v Erskine* [2009] EWCA Crim 1425, July 14, 2009, CA, unrep., where the Lord Chief Justice said that it is abundantly clear is that, without a fresh approach to

the way in which authorities are used in the course of forensic argument, the administration of criminal justice will be suffocated.) It must be a matter of particular concern that instances have arisen (as the *Midgulf International Ltd* case and the *Hedrich* case show) where the Court has felt obliged to complain that parties to appeals have failed to comply, not only with para.5.10 of PD52, but also with bespoke directions as to the refining and simplifying of skeleton arguments given by the managing lord justice.

COSTS—GUIDELINE HOURLY RATES FOR 2010

On March 31, 2010, it was announced that the Master of the Rolls had considered the recommendation from the Advisory Committee on Costs further, and also additional material put to him by the Committee, and on the basis of the evidence available to him, had decided to accept the Committee's recommendation that the 2009 Guideline Hourly Rates should be increased (in line with inflation) by 1.7 per cent for 2010. The intention is that this should take effect from April 1, 2010.

As stated in the 2010 edition of the *White Book* at para.48.49 (Vol.1, p.1494), at the time of going to press the announcement by the Master the Rolls had not come to hand and the guideline rates shown in that paragraph were the 2009 rates. The new rates are as follows. The figures as shown in para.48.49 should be adjusted accordingly.

	Band A	Band B	Band C	Band D
London 1	409	296	226	138
London 2	317	242	196	126
London 3	(229–267)	(172–229)	165	121
National 1	217	192	161	118
National 2	201	177	146	111

The rates for London 3, Bands A and B are presented as ranges following the format of *The Guide to the Summary Assessment of Costs*. These ranges go some way towards reflecting the wide range of work types transacted in these areas.

SCR Update

AMENDMENTS TO SCR PRACTICE DIRECTIONS

The Supreme Court Rules 2009 are published in Vol.2 of the *White Book* in Section 4A (paras 4A–0.1 to 4A–55), followed by the 14 Practice Directions that supplement those Rules. The SCR Forms are included after the last of the practice directions (see para.4A–197 et seq.). Recently, some of the practice directions have been amended. These amendments will be included in Supplement 1 of the *White Book*.

The more substantial of the amendments are shown below.

PRACTICE DIRECTION 3—APPLICATION FOR PERMISSION TO APPEAL

Paragraph 4A–74, p.1671

After para.3.1.10, insert the following two new paragraphs:

"Anonymity and reporting restrictions

3.1.11 In any application concerning children, the parties, in addition to considering the case title to be used, should also consider whether it would be appropriate for the Court to make an order under section 39 of the Children and Young Persons Act 1933 (reporting restrictions). The parties should always inform the Registry if such an order has been made by a court below. In such cases the Registrar will then make a further order imposing reporting restrictions. Any request for such an order to be made by the Court and any objections to the making of such an order should be made in writing, as soon as possible after the filing of an application for permission.

3.1.12 Paragraph 3.1.11 also applies to a request for an order under section 4 of the Contempt of Court Act 1981 (contemporary reports of proceedings)."

Paragraph 4A–75, p.1672

In final paragraph of para.3.2.1, after "requested by the Appeal Panel." insert:

"An appellant who wishes to provide documents other than those listed above must give a detailed explanation."

In para 3.2.2, at end insert "but do not need to be bound".

Paragraph 4A–76, p.1673

In para.3.3.8, for "do not have a right" substitute "are not encouraged".

Paragraph 4A–82, p.1680

In para.3.6.14, delete "or an Appeal Panel".

PRACTICE DIRECTION 4—NOTICE OF APPEAL

Paragraph 4A–85, p.1682

At beginning of para.4.2.2, delete "Where permission to appeal has been obtained,".

Paragraph 4A–85, p.1683

For para.4.2.10 (Anonymity in reporting proceedings) substitute:

"**4.2.10** In any appeal concerning children, the parties, in addition to considering the case title to be used, should also consider whether it would be appropriate for the Court to make an order under section 39 of the Children and Young Persons Act 1933 (reporting restrictions). The parties should always inform the Registry if such an order has been made by a court below. In such cases the Registrar will then make a further order imposing reporting restrictions. Any request for such an order to be made by the Court and any objections to the making of such an order should be made in writing, as soon as possible after the filing of an application for permission or a notice of appeal."

PRACTICE DIRECTION 6—THE APPEAL HEARING

Paragraph 4A–97, pp.1690 and 1691

In para.6.2.1 (Fixing the hearing date), before second sentence, beginning "Time estimates must be" insert:

"Parties are encouraged to offer agreed dates which are convenient to all counsel at an early stage and there is no need to wait until after the filing of the statement of facts and issues to fix the hearing date."

In para.6.2.2, at very end add:

"Counsel should agree an order of speeches or timetable for the hearing and submit it to the Registry on the working day before the hearing."

Paragraph 4A–101, p.1693

In para.6.4.4 (Core volumes), for sub-para.(d) substitute:

"(d) must indicate (by e.g. a label attached to the plastic spine) the volume number (in arabic numerals) and the short title of the appeal."

Paragraph 4A–102, p.1694

After para.6.5.8, add new para.6.5.9 as follows:

"Respondents' documents

6.5.9 Respondents are not encouraged to provide additional documents of their own but, where it is necessary for a respondent to place documents before the Court, they should be provided to the Registry in advance of the hearing with an explanatory letter."

Paragraph 4A–104, p.1695

In para.6.7.1 (Costs), last line, for "7 copies", substitute "3 copies".

Paragraph 4A–106, pp.1696 and 1697

In para.6.8.3 (Conditions under which judgments are released in advance), after "client Government department, insert ", body or company".

PRACTICE DIRECTION 7—APPLICATIONS, DOCUMENTS, FORMS AND ORDERS

Paragraph 4A–112, p.1701

For para.7.4.1 (Draft order) substitute:

"Before the Court hands down its judgment, the Registrar will normally send a draft order to all parties who filed a case. The drafts must be returned to the Registrar no later than 2 days after the date of receipt (unless otherwise directed), either approved or with suggested amendments. If amendments are proposed, they must be submitted to the solicitors for the other parties, who should indicate their approval or disagreement both to the solicitors submitting the proposals and to the Registrar."

PRACTICE DIRECTION 8—MISCELLANEOUS MATTERS

Paragraph 4A–117, pp.1704 and 1705

In para.8.3.2 (Cross-appeals), after "cross-appeal must be filed", insert "within 42 days of the grant by the Court of permission to appeal".

In para.8.3.3, "within 42 days of the filing of the appeal" substitute "within 42 days of the grant by the Court of permission to appeal or the filing of the notice of appeal".

Paragraph 4A–118, p.1705

After para.8.4.3 add new sub-paragraph (8.4.4) as follows:

"8.4.4 If a party to an application for permission to appeal dies and that party has no personal representative, immediate notice of the death must be given in writing to the Registrar and to the other parties. The Registrar may direct that the application proceeds in the absence of a person representing the estate of the deceased or may appoint a person to represent the deceased person's interest. Any application to substitute the new party must be filed with the prescribed fee within 28 days of the date of notice of death. It should explain the circumstances in which it is being filed. It must be endorsed with a certificate of service on all other parties."

PRACTICE DIRECTION 9—THE HUMAN RIGHTS ACT 1998

Paragraph 4A–133, p.1711

In para.9.1.2, for "The Crown has the right to be joined as a party" substitute "The Crown has the right to intervene".

In para.9.1.3, at end add:

"Where the Crown intends to intervene in the appeal, notice can be given in Form 2."

PRACTICE DIRECTION 11—THE EUROPEAN COURT OF JUSTICE

Paragraph 4A-140, p.1719

For paragraph 11.1.1 substitute the following:

"11.1.1 Article 267 (ex 234) of the Treaty on the Functioning of the European Union provides:

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;
(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay."

PRACTICE DIRECTION 13—COSTS

Paragraph 4A–164, p.1732

For para.7.1 (Form of bill) substitute:

"Bills of costs must follow as closely as possible the forms of bill set out in Section 2 below, using the appropriate terminology for categories of items of work; and items of work must be consecutively numbered. Standard three column bill paper should be used. See paragraph 16.3 for items relating to counsel's fees."

Paragraph 4A–166, p.1732

In para.9.1 (Documents), "documents must be filed" substitute "documents only must be filed".

Paragraph 4A–168, pp.1732 and 1733

For paras 11.1 and 11.2 (Fees for preparing applications for permission to appeal) substitute the following (note that the footnote that was in para.11.1 is now in para.11.2):

"**11.1** The general rule is that a single fee is allowed for one junior counsel for preparing applications for permission to appeal unless a public funding or legal aid certificate authorises two Counsel.

11.2 A fee may be allowed for a Queen's Counsel instead of junior counsel if this is held to be necessary because of the difficulty or complexity of the case or other good reason[1]. In a publicly funded application for permission to appeal, a fee for Queen's Counsel is not allowed unless permission has been given by the relevant funding authority."

Paragraph 4A–171, pp.1733 and 1734

In para.14.1 (Provisional assessment), for "where the parties request a provisional assessment" substitute "where one of the parties requests such an assessment (see rule 49(5))".

Delete para.14.2, and re-number paras 14.3 and 14.4 as paras 14.2 and 14.3.

Paragraph 4A–172, p.1734

In para.15.4, for "or the London agent" substitute "an appointed agent".

In para.15.5, delete second sentence (beginning "Submissions on").

Paragraph 4A–180, p.1737

For para.23.3 (Fees) substitute the following:

"**23.3** Responsibility for informing the Registrar that costs have been agreed lies with the receiving party, but both parties must confirm the agreement in writing."

Delete para.23.4, and re-number para.23.5 as para.23.4.

Paragraph 4A–183, pp.1738 to 1740

In para.26.1 (Quantum: guidelines on fees allowed), add at end:

"Bills must be drawn using a consolidated figure for the hourly rate."

Delete para.26.3 and re-number paras 26.4 to 26.12 as paras 26.3 to 26.11.

Paragraph 4A–186, p.1741

For para.29.2 (Costs of drafting bill for assessment) substitute:

"**29.2** For a larger bill the amount allowed for time reasonably spent in drafting the bill is calculated as a multiple of the relevant hourly rate for a Grade D fee earner (unless a claim for a higher grade is justified)."

Paragraph 4A–187, pp.1743, 1748 and 1754

Section 2: forms of bills of costs

In Form A (Respondent's bill of costs), in item 15 (p.1743), for "Assessment fee (to be added" substitute "Filing and Assessment fee (to be added)". (It should be noted that when Form A was re-published on the Supreme Court UK website, the "Description of work done" table included in it was inadvertently omitted.)

Form B (Appellant's bill of costs), in item 58 (p.1748), for "Assessment fee (to be added)" substitute "Filing and Assessment fee (to be added)".

In Form C (Respondent's bill of costs including separate accounts etc), in item 48 (p.1754), for "Assessment fee (to be added)" substitute "Filing and Assessment fee (to be added)".

Paragraph 4A–188, p.1757

Section 3: summary and allocatur of bills of costs

The Allocatur has been replaced with a new and more detailed version.

Paragraph 4A–189, p.1757

Section 4: fees

In Section 4 (Fees), the first paragraph is replaced with the following paragraphs (as follows), and the second (now last) paragraph remains as is):

For text of Section 4, substitute the following:

"All Supreme Court fees are set out in the Supreme Court Fees Order 2009 available on the Office of Public Sector Information Website at www.opsi.govuk and in Annex 2 to Practice Direction 7.

The fee payable on filing a bill of costs is 2.5% of the amount claimed.

The fee payable on assessment of a bill of costs is 2.5% of the amount allowed (inclusive of VAT).

Drafts and cheques for assessment fees are payable to 'the Supreme Court of the United Kingdom'."

Paragraph 4A–190, p.1761

For London bands table, substitute the following:

"LONDON BANDS

Grade	A	B	C	D
London 1 EC1, EC2, EC3, EC4	£402	£291	£222	£136
London 2 W1, WC1, WC2, SW1	£312	£238	£193	£124
London 3	£225–263	£169–225	£162	£119
(All other London post codes: W, NW, N, E, SE, SW and Bromley, Croydon, Dartford, Gravesend and Uxbridge)"				

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