

Introduction

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 1 - Overriding Objective

Introduction

- 1. 1 The Civil Procedure Rules 1998 (SI 1998/3132) (CPR), which came into effect on 26 April 1999, were designed to transform English civil procedure. The CPR largely implemented the recommendations made by Lord Woolf MR in his reports on access to justice, which proposed measures for remedying the shortcomings of the old system.¹ The twin pillars of Lord Woolf's approach can be summarised as follows: on the one hand, it was necessary to radically simplify and streamline the complex body of rules and case law which had built up under the old system; and on the other, it was essential to fundamentally change the prevailing attitude to civil litigation, which tolerated non-compliance with rules and orders and encouraged excessive adversarialism. These problems were interconnected, and engendered much cost and delay which put civil litigation out of the reach of most ordinary citizens. Three provisions in particular were intended to mark the change heralded by the CPR: CPR 1.1(1), which set out an overriding objective for the civil procedural framework; CPR 1.1(2), which elaborated on the meaning of the overriding objective; and CPR 1.4(1), which imposed a duty on the court to "further the overriding objective by actively managing cases".
- 1. 2 Originally, CPR 1.1(1) declared, "These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly." This wording was amended in 2013 so that CPR 1.1(1) stated that, "These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly *and at proportionate cost*" (emphasis added).² The first version has come to be known as the Mark I overriding objective and the more recent as the Mark II overriding objective.³ The Mark II overriding objective was introduced by the Rules Committee following the recommendations of Sir Rupert Jackson's reports on civil litigation costs,⁴ which found that despite Lord Woolf's reforms, courts were still "too tolerant of delays and non-compliance with orders"⁵ and litigation continued to be conducted at excessive cost.
- 1. 3 In his Final Report, Sir Rupert Jackson considered that proportionality was a key element of the Mark I overriding objective.⁶ The addition of the express reference to "proportionality" in the Mark II overriding objective was to make explicit that which previously had been implied.⁷ Although it might therefore be said that the amendments to CPR 1.1(1) are superfluous, as the Mark I overriding objective already required the courts to deal with cases justly and at proportionate cost, the addition of the above-mentioned words underlines the court's duty to manage cases in ways that are proportionate to the circumstances of the particular case and to the resources of the judicial system as a whole. As Lord Dyson MR has said, the "framework is intended to ensure that all litigants have fair access to the courts and a fair opportunity to proceed to judgment."⁸ If one litigant uses a disproportionate amount of court resources, this impacts on others who are waiting to use the court system to vindicate their rights. Proportionality is therefore a decision-making parameter.
- 1. 4 CPR 1.1(1), 1.1(2) and 1.4(1) together give expression to the idea that only by adequate and proportionate management of cases can the court deliver a satisfactory dispute resolution service. The present chapter examines the background and the theory behind the overriding objective and its far-reaching implications for the court's approach to the conduct of litigation. The practical implications of this for the court's exercise of its case management powers are dealt with in more detail in Ch.12.

Footnotes

- 1 Lord Woolf, Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales (London: HMSO, 1996) (hereinafter “Woolf, Interim Report”); Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales (London: HMSO, 1996) (hereinafter “Woolf, Final Report”). Some of Lord Woolf’s views before he undertook his inquiry appeared in the 1994 Bentham Club Presidential Address, entitled “Access to Justice”, CLP 341.
- 2 CPR 1.1(1) was amended again in 2022 to remove the word “new”.
- 3 Lord Dyson MR, “The Application of the Amendments to the Civil Procedure Rules: 18th Lecture in the Implementation Programme”, speech delivered at the District Judges’ Annual Seminar, Judicial College, 22 March 2013.
- 4 Jackson LJ, Review of Civil Litigation Costs: Preliminary Report (London: HMSO, 2009) (hereinafter “Jackson, Preliminary Report”); Jackson LJ, Review of Civil Litigation Costs: Final Report (London: HMSO, 2010) (hereinafter “Jackson, Final Report”).
- 5 Jackson, Final Report, Ch.39 para.6.5.
- 6 Jackson, Final Report, Ch.3 para.3.6; see also *Gotch v Enelco Ltd [2015] EWHC 1802 (TCC)* [42]–[49], where Edwards-Stuart J explained in trenchant terms that proportionality is a basic principle underlying the approach to civil procedure.
- 7 Lord Dyson MR, “The Application of the Amendments to the Civil Procedure Rules: 18th Lecture in the Implementation Programme”, speech delivered at the District Judges’ Annual Seminar, Judicial College, 22 March 2013.
- 8 Lord Dyson MR, “The Application of the Amendments to the Civil Procedure Rules: 18th Lecture in the Implementation Programme”, speech delivered at the District Judges’ Annual Seminar, Judicial College, 22 March 2013.

Defects of the Pre-CPR System

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Defects of the Pre-CPR System

Introduction

1. 5 It is impossible to appreciate the full implications of the overriding objective without understanding the mischief which it sought to remedy. Although CPR 1.1 represents the first express articulation of the temporal and resource dimensions of justice in rules of procedure, these factors were not unknown to English law before. The right to timely adjudication was mentioned in the Magna Carta: “To no one will we sell, to no one deny or delay right or justice”.⁹ Jeremy Bentham saw rectitude of decision as the “direct end” of justice, but stressed that justice also entailed the “collateral ends” of “the avoidance of unnecessary delay, vexation, and expense”.¹⁰ Similarly, the courts were not completely oblivious to the connection between justice and resources. In *Pearse v Pearse*,¹¹ Knight Bruce VC observed:

“The discovery and vindication and establishment of truth are main purposes certainly of the existence of Courts of Justice; still, for the obtaining of these objects, which, however valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is open to them.... Truth, like all other good things, may be loved unwisely—may be pursued too keenly—may cost too much.”

1. 6 In practice, however, considerations of time and resources played a very limited role in the way that the courts handled litigation before the CPR. The need for timely adjudication found expression only in certain corners of procedure; for instance, the court was willing to strike out claims for want of prosecution, where the delay clearly undermined their ability to dispose fairly of the action. Otherwise, parties were free to complicate and protract litigation. Resource considerations were likewise limited to marginal areas. For example, it was recognised that unaffordable court fees could lead to a denial of access to justice.¹² At the same time, however, scant attention was paid to the fact that the high and unpredictable cost of litigation constituted a far greater—indeed, systemic—obstacle to access to justice.

1. 7 Two broad reasons for this approach can be identified. First, the prevailing view was that under the common law adversarial system, it was primarily for the parties rather than the court to control and progress the litigation process up until the trial itself. This is not to say that the court lacked the power to intervene. Even before the CPR, rules and court orders dictated process requirements and laid down deadlines for their fulfilment, and the court had ample power to enforce compliance. Nevertheless, a laissez-faire attitude prevailed, allowing parties considerable freedom to determine the intensity and pace of the litigation process, on the supposition that this is what the principle of party autonomy called for. Second, the court’s function was conceived of as being to dispense substantive justice, or justice on the merits, above all else. It was thought that non-compliance with process requirements ought not to get in the way of the court’s principal task of arriving at a factually and legally correct outcome on the merits; and it was this mode of thought that gave impetus to the tired aphorism that procedural rules should be the “handmaid rather than mistress” of justice.¹³ Delay and expense were accepted as the unfortunate but inevitable corollary of achieving substantive justice. Millett LJ gave voice to this attitude when he declared that:

“Litigation is slow, cumbersome, beset by technicalities, and expensive … the process is a difficult one which is often frustrated by the overriding need to ensure that justice is not sacrificed. It is easy to dispense injustice quickly and cheaply, but it is better to do justice even if it takes a little longer and costs a little more.”¹⁴

The emergence of the justice on the merits approach—a reaction against formalism

1. 8

The system contained in the [Rules of the Supreme Court \(RSC](#), replaced by the [CPR](#)) was itself a reaction against its predecessor. For a long period preceding the [Common Law Procedure Act 1852](#) and the [Judicature Acts 1873](#) and [1875](#), a formalistic approach dominated. The courts regarded their main task as being to secure strict adherence with process requirements, and a litigant would not be able to obtain a judgment on the merits unless all procedural forms were completely and precisely followed. In 1901, Odgers described the judicial climate before the Judicature Acts as follows:

“In the first place, our judges in those days were pedantically strict as to the form of action in which the plaintiff sued and as to the technical language in which claims and defences appeared on the records of the Court. There were only so many ‘forms of action’ recognised by the Court; and every plaintiff had to pin himself down to one of these. If he selected the wrong one, he would at the trial be non-suited and have to pay the defendant’s costs, although an action would have lain if the declaration had been differently drawn.”¹⁵

The courts of common law, Odgers wrote, “were sadly hampered in the year 1800 by cumbrous procedure and pedantic technicalities which caused suitors expense, delay, vexation and disgust. It took years for a merchant to recover a debt due to him. And half the actions were decided not on their real merits, but on questions of form and pleading”.¹⁶ The situation in the Court of Chancery was no better. Although this court was supposed to administer a code of morals rather than strict law and was meant to remedy the evils that flowed from the technicalities of the common law, its processes by the year 1800 had become, according to Odgers:

“… more technical, if that were possible, than the courts of common law themselves; its procedure had become more rigid; it would only grant relief in certain specified cases. However strong the moral claim of a plaintiff might be, he was constantly told he had no equity; often too he was sent to a court of common law, though the matter could more fitly be decided in equity …”¹⁷

1. 9

Delay was exacerbated by a combination of two factors: litigation was liable to involve a multiplicity of procedural hearings in a range of courts, each operated by a very small judiciary.¹⁸ Since an action could be defeated on procedural grounds alone, a great deal of effort would go into taking up procedural points.¹⁹ Moreover, the resolution of these would not necessarily put an end to the litigation; claimants who had been defeated on one form of action could frame their cause in another form and launch new proceedings, which could in turn be liable to intense procedural scrutiny by the opponent. Jurisdictional problems too caused much delay. Numerous journeys to different courts delayed not only the case in hand, but also other cases by increasing court congestion. Needless to say, the amount of procedural activity involved in litigation greatly inflated the costs to the litigants.

1. 10

Although the legal profession initially resisted the fundamental changes wrought by the 19th century reforms of the court and its procedure,²⁰ the judiciary soon embraced the new less formalistic approach with enthusiasm. Judges were no longer willing to allow technicalities to get in the way of determining the real merits of the case.²¹ Instead, they adopted a new principle: that doing justice on the merits of the case was more important than enforcing compliance with rules or court orders. After all,

the main function of the court was surely to arrive at a legally and factually correct outcome, so as to vindicate the substantive rights of the individual litigant and thereby uphold the rule of law.²²

1.11 This philosophy was embedded in the rules of court themselves.²³ RSC 1883 Ord.70 r.1 stated²⁴:

- (1) Non-compliance with any of these rules, or with any rule of practice for the time being in force, shall not render any proceedings void unless the court or judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the court or judge shall think fit.
- (2) No application to set aside any proceeding for irregularity shall be allowed unless made within reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity.

These provisions ensured that procedural irregularities no longer rendered proceedings void. Instead, the court had discretion either to allow the defect to be put right on terms that the court thought fit or, alternatively, to set aside the proceedings.

1.12 In exercising this new discretion the touchstone test was whether it was in the interests of justice, narrowly conceived as meaning justice as between the individual litigants, to cure the procedural irregularity. Typically, this meant forgiving the procedural default so as to enable the case to proceed to a merits-based disposal, especially where the opposing party could be compensated in costs. In an oft-quoted dictum, Brett MR summarised the new approach as follows:

“However negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated in costs.”²⁵

Bowen LJ gave an even more fulsome endorsement of the new creed:

“... the object of the Courts is to decide the rights of parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice ...”²⁶

1.13 In addition to its general discretion to cure irregularities under the RSC, the court had an express power to extend time limits under RSC Ord.3 r.5²⁷:

- (1) The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these rules, or by any judgment, order or direction, to do any act in any proceedings.
- (2) The Court may extend any such period as is referred to in paragraph (1) although the application for extension is not made until after the expiration of that period.

1. 14 Lord Diplock articulated the approach to be followed with regard to non-compliance with time limits in *Birkett v James*.²⁸ The case involved an application to dismiss an action for want of prosecution. Lord Diplock stated:

“The power should be exercised only where the court is satisfied either (1) that the default has been intentional and contumelious, e.g. disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (2)(a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party.”²⁹

The upshot was that as long as the passage of time did not impair the quality of the evidence and as long as the delay did not cause real prejudice to the defendant, claimants were free to delay performance of their process obligations for as long as they wanted.

1. 15 For a time, the supremacy of the justice on the merits approach was somewhat checked by a distinction between non-compliance with the rules of court that rendered the proceedings a nullity or void, and non-compliance that merely rendered the proceedings irregular.³⁰ But this distinction was removed by RSC Ord.2 r.1 in the wake of *Re Pritchard*,³¹ with the result that almost no procedural default could lead to nullity.³² This rule change was declared by Lord Denning MR to be the final death knell for the former formalistic approach:

“This new rule does away with the old distinction between nullities and irregularities. Every omission or mistake in practice or procedure is henceforward to be regarded as an irregularity which the court can and should rectify so long as it can do so without injustice. It can be asserted that ‘it is not possible … for an honest litigant in Her Majesty’s Supreme Court to be defeated by any mere technicality, any slip, any mistaken step in his litigation’.”³³

1. 16 It should be noted that some procedural defaults could still justify dismissal of a case for non-compliance with the rules. For instance, it was held that an irregularity in the renewal of a writ was exclusively the province of RSC Ord.6 r.8 and could not be cured in the exercise of discretion under Ord.2 r.2.³⁴ Further, there were situations where the default was so fundamental that, as a rule, the court would not use its discretion to cure it.³⁵ But such instances were few and far between.

The court’s approach under the RSC undermined the authority of rules and court orders

1. 17 While the existence of a discretion to cure procedural defaults need not necessarily undermine the binding force of rules and court orders, it can and certainly did so prior to the CPR. The judiciary’s single-minded attachment to achieving justice on the merits undermined the normative force of the RSC’s process requirements, and encouraged parties and their lawyers to be less than scrupulous about compliance with time limits and other process obligations.

1. 18 This approach gave rise to a culture of non-compliance with rules and orders, and thereby provided fertile ground for litigation over compliance with process. The very existence of the discretion to cure procedural errors resulted in a confrontational culture. Non-defaulting litigants were unlikely to forgive their opponent’s lapse, especially if they stood to gain some advantage from objecting or if they could inflict some disadvantage on the other side by sustaining intense interlocutory activity. If a party had missed a deadline or was responsible for some irregularity, their opponent might see benefit in initiating interlocutory litigation in the hope of delaying the resolution of the case, or exhausting the defaulter’s finances and thus forcing a retreat or

an advantageous settlement. Applications to resolve a dispute over a default or other procedural irregularity often required one or more hearings to resolve, and even then the matter would not be finally settled until the dissatisfied parties exhausted their rights of appeal. In his Final Report, Lord Woolf described:

“the tendency of parties ... to make numerous interlocutory applications. These are generally of a tactical nature which may be of dubious benefit even to the party making the application and which may not be warranted by the costs involved.”³⁶

- 1.19 Not all cases involved extensive satellite litigation, but a fair proportion did. Since it was impossible to know in advance the extent of procedural warfare that the litigation could entail, prospective litigants would have to be prepared to spend large and unpredictable amounts of money. Increasingly, access to the courts became limited to litigants with deep pockets or to those who could rely on the taxpayer’s support. Thus, paradoxically, far from promoting just and expeditious dispute resolution, the justice on the merits approach had the effect of undermining access to justice. It created extensive scope for litigation that had nothing to do with the merits, which could well delay or even thwart a merits-based resolution of the dispute. Resort to court could become such a protracted, costly and unpredictable affair as to put access to justice out of the reach of most ordinary citizens.
- 1.20 It is also important to stress that the provisions of the RSC concerning procedural irregularities, coupled with the court’s permissive approach to non-compliance with deadlines and other process requirements, ultimately introduced much complexity into the procedural framework. An irregular procedural step displayed symptoms of both validity and invalidity.³⁷ It was invalid in the sense that it did not have the automatic effect that a regular procedural step would have. For instance, an irregular notice of acceptance of money paid into court would not confer a right on the claimant to take out the money. But the irregular acceptance also had manifestations of validity, for unless the defendant promptly applied to retrieve the money paid in, the notice would entitle the claimant to take out the money, notwithstanding that the notice had been defective.³⁸ The legal consequence of a procedural default or of an irregularity could therefore only be determined by judicial decision. Since the court had, as we have seen, a wide discretion in the matter, the outcome was unpredictable. The excessive satellite litigation that ensued resulted in a massive build-up of case law,³⁹ which in turn undermined the predictability and accessibility of the civil justice system.

The court’s limited case management role under the RSC

- 1.21 Quite apart from the court’s laissez-faire approach to enforcing compliance with rules and court orders, the court had very limited powers of control over the pre-trial process and no facility for monitoring its progress. As Lord Woolf observed, there was “no clear judicial responsibility for managing individual cases or for the overall administration of the civil courts”.⁴⁰ The court’s pre-trial role was essentially reactive, directed to dealing with such interim applications as the parties chose to make.
- 1.22 This reactive role was due in no small part to a perception that, under the common law adversarial system, it was for the parties to control the pre-trial litigation process. “Under the principle of what is called ‘party control,’” Sir Jack Jacob wrote, “but subject to compliance with the rules, practices and orders of the court ... the parties retain the initiative at all stages of civil proceedings. They can agree to extend time limits which they are required to observe under the rules or orders of the court ... the parties may move a case forward rapidly or slowly, though if there is prolonged and inexcusable delay extending beyond the applicable limitation period which is prejudicial to the defendant the action may be dismissed for want of prosecution”.⁴¹ This was, it was thought, of a piece with the parties’ freedom to “delimit the issues or questions of fact or law, which they desire the court to determine”, to gather and present the evidence on which they wished to rely in support of their case, and indeed to settle the matter on such terms as they thought fit.⁴²

The problem of party control of the litigation process

1. 23

The court's laissez-faire approach to pre-trial procedure resulted in considerable waste of resources. For instance, Lord Woolf found that discovery was sometimes pursued without any regard to efficiency and economy, consuming vast resources for little benefit. Expert evidence, instead of assisting the court, could cause unreasonable delay and confusion at great expense to the parties. Even procedural reforms that had been designed to promote efficiency could be undermined. Pre-trial exchange of witness statements, Lord Woolf noted, had become little more than an opportunity to deploy "the draftsman's skill ... to obscure the original words of the witness, not infrequently at enormous expense".⁴³ And, as we have seen, the parties were in effect permitted to use as many of the court's resources as they desired, in making multiple interlocutory applications to resolve pre-trial procedural skirmishes. As a result, the cost of litigation could get out of all proportion to the value of the subject matter in dispute. The reason for the excess of cost and the long delays, Lord Woolf concluded, lay not so much in rules themselves as in the proliferation of such "adversarial tactics", which had resulted in the procedural tools "being subverted from their proper purpose".⁴⁴ Litigants were left free to complicate and protract the litigation process and the courts had become powerless to intervene.

1. 24

The assumption that the principle of party autonomy demanded that the parties be in control of the pre-trial litigation process was based on a fallacy. For party freedom to define the substantive issues, adduce evidence and test that of their opponent in no way implies that litigants must also be free to control pre-trial procedural activity. In reality, there is no inconsistency between the principle of party autonomy and the court having an active managerial role. A court that sets strict timetables to bring a case to trial, actively monitors compliance with rules and directions, determines the scope of disclosure, limits the number of expert witnesses, or otherwise excludes irrelevant or superfluous evidence, is still not a court that is empowered to decide what issues are to be investigated and how this is to be done.⁴⁵ As Lord Woolf recognised in his Final Report, suggestions that court management of the pre-trial litigation process could undermine the adversarial nature of our civil justice system were groundless.⁴⁶ Under his proposals, the parties would remain free to decide whether to litigate, what to litigate and how to conduct their cases, but this would now take place "in a managed environment governed by the courts and by the rules which will focus effort on the key issues rather than allowing every issue to be pursued regardless of expense and time".⁴⁷

1. 25

With this in mind, we turn to two considerations which underpin the CPR approach to case management and party compliance. The first is the realisation that the civil justice system is fundamentally a public service, the resources of which need to be carefully managed and fairly distributed. The second, closely related to the first, is the appreciation that "justice" means more than just substantive justice as between the individual litigants. Rather, "justice" should be understood as a rich and multi-dimensional concept, which also implies expeditious resolution at reasonable and proportionate cost through the fair allocation of resources across the system as a whole. Taken together, these matters explain and illuminate the paradigm shift in the approach to civil litigation that the overriding objective encapsulates.

Footnotes

⁹ Magna Carta Ch.40; emphasis added.

¹⁰ J. Bentham, *Rationale of Judicial Evidence* [1827] Vol.1 pp.33–34.

¹¹ *Pearse v Pearse* (1846) 63 ER 950 at 957, HL. Cited with approval in *Minet v Morgan* (1873) 8 Ch App 361 at 368, CA. In *Ashmore v Corp of Lloyd's* [1992] 2 All ER 486 at 488; [1992] 1 W.L.R. 446 at 448, HL, Lord Roskill said: "Litigants are only entitled to so much of the trial judge's time as is necessary for the proper determination of the relevant issues."

¹² *R v Lord Chancellor Ex p. Witham* [1998] QB 575; [1997] 2 All ER 779 where the court struck down an order made under the *Supreme Court Act 1981* s.130 which imposed court fees without making provision for litigants who were unable to pay the fees. For a more recent example, see *R (Unison) v Lord Chancellor* [2017] UKSC 51; [2020] AC 869, in which the Supreme Court struck down an order made under the *Tribunals, Courts and Enforcement Act 2007*

- s.42(1), which imposed tribunal fees which were in and of themselves excessive (even though the order provided for a scheme of fee remission for indigent litigants).
- 13 These were the words of Lord Collins MR (though often misattributed to Lord Esher MR) in *Re Coles and Ravenshear Arbitration* [1907] 1 KB 1 at 4, CA.
- 14 *Gale v Superdrug Stores Plc* [1996] 3 All ER 468 at 477; [1996] 1 W.L.R. 1089 at 1098, CA. See also J. Jacob, “The Hamlyn Lectures 1986”, *The Fabric of English Civil Justice* (London: Stevens & Sons, 1987), p.16; Legg, “*Reconciling the goals of minimising cost and delay with the principle of a fair trial in the Australian civil justice system*” (2014) 33(2) C.J.Q. 157, at 167 and 170.
- 15 W.B. Odgers, “Changes in Procedure and in the Law of Evidence” in *A Century of Law Reform: twelve lectures on the changes in the law of England during the nineteenth century* (London: Macmillan, 1901), 203 at 212. For a comprehensive survey see W.S. Holdsworth, *History of English Law* (London: Methuen & Co, 1924), Vols I and XV.
- 16 W.B. Odgers, “Changes in Procedure and in the Law of Evidence” in *A Century of Law Reform: twelve lectures on the changes in the law of England during the nineteenth century* (London: Macmillan, 1901), p.203.
- 17 W.B. Odgers, “Changes in Procedure and in the Law of Evidence” in *A Century of Law Reform: twelve lectures on the changes in the law of England during the nineteenth century* (London: Macmillan, 1901), p.203 at pp.207–208; see also pp.221 ff. In Chancery the process of discovery was subverted to maximise legal fees: J. Getzler, “*Patterns of Fusion*” in P. Birks (ed.) *The Classification of Obligations* (Oxford: Clarendon Press, 1997), p.157.
- 18 In the early 1800s the King’s Bench consisted of the Lord Chief Justice and three other judges; the Exchequer included the Chief Baron and three Barons of the Exchequer; the Court of Chancery included the Lord Chancellor, who had many responsibilities in addition to his judicial duties, and the Master of the Rolls. It was only in 1815 that another Chancery judge was added, in the form of the Vice-Chancellor. W.B. Odgers, “Changes in Procedure and in the Law of Evidence” in *A Century of Law Reform: twelve lectures on the changes in the law of England during the nineteenth century* (London: Macmillan 1901), p.203 at p.224.
- 19 Odgers tells of a case heard in 1830 in which there had been seven trials—three in the King’s Bench and four in Chancery—at the close of which the suit went up to the House of Lords: W.B. Odgers, “Changes in Procedure and in the Law of Evidence” in *A Century of Law Reform: twelve lectures on the changes in the law of England during the nineteenth century* (London: Macmillan, 1901), p.203 at p.225. Lord Eldon himself could take over 30 years to give judgment: J.H. Baker, *An Introduction to English Legal History*, 5th edn (Oxford: Oxford University Press, 2019), pp.120–122; see also M. Lobban “*Contractual Fraud in Common Law and Equity*” (1997) 17 O.J.L.S. 441.
- 20 E.R. Sunderland, “*The English Struggle for Procedural Reform*” (1926) 39 Harv. L.R. 725, at 728. See also T.W. Shelton, “*The Drama of English Procedure*” (1931) 17 Va. L.R. 215; D. Ipp, “*Reforms to the Adversarial Process in Civil Litigation—Part I*” (1995) 69 A.L.J. 705.
- 21 Judges brushed “aside senseless technicalities in the same spirit (they) would a house fly”: T.W. Shelton, “*The Drama of English Procedure*” (1931) 17 Va L.R. 215, at 252.
- 22 As the High Court of Australia put it, “the ultimate aim of the court is the attainment of justice and no principle of case management can be allowed to supplant that aim”, *State of Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146, 154. RSC Ord.59 r.1 of 1875.
- 23 Replacing the original rule Ord.59 r.1 of 1875.
- 24 *Clarapede & Co v Commercial Union Association* [1883] 32 WR 262 at 263, CA.
- 25 *Cropper v Smith* (1884) 26 Ch D 700 at 710–711, CA. Bowen LJ’s views, too, are often quoted. See for example *Pontin v Wood* [1962] 1 QB 594 at 609; [1962] 1 All ER 294 at 297, CA; and in his Note of Reservation to the report of the Winn Committee, Sir Jack Jacob invoked Bowen LJ’s views as follows: “The admonition by Lord Justice Bowen that ‘courts do not exist for the sake of discipline’ should be reflected in the principle that rules of court should not be framed on the basis of imposing penalties or producing automatic consequences for non-compliance with the rules or orders of the court. The function of rules of court is to provide guidelines not trip wires and they fulfil their function most when they intrude least in the course of litigation”: R. Winn, *Report of the Committee on Personal Injuries Litigation* (London: HMSO, 1968), Cmnd 3691, pp.151–152.
- 26 CCR 13 r.5 was to the same effect.
- 27 *Birkett v James* [1978] AC 297; [1977] 2 All ER 801, HL.
- 28 *Birkett v James* [1978] AC 297 at 318; [1977] 2 All ER 801 at 805, HL.
- 29 If they were a nullity or void, the court had no choice but to set them aside. If they were merely irregular, they remained valid and the court had discretion to set them aside or to make some other order on terms it thought just. Attempts to devise a test for distinguishing between the two classes of irregularities were made: *Marsh v Marsh* [1945] AC 271 at 284, PC.
- 30 *Re Pritchard* [1963] Ch 502; [1963] 1 All ER 873, CA. A widow applied under the *Inheritance (Family Provision) Act 1938* for provision to be made for her maintenance out of her husband’s estate. She issued a summons in the

Pontypridd District Registry of the High Court, overlooking the fact that RSC Ord.54 r.4B provided at the time that an originating summons “shall be sealed in the Central office” of the High Court, and not the District Registry. In the face of a powerful dissent by Lord Denning MR the Court of Appeal held that the mistake rendered the proceedings void. “The originating summons in this case, therefore”, Danckwerts LJ added at 885, “is a nullity and has no operation. It has no more application to the matter to be decided than a dog licence.”

32 RSC Ord.2 r.1 stated: “(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of any thing done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.” CCR 37 r.5 was to the same effect. The distinction has not, however, disappeared altogether. First, failure to comply with statutory procedural requirements may lead to nullity. Second, a failure to comply with some rules of court may still be so fundamental that the court should never cure as a matter of discretion: Supreme Court Practice 1999 (London: Sweet & Maxwell, 1998), Vol.1 para.2.1.2.

33 *Harkness v Bell's Asbestos and Engineering Ltd* [1967] 2 QB 729 at 735–736; [1966] 3 All ER 843 at 845–846, CA. The reference in the dictum is to Bowen LJ as quoted in *A. Vanderbilt, “Improving the Administration of Justice—Two Decades of Development”* (1957) 26 U. Cin. L. Rev. 155, at 239–240. See also *Hillingdon LBC v Vijayatunga* [2007] EWCA Civ 730.

34 *Bernstein v Jackson* [1982] 2 All ER 806; [1982] 1 W.L.R. 1082, CA.

35 For instance, it was held that failure to obtain leave before serving out of the jurisdiction was such a fundamental defect that it must not be rectified in the exercise of the discretion under RSC Ord.2 r.1: *Leal v Dunlop Bio-Processes International Ltd* [1984] 2 All ER 207 at 215; [1984] 1 W.L.R. 874 at 885, CA. This decision was later modified: *Golden Ocean Assurance Ltd and World Mariner Shipping SA v Martin* [1990] 2 Lloyd's Rep. 215, CA, but the court's power to limit its discretion remained intact. See also *Camera Care Ltd v Victor Hasselblad AB* [1986] 1 F.T.L.R. 348, CA.

36 Woolf, Final Report, Ch.7 para.23. Concerns about disproportionate procedural activity and costs had been voiced in M. Hodgson, Report of the Review Body on Civil Justice (London: HMSO, 1988), p.14, but to little avail.

37 *Metroinvest Anstalt v Commercial Union Assurance Co Plc* [1985] 2 All ER 318; [1985] 1 W.L.R. 513, CA. Slade LJ said: “Where … the court finds that a failure of the nature referred to in [RSC Ord.2] r.1(1) has occurred, which has not been waived by the other party either expressly or by implication, the court is given by r.1(2) a choice of courses to pursue at its own discretion, whether or not an application under Ord.2, r.2 is before it. In such a situation, in the exercise of its discretion under r.1(2), it may either adopt the more draconian course of setting aside wholly or in part the proceedings in which the failure occurred, or the relevant step taken in those proceedings or the relevant document or order. Alternatively, it may ‘make such order … dealing with the proceedings generally as it thinks fit’. The last mentioned words are … manifestly wide enough to empower it to make a dispensing order waiving the relevant irregularity …”.

38 This is because RSC Ord.2 r.2(1) provided: “An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.” The notion of waiver is introduced here; the failure to make a prompt objection could itself validate the defective notice. Waiver occurred, under r.2(1), if a fresh step had been taken with knowledge of the irregularity.

39 For instance, the commonplace issue of dismissal for want of prosecution could necessitate recourse to a voluminous body of precedents, and required protracted hearings in which the nuances of earlier rulings were debated. By 1993 the second limb of Lord Diplock’s test in *Birkett v James* had acquired 15 sub-rules: *Trill v Sacher* [1993] 1 All ER 961; [1993] 1 W.L.R. 1379, CA. See also *Shtun v Zalejska* [1996] 3 All ER 411; [1996] 1 W.L.R. 1270, CA. Lord Bingham MR observed in *Sparrow v Sovereign Chicken Ltd* [1994] CA Transcript 750, that *Birkett v James* encouraged parties “to take points and indulge in refinements which would do credit to a medieval schoolman”.

40 Woolf, Interim Report, p.7.

41 J. Jacob, “The Hamlyn Lectures 1986”, The Fabric of English Civil Justice (London: Stevens & Sons, 1987), p.13. See also *Briscoe v Briscoe* [1968] P. 501.

42 J. Jacob, “The Hamlyn Lectures 1986”, The Fabric of English Civil Justice (London: Stevens & Sons, 1987), pp.13–14.

43 Woolf, Interim Report, p.8.

44 Woolf, Interim Report, pp.7–8.

45 See Lord Thomas CJ, “Reshaping Justice”, speech given to Justice, London, 3 March 2014, <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Speeches/lcj-speech-reshaping-justice.pdf> (accessed 10 March 2025); A.S. Zuckerman, “No Justice Without Lawyers—The Myth of an Inquisitorial Solution”, (2014) 33 CJQ 355. See also Ch.12 Case Management Pt I paras 12.7 ff.

- 46 Woolf, Final Report, Ch.1 para.3. See also J. Jacob, "The Hamlyn Lectures 1986", The Fabric of English Civil Justice (London: Stevens & Sons, 1987), p.106.
- 47 Woolf, Final Report, Ch.1 para.3. See, in this regard, *Various Claimants v MGN Ltd [2020] EWHC 553 (Ch)*, where Mann J confirmed that the court had power, taking CPR 3.1(2)(k) and 3.4(2)(b) together, to exclude discrete issues from consideration on proportionality grounds.

The Civil Court Provides a Public Service of Enforcing Civil Rights

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 1 - Overriding Objective

The Civil Court Provides a Public Service of Enforcing Civil Rights

The function of the civil court

1. 26

The overriding objective can be properly understood only in the context of the particular function that the court fulfils in a system governed by the rule of law. The adjudication of civil disputes tends to be seen nowadays as merely a dispute resolution process. Since disputes predominantly concern private rights, it is thought that the process of resolving them is essentially a private matter of no major public interest. This explains why it is so fashionable to regard alternative dispute resolution (ADR) as an adequate and cheaper substitute for court adjudication and why courts all over the world are so insistent that litigants avail themselves of ADR.⁴⁸ Yet, to regard court adjudication as simply one of many forms of private dispute resolution is to debase its constitutional function in a system governed by the rule of law.⁴⁹ No one thinks of an appeal to the Supreme Court or of the criminal trial as merely a dispute resolution process. Nor should one regard any other court adjudication of civil claims as merely a dispute resolution mechanism. The civil process is just as much a law enforcement process as is its criminal counterpart. A pedestrian injured by a speeding car does not go to court asking the judge: "Please resolve my dispute with the speeding driver." Rather, the pedestrian demands their due under law. Court adjudication is the process which provides citizens with the remedies to which they are entitled for wrongs that they have suffered. Rights are meaningless if they are conferred without a corresponding entitlement to remedy in the event of breach, and without enforceable rights the rule of law is illusory.

1. 27

Law enforcement—whether civil or criminal—transcends the interests of the immediate parties. This is not just because certain cases are of wider public importance or establish precedents that may be applied in other cases. It is also because in a society governed by the rule of law, we all have an interest in rights being respected and in wrongs being redressed. The surest way of undermining good social order is to allow infringements of rights to go without redress. Where there is no redress for wrongs there is no value to rights and no incentive to behave according to the law.⁵⁰ As Lord Reed explained:

"[p]eople and businesses need to know, on the one hand, that they will be able to enforce their rights if they have to do so, and, on the other hand, that if they fail to meet their obligations, there is likely to be a remedy against them. It is that knowledge which underpins everyday economic and social relations."⁵¹

The civil court underwrites the rights that persons possess under its jurisdiction by providing a service for their protection and enforcement. It is precisely because the upholding of rights is in the interest of the community as a whole that binding adjudication is a monopoly of the state and is not left to private enterprise. Law enforcement is essentially a public service, delivered by a public authority, with the objective of redressing wrongs for both the individual and the collective good.

1. 28

The civil court cannot realise the aims of vindicating the rights of litigants, and thereby promote respect for the rule of law in society as a whole, if it is in reality inaccessible. Accessibility is a necessary pre-condition to court assistance for the protection of rights. In the absence of access to court, aggrieved persons cannot obtain redress for wrongs, and their rights become just as nugatory as if there was no legal entitlement to remedy in the first place.⁵² Indeed, the courts have consistently recognised a common law "constitutional right of unimpeded access to the courts" for precisely these reasons.⁵³

A public service requires management

1. 29

Judges tend to consider that their role is predominantly to deliver judgments that are well founded in fact and in law, and that all else is secondary.⁵⁴ While it is undoubtedly true that the court's role as an underwriter of our rights is to deliver correct judgments, this does not fully describe the court's function as upholder of the rule of law. To uphold the rule of law, the court must be able to provide meaningfully effective protection of rights, not merely decisions that are theoretically correct. Once we focus on the need to deliver effective remedies for wrongs, the time factor comes into view. A remedy for a wrong has to be administered when it can still do some good, and so if the court is to provide effective remedies it has to deliver judgments within a reasonable time.⁵⁵ Compensation for personal injuries that comes after 15 years of litigation is hardly adequate, even if it reflects the correct application of the law to the true facts, because the claimant will have been denied adequate income support and possibly treatment for a substantial portion of their life. Even in a dispute over property rights, the passage of time tends to erode their usefulness and value by the sheer uncertainty of litigation; the longer the enforcement process, the greater the uncertainty and the less valuable rights become. Seen from this perspective, expedition is not an independent aspect of dispensing justice, but an integral part of it.⁵⁶

1. 30

Similarly, high litigation cost denies those who cannot afford it the possibility of seeking protection of their rights, and thereby weakens the rule of law. The Chief Justice of the Federal Court of Australia made this point when he said: "Nor is justice somehow able to be analysed as a concept distinct from the speed or cost of its delivery. Justice delayed is justice denied; cannot the same be said of justice at an unreasonable cost?"⁵⁷ It is unjust to extract from those who seek court assistance a disproportionate price as a condition for seeking redress for the wrong, because disproportionate cost robs legal redress of its efficacy and may be equivalent to denial of redress altogether. This is true not only where the price levied by the state for litigants to make use of the legal system is unreasonably high, as in the case of excessive court fees.⁵⁸ It is also true where, in order to obtain redress, litigants would have to pay more for legal representation than the value of the right that they seek to protect. It should be stressed that the very risk of having to spend more to obtain court redress than the value of the underlying right amounts to a denial of access to court, since it would deter most rational people from seeking redress in the first place.

1. 31

We may conclude that a just system of adjudication of civil disputes must meet three basic requirements, all of which are as integral as each other to the enforcement of civil rights. It must deliver judgments that are well grounded in law and in fact. It must do so within a reasonable time. And it must not involve the expenditure of unreasonable, disproportionate or unpredictable levels of resources. The legitimate entitlement, derived from the rule of law principle, that persons should be able to obtain effective court protection of rights (that is, at proportionate cost and within a reasonable time), does not mean that we are entitled to claim the best possible court adjudication system regardless of how much it costs the state. One is no more entitled to the best possible system of justice than one is to the best possible health, education or transport services. All that citizens are entitled to expect is the allocation of such resources to the civil justice system as are necessary to achieve their basic entitlement, namely reasonably meaningful protection and enforcement of their rights.⁵⁹ Determining what is a reasonable allocation of resources for the administration of civil justice involves many and varied public policy decisions, which only the legislature can make.⁶⁰ But two basic points can be made: first, civil justice, like any other public service, must be provided at a reasonable and proportionate cost to taxpayers and litigants alike. And second, there will in practice always be resource or cost constraints in delivering civil justice.⁶¹

1. 32

The need to deliver well-founded judgments in a reasonable time by means of available resources creates obvious tensions between the imperatives of truth, of time and of cost. Delivering high-quality and speedy judgments may require far greater resources than can be expected from the taxpayers or court users. Inevitably, compromises need to be made to resolve the competing demands of high-quality judgments, timely resolution and affordability. A range of strategies are in principle available, both in individual disputes and at the level of general policy, in order to optimise efficiency and strike an appropriate balance between these competing tensions. For example, in a particular case, it might be decided that certain evidence can

reasonably be dispensed with in order to streamline the proceedings; and at the level of general policy, we might decide to adopt less resource-intensive processes for certain types of proceedings or perhaps to take longer to reach a resolution in others. This way of looking at the delivery of civil justice leads to a number of conclusions. First, it is necessary for the court to actively manage individual cases, in order to strike the appropriate balance between justice, expedition and cost. This cannot realistically be expected to occur where the court leaves control of the litigation process to the parties. For one thing, each party is bound to pursue the course that best suits their own interests, which may or may not be consistent with the fair and expeditious resolution of the case, or with the best interests of the civil justice system as a whole.⁶² And in any event, litigants do not have access to information necessary for effective management, such as case-loads, judicial availability or budgetary limits.

- 1.33 Second, case management decisions geared towards reaching the right compromise between correct outcomes, speed and cost should be adopted in a coherent and consistent way as between different cases. Inevitably, court management of litigation is predominantly case-based, but if satisfactory results are to be achieved, it must be guided by general principles which are designed to achieve standards of efficiency. This can only be done if a coherent and robust set of policies and guidelines for balancing desired outcomes against time and resource constraints are developed.⁶³ The pre-CPR system presents a cautionary tale in this regard, in that it had developed principles for the interpretation and application of procedural rules, but with no regard to overall efficiency.⁶⁴ The predecessors of the CPR, the RSC and the County Court Rules (CCR), relied for their interpretation on general common law principles, which did not address the needs of a well-run litigation system. By contrast, the CPR provide an interpretative machinery in the form of the overriding objective, which expressly conveys the legislature's commitment to delivering a litigation service which is just, timely and involves proportionate use of resources.⁶⁵ The interpretative framework provided by the overriding objective is supported by the fact that under the CPR the Court of Appeal has responsibility for the administration of civil procedure, and to this end monitors and develops principles for the exercise of discretion.⁶⁶

Footnotes

- 48 For example, in Singapore the State Courts have implemented a “presumption of ADR” for civil matters, by which cases filed in the State Courts are automatically referred to the most appropriate mode of ADR at the pre-trial conference: Subordinate Court Practice Direction Amendment No. 2 of 2012. While the parties may opt out of ADR, they risk being penalised in costs: Subordinate Court Practice Direction Amendment No. 2 of 2012 at s.25A(8)–(9).
- 49 H. Genn, “The Hamlyn Lectures 2008”, Judging Civil Justice (Cambridge: Cambridge University Press, 2009), pp.20–24. For an alternative viewpoint, see A.K.C. Koo, “*The role of the English courts in alternative dispute resolution*” (2018) 38(4) L.S. 666. See also *R (Unison) v Lord Chancellor [2017] UKSC 51; [2020] AC 869* [67], where Lord Reed observed that “the idea that bringing a claim before a court or a tribunal is a purely private activity ... [is] demonstrably untenable”.
- 50 See, in this regard, the interesting discussion of “justice” and “welfare” benefits that are generated and distributed by legal systems in F. Wilmot-Smith, Equal Justice: Fair Legal Systems in an Unfair World (Harvard University Press, 2019), at pp.15–22.
- 51 *R (Unison) v Lord Chancellor [2017] UKSC 51; [2020] AC 869* [71].
- 52 For an example see *R (Unison) v Lord Chancellor [2017] UKSC 51; [2020] AC 869* [68]. As Blackstone wrote, “A third subordinate right of every Englishman is that of applying to the courts of justice for redress of injuries. Since the law is in England supreme arbiter of every man’s life, liberty, and property, courts of justice must at all times be open to the subject, and the law be duly administered therein”: W. Morrison (ed.), Blackstone’s Commentaries on the Laws of England (London: Routledge-Cavendish, 2001), Vol.1 p.141; (emphasis added).
- 53 See for example *Attorney General v Times Newspapers Ltd [1974] AC 273* at 310, HL; *Raymond v Honey [1983] 1 AC 1* at 13–14, HL; *R v Lord Chancellor, Ex p. Witham [1998] QB 575; [1997] 2 All ER 779; R v Secretary of State for the Home Department, Ex p. Saleem [2001] 1 W.L.R. 443; R (Unison) v Lord Chancellor [2017] UKSC 51; [2020] AC 869*.
- 54 Bentham thought that the direct aim of the civil litigation process was to obtain rectitude of decision, by which he meant the correct application of the law to the true facts: J. Bowring (ed.), The Works of Jeremy Bentham, Vol. II, Principles of Judicial Procedure (Edinburgh: William Tait, 1838–43); see also W. Twining, Theories of Evidence: Bentham & Wigmore (London: Weidenfeld and Nicholson, 1985). “[T]he primary duty of the courts”, Lord Denning MR observed, “is to ascertain the truth by the best evidence available”: *Harmony Shipping Co SA v Davies [1979] 3 All ER 177* at 181, CA. Another Master of the Rolls, Lord Donaldson, stressed that “litigation is not a war or even a game. It is designed to do real justice between opposing parties ...”: *Davies v Eli Lilly & Co [1987] 1 W.L.R. 428* at 431, CA.

- 55 See below, paras 1.50 ff.
- 56 As is indicated by the aphorism “justice delayed is justice denied”.
- 57 Chief Justice Allsop, “Judicial Case Management and the Problem of Costs”, speech at the University of New South Wales, Faculty of Law, 9 September 2014, <https://www.austlii.edu.au/cgi-bin/viewdoc/au/journals/FedJSchol/2014/16.html> (accessed 10 March 2025).
- 58 *R v Lord Chancellor Ex p. Witham [1998] QB 575; [1997] 2 All ER 779; R (Unison) v Lord Chancellor [2017] UKSC 51; [2020] AC 869.*
- 59 R.M. Dworkin, A Matter of Principle (Oxford: Clarendon Press, 1985), p.92. For a purely economic approach to the problem see: *R.A. Posner, “An Economic Approach to Legal Procedure and Judicial Administration”* (1973) 2 *Journal of Legal Studies* 399, and R.A. Posner, Economic Analysis of the Law, 9th edn, (New York: Wolters Kluwer, 2014).
- 60 A number of questions of policy are connected with the resource dimension of justice. Of particular importance is whether the cost of the legal system should be borne by the state (namely, the taxpayer) or the litigants who use it. This policy question is influenced by such considerations as whether public services are more effectively or justly provided by charging the user or by paying for them through taxes. These considerations are beyond the scope of this work, but for a lively discussion of their implications for how legal systems should be designed and funded, see F. Wilmot-Smith, Equal Justice: Fair Legal Systems in an Unfair World (Cambridge, Mass.: Harvard University Press, 2019).
- 61 See the arresting discussion of the implications of this in F. Wilmot-Smith, Equal Justice: Fair Legal Systems in an Unfair World (Cambridge, Mass.: Harvard University Press, 2019).
- 62 *Mitchell v News Group Newspapers Ltd [2013] EWCA Civ 1537; [2014] 1 W.L.R. 795* [38]–[39]; *Chartwell Estate Agents Ltd v Fergies Properties SA [2014] 3 Costs L.R. 588* [62].
- 63 Further, it must be remembered that adequate management of the civil justice system also requires an effective judicial leadership to adopt general policies for the proper management and distribution of resources across the system as a whole, and to continually review the performance of the system as a whole and periodically respond to emerging problems; see Ch.12 Case Management Pt I para 12.5–12.6 and also paras 12.29 ff on the use of technology in case management.
- 64 As in the case of *Birkett v James [1978] AC 297; [1977] 2 All ER 801, HL*, and its progeny (see above, para.1.20 fn.38), which governed applications to dismiss actions for inexcusable and inordinate delay.
- 65 See below, paras 1.73 ff.
- 66 *Callery v Gray (Nos 1 and 2) [2002] UKHL 28; [2002] 1 W.L.R. 2000*, per Lord Bingham at [6] and [8], and per Lord Hoffman at [17].

The Overriding Objective—Integrating Justice and Management

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 1 - Overriding Objective

The Overriding Objective—Integrating Justice and Management

A multi-dimensional concept of justice

- 1.34 The second consideration which underpins the [CPR](#) approach to case management and party compliance is the recognition that dealing with cases justly does not just mean reaching a result which is correct as a matter of fact and of law. Dealing with cases justly also requires expedition and proportionate use of resources, and each of these imperatives forms part of the whole.⁶⁷ Buxton LJ explained: [CPR](#):

“[1.1\(1\)](#) says that the overriding objective is to enable the court to deal with cases justly; but then in [1.1\(2\)](#) it explains that just dealing with a case includes not only matters such as the parties being on an equal footing but also, much more directly, management questions such as saving expense, dealing with the case in a proportionate way and ensuring that it is dealt with expeditiously. In making a decision under the overriding objective the court has to balance all those considerations that are set out under that heading without giving one of them undue weight.”⁶⁸

Dealing with cases justly is therefore a multi-dimensional concept, as Lord Dyson MR spelt out:

“... doing justice is not something distinct from, and superior to, the overriding objective. Doing justice in each set of proceedings is to ensure that proceedings are dealt with justly and at proportionate cost. Justice in the individual case is now only achievable through the proper application of the [CPR](#) consistently with the overriding objective.”⁶⁹

- 1.35 As to the time dimension of justice, it should be noted that delay may have two different consequences. It may induce error because evidence deteriorates with the passage of time: memories fade, witnesses become unavailable and documents get lost. Quite apart from increasing the risk of error, delay may undermine the effectiveness of legal remedies by eroding their practical utility. The greater the delay in obtaining judgment, the more likely it is that its practical benefit has diminished or even disappeared. A judgment holding that the claimant was wrongly excluded from the electoral roll would be of little use if it were given after the elections had taken place. A person who has suffered serious injuries could hardly be said to have received just redress if they had to endure many years of privation before obtaining compensation.⁷⁰ There are other adverse consequences of protracted litigation. For example, where a long period of procedural inactivity on the part of one party has induced the opponent to act on the assumption that the proceedings would go no further, it may well be unfair to restart the proceedings. Long delays in the process of dispute resolution tend to increase litigation costs. As we have seen, high litigation costs are also capable of undermining justice as between the parties to a dispute. This is particularly so where they do not enjoy equal resources, and the richer party can use delay and procedural devices to oppress their poorer opponent. As Lord Bingham stressed, “the judge must always bear in mind that justice requires not only that the right answer be given but also that it be achieved by a trial process which is fair to all parties”.⁷¹ In other words, considerations of both time and cost are integral to just dispute resolution.

1.36

Under the **CPR** dealing with cases justly is not confined to doing justice between the parties to a dispute, but is also concerned with the proper administration of the civil justice system as a whole. This may be termed the systemic conception of justice. For a start, the civil justice system must command public confidence, if rights are to have value and people are to behave in accordance with their obligations. Public confidence in court decisions depends not only on whether the court is seen as capable of delivering well-founded judgments, but also on whether it follows procedures which are capable of resolving disputes with reasonable expedition and at proportionate cost. For example, if proceedings tend to be lengthy, the resulting uncertainty may itself undermine the value of rights.⁷² Similarly, a person who knows that their opponent is unable to engage in legal proceedings because of their likely duration and cost has little incentive to comply with the duties owed to the opponent. Put simply, civil procedure is as much a part of the rule of law as are the principles that contracts should be enforced, and that civil wrongs should be remedied.

- 1.37 A holistic approach to civil justice pays attention to resource considerations generally. It recognises that the system's scarce resources must not be wasted, and that they must be allocated fairly as between different litigants. A court that invests disproportionate time and effort in resolving a particular dispute will run out of resources to deal with other cases waiting their turn, and will consequently leave some litigants without adequate remedy. As Lord Woolf MR stated in the pre-**CPR** case of *Beechley Property Ltd v Edgar*, looking forward to the **CPR** system⁷³:

“It is no use the party coming forward and saying, ‘The evidence will help our case’. You have to consider the position not only from the plaintiff’s point of view, but also from the point of view of the defendant, and with a view to doing justice between other litigants as well.”

- 1.38 This has significant implications for the court’s approach to litigant-induced delay, as Lord Woolf MR explained in *Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd*⁷⁴:

“In *Birkett v James* the consequence to other litigants and to the courts of inordinate delay was not a consideration which was in issue. From now on it is going to be a consideration of increasing significance. Litigants and their legal advisers must recognise that any delay which occurs from now on will be assessed not only from the point of view of the prejudice caused to the particular litigants whose case it is, but also in relation to the effect it can have on other litigants who are wishing to have their cases heard and the prejudice which is caused to the due administration of justice. The existing rules do contain the limits which are designed to achieve the disposal of litigation within a reasonable time scale. Those rules should be observed.”

Lord Woolf CJ returned to this matter in *Jones v University of Warwick*⁷⁵:

“A judge’s responsibility today in the course of properly managing litigation requires him, when exercising his discretion in accordance with the overriding objective contained in **CPR Pt 1**, to consider the effect of his decision upon litigation generally. An example of the wider approach is that the judges are required to ensure that a case only uses its appropriate share of the resources of the court (**CPR Pt 1.1(2)(e)**). Proactive management of civil proceedings, which is at the heart of the **CPR**, is not only concerned with an individual piece of litigation which is before the Court, it is also concerned with litigation as a whole.”

- 1.39 In a similar vein, Lord Dyson MR explained that under the **CPR** approach,

“... in some cases parties will have to be denied the opportunity to adduce certain evidence if they have failed to exchange in accordance with case management directions. Doing so may be justified in order to ensure that they do not expend more than proportionate costs on their own litigation. Equally, this might be justified in order to ensure that all other court-users have fair access.”

It is clear that the systemic conception of justice has important practical implications for case management decisions in individual cases, in that the proper administration of justice and the needs of other litigants become explicit decision-making parameters, alongside the considerations of correct outcomes, expedition and cost that are already in play at the level of the individual dispute. In managing any individual dispute, the court must bear in mind its obligation to provide assistance to all and therefore consider the consequences that individual decisions on matters of procedure may have on its ability to satisfy the public demand for justice. In other words, systemic concerns are part and parcel of the whole concept of doing justice.

1. 40

In recognising that the civil justice system is a public service which requires careful management, and that “justice” is a multi-dimensional concept which goes beyond mere substantive justice in individual disputes, the [CPR](#) system represents a radical departure from its predecessor. The nature and extent of the departure cannot be fully understood without appreciating that the [CPR](#) system is driven by three key aims: correct application of the law to the true facts; proportionate cost to litigants and to the taxpayer; and resolution within a reasonable time. All three imperatives are central to the civil justice system, and none are necessarily subordinate to the others since they all form part of our overall conception of justice. The overriding objective gives them voice and provides the framework for ensuring that considerations of time and resource receive appropriate attention throughout the adjudication process.⁷⁶ With this in mind, we turn to the elements of the overriding objective and its functions in guiding court exercise of discretion in case management decisions, as an interpretive tool and as a duty of co-operation imposed upon the parties.

Footnotes

67 In [Adoko v Jemal, The Times, 8 July 1999, CA](#), Laws LJ said that the “proper and proportionate use of court resources is now to be considered part of substantive justice itself”.

68 [Holmes v SGB Services Plc \[2001\] EWCA Civ 354](#) [38]. Rix LJ explained in [JSC BTA Bank v Ablyazov \[2012\] EWCA Civ 1551](#) [65] that in the eyes of the fair-minded and informed observer “there is not only convenience but also justice to be found in the efficient conduct of complex civil claims”.

69 Lord Dyson MR, “The Application of the Amendments to the Civil Procedure Rules: 18th Lecture in the Implementation Programme”, speech delivered at the District Judges’ Annual Seminar, Judicial College, 22 March 2013, [26].

70 R. Winn, Report of the Committee on Personal Injuries Litigation (London: HMSO, 1968), Cmnd 3691 drew attention to the plight of victims of personal injuries who have to wait a long time for compensation. It resulted in the introduction of the interim payment procedure under [RSC Ord.29 rr.11–12](#). See also the discussion below of the right to timely adjudication under art.6 of the European Convention on Human Rights (ECHR): paras [1.49–1.57](#).

71 [O'Brien v Chief Constable of South Wales Police \[2005\] UKHL 26; \[2005\] 2 AC 534](#) [6].

72 For example, if a person is at risk from a claim contesting their right to build on land for which there is no other use, the longer they are exposed to the risk the lesser the productivity and value of the land.

73 [Beechley Property Ltd v Edgar, The Times, 18 July 1996, CA](#).

74 [Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd \[1998\] 2 All ER 181 at 191; \[1998\] 1 W.L.R. 1426](#) at 1436, CA. For discussion of [Birkett v James](#) see above, para.1.14, and Ch.12 Case Management Pt II paras [12.267 ff](#).

75 [Jones v University of Warwick \[2003\] EWCA Civ 151; \[2003\] 1 W.L.R. 954](#) [25].

76 The importance of the overriding objective as a device for giving expression to the multidimensional concept of justice under the [CPR](#) can be seen in the Supreme Court’s decision in [Sainsbury’s Supermarkets Ltd v Visa Europe Services LLC \[2020\] UKSC 24](#). At [239], the court identified the longstanding principle that there should be finality in litigation, and in particular the rule in [Henderson v Henderson \(1843\) 3 Hare 100](#) (discussed further in Ch.26 Finality of Litigation at paras [26.115 ff](#)), as “firmly underwritten by and inherent in the overriding objective”. The requirement that litigants should bring forward their whole case in one claim is based not only on “what is required to do justice between the parties”, but also on “wider public policy considerations” including the need to ensure expeditious resolution of disputes, and the need to allocate the court’s resources fairly between different cases.

Components of the Overriding Objective

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 1 - Overriding Objective

Components of the Overriding Objective

- 1.41 The overriding objective articulates general principles that must guide the interpretation of the [CPR](#) and their application. It encapsulates the fundamental purpose of the rules, and so describes the spirit in which they are to be understood and carried out.⁷⁷ The Mark II overriding objective, as amended in April 2022, expresses this purpose as follows:

“These Rules are a procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.”⁷⁸

- 1.42 The drafters of the [CPR](#) have taken care to articulate what is intended to be achieved by “dealing with cases justly and at proportionate cost”. [CPR 1.1\(2\)](#) states:

Rule 1_1

“(2) Dealing with a case justly and at proportionate cost includes, so far as is practicable—

- (a) ensuring that the parties are on an equal footing and can participate fully in proceedings, and that parties and witnesses can give their best evidence;
- (b) saving expense;
- (c) dealing with the case in ways which are proportionate—
 - (i) to the amount of money involved;
 - (ii) to the importance of the case;
 - (iii) to the complexity of the issues; and
 - (iv) to the financial position of each party;
- (d) ensuring that it is dealt with expeditiously and fairly;
- (e) allotting to it an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases;
- (f) promoting and using alternative dispute resolution;
- (g) enforcing compliance with rules, practice directions and other orders.”

⁷⁹

There are a number of imperatives both implicit and explicit in these statements. The salient points are that the court must ascertain the true facts and correctly apply the law to them; that the process adopted must be fair to both parties; that judgments

must be reached within a reasonable time; and that the procedures adopted and costs incurred remain proportionate. Given the pivotal role of the overriding objective in the interpretation of the [CPR](#), in the exercise of judicial discretion and in judicial use of case management powers, it is important to consider each of these elements and their role in the general scheme of litigation.

The imperative of ascertaining the truth

- 1.43** The overriding objective does not expressly mention the determination of truth. This is not surprising because, as a footnote to the third draft of [CPR 1.1](#) stated, “seeking the truth is so obviously part of the court’s role that it does not need to be stated expressly in the Rules”.⁸⁰ As we saw earlier, providing remedies for wrongs is the peculiar constitutional function of court adjudication in a system governed by the rule of law. Therefore, the right to correct adjudication upon disputed rights is not something derivable from the [CPR](#), mere subordinate legislation. The function of the [CPR](#) is quite different: to provide the practical framework for court adjudication.
- 1.44** While the court is under a constitutional duty to decide cases according to the facts and the law, it is not infallible and no system can guarantee the factual correctness of each and every judgment. Nevertheless, all that is available for the determination of disputed facts is the existing procedural system, and public confidence in court decisions depends on whether that system is seen as capable of delivering well-founded judgments. The law’s commitment to correct outcomes is demonstrable in most areas of procedure. It shapes the right to fair trial and underpins English law’s processes of giving parties access to all relevant evidence. Further, the preference for deciding cases on their merits constitutes an important consideration in the exercise of judicial discretion in virtually all matters of procedure. However, the philosophy embodied in the overriding objective recognises that public confidence in the civil process can be maintained only if court assistance can be obtained without excessive delay or cost. The influence of this philosophy can be seen, for example, in the Supreme Court’s decision in [Sainsbury’s Supermarkets Ltd v Visa Europe Services LLC](#), where the court recognised that the pursuit of perfect justice between the parties had to yield to considerations of cost and proportionality:

“The court in applying the compensatory principle is charged with avoiding under-compensation and also over-compensation. Justice is not achieved if a claimant receives less or more than its actual loss. But in applying the principle the court must also have regard to another principle, enshrined in the overriding objective of the Civil Procedure Rules, that legal disputes should be dealt with at a proportionate cost. The court and the parties may have to forgo precision, even where it is possible, if the cost of achieving that precision is disproportionate, and rely on estimates”.⁸¹

Procedural fairness

- 1.45** One of the components of the overriding objective is procedural fairness.⁸² The requirements of fair process are deeply rooted in English law. Entitlements such as the right to an impartial tribunal, the right to be heard and informed of the opponent’s case or, indeed, the elementary right of access to court have for centuries found expression in the case law and in the rules of procedure, including of course the [CPR](#).⁸³ The common law safeguards of procedural fairness are now overlaid with the right to a fair trial established by the European Convention on Human Rights (ECHR) art.6. Detailed discussion of the right to a fair trial at common law and in accordance with the ECHR is to be found in [Ch.3](#).
- 1.46** However, while there is some overlap between the practical aims of the overriding objective and the basic requirements of a fair trial, such as ensuring that cases are dealt with expeditiously and that litigants are treated on an equal footing, one should

not lose sight of important differences. First, the right to a fair trial, whether at common law or under the ECHR art.6, is much wider, and includes such rights as the right to be heard, the right to an impartial tribunal and the right to public trial. Second, the entitlements bundled under the concept of fair trial are ends in themselves, not means to achieving some other goals.⁸⁴ Third, and related to this, the overriding objective does not impose precise duties on the court or confer well-defined rights on litigants;⁸⁵ rather, it calls for practical measures to be adopted in light of the specific circumstances of the case, having regard to the cost to each party and the resources available for the administration of civil justice at large.

- 1.47** Seen from this perspective, the meaning of the requirement in [CPR 1.1\(2\)\(a\)](#) to ensure that the parties are “on an equal footing” is not immediately obvious. It might be thought that the aim of ensuring that the parties are on an equal footing looks beyond matters of practical efficiency and invokes general principles of procedural fairness. However, such an interpretation would make the clause redundant because fundamental standards of fairness have always been part of English procedure and are now reinforced by the ECHR art.6.⁸⁶ It would, therefore, be more in keeping with the ideas behind the overriding objective to interpret [CPR 1.1\(2\)\(a\)](#) as requiring fairness in the exercise of judicial case management powers and ensuring that they are not as a matter of practical reality exercised to the detriment of one party. On this view, ensuring that the parties are treated on an equal footing would mean, for instance, that the court must not give directions that impose on one party an unwarranted procedural disadvantage compared with another party. This does not mean that the court must mechanically ensure that each party is treated the same; for example, if one party is allowed to call only one expert witness, [CPR 1.1\(2\)\(a\)](#) does not automatically dictate that the other party must not be allowed more than one expert.⁸⁷ Equality in this context is fact-sensitive and depends on the circumstances of the particular case.

- 1.48** This view is reflected in the April 2021 amendment to [CPR 1.1\(2\)\(a\)](#), which specified that in placing the parties “on an equal footing” the court must ensure that they “can participate fully in proceedings, and that parties and witnesses can give their best evidence”. These aspirations are nothing new; common law standards of procedural fairness and the ECHR art.6 have always required the court to take account of parties’ and witness’ vulnerabilities, particularly at trial, and to institute special measures if need be to enable such persons to give their best evidence. [CPR 1.1\(2\)\(a\)](#)⁸⁸ is therefore best understood as giving expression to the idea that in exercising its case management powers, the court may need to take practical steps to redress imbalances arising from the vulnerability of a party or their witnesses.⁸⁹ In doing so the court should focus on the specific impact the alleged vulnerability is likely to have, and should not go further than is necessary to remove the unwarranted disadvantage that is likely to flow from it.⁹⁰

- 1.49** The proper approach to securing equality and fairness in the context of the overriding objective may also be illustrated by reference to [CPR 1.1\(2\)\(c\)\(iv\)](#), which requires the court to deal with cases in ways that are proportionate “to the financial position of each party”. Under the interpretation advocated here it would be wrong to give case management directions that disadvantage litigants of limited means. Where one party is much better financed than their opponent the court may make orders designed to rectify this imbalance, such as allowing the party represented by a sole practitioner more time to carry out necessary work,⁹¹ or requiring the larger firm to prepare bundles of documents needed for court hearings.⁹² The court may order that a large corporation, which has an interest in obtaining a ruling of general importance to its business, to bear its own costs even if it succeeds on appeal.⁹³ Further, where at least one party to proceedings is a litigant in person, the court is expressly required to take this into account when making case management decisions ([CPR 3.1A](#)).⁹⁴ Although the court may make costs orders to redress resource imbalance, it may not prevent a party from employing leading counsel simply because the opponent cannot do the same.⁹⁵ Parties are entitled to be represented by lawyers of their choice, though they may not necessarily recover the cost.

Timely resolution

- 1.50** As already noted,⁹⁶ delay may adversely affect court adjudication in two different ways: it may induce error and it may create prejudice. The first is concerned with the effect that the passage of time may have on the court’s ability to determine the truth.

Over time memories fade, witnesses become unavailable and documents may be lost.⁹⁷ Prejudice-inducing delay has different, though equally harmful, consequences. Delay may undermine the value of rights by creating uncertainty, impairing the practical utility of judgments. Whether delay results in error or reduces the effectiveness of the remedy the outcome is the same: there is a denial of justice. There are many other adverse consequences of delay. Long periods of procedural inactivity on the part of one party may lull the other party into a sense of false security. Protracted litigation may adversely affect the wellbeing of litigants by causing stress and anxiety. The cost of litigation, too, tends to be increased by long delays, both because lawyers must then spend time refreshing their knowledge of the case, and because delay has a tendency to generate procedural disputes and costly interim hearings. This in turn results in needless waste of court resources, undermining the court's ability to provide others with timely dispute resolution.

- 1. 51** Although the deleterious effects of delay were not unknown before the **CPR**, the court was unable to translate the imperative of expedition into practical measures for speeding up the resolution of disputes. The overriding objective, backed by a variety of case management powers, seeks to do just that. **CPR 1.1(2)(d)** expressly requires the court to ensure that cases are dealt with expeditiously, and following Sir Rupert Jackson's recommendations **CPR 1.1(2)(f)** emphasises that ensuring timely compliance with rules and orders is itself key to disposing of cases justly and proportionately. The court is entrusted with the task of actively managing cases in order to further the overriding objective by, among other things, controlling the progress of the case (**CPR 1.4(2)(g)**). Accordingly, the **CPR** have made the need for timely resolution a core consideration in case management and in the exercise of judicial discretion generally.

The right to adjudication within a reasonable time under ECHR art.6

- 1. 52** The requirement for expedition under the overriding objective intersects with the right to adjudication within a reasonable time under art.6 of the ECHR. It is therefore convenient to deal with this aspect of art.6 here, rather than in **Ch.3**, where other facets of the right to fair trial are discussed. Article 6 of the ECHR provides that “[i]n the determination of their rights and obligations ... everyone is entitled to a ... hearing within a reasonable time ...” The right to adjudication within a reasonable time is independent of prejudice, so that there may be a violation of the right even if a party has suffered no material hardship as a result of the delay, and even though it has not undermined the court's ability to hold a fair trial.⁹⁸ This is particularly so where the delay has affected the enjoyment of other rights under the ECHR.⁹⁹

- 1. 53** Four points should be noted about the right to adjudication within a reasonable time. First, the concept of “reasonable time” is flexible and context-dependent. As the overriding objective recognises, what amounts to due expedition in a particular case will depend on a number of factors including factual and legal complexity,¹⁰⁰ the need to ensure that litigants have adequate time for preparation, the availability of evidence,¹⁰¹ whether what is at stake calls for particular diligence in the prosecution of proceedings,¹⁰² the conduct of the parties (and especially the party complaining of delay) in the course of the litigation,¹⁰³ and so on. Thus, the European Court of Human Rights (ECtHR) has repeatedly recognised that the reasonableness of any delay must be assessed by reference to the circumstances of the particular case.¹⁰⁴

- 1. 54** Second, the threshold for establishing unreasonable delay under art.6 is a high one. Consequently, the degree of expedition which the overriding objective calls for, and that required by art.6, cannot be regarded as one and the same. The general approach of the ECtHR is reflected in a Privy Council decision, which was concerned with delay in trying criminal cases. Lord Bingham said:

“In any case in which it is said that the reasonable time requirement ... has been ... violated, the first step is to consider the period of time which has elapsed. Unless that period is one which, on its face and without more, gives grounds for real concern it is almost certainly unnecessary to go further, since the [ECHR] is directed not to departures from the ideal but to infringements of basic human rights. The threshold of proving a breach of the reasonable time requirement is a high one, not easily crossed. But if the period which has elapsed is one which, on its face and without more, gives ground for real concern, two consequences follow. First, it is necessary for

the court to look into the detailed facts and circumstances of the particular case ... Secondly, it is necessary for the contracting state to explain and justify any lapse of time which appears to be excessive.”¹⁰⁵

He went on to explain that three areas call for particular enquiry: the complexity of the case; the conduct of the accused; and the manner in which the case has been dealt with by the administrative and judicial authorities.

1. 55 Third, it must be remembered that the obligation to provide adjudication within a reasonable time is, like all obligations under the ECHR, imposed on the state. Consequently, periods of delay for which the court is in no way responsible will not be counted for the purposes of determining whether there has been unreasonable delay within the meaning of art.6. This may include, for example, the period before commencement of a civil action,¹⁰⁶ or periods where a party had the power to unilaterally progress proceedings but did not do so, as in costs assessment proceedings under CPR 47.¹⁰⁷ At the same time, it is not just delay for which the court is *solely* responsible that will be taken into account (for example, where the court took an excessively long time to deliver judgment)¹⁰⁸; the court must also avoid inaction which *contributes* to unreasonable delay. Accordingly, the court must ensure that procedural defaults by individual litigants do not defeat the right of other parties to a timely resolution.¹⁰⁹

1. 56 This point has been emphasised by the ECtHR. *Unión Alimentaria Sanders SA v Spain*¹¹⁰ dealt with a complaint by a Spanish litigant of an infringement of his right to adjudication within a reasonable time. The government of Spain argued that since it was a principle of Spanish civil procedure that the responsibility for progressing proceedings rested on the parties, the Spanish courts could not be held responsible for party-induced delays. The ECtHR rejected this argument, observing:

“The Court reiterates that such a principle does not absolve the courts from ensuring compliance with the requirements of Article 6 concerning reasonable time ... the Court considers that the person concerned is required only to show diligence in carrying out the procedural steps relating to him, to refrain from using delaying tactics and to avail himself of the scope afforded by domestic law for shortening the proceedings. He is under no duty to take action which is not apt for that purpose ...”¹¹¹

Similarly, in *Scopelliti v Italy* the ECtHR observed:

“The Court reiterates that in Italy civil proceedings are subject to the ‘principio dispositivo’, according to which it is for the parties to take the initiative with regard to the progress of the proceedings. However, that principle does not dispense the courts from ensuring compliance with the requirements of Article 6 as regards reasonable time ...”¹¹²

1. 57 Fourth, the obligation imposed on the state under art.6 is not limited to avoiding excessive delay in individual cases. Rather, it requires contracting states to organise their legal systems in such a way that the court has the facilities necessary to enable it to satisfy the right to an adjudication within a reasonable time.¹¹³ The CPR achieve this by requiring the court to ensure that cases are dealt with expeditiously (CPR 1.1(2)(d)) and to enforce compliance with rules and orders (CPR 1.1(2)(f)). To this end, numerous rules are designed to encourage expeditious resolution of disputes and the CPR give the court ample powers to ensure that the parties comply with time limits.

1. 58 The manner in which the court exercises its powers to secure adjudication within a reasonable time is discussed in Ch.12. Here only a few more general remarks are called for. Since what is a “reasonable time” for resolution is context-dependent, the court will set a pre-trial and trial timetable calibrated to the needs of the particular dispute. The case management timetable should be regarded as the starting point for measuring reasonableness, since case management directions create a legitimate expectation of a final resolution within the rough contours of this timetable (barring unforeseen difficulties). Consequently, when it considers an application for an extension of time the court should take into account the legitimate expectation the non-defaulting party

has to timely adjudication.¹¹⁴ Where a party has had reasonable time to perform their process obligations but has failed to do so, the court should generally refuse them further time to comply, particularly if the non-defaulting party would otherwise be robbed of their legitimate expectation of timely resolution.¹¹⁵ It is not suggested that the court should always deny defaulting parties more time. But a litigant who has striven to fulfil their process requirements punctually is entitled to have their interest in expeditious resolution given appropriate weight, especially when the defaulting party can show no good reason for the delay.¹¹⁶

Proportionality

Meaning of “proportionality”

1. 59

The notion of “proportionality” in the CPR is not easy to define with precision, not least because of its relatively recent appearance in English law. Proportionality was originally a civilian principle, developed as an independent concept in German law to assess whether police conduct unnecessarily interfered with citizens’ freedoms.¹¹⁷ It later emerged as a general principle of EU law,¹¹⁸ used to test the legality of acts of the EU institutions and of domestic public authorities where EU rights are engaged.¹¹⁹ It has been employed in English administrative law as a criterion for assessing whether the use of statutory powers by public authorities, including the police, was unnecessary or excessive in relation to a particular intended objective.¹²⁰ And it forms part of the analytical framework for determining whether public authorities have acted incompatibly with individuals’ rights under the ECHR in breach of the Human Rights Act 1998.¹²¹ Proportionality has been described as a “distinctly protean” concept,¹²² and its meaning and implications necessarily vary according to the context in which it is used. Thus, in *Campbell v M.G.N. Ltd (No.2)* Lord Hoffmann considered that the conception of proportionality which governs the lawfulness of interferences with ECHR rights must not be conflated with the principle of proportionality found in the CPR.¹²³

1. 60

The drafters of the CPR have taken care to specify the goals towards which the proportionality principle is oriented, at CPR 1.1(2). These are: ensuring that the parties are on an equal footing (CPR 1.1(2)(a)); ensuring that the dispute is dealt with expeditiously and fairly (CPR 1.1(2)(d)); allotting to it an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases (CPR 1.1(2)(e)); and enforcing compliance with rules, practice directions and orders (CPR 1.1(2)(f)).¹²⁴ Having articulated the proportionality goals the rule identifies the factors that need to be considered when applying the concept to particular cases. These include: the amount of money at stake in the dispute (CPR 1.1(2)(c)(i)), the importance and complexity of the case (CPR 1.1(2)(c)(ii)–(iii)) and the financial position of each party (CPR 1.1(2)(c)(iv)). Consequently, in deciding what is the appropriate procedure to be followed, the court will need to form a view of the relative importance of the factors. For example, should the court give more weight to the complexity of the issues or to the fact that a case involves a relatively low amount of money?

1. 61

In arriving at this determination, a central consideration will be whether the likely benefits of taking a particular procedural step justify the cost of taking it: CPR 1.4(2)(h).¹²⁵ A particular case management decision that may otherwise seem suitable may, on reflection, be considered disproportionate if the benefits to be gained from it are outweighed by excessive cost and the amount of court resources that it would consume. By requiring the court to articulate the cost and time aspects of case management decisions in this way, the overriding objective brings to the fore the importance of adapting the litigation process to the needs of the individual case. The whole of the CPR is imbued with the notion that the process employed is to be adapted to a case’s needs,¹²⁶ and the court has extensive powers to ensure that the procedural steps taken are limited to those which are necessary to properly dispose of the particular dispute.¹²⁷

Proportionality of cost to the parties

1. 62

One aspect of the CPR concept of proportionality is concerned with cost to the parties.¹²⁸ Legal services are expensive. The more complex and protracted the litigation process is, the greater the demand on the parties' resources. Accordingly, one of the functions of proportionality is to ensure that the civil process remains as accessible as possible by keeping the cost of litigation to the minimum necessary to enable the court to discharge its constitutional functions.¹²⁹ At the same time, the proportionality principle is intended to ensure that the litigation process is not used by powerful parties as a means of oppressing poorer or otherwise vulnerable opponents by running up costs unnecessarily. These aims are not just reflected in the overriding objective "of enabling the court to deal with cases justly and at proportionate cost" (CPR 1.1(1)) and in the cost-benefit test expressed in CPR 1.4(2)(h). Most of the procedural innovations of the CPR, such as the procedural tracks, the creation of stronger incentives to respond to offers to settle, and greater judicial discretion to make costs orders that reflect the parties' conduct in the litigation, which are designed to exert a downward pressure on process costs.

Systemic conception of proportionality

1. 63

It is also apparent that in seeking to satisfy the procedural needs of the particular case, the court must bear in mind its obligation to provide assistance to all and must therefore consider the consequences that individual decisions on matters of procedure may have on its ability to satisfy the public demand for justice. In particular, this aim is made clear by CPR 1.1(2)(e) (which spells out the need to allot an appropriate share of the court's resources to a given dispute, while taking into account the need to allot resources to other cases) and CPR 1.1(2)(g) (which emphasises the importance of enforcing compliance with rules, practice directions and orders). This consideration may be referred to as the systemic conception of procedural proportionality, discussed above.¹³⁰

1. 64

The systemic aspect of proportionality was always part and parcel of CPR 1.1, but had not been sufficiently appreciated before Sir Rupert Jackson's reforms.¹³¹ The impression was sometimes given that considerations of economy of time and cost were incompatible with doing justice on the merits, and the impact of case management decisions and procedural default on the system as a whole were all too often ignored.¹³² The changes made to the Mark II overriding objective were intended to make explicit that which previously had been inherent, and to underline the court's duty to manage cases in ways that are proportionate to the circumstances of the particular case and to the resources of the judicial system as a whole.¹³³ Extrajudicially, Lord Dyson MR has explained that the Mark II overriding objective is designed to take account of this public need to fairly distribute scarce court resources¹³⁴:

"… in some cases parties will have to be denied the opportunity to adduce certain evidence if they have failed to exchange in accordance with case management directions. Doing so may be justified in order to ensure that they do not expend more than proportionate costs on their own litigation. Equally, this might be justified in order to ensure that all other court-users have fair access."

1. 65

As explained above,¹³⁵ it is a misconception that justice on the merits transcends proportionality. The changes to the overriding objective that were introduced in 2013 were intended to remove this misconception, and to resolve any apparent conflict between the imperatives of achieving substantive justice and ensuring proportionality, as explained by Lord Dyson MR¹³⁶:

"Dealing with cases justly does not simply mean ensuring that a decision is reached on the merits. It is a mistake to assume that it does. Equally, it is a mistaken assumption, which some have made, that the overriding objective

of dealing with cases justly does not require the court to manage cases so that no more than proportionate costs are expended. It requires the court to do precisely that; and so far as practicable to achieve the effective and consistent enforcement of compliance with rules, PDs and court orders.”

- 1. 66** The ramifications of the systemic conception of proportionality can be perceived in the emergence of the species of abuse of process recognised by the Court of Appeal in *Jameel v Dow Jones & Co Inc.*¹³⁷ In that case, Lord Phillips MR said:

“An abuse of process is of concern not merely to the parties but to the court. It is no longer the role of the court simply to provide a level playing field and to referee whatever game the parties choose to play upon it. The court is concerned to ensure that judicial and court resources are appropriately and proportionately used in accordance with the requirements of justice.”¹³⁸

Lord Phillips MR went on to explain that it “would be an abuse of process to continue to commit the resources of the English court, including substantial judge and possibly jury time, to an action where so little is now seen to be at stake”.¹³⁹ This should not, however, be taken to imply that claims of limited monetary value should not receive adequate attention. “The mere fact that a claim is small”, Lewison LJ explained:

“should not automatically result in the court refusing to hear it at all. If I am entitled to recover a debt of £50 I should, in principle, have access to justice to enable me to recover it if my debtor does not pay. It would be an affront to justice if my claim were simply struck out. The real question, to my mind, is whether in any particular case there is a proportionate procedure by which the merits of a claim can be investigated. In my judgment it is only if there is no proportionate procedure by which a claim can be adjudicated that it would be right to strike it out as an abuse of process.”¹⁴⁰

How far the court may take proportionality is illustrated by the Court of Appeal decision in *R (M) v Croydon London Borough Council*,¹⁴¹ where Lord Neuberger MR indicated that the court may refuse to make a determination of costs in costs-only proceedings on the ground that such an exercise would be disproportionate.¹⁴²

The implications of proportionality for case management

- 1. 67** The court’s case management powers are considered in outline below, and in greater detail in Ch.12. However, it is appropriate to draw together the implications of proportionality for the court’s approach to exercising its discretion here. Considerations of proportionality come into almost all procedural decision-making, and guide the court in determining the process to be followed both before and during the trial.¹⁴³ Thus, one of the first matters that the court must consider is whether the case raises issues that require adjudication on the merits. It has the power to strike out a statement of case if it discloses no reasonable grounds for bringing or defending the claim (CPR 3.4(2)) or to grant summary judgment if it considers that the party has no real prospect of succeeding in their claim or defence (CPR 24.3). If the dispute does raise an issue worthy of court attention, the court must next consider whether it could be decided summarily without recourse to one of the normal trial tracks. Should a case proceed beyond this stage, proportionality is an important consideration in deciding to which track to allocate it, and is central to the choice of case management directions. Thus, it is relevant to deciding the scope of disclosure,¹⁴⁴ to permitting amendments to statements of case,¹⁴⁵ to allowing expert evidence¹⁴⁶ and even to whether to entertain an appeal.¹⁴⁷

- 1. 68** Similarly, proportionality is relevant to the exercise of discretion in a variety of contexts, such as whether to extend time limits, in applications for relief from sanctions for non-compliance with rules or orders, and in making costs orders or assessing the amount of costs to be paid. In its approach to the first two types of issue, in particular, the importance of the systemic

dimension of proportionality can be seen. For example, requests for extensions of time or for relief which would necessitate the adjournment of a trial are viewed especially unsympathetically, because the need to adjourn the trial in one case could have a knock-on effect on other cases waiting for their turn.¹⁴⁸

- 1.69 The systemic conception of proportionality has another important consequence for the court's approach to managing its caseload—the test of whether a case has “a real prospect of success” has become a widely used threshold test for determining whether it should continue or go to trial. It is the litmus test for summary judgment applications under CPR 24.3; the choice of summary disposal is governed by the need for “avoiding the court’s resources being used up on cases where it would serve no purpose”.¹⁴⁹ The same test is used in deciding whether to strike out a claim that is indistinguishable from a previous claim with which the claimant did not proceed or which was struck out,¹⁵⁰ whether to set aside a default judgment,¹⁵¹ whether to grant permission to appeal¹⁵² and whether to order a new trial.¹⁵³

The overriding objective—a matter of compromise

- 1.70 The overriding objective sets out specific goals that the court must further in carrying out its case management and other functions. However, one can hardly fail to notice that these goals are capable of pointing in different directions.¹⁵⁴ Sparing litigant and court resources may be incompatible with expeditious resolution, or it may be at odds with the need to arrive at a correct outcome. Similarly, expedition may be achieved only by investing more resources, or by restricting disclosure and thus running a higher risk of error. As in every other human endeavour, it is impossible to achieve perfection in every respect. The strength of the CPR lies precisely in confronting the inevitable tension between the three core imperatives: correctness of outcomes, expeditious resolution and economy of court and party resources. Active case management brings to the fore the need to resolve this tension in a fact-sensitive manner, and proportionality is the key to this exercise.¹⁵⁵ Proportionality in case management decisions can only be achieved by way of a cost-benefit analysis, in which the crucial issue is the advantage that is likely to be gained from taking a particular procedural step, bearing in mind the features of the particular case, such as the complexity of the issues and their importance.

- 1.71 The need for case management decisions to be made through the prism of proportionality will inevitably present the court with a range of possibilities from which to choose.¹⁵⁶ It is inevitable that there will be situations where different judges may come to different case-specific conclusions.¹⁵⁷ However, the court does not have unlimited discretion. It cannot overlook considerations of time and cost, and focus only on reaching a correct determination on the merits. It must be stressed that while dicta will always be found which could lead the unwary to conclude that the need for deciding the case on its merits trumps all other considerations, this is not so.¹⁵⁸ As we have seen, the overriding objective is animated by a radical conception of justice, according to which none of these considerations are inherently more important than the others. “In making a decision under the overriding objective”, Buxton LJ explained, “the court has to balance all those considerations that are set out under [CPR 1.1(2)] without giving one of them undue weight.”¹⁵⁹

Footnotes

⁷⁷ Woolf, Final Report, p.274.

⁷⁸ CPR 1.1(1).

⁷⁹ CPR 1.1(2)(a) was amended in April 2021 to add the words “and can participate fully in proceedings, and that parties and witnesses can give their best evidence”. The aim was to make clear that placing parties on an “equal footing” may include taking positive steps to facilitate the participation of vulnerable parties and witnesses who may otherwise be at a disadvantage in the proceedings; at the same time, CPR 1.6 and PD 1A were introduced to set out the steps the

court should consider taking when confronted with party or witness vulnerability. PD 1A was amended with effect from April and June 2022 to (i) make express provision for the court to withhold the address or contact details of a vulnerable witness or party from other parties to the dispute (a power which the court had under its inherent jurisdiction in any event, cf. *Axnoller Events Ltd v Brake [2022] EWHC 1162 (Ch)* [26]); (ii) to identify specific “special measures” which might be ordered to enable a vulnerable person to give evidence; and (iii) to reflect the **Domestic Abuse Act 2021 s.66**, which prohibits perpetrators of certain specified offences from personally cross-examining their victims in civil proceedings. See further below, para.1.48.

80 Though, interestingly, the **Criminal Procedure Rules 2015 (SI 2015/1490)** expressly state in CrimPR 1.1(2) that “dealing with a criminal case justly includes—(a) acquitting the innocent and convicting the guilty”.

81 *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC [2020] UKSC 24* [217].

82 CPR 1.1(2)(a) injuncts the court to “ensure that the parties are on an equal footing”, while CPR 1.1(2)(d) requires that a case is dealt with “fairly”.

83 Note *General Mediterranean Holdings SA v Patel [2000] 1 W.L.R. 272*, in which Toulson J held that CPR 48.7(3) (as originally enacted) was ultra vires and invalid insofar as it permitted the court to order disclosure of privileged material for the purposes of a wasted costs application. There was nothing in the parent act, namely the **Civil Procedure Act 1997**, to suggest that Parliament had intended to confer on the rule-maker the power to restrict legal professional privilege, which was a substantive right of constitutional importance. See also Ch.2 Rule-Making and Precedent paras 2.8 ff and 2.14.

84 *Summers*, “Evaluating and Improving Legal Processes—A Plea for ‘Process Values’” (1974) 60 Cornell L. Rev. I; Mashaw, “Administrative Due Process: The Quest for a Dignitary Theory” (1981) 61 Boston L.R. 885.

85 PD 1A sets out certain specific steps the court should consider taking in order to “give effect to the overriding objective in relation to vulnerable parties and witnesses”: CPR 1.6. This includes, for example, a right for victims of domestic abuse not to be cross-examined by their abuser; in such circumstances the court must identify an alternative to cross-examination by the perpetrator, which may include appointing a legal representative to conduct the cross-examination on their behalf: **Domestic Abuse Act 2021 s.66**. PD 1A is not to be applied in a rigid or mechanistic way. It is a “useful reasoning tool”, but is not exhaustive or prescriptive: *AXX v Zajac [2022] EWHC 2463 (KB)* [33]–[34].

86 For this reason, it is suggested that the emphasis placed on the issue of judicial bias in the White Book 2025 (London: Sweet & Maxwell, 2025) para.1.1.3 is misplaced (hereinafter “2025 WB”).

87 *Kirkman v Euro Exide Corp (CMP Batteries Ltd) [2007] EWCA Civ 66; [2007] C.P. Rep. 19.*

88 CPR 1.6 and PD 1A.

89 Thus, in *AXX v Zajac [2022] EWHC 2463 (KB)*, the claimant’s traumatic brain injury influenced the decision whether to order a split trial, since he would be able to participate more effectively at the quantum stage if liability had been established. In *Santiago v Motor Insurers’ Bureau [2023] EWCA Civ 838*, CPR 1.1(2)(a) had an important influence on the Court of Appeal’s interpretation of the former CPR 45.29I(h), although the court stressed that it would have reached the same conclusion before the 2021 amendments, which served to “clarify and reinforce” what was required by the overriding objective: [62].

90 Cf. *Kimathi v Foreign and Commonwealth Office [2015] EWHC 3116 (QB)* [57]–[60].

91 Though see *Emmott v Michael Wilson & Partners Ltd [2019] EWHC 3780 (Comm)*, in which the court refused an application for an adjournment premised on CPR 1.1(2)(a), in circumstances where the claimant had retained leading counsel, and the defendant claimed it would be able to do so if an adjournment was granted, but would otherwise have to proceed with its director acting in effect as a litigant in person. The judge considered that in the circumstances, the defendant’s arguments “put too much weight on the equal footing provision within the overriding objective”, bearing in mind that the defendant had had ample opportunity to get its affairs in order, that the application was made at the outset of a two-day hearing and that considerable party and public resources would be wasted if the application was granted.

92 *Maltez v Lewis (2000) 16 Const LJ 65 (Ch)*. In *Axnoller Events Ltd v Brake [2021] EWHC 1706 (Ch)*, the principle of equality of arms did not require the court to order a represented party to provide a litigant in person with a hard copy of a bundle free of charge, in circumstances where the litigant in person had been provided with an electronic bundle but claimed they could not afford to print it out in readiness for the trial.

93 *Lloyd Jones v T-Mobile (UK) Ltd [2003] EWCA Civ 1162* [25]–[28].

94 Introduced in 2015 by **Civil Procedure (Amendment No.4) Rules 2015 (SI 2015/1569)**, following recommendations in Report of the Judicial Working Group on Litigants in Person (London: Judicial Office, 2013).

95 *Maltez v Lewis (2000) 16 Const LJ 65 (Ch)*.

96 See above, para.1.35.

97 Equally, where there is a long period between the hearing and the judgment, the judge’s ability to deliver sound factual findings may be undermined: *Goose v Wilson Sandford [1998] TLR 85* [113]; *Bond v Dunster Properties Ltd [2011]*

- EWCA Civ 455* [7]. More broadly, delay in the delivery of a judgment is inimical to respect for the rule of law, as Peter Gibson LJ highlighted in *Goose* at [112]: “A judge’s tardiness in completing his judicial task after a trial is over denies justice to the winning party during the period of the delay. It also undermines the loser’s confidence in the correctness of the decision when it is eventually delivered … Conduct like this weakens public confidence in the whole judicial process. Left unchecked it would be ultimately subversive of the rule of law” (cited with approval in *Bank St Petersburg PJSC v Arkhangelsky* [2020] EWCA Civ 408).
- 98 *Konig v Federal Republic of Germany (Merits)* (1978) 2 E.H.R.R. 170 [15], *Eckle v Germany* (1983) 5 E.H.R.R. 1 [66]; *Dyer v Watson* [2002] UKPC D1; [2004] 1 AC 379 [50].
- 99 See for example *M v Croatia* [2015] ECHR 759.
- 100 See for example *Comingersoll SA v Portugal* (2001) 31 E.H.R.R. 31; *Frydlender v France* (2001) 31 E.H.R.R. 52 [43]; *Nicolae Virgiliu Tănase v Romania* [2019] ECHR 491 [209]. However, complexity may not of itself justify excessive delay: *Sizov v Russia* (No.2) [2012] ECHR 1649, [60]; *Cipolletta v Italy* [2018] ECHR 51 [44]. In *Lupeni Greek Catholic Parish v Romania* [2015] ECHR 487, complexity which was engendered by the lack of clarity and foreseeability in the domestic law was held to be the state’s fault: at [150].
- 101 See for example *Konig v Federal Republic of Germany (Merits)* (1978) 2 E.H.R.R. 170 [102] and [107]; *H v United Kingdom (Merits)* [1987] ECHR 14 [72].
- 102 See for example *Susmann v Germany* (1998) 25 E.H.R.R. 64 [61]; *Bock v Germany* (1990) 12 E.H.R.R. 247 [49]; *Tsikakis v Germany* (App. 1521/06, 10 February 2011, ECtHR) [64] and [68].
- 103 See for example *Buchholz v Federal Republic of Germany* [1981] ECHR 2 [49]; *Erkner and Hofauer v Austria* [1987] ECHR 5 [68]; *Nicolae Virgiliu Tănase v Romania* [2019] ECHR 491 [211].
- 104 See cases cited above, and also G.J.H. van Hoof et al (eds.), *Theory and Practice of the European Convention on Human Rights* (5th edn, 2018), Ch.10. In addition, in calculating the period of delay to be assessed, regard must be had to the circumstances of the case. Thus, while the period normally runs from the commencement of civil proceedings (*Poiss v Austria* (1988) 10 E.H.R.R. 231 [50]; *Bock v Germany* (1990) 12 E.H.R.R. 247 [35]), it may sometimes begin to run from an earlier point (*Golder v United Kingdom* [1975] 1 E.H.R.R. 524 [32]; *Siegel v France* [2000] ECHR 647 [33]–[38]). Further, in general “the period whose reasonableness falls to be reviewed takes in the entirety of the proceedings in issue, including any appeals”: *Erkner and Hofauer v Austria* [1987] ECHR 5 [65]. Sometimes, however, the delay in question may arise out of a particular stage of the proceedings—for example an appeal (see *Portington v Greece* [1998] ECHR 94) or costs-only proceedings following delivery of a judgment on the merits (see *Robins v United Kingdom* (1998) 26 E.H.R.R. 527).
- 105 *Dyer v Watson* [2002] UKPC D1; [2004] 1 AC 379 [52].
- 106 *Poiss v Austria* (1988) 10 E.H.R.R. 231, [50]; *Bock v Germany* (1990) 12 E.H.R.R. 247 [35].
- 107 *Less v Benedict* [2005] EWHC 1643 (Ch). Under CPR 47, both the paying party and the receiving party have it in their own hands to move the assessment forward unilaterally. On the other hand, see *Blake v United Kingdom* [2006] ECHR 805 [45], where the ECtHR made clear that even if a litigant has the ability to progress proceedings, this will not absolve the state of its responsibility to ensure that proceedings are dealt with expeditiously.
- 108 See for example *Bank St Petersburg PJSC v Arkhangelsky* [2020] EWCA Civ 408. Although the Court of Appeal was not considering art.6 of the ECHR as such, it considered the authorities on the effect of delay in the delivery of judgments generally, and noted that the “unwritten rule applicable to both the Business and Property Courts and the Court of Appeal is that judgments should be delivered within three months of the hearing”: at [77]–[84].
- 109 See for example *Philis v Greece* (No. 2) (1998) 25 E.H.R.R. 417 [49]; *Mitchell v United Kingdom* (2003) 36 E.H.R.R. 52 [56]. By contrast, where a state’s judicial authorities have sought to actively manage proceedings and there are no systemic defects preventing the timely resolution of cases, and the delay is the result of the complaining litigant’s own tactics, there will be no breach of art.6 ECHR: *Gilligan v Ireland* (2023) 76 E.H.R.R. 32.
- 110 *Unión Alimentaria Sanders SA v Spain* (1989) 12 E.H.R.R. 24.
- 111 *Unión Alimentaria Sanders SA v Spain* (1989) 12 E.H.R.R. 24 [35].
- 112 *Scopelliti v Italy* (1993) 17 E.H.R.R. 493, [25].
- 113 *Zimmerman and Steiner v Switzerland* (1983) 6 E.H.R.R. 17; *Guincho v Portugal* (1985) 7 E.H.R.R. 223; *Lelik v Russia* [2010] ECHR 798 [50]. Instructive in this regard is *Mitchell v United Kingdom* (2003) 36 E.H.R.R. 52, in which reference was made to the dysfunctional pre-CPR system and to Lord Woolf’s reforms. The ECtHR concluded that the lengthy period (of almost two and a half years) between the filing of the notice setting the case down for trial by the claimant, and the actual listing of the case by the court, was due “first and foremost [to] the failure by the State to organise its system in such a way as to meet its Convention obligations”: at [54].
- 114 *Powell v Pallisers of Hereford Ltd* [2002] EWCA Civ 959, [28]; *Smith v Kvaerner Cementation Foundations Ltd* [2006] EWCA Civ 242; [2007] 1 W.L.R. 370 [51]. See also *Phelps v Button* [2016] EWHC 3185 (Ch), in which the CPR authorities on strike-out for want of prosecution are considered.

- 115 That said, the court has recognised that where the art.6 right to timely resolution has been breached, that does not mean that the court must put an end to proceedings, particularly where the innocent party would thereby suffer. Where a breach of art.6 has arisen, directing further hearings to dispose of the matter does not mean that the court is sanctioning a continuance of the breach; rather, it is “taking remedial action to correct the consequences of the breach”: *Less v Benedict [2005] EWHC 1643 (Ch)* [38]–[40]. See also *Attorney General’s Reference (No.2 of 2001) [2003] UKHL 68*; *[2004] 2 AC 72* [29].
- 116 See *Phelps v Button [2016] EWHC 3185 (Ch)*.
- 117 See Susanne Baer, “*Equality: The Jurisprudence of the German Constitutional Court*” (1999) 5 Colum. J. Eur. L. 249.
- 118 Article 5 of the Treaty on European Union.
- 119 See for example *Internationale Handelsgesellschaft mbH v Einfuhr und Vorratsstelle für Gertreide und Futtermittel [1970] ECR 1125*; *[1972] CMLR 255*; *International Transport Workers’ Federation v Viking Line ABP (C-438/05) [2007] ECR I-10779*; *[2008] 1 CMLR 51* and *Laval Un Partneri Ltd v Svenska Byggnadsarbetareförbundet [2007] ECR I-11767*; *[2008] 2 CMLR 9*.
- 120 See for example de *Freitas v The Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing (Antigua and Barbuda) [1998] UKPC 30*; *[1999] 1 AC 69*. See further P. Craig, “Proportionality and Judicial Review: A UK Historical Perspective” in S. Vogenauer and S. Weatherill (eds), *General Principles of Law: European and Comparative Perspectives* (Oxford: Hart, 2017). Note, however, that there is a longstanding debate about whether proportionality, as opposed to rationality, is the proper standard for substantive review of public authorities’ decisions: see for example *Keyu v Secretary of State for Foreign and Commonwealth Affairs [2015] UKSC 69*; *[2016] AC 1355*.
- 121 See D. Feldman, “Proportionality and the Human Rights Act 1998”, in E. Ellis (ed.) *The Principle of Proportionality in the Laws of Europe* (Oxford: Hart, 2009); T. Hickman, “*The Substance and Structure of Proportionality*” *[2008] Public Law 694*. See also A. Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge: Cambridge University Press, 2009), for an account of the courts’ use of the proportionality principle in reviewing the constitutionality of primary and secondary legislation under the *Human Rights Act 1998*.
- 122 E. Bjorge and J.R. Williams, “*The protean principle of proportionality: how different is proportionality in EU contexts?*” *(2016) 75 Cambridge Law Journal 186*, at 188.
- 123 *Campbell v M.G.N. Ltd (No.2) [2005] UKHL 61* [22]-[23].
- 124 Added in 2013 following the recommendations made in Jackson, Final Report.
- 125 2025 WB 1.4.10. The editors of the White Book consider that this may be regarded as an “aspect” of proportionality in the CPR context.
- 126 As can be seen, for example, in the system of procedural tracks adopted following Lord Woolf’s recommendations; see Ch.12 Case Management Pt I paras 12.90 ff.
- 127 See for example: CPR 30.3 (criteria for transfer), CPR 31.3(2) (withholding inspection of a class of disclosed document on grounds of disproportionality), CPR 31.7 (extent of the duty of search).
- 128 See above, paras 1.34 ff.
- 129 Although the imperative of reducing the cost of litigation is now expressly part of the overriding objective “of enabling the court to deal with cases justly and at proportionate cost” (CPR 1.1(1)), it has always been a central plank of Lord Woolf’s reforms: Woolf, Final Report, p.80.
- 130 See above, paras 1.34 ff.
- 131 Jackson, Final Report, Ch.3 para.3.6; see also *Gotch v Enelco Ltd [2015] EWHC 1802 (TCC)* [42]–[49].
- 132 See for example the remarks of the House of Lords in *Moy v Pettman Smith (a firm) [2005] UKHL 7*; *[2005] 1 W.L.R. 581* [42] and [61]. Fortunately, those remarks cannot be regarded as good law, particularly in light of the Supreme Court’s endorsement of *Mitchell v News Group Newspapers Ltd [2013] EWCA Civ 1537*; *[2014] 1 W.L.R. 795* and *Denton v TH White Ltd [2014] EWCA Civ 906*; *[2014] 1 W.L.R. 3926*, in *Prince Abdulaziz v Apex Global Management Ltd [2014] UKSC 64*; *[2014] 1 W.L.R. 4495* [79], and *Thevarajah v Riordan [2015] UKSC 78*; *[2016] 1 W.L.R. 76* [13].
- 133 Lord Dyson MR, “The Application of the Amendments to the Civil Procedure Rules: 18th Lecture in the Implementation Programme”, speech delivered at the District Judges’ Annual Seminar, Judicial College, 22 March 2013.
- 134 Lord Dyson MR, “The Application of the Amendments to the Civil Procedure Rules: 18th Lecture in the Implementation Programme”, speech delivered at the District Judges’ Annual Seminar, Judicial College, 22 March 2013. See also the lecture by Lord Devlin, broadcast in 1970 and quoted by Lord Woolf in his Interim Report, at Ch.1 paras 5–6.
- 135 See above, paras 1.17 ff and 1.34 ff. See also *Sainsbury’s Supermarkets Ltd v Visa Europe Services LLC [2020] UKSC 24* [217], which explained that substantive justice cannot be achieved without reference to considerations of cost and proportionality; on the contrary, such considerations are integral aspects of justice on the merits.
- 136 Lord Dyson MR, “The Application of the Amendments to the Civil Procedure Rules: 18th Lecture in the Implementation Programme”, speech delivered at the District Judges’ Annual Seminar, Judicial College, 22 March 2013.

- 137 *Jameel v Dow Jones & Co Inc* [2005] EWCA Civ 75; [2005] QB 946. See also *Various Claimants v MGN Ltd* [2020] EWHC 553 (Ch).
- 138 *Jameel v Dow Jones & Co Inc* [2005] EWCA Civ 75; [2005] QB 946 [54].
- 139 *Jameel v Dow Jones & Co Inc* [2005] EWCA Civ 75; [2005] QB 946 [70].
- 140 *Sullivan v Bristol Film Studios Ltd* [2012] EWCA Civ 570 [29]. See also *Ames v The Spamhaus Project Limited* [2015] EWHC 127 (QB); [2015] 1 W.L.R. 3409 and *Alsaifi v Trinity Mirror Plc* [2018] EWHC 1954 (QB).
- 141 *R (M) v Croydon London Borough Council* [2012] EWCA Civ 595.
- 142 Costs-only proceedings are taken where parties have compromised their dispute and agreed the incidence of costs, but cannot agree their amount: [CPR 46.14](#). See [Ch.28 Costs para.28.143 ff](#).
- 143 For examples see 2025 WB 11-10, and see generally Ch.12 Case Management.
- 144 [CPR 31.5\(7\)](#); [CPR 31.3\(2\)](#); PD 31A para.2.
- 145 *McPhilemy v Times Newspapers Ltd (No.1)* [1999] 3 All ER 775, CA; *Hague Plant Ltd v Hague* [2014] EWHC 568 (Ch).
- 146 *Mann v Chetty* [2000] All ER (D) 1531, CA; *Blue v Ashley* [2017] EWHC 1455 (Comm).
- 147 It would not be a sensible use of court time to consider the merits of an appeal against an interim injunction, when the trial was a few weeks away: *SBJ Stephenson Ltd v Mandy* [1999] C.P.L.R. 500, CA.
- 148 For examples, see 2025 WB 3.1.3, and [Ch.12 Case Management Pt I](#) paras 12.45 ff and [Pt II](#) paras 12.196 ff. Note that [CPR 3.8\(4\)](#) states that the parties may agree extensions of time of up to 28 days, “provided always that any such extension does not put at risk any hearing date”.
- 149 *Swain v Hillman* [1999] EWCA Civ 3053; [2001] 1 All ER 91. For a discussion of summary judgment, see [Ch.9 Disposal Without Trial para.9.54 ff](#).
- 150 *Securum Finance Ltd v Ashton* [2000] EWCA Civ 197; [2001] Ch 291; *Cranway Ltd v Playtech Ltd* [2008] EWHC 550 (Pat) [21]-[22]. See also *Davies v Carillion Energy Services Ltd* [2017] EWHC 3206 (QB); [2018] 1 W.L.R. 1734.
- 151 [CPR 13.3\(1\)\(a\)](#); see also [Ch.9 Disposal Without Trial](#) paras 9.33 ff.
- 152 [CPR 52.6\(1\)\(a\)](#); see also [Ch.26 Appeal](#) paras 25.104 ff.
- 153 *Simetra Global Assets Ltd v Ikon Finance Ltd* [2019] EWCA Civ 1413; [2019] 4 W.L.R. 112.
- 154 For a general discussion see: *L. Walker, A. Lind and T. Tyler, “The Relationship between Procedural and Distributive Justice”* (1979) 65 Vir. L.R. 1401; *W. Twining, “Alternative to What? Theories of Litigation, Procedure and Dispute Settlement in Anglo-American Jurisprudence: Some Neglected Classics”* (1993) 56 M.L.R. 380; *A.A.S. Zuckerman, “Quality and Economy in Civil Procedure—the Case for Commuting Correct Judgments for Timely Judgments”* (1994) 14 O.J.L.S. 353.
- 155 See *Gotch v Enelco Ltd* [2015] EWHC 1802 (TCC) [42]-[49].
- 156 See for example *Quaradeghini v Mishcon De Reya Solicitors* [2019] EWHC 3523 (Ch).
- 157 As such, it is well established that an appellate court will not lightly interfere with case management or other discretionary decisions: see [Ch.26 Appeal](#) paras 25.227 ff (see also paras 25.126 ff).
- 158 See for example *Moy v Pettman Smith (a firm)* [2005] UKHL 7; [2005] 1 W.L.R. 581 [42] and [61]. But given the Supreme Court’s comments in *Prince Abdulaziz v Apex Global Management Ltd* [2014] UKSC 64; [2014] 1 W.L.R. 4495 [79], Moy cannot properly be viewed as correctly stating the approach to be taken to case management.
- 159 *Holmes v SGB Services Plc* [2001] EWCA Civ 354 [38].

Court's Duty to Further the Overriding Objective

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 1 - Overriding Objective

Court's Duty to Further the Overriding Objective

1.72

The overriding objective fulfils several roles. First and foremost, it embodies the philosophy which underpins and animates the CPR and the administration of civil justice generally.¹⁶⁰ Second, and at the more practical level, it provides a concrete framework for interpreting and applying the rules. Thus, CPR 1.2 states that the “court must seek to give effect to the overriding objective when it – (a) exercises any power given to it by the Rules; or (b) interprets any rule...” Individual rules, Lord Woolf explained, offer detailed directions for the steps to be taken in the course of litigation, but their success in achieving a just and sensible resolution “depends upon the spirit in which they are carried out” and on the “understanding of the fundamental purpose of the rules and of the underlying system of procedure”.¹⁶¹ The instrumental, guiding nature of the overriding objective is made clear by CPR 1.1(1); its purpose is to *enable* the court to deal with cases justly and at proportionate cost. Similarly, CPR 1.1(2) provides that the court is required to achieve the goals set out therein only insofar as practicable, making clear that the overriding objective is a tool designed to obtain practical results. The overriding objective is primarily addressed to the court.¹⁶² But it also makes demands of the parties, who have a duty to assist the court to further the overriding objective by co-operating with each other and with the court (CPR 1.3, CPR 1.4(2)). This aspect of the overriding objective is dealt with further below.

The overriding objective as a tool of interpretation

1.73

As with any legislation, the court will sometimes be called upon to interpret provisions of the CPR. When it does so, CPR 1.2(b) makes clear that it must seek to further the overriding objective. This means that the court is required to adopt a purposive approach to interpretation in preference to the more traditional literal approach.¹⁶³ Seen in this light, the overriding objective becomes an embodiment of the legislative intent behind the CPR, and the court is required to presume that each individual rule is intended to further the overriding objective.¹⁶⁴ Consequently, wherever there is ambiguity in the rules or a rule is capable of a range of different interpretations, the court should give effect to that which best advances the overriding objective and avoids the mischiefs endemic in the pre-CPR system, which the CPR sought to address.¹⁶⁵ Thus, in *Ali v Kayne*, the Court of Appeal preferred one interpretation of a rule concerning the allocation of jurisdiction for the punishment of contempt of court as between the Divisional Court and single judges of the High Court over another possible interpretation, on the ground that it was more consistent with the overriding objective and would better conserve the court’s scarce judicial resources.¹⁶⁶ Similarly, in *Lomax v Lomax* the Court of Appeal adopted an expansive interpretation of the court’s power to order early neutral evaluation of a case, as this was more consistent with the overriding objective.¹⁶⁷ The court must similarly give effect to the overriding objective when exercising its common law power to fashion, in a judgment, a rule or principle of practice to fill a lacuna in the CPR.¹⁶⁸

1.74

At the same time, notice needs to be taken of the limits to CPR 1.2(b). Since the overriding objective is an interpretative tool, an expression of the legislative intention underpinning the CPR as a whole, it is doubtful whether the court could rely on the overriding objective to adopt an interpretation of a rule that was wholly inconsistent with its clear meaning.¹⁶⁹ Equally, it must be remembered that the interpretative duty imposed on the court by CPR 1.2(b) is itself a creature of subordinate legislation and only applies where the court is construing provisions of the CPR. Consequently, it is not engaged where the court is interpreting provisions of substantive law.¹⁷⁰

Case management objectives and powers—overview

- 1.75 Unlike the position before the CPR, the court, not the parties, controls the intensity and pace of the litigation process. It must actively manage cases to ensure proportionality of cost and is given extensive powers to do so. The overriding objective was defined and elaborated in order to guide the court in exercising both its new case management powers and its traditional discretion in matters of procedure (CPR 1.2(a)).
- 1.76 CPR 1.4(1) requires the court to “further the overriding objective by actively managing cases”. CPR 1.4(2) sets out what is expected of active case management:

Rule 1.4:(2)

- “(2) Active case management includes—
- (a) encouraging the parties to co-operate with each other in the conduct of the proceedings;
 - (b) identifying the issues at an early stage;
 - (c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;
 - (d) deciding the order in which issues are to be resolved;
 - (e) ordering or encouraging the parties to use, and facilitating the use of, alternative dispute resolution;
 - (f) helping the parties to settle the whole or part of the case;
 - (g) fixing timetables or otherwise controlling the progress of the case;
 - (h) considering whether the likely benefits of taking a particular step justify the cost of taking it;
 - (i) dealing with as many aspects of the case as it can on the same occasion;
 - (j) dealing with the case without the parties needing to attend at court;
 - (k) making use of technology; and
 - (l) giving directions to ensure that the trial of a case proceeds quickly and efficiently.”

The court must therefore adopt the most appropriate case management measures for ensuring that a correct outcome is reached in a proportionate and reasonably expeditious manner. CPR 3.1 sets out the case management powers that the court has at its disposal, which will be discussed in Ch 12. The meaning of “proportionality” in the context of the overriding objective, and its particular implications for case management decisions, was considered above.¹⁷¹

- 1.77 It should be noted that in addition to its case management powers in CPR 3.1, the court continues to possess its traditional discretionary powers in matters of procedure. It retains its general power to cure procedural defects, as CPR 3.10 makes clear:

Rule 3_10

“Where there has been an error of procedure such as a failure to comply with a rule or practice direction—

- (a) the error does not invalidate any step taken in the proceedings unless the court so orders; and
- (b) the court may make an order to remedy the error.”

Further, as before, the court has a general discretion to extend time limits. [CPR 3.1\(2\)](#) states that the court may:

Rule 3_1:(2)

“(a) extend or shorten the time for compliance with any rule, practice direction or court order (even if the application for extension is made after the time for compliance has expired).”

And similarly, the court continues to have a general power to grant relief from sanctions imposed for non-compliance with rules or court orders. [CPR 3.8\(1\)](#) provides:

Rule 3_8:(1)

“Where a party has failed to comply with a rule, practice direction or court order, any sanction for failure to comply imposed by the rule, practice direction or court order has effect unless the party in default applies for and obtains relief from the sanction.”

[172](#)

Under the [CPR](#) these powers are subservient to the overriding objective,¹⁷³ because the “court must seek to give effect to the overriding objective when it—(a) exercises any power given to it by the Rules” ([CPR 1.2\(a\)\)](#).¹⁷⁴ Although the court’s approach to the exercise of its discretionary powers is addressed in detail in Ch.12, certain of the techniques laid down in [CPR 1.4](#) deserve further attention here.¹⁷⁵ As will be seen, each of these techniques is geared towards ensuring that the objectives of proportionality and due expedition receive appropriate attention throughout the adjudicative process.¹⁷⁶

Early identification of the issues

1. 78

In order to resolve a dispute expeditiously and with proportionate investment of procedural resources the court must control litigation from an early stage so as to be able to devise appropriate case management directions. It must begin by identifying the issues in dispute, determine which of them require full investigation and which can be summarily determined, and decide the order in which this is to be done ([CPR 1.4\(2\)\(b\)–\(d\)\)](#).¹⁷⁷ Even at this early stage the court may, of its own initiative, strike out a statement of case or exclude an issue from consideration.¹⁷⁸

1. 79

The court’s management task is facilitated by the directions questionnaires, which the parties must return to court after the defence has been served ([CPR 26.4](#)).¹⁷⁹ In these the parties are required to furnish the court with information about the nature of the process that would be involved in resolving the dispute (such as the extent of disclosure, the number of witnesses and experts to be called), about the likely duration of the trial and the costs of the proceedings. Moreover, the parties must consult each other about the information supplied, and must endeavour to agree proposed directions (PD 26 para.4).

The CPR approach of adapting process to dispute

1. 80

In any large volume of litigation cases will differ in complexity and importance. Many, if not most, will be relatively simple or modest. As cases increase in complexity and importance their number tends to diminish so that only a very small proportion would be of exceptional complexity or of far-reaching economic or social consequence. The gravity of an erroneous decision also varies greatly. Any adjudicative process carries with it a risk of error, but the magnitude of the harm that an error may cause varies according to the value of the dispute or the importance of the issues at stake. An erroneous judgment about an entitlement to £15,000 is generally less serious than a mistake about an entitlement to £15m. Given such diversity, it would make no sense to devote equal court attention to every dispute, because this would leave insufficient resources for cases of importance or complexity while unnecessarily wasting resources on disputes that could be satisfactorily resolved summarily. It follows that differentiation in the allocation of procedural resources is necessary to achieve justice in individual cases, and to ensure the proper administration of justice generally. Resources must be directed to where they would do most good, but equally allocation of resources must take account of the harm that may be caused if insufficient resources are provided; this is not peculiar to the administration of civil justice but is a concern that is present in every public service.

1. 81

There are several methods for matching process to disputes. The traditional and most diffuse consists of tiered courts whereby lower tier courts decide simple cases while important or complex disputes are reserved for the superior courts in the hierarchy. This may be referred to as the jurisdictional technique. A jurisdictional system of this kind would differentiate between cases according to their value or some other criterion denoting importance. Although common, the jurisdictional approach suffers from a serious weakness, because allocation criteria tend to be inflexible and end up making unsuitable matches between disputes and courts.¹⁸⁰ If, for instance, the allocation criterion turns on value, high-value cases would be referred to the superior courts even when they are in fact straightforward, and low-value cases would be sent to the inferior courts even when they are in reality complex. A different technique consists of matching not courts to disputes but matching procedure to disputes. The same court may have a range of processes at its disposal, ranging from formal and demanding proceedings, through intermediary proceedings, to rough and ready informal processes.

1. 82

Both the jurisdictional technique and the system of matching process to dispute are prone to upward pressure, which constantly pushes more cases towards the superior courts or towards the more formal and demanding procedures. A number of factors contribute to this. There is a common perception that the superior courts employing the most exacting procedure provide the benchmark for justice, which implies that inferior courts dispense inferior justice because they are staffed by less senior judges or because they follow less probing procedures. A further factor contributing to the upward pressure has to do with financial and tactical incentives. If lawyers earn more from litigation in the superior courts or from engaging in more demanding procedures, they may be tempted to direct as many of their clients to those courts as possible. Clients too may have reasons of their own to turn to more expensive processes, particularly if they can intimidate their poorer opponents by doing so.

1. 83

The pre-CPR approach to the problem was largely jurisdictional, consisting of a two-tier system of first instance courts. The County Court was originally conceived as a forum for the resolution of low-value disputes by means of a simpler and more expeditious procedure than that employed in the High Court.¹⁸¹ In recent decades, however, the procedural differences between the County Court and the High Court have been eroded, especially after 1991 when the single monetary limit for County Court claims was abolished,¹⁸² and after 1999 when the RSC and CCR were abolished and replaced with a common set of rules, the CPR.

1. 84

The CPR provide a more thorough, flexible and adjustable method for obtaining a satisfactory correlation between the needs of individual cases and the process adopted for their resolution. First, the jurisdictional approach has largely vanished. There is only one set of rules applicable to both the High Court and the County Court. Moreover, the jurisdiction of the County Court now overlaps substantially with that of the High Court,¹⁸³ and whether a claim is to be disposed of in the High Court

or the County Court depends primarily on a multifaceted appraisal of its value, complexity and importance.¹⁸⁴ The intention is to reserve High Court adjudication for litigation that requires specialisation (such as heavy commercial cases or complex disputes arising from construction contracts) or which justifies High Court attention due its value, complexity or importance, and the penalties for inappropriately bringing a claim in the High Court when it should have been brought in the County Court can be severe.¹⁸⁵

1.85

Second, with effect from 1 October 2023,¹⁸⁶ there are four procedural tracks available for Pt 7 claims: the small claims track, the fast track, the intermediate track and the multi-track.¹⁸⁷ The tracks are considered in Ch.12. For present purposes it suffices to say that the small claims track, which is intended, roughly speaking, for straightforward money claims up to £10,000, is meant to provide a simple and cheap method for resolving run-of-the-mill disputes.¹⁸⁸ The fast and intermediate tracks consist of more probing procedures than the small claims track, but which are nonetheless more or less standardised, since the cases which fall within the ambit of these tracks do not necessarily call for a more bespoke or exacting process. The fast and intermediate tracks are intended for mid-range litigation, with the fast track being designed for cases between £10,000 and £25,000 where the trial is likely to last no more than one day and limited (if any) expert evidence is needed,¹⁸⁹ and the intermediate track being designed for cases of up to £100,000, where the trial is likely to last no more than three days.¹⁹⁰ The multi-track procedure is the most intensive and extensive, and is reserved for the most serious or difficult cases.¹⁹¹ Allocation to the appropriate track is determined by the court, not the parties, and again depends on a mix of factors including complexity and importance as well as financial value.

1.86

Third, within each track the court has extensive powers to ensure that the process employed is proportionate to the particular requirements of the individual case. The whole of the CPR is suffused with the notion that the process employed is adapted according to a case's needs, and that the procedural steps taken are no more intensive or extensive than are necessary to dispose of the particular dispute.¹⁹² Thus, the court exercises tight control over the number of experts on which a party may rely,¹⁹³ and it has been emphasised that the court should only order such disclosure as is proportionate in the circumstances of the particular case.¹⁹⁴

1.87

It is worth bearing in mind that just as process can be flexed to the needs of a dispute, disputes too can be adjusted to process. As Professor Ian Scott has observed, "an alteration in the processes for handling a dispute can have the effect of altering the dispute itself."¹⁹⁵ The procedure adopted may have a bearing on what the parties decide to dispute and how they go about it. For example, if certain issues can be disposed of summarily, the need for expert evidence may be considerably reduced, as may the time needed for trial; likewise if the courts adopt a robust approach to controlling the scope and volume of evidence, with the result that issues which are in reality superfluous fall away. Happily, this idea has now been given expression in the rules governing allocation. For example, when considering allocation to the intermediate track, the court is to ask itself whether the trial is likely to last less than three days "if the case is managed proportionately": CPR 26.9(7)(c)(i).¹⁹⁶ The answer to this question might be very different were the court simply to take at face value the parties' initial presentation of their cases in their statements of case. In a similar vein, it should be remembered that parties respond to economic and other external incentives (for example, the design of the costs recovery regime applicable to a claim), and this may affect the nature of a given dispute, its complexity and its intensity.

The court must actively monitor the progress of a case

1.88

Key to case management is that the court must not wait for the parties to make applications in order to give directions or, indeed, in order to enforce compliance with them.¹⁹⁷ Though it would not be strictly accurate to say that the court has the initiative in respect of all aspects of pre-trial procedure,¹⁹⁸ the circumstances in which it will act of its own initiative are much wider than previously. It sets timetables for fast track, intermediate track and multi-track litigation,¹⁹⁹ and can and will act to deal with non-compliance with deadlines (for example, by issuing unless orders or imposing other sanctions).²⁰⁰

It has a duty to review the state of progress on every occasion that a case comes before it,²⁰¹ including the extent to which parties have complied with court directions, and consider whether any additional directions are necessary. This is designed, in particular, to achieve the overriding objective's goal of promoting expedition and, as Brooke LJ put it in *Thomson v O'Connor*, to avoid recurrence of:

“... the lax practices which existed before [the CPR] were introduced whereby parties' solicitors often regarded directions given by the court as so much waste paper, extended time unilaterally without approaching the court, reached agreements allowing each other plenty of time without approaching the court, and made it virtually impossible for courts to organise their lists effectively.”²⁰²

Functional convergence of pre-trial and trial processes

1.89

One of the prominent features of pre-CPR procedure was a sharp distinction between the pre-trial and trial stages of litigation. Traditionally the pre-trial process was exclusively occupied with preparation for the trial and was largely controlled by the parties, who were expected to carry out pre-trial preparation with minimal court interference. Most importantly, the pre-trial stage formed no part of the decision-making process. Adjudication took place only at the trial, where judges presided over the presentation of evidence and argument, and where the final outcome of the litigation was shaped.

1.90

Court control of litigation, underpinned by the overriding objective, has greatly eroded the functional differences between the pre-trial and trial phases. The extent of the court's involvement in the litigation process from the outset is such that the adjudicative task may be said to start as soon as the court undertakes responsibility for management of the case. The pre-trial process is no longer devoted to exchange of pleadings and of evidence between the parties. Rather, decisions must be made regarding the extent of disclosure, and what kind of expert evidence to allow and how many experts to hear, and case management decisions such as these are certainly capable of influencing the outcome. Of course, not every case management decision *will* affect the outcome, but the scope for influential decisions is sufficiently extensive to justify the conclusion that the adjudication of disputes is one continuing process, in which the trial is merely the final stage. This represents a very considerable departure from the traditional common law model of civil adjudication and brings English procedure closer to civil law systems.²⁰³

1.91

The evidentiary stage, which formerly coincided with the trial, now begins earlier. While in theory evidence and argument are still presented at the trial, in reality they may be put before the court well in advance of the trial. In a complex case, the judge will have read the relevant documents, the witness statements and the parties' skeleton arguments before the trial. At the trial, the court may dispense with reading out documentary evidence, with evidence in chief and even with detailed legal argument. The trial judge may limit the time for cross-examination or direct that oral argument should be limited to certain issues only or should be limited in time. The modern trial can at times be a seamless continuation of the pre-trial process.²⁰⁴

Footnotes

160 Woolf, Final Report, p.274; and see above, paras 1.34 ff. In this regard, contrast the “overarching purpose” introduced into the Federal Court of Australia Act 1976 by the Access to Justice (Civil Litigation Reforms) Amendment Act 2009 s.37M; and the “underlying objectives” incorporated into the Hong Kong Rules of the High Court, Order 1A r.1 by the 2009 Civil Justice Reform. In both cases, it was thought that an “overriding” objective such as that found in CPR 1.1 would “trump any other inconsistent purpose”, thus undermining specific procedural provisions, hampering the exercise of discretion and perhaps preventing the court from achieving substantive justice: see Legg, “Reconciling the goals of minimising cost and delay with the principle of a fair trial in the Australian civil justice system” (2014) 33(2) C.J.Q.

157, at 162. The limitations of these views are obvious. Not only do they fail to grasp that “justice”, in its fullest sense, cannot be delivered without regard to time and resource considerations; they also tend to result in the adoption of a loose kind of “mission statement” for the civil justice system, which is neither as clear nor as specific as the CPR’s overriding objective.

161 Woolf, Final Report, p.274.

162 A point underlined by CPR 1.4(1), which states that the “court must further the overriding objective by actively managing cases”.

163 This has important implications for the precedential value of pre-CPR provisions interpreting provisions of the RSC, even if the RSC provision in question is materially identical to the equivalent provision in the CPR: see Ch.2 Rule-Making and Precedent paras 2.53 ff.

164 Of course, each individual rule will additionally have a specific purpose, unique to it, which will also be relevant when interpreting the rule. Thus, in *Qader v Esure Services Ltd [2016] EWCA Civ 1109; [2017] 1 W.L.R. 1924*, the Court of Appeal considered the particular end the Civil Procedure Rule Committee (CPRC) had in mind when drafting provisions formerly in CPR 45. The Court of Appeal gave effect to this in rectifying an “obvious drafting mistake” in CPR 45 see [14]–[21].

165 See *Super Industrial Services Ltd and another v National Gas Company of Trinidad and Tobago Ltd (Trinidad and Tobago) [2018] UKPC 17*, in which the Privy Council relied on the chaotic and wasteful character of the civil litigation system in Trinidad and Tobago before the introduction of the Civil Proceedings Rules in 2005, in adopting a stringent interpretation of a rule providing for automatic strike-out of a claim, if the claimant failed to apply within a specified period for a case management conference to be listed.

166 *Ali v Kayne [2011] EWCA Civ 1582*.

167 *Lomax v Lomax [2019] EWCA Civ 1467; [2019] 1 W.L.R. 6527* [32].

168 That is, the High Court, Court of Appeal or Supreme Court. The power is discussed in Ch.2 Rule-Making and Precedent at paras 2.31 and 2.40 ff.

169 *Vinos v Marks & Spencer [2001] 3 All ER 784, CA* [20]. See also *Qader v Esure Services Ltd [2016] EWCA Civ 1109; [2017] 1 W.L.R. 1924*, [35] ff. In that case, the effect of the rule was clear, and “no ordinary process of construction” could produce the result which was reached. Rather, in arriving at that result the Court of Appeal had to invoke the court’s exceptional jurisdiction (described in *Inco Europe Ltd v First Choice Distribution [2000] UKHL 15; [2000] 1 W.L.R. 586*) to correct “obvious drafting errors” in legislation.

170 *Cowan v Foreman [2019] EWCA Civ 1336; [2020] Fam 129*.

171 See above, paras 1.59–1.69.

172 CPR 3.8(2) sets out the procedure for obtaining relief from sanctions and CPR 3.9 lists the considerations to be taken into account when considering an application for relief. The court’s approach to applications for relief from sanctions is crucial to how it discharges its duty to ensure cases are dealt with in accordance with the overriding objective. This aspect is considered in detail in Ch.12 Case Management.

173 Consequently, in making such decisions the court must be guided by considerations of proportionality; see above, paras 1.59–1.69.

174 It may be asked what exercises of discretion are caught by this provision since, as we have just seen, some of the court’s powers are reflected in the CPR but in fact derive from elsewhere or from the common law; see also 2025 WB 11-5. It would be obviously unsatisfactory if the overriding objective did not guide such discretion, when it does govern powers which are conferred by the CPR. The better view is therefore that CPR 1.2(a) requires the court to further the overriding objective when exercising any power contained within the CPR (whether derived from it or not), and indeed there is no indication that the courts have adopted a contrary approach. A related point is that there is a tendency to invoke the overriding objective even where the court is not exercising a CPR power or interpreting a CPR provision (for example, where the Court of Appeal is considering whether to entertain an academic appeal: see *Bowman v Fels [2005] EWCA Civ 226; [2005] 1 W.L.R. 3083* [10]; *Rolls-Royce Plc v Unite the Union [2009] EWCA Civ 387* [46] and [50]; and see other examples at 2025 WB 11-5). This is inevitable and unproblematic; a court that is mindful of its duty to manage cases and ensure the proper administration of justice is unlikely to put these concerns to one side simply because CPR 1.2 does not strictly apply to the exercise of the power in question.

175 Not all of the techniques alluded to in CPR 1.4(2) are discussed here. For example, promoting settlement is addressed separately below, and the court’s use of technology is considered in Ch.12 Case Management Pt I paras 12.29 ff.

176 The meaning of proportionality in the context of the overriding objective, and its particular implications for case management, was discussed above at paras 1.59–1.69. Similarly, the need to ensure expedition in the management of cases was discussed at paras 1.50–1.58. The points made therein should be kept in view when reading the following paragraphs.

- 177 For the power to decide the order in which to determine issues see [CPR 3.1\(2\)\(k\)](#). The court may decide that certain issues in the proceedings should be adjudicated first—for example by way of a split trial ([CPR 3.1\(2\)\(j\)](#)). It may also consolidate different claims and try them together.
- 178 According to PD 26 para.10, the court's power to dispose of cases summarily includes the power to strike out a statement of case under [CPR 3.4](#). For exclusion of issues see [CPR 3.1\(2\)\(l\)](#); and see *Various Claimants v MGN Ltd [2020] EWHC 553 (Ch)*.
- 179 See Ch.12 Case Management Pt I paras [12.122 ff](#).
- 180 Prior to the [CPR](#), this was compounded by the fact that the High Court and the county courts (as they were prior to 2013; see below, para.[1.83 fn.181](#)) had different procedures (the [RSC](#) and [CCR](#), respectively). Since it was difficult and time-consuming for lawyers to master the rules of both courts, there was a tendency to direct cases to the court with the procedure with which the lawyer was familiar, rather than to the appropriate court.
- 181 The county courts (established by the [County Courts Act 1846](#)) had jurisdiction limited to the value of £20 in 1846, which was progressively raised reaching £5,000 in 1991, prior to the [Courts and Legal Services Act 1990](#) and the [High Court and County Courts Jurisdiction Order 1991 \(SI 1991/724\)](#). Within the county courts, lower-value claims were dealt with by the small claims court (as at 1991, those valued at less than £1,000). The county court procedure was cheaper and litigants were encouraged to bring their claims there even where it was possible to proceed in the High Court: [County Courts Act 1959 ss.19–20](#). Note that in 2013, following recommendations by Sir Henry Brooke in his report, Should the Civil Courts be Unified? (Judicial Office, August 2008), the former county courts were consolidated so as to form a single County Court for England and Wales; see the [Crime and Courts Act 2013 s.17\(1\)](#).
- 182 [Courts and Legal Services Act 1990](#) and the [High Court and County Courts Jurisdiction Order 1991 \(SI 1991/724\)](#). Thereafter, a simplified procedure continued to operate only with respect to small claims.
- 183 Though some jurisdictional rules remain. For example, defamation claims must be brought in the High Court unless the parties agree otherwise (PD 7A para.2.9), as must applications for habeas corpus ([CPR 87.2](#)) and judicial review claims ([Senior Courts Act 1981 s.31](#); though note that [s.31A of that Act](#) obliges the High Court to transfer certain types of judicial review claims to the Upper Tribunal for determination).
- 184 See [Ch.4 Commencement paras 4.7 ff](#). This is reflected, too, in the criteria for transfer of cases between the High Court and County Court, found in [CPR 30.3](#).
- 185 See [Ch.4 Commencement para.4.12](#).
- 186 Prior to 1 October 2023 there were only three tracks; the intermediate track did not exist. The intermediate track was created to give effect to Sir Rupert Jackson's Review of Civil Litigation Costs: Supplemental Report (London: HMSO, 2017) (hereafter "Jackson, Supplemental Report"), which recommended the extension of fixed recoverable costs into the lower echelons of the multi-track. At the same time the fast track has been substantially amended to give effect to the recommendation that fixed recoverable costs be extended to the whole of that track. Despite these changes, the essential point made in this paragraph is the same both before and after 1 October 2023: namely that the [CPR](#) establish a system of different procedural regimes or 'tracks', into which cases can be funnelled in order to ensure that no more resource is spent on them than is necessary to ensure their just and timely resolution.
- 187 Key to the operation of the redesigned fast and intermediate tracks is the concept of "assignment" to a complexity band: [CPR 26.15](#) and [26.16](#). Assignment generally takes place at the same time as allocation ([CPR 26.17](#)), and is primarily relevant to determining the level of fixed recoverable costs that may be awarded. Assignment is dealt with further in Ch.12 Case Management Pt I paras [12.119 ff](#), and fixed recoverable costs in [Ch.28 Costs para.28.153 ff](#).
- 188 See [CPR 26.9\(1\) and \(4\)](#), PD 26 para.15, [CPR 27](#) and PD 27A.
- 189 [CPR 26.9\(5\)](#), PD 26 para.16, [CPR 28, Sections I-II](#), and PD 28.
- 190 [CPR 26.9\(7\)–\(11\)](#), PD 26 para.17, [CPR 28, Sections I and IV](#). [CPR 26.9\(10\)](#) identifies certain types of case which are deemed to be unsuitable for the intermediate track and which are therefore automatically excluded even if the value is under £100,000 and the trial is likely to last less than three days. These include mesothelioma claims, abuse claims, certain clinical negligence claims, and civil claims against the police. As regards the latter category, it is curious that only claims against "the police" are excluded. A claim for misfeasance in public office, or for breach of the Human Rights Act 1998, is likely to be complex and to raise issues of public importance whether the defendant is a police force or some other public authority. This was recognised in Sir Rupert Jackson's recommendations which gave rise to the intermediate track, which proposed that civil actions against public authorities generally be excluded from the intermediate track: Jackson, Supplemental Report, at p.37.
- 191 [CPR 26.9\(12\)](#), [CPR 29](#) and PD 29.
- 192 See for example [CPR 31.3\(2\)](#) (withholding inspection of a class of disclosed document on grounds of disproportionality), [CPR 31.7](#) (extent of the duty of search). See also Ch.12 Case Management.
- 193 [CPR 35.4](#); see also [Ch.21 Experts](#) paras [21.34 ff](#).

- 194 Following recommendations made in Jackson, Final Report at Ch.37, in 2013 [CPR 31.5\(7\)](#) was introduced, requiring the court to consider a “menu” of disclosure options for non-personal injury multi-track claims. The intention was to discourage the court from simply ordering standard disclosure as the default option, even where standard disclosure was not genuinely needed. This aim was not realised, especially in commercial and property disputes: Jackson, Supplemental Report, at pp.35–36. PD 57AD was subsequently introduced to govern disclosure in the Business and Property Courts, with the aim of making disclosure in such cases more focused and efficient; See [Ch.16](#) Disclosure paras [15.5–15.11](#).
- 195 I.R. Scott, “Caseflow Management in the Trial Court” in A.A.S. Zuckerman and R. Cranston (eds), Reform of Civil Procedure—Essays on Access to Justice (Oxford: Oxford University Press, 1995).
- 196 See also the Intellectual Property Court Enterprise Guide (2024), which states (at 3.2) that “a party wishing for the proceedings to be in IPEC remains under an obligation to tailor their case to ensure that all the issues in the proceedings will not give rise to a trial lasting more than 2 days, or exceptionally, 3 days”.
- 197 [CPR 3.3](#); *Southern & District Finance Plc v Turner [2003] EWCA Civ 1574* [34].
- 198 For example, there continue to be many circumstances in which the parties need to make interim applications, including for summary judgement and/or strike-out, or to bring procedural default to the court’s attention and to seek relief and further directions. Moreover, it is no longer the case that the parties must seek court approval for each and every extension of time that is required; from 5 June 2014, [CPR 3.8\(4\)](#) states that the parties may agree extensions of time of up to 28 days, provided that this does not jeopardise any future hearing.
- 199 [CPR 28.2](#) and [29.2](#). [CPR 1.4\(2\)\(g\)](#) and [\(l\)](#) make clear that it is the court’s duty to set timetables and other directions to ensure the expeditious and fair resolution of the dispute.
- 200 This power is bolstered by [CPR 3.1\(8\)](#), which enables the court to “contact the parties from time to time in order to monitor compliance with directions”. Were it otherwise, the court might only become aware of non-compliance where a filing deadline has been missed, or where a party brings the default to the court’s attention by way of an application.
- 201 See [CPR 1.4\(2\)\(i\)](#) and, for example, [CPR 24.6\(b\)](#) (directions after summary judgment hearing), [CPR 26.5\(6\)](#) (directions after stay for settlement) and [CPR 20.13](#) (directions after defence to an additional claim is filed).
- 202 *Thomson v O’Connor [2005] EWCA Civ 1533* [17]. Though note that the parties’ ability to extend time without obtaining the court’s approval has to some extent been revived by a 2014 amendment to [CPR 3.8\(4\)](#). However, the power to do so is limited in that no extension can exceed 28 days and it cannot put at risk any hearing date.
- 203 Though arguably the most quintessential feature of common law adversarial litigation remains intact: namely that it is for the parties, not the court, to decide what issues to raise and how they are to be investigated: see A.A.S. Zuckerman, “*No Justice Without Lawyers—The Myth of an Inquisitorial Solution*”, (2014) 33 CJQ 355. See also Ch.12 Case Management Pt I paras [12.7](#) ff.
- 204 See [Ch.22](#) Trial and Evidence paras [22.3–22.6](#).

The Parties' Duty to Further the Overriding Objective

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 1 - Overriding Objective

The Parties' Duty to Further the Overriding Objective

The duty to assist the court

- 1.92 A court cannot hope to actively manage cases in accordance with the overriding objective without party co-operation, especially in the English adversarial system in which the parties alone decide what issues to dispute and what evidence to adduce. Accordingly, in addition to their specific procedural obligations, the parties have a general duty to assist the court in discharging its case management function. [CPR 1.3](#) stipulates that the “parties are required to help the court to further the overriding objective”. This applies equally to their legal representatives. ²⁰⁵
- 1.93 For example, parties have a duty to provide the court with full and timely information about their circumstances and constraints, such as the availability of expert witnesses. ²⁰⁶ They must assist the court to allot the case no more than an appropriate share of the court’s resources by responding to requests from the court and the opponent for information relevant to the progress of the case. ²⁰⁷ Further, procedural points should be agreed so far as possible in order to avoid taking up court time with unnecessary interim applications, ²⁰⁸ and applications that are necessary must be made promptly. ²⁰⁹ Thus, a party must not delay a recusal application if to do so would disrupt the timetable for trial. ²¹⁰ And where parties make an application to vacate an imminent trial date, having been aware for several months that it was unlikely that that date could be met because of the failure of one or both of them to meet deadlines imposed by the court’s directions, they are in plain breach of their duty under [CPR 1.3](#). ²¹¹

The duty of the parties to co-operate with each other

- 1.94 Although the rules do not expressly require it, the duty in [CPR 1.3](#) also implies that the parties must co-operate with each other. Indeed, this is one of the objectives of active case management: [CPR 1.4\(2\)\(a\)](#) states that the court must encourage “the parties to co-operate with each other in the conduct of the proceedings”. The duty to co-operate with each other is one of the most significant cultural changes brought about by the [CPR](#). Before the [CPR](#), parties had no comparable duty. They were of course obliged to perform their process duties, but beyond that they were free to refrain from responding to questions from their opponent, free to withhold information unless and until they came under a disclosure duty and free to resist settlement negotiations. If they engaged in negotiations, they remained free to drag out the talks to no end other than to run up costs and make their opponent’s life difficult.

- 1.95 Edwards-Stuart J drew attention to this aspect of the overriding objective in trenchant terms when he said that ²¹²:

“By [CPR 1.3](#) the parties are required to help the court to further the overriding objective.

It is therefore time to say, in the clearest terms, that parties and their solicitors can no longer conduct litigation in a manner which does not keep the proportionality of the costs being incurred at the forefront of their minds at all times.

It is no longer acceptable — if it ever was — for parties to pursue issues or applications that have no real impact on the issues that are central to the dispute. Further, it is no longer acceptable for solicitors to carry on a war of attrition by correspondence, whether instructed to do so or not ...

Unreasonableness, intransigence and the taking of every point must in my view now be regarded as unacceptable, because conducting litigation in that way flies in the face of the overriding objective as it is now formulated. These habits must disappear from the landscape of litigation ...

If access to justice is to have any real meaning, then the aim of keeping costs to the reasonable minimum must become paramount. Procedural squabbles must be banished and a culture of cooperative conduct introduced in their place. This will not prevent contentious issues from being tried fairly: on the contrary it should promote it.”

1. 96 Thus, parties must respond positively to reasonable requests for information ²¹³ and to invitations to settlement negotiations. ²¹⁴ They are encouraged to engage constructively with each other, including before the litigation commences, ²¹⁵ so as to agree as many aspects of the litigation process as possible. ²¹⁶ For example, a party contemplating proceedings under **CPR 8** which could be brought under **CPR 7** is under a duty to consult with the proposed defendant. ²¹⁷ Similarly, although **CPR 19.2(2)** does not expressly require that all applications to join a party be served on the existing parties, the existing parties should be consulted and provided with the application notice and evidence in support, especially where the proposed joinder is likely to increase the cost or length of the proceedings. ²¹⁸ Crucially, parties are required to work together to make adequate preparations for trial. As Briggs J explained, they are required to put to one side their hostility and co-operate in preparations for trial to ensure proportionality of costs and conservation of court resources. ²¹⁹ In the Business and Property Courts, PD 57AD places a strong emphasis throughout on the importance of parties and their legal representatives co-operating with each other “so that the scope of disclosure, if any, that is required in proceedings can be agreed or determined by the court in the most efficient way possible”. ²²⁰

1. 97 The parties are expected to avert unnecessary disputes over compliance with rules and court orders by making use of **CPR 3.8(4)**. This rule provides that where a rule, practice direction or order specifies a consequence for failure to comply with a deadline, parties may agree extensions of time of up to 28 days between themselves, unless the court has ordered otherwise or a future hearing would be imperilled as a result. ²²¹ In *Hallam Estates Ltd v Baker*, Jackson LJ stated this reflects the imperatives of allotting to cases no more than an appropriate share of the court’s resources and thereby minimising cost. He stressed that in pursuance of the duty under **CPR 1.3**, solicitors should be prepared to agree to any “reasonable extension of time which neither imperils future hearing dates nor otherwise disrupts the conduct of the litigation”, so as to reduce the volume of petty relief from sanctions applications coming before the courts. ²²² Similarly, the duty set out in **CPR 1.3** calls for a common-sense approach for where minor procedural default has occurred. In *Denton v TH White*, the Court of Appeal recognised the scope that **CPR 3.8** and **3.9** had created for parties to attempt to take advantage of trifling mistakes made by their opponents so as to obtain a windfall, and warned that:

“... where it is ... obvious that relief from sanctions is appropriate, parties should agree that relief from sanctions be granted without the need for further costs to be expended in satellite litigation ...”

The court will be more ready in the future to penalise opportunism. The duty of care owed by a legal representative to his client takes account of the fact that litigants are required to help the court to further the overriding objective. Representatives should bear this important obligation to the court in mind when considering whether to advise their clients to adopt an uncooperative attitude in unreasonably refusing to agree extensions of time and in unreasonably opposing applications for relief from sanctions. It is as unacceptable for a party to try to take advantage of a minor inadvertent error, as it is for rules, orders and practice directions to be breached in the first place. Heavy costs sanctions should, therefore, be imposed on parties who behave unreasonably in refusing to agree extensions of time or unreasonably oppose applications for relief from sanctions.”²²³

1. 98 Most importantly, parties are generally expected to draw attention to any obvious procedural mistake that their opponent has made so it may be corrected in time,²²⁴ or at least to “take the procedural point” promptly and well in advance of any hearing.²²⁵ Where a party fails to do so, that may be a factor to be taken into account when deciding whether relief from sanctions ought to be granted.²²⁶ For example, it is not acceptable for a party who is aware of a purely technical defect in their opponent’s CPR 36 offer to refuse to inform them of the nature of the defect, only to seek to rely on it at a hearing.²²⁷ In *Kesslar v Moore & Tibbits (a firm)*, Sedley LJ considered that a defendant who had waited until the limitation period had expired, before arguing that the claimant had sued the wrong party, should not be permitted to reap the benefit of the claimant’s mistake.²²⁸

“The Civil Procedure Rules are not, as at times the Rules of the Supreme Court seemed to be, a sort of Hague Convention regulating the worst excesses of warfare, which litigants were otherwise free to conduct as they saw fit. The overriding objective makes this plain. In support of its principal purpose of enabling the court to deal with cases justly, its first aim is to ensure that the parties are on an equal footing. The withholding by one party, until it is believed to be too late to do anything about it, of the fact that it is not the person whom the claimant manifestly intends to sue in my judgment runs counter to the overriding objective.”

1. 99 The duty to co-operate does not however relieve litigants from the need to comply with the rules, and does not impose on defendants requirements outside those demanded by the rules.²²⁹ A trio of cases considered situations where the defendant realised that the claimant’s purported service was not in accordance with the rules, but failed to draw the claimant’s attention to the defect.²³⁰ In each, it was accepted that the default position is that a party is “not obliged to inform the opposing side of its mistakes – in the sense of steps taken or positions adopted which appear not to be in that other side’s best interest”.²³¹ In *OOO Abbott v Econowall UK Ltd*, this default position was held to be subject to the qualification that CPR 1.3:

“requires parties to take reasonable steps to ensure, so far as is reasonably possible, that there is clear common understanding between them as to the identity of the issues in the litigation and also as to related matters, including procedural arrangements. The reason is that any breakdown in such understanding is likely to lead to wasted expense and also to hamper expedition in the progress of the case ...”²³²

Consequently, in that case the defendant’s conduct (in failing to correct the claimant’s solicitor’s mistaken belief that the parties had agreed to a longer extension of the period for serving the claim form than they in fact had) was in breach of CPR 1.3, and constituted a factor in favour of validating service under CPR 6.15. However, in *Higgins v ERC Accountants and Business* and in *Woodward v Phoenix Healthcare Distribution Ltd*, the court went out of its way to stress that CPR 1.3:

“does not extend to requiring a solicitor acting for one party to inform his or her opponent of an apparent error made by that opponent in the absence of instructions from his or her client to do so, when to do so might be contrary to the substantive interests of that solicitor’s client.”²³³

Thus, where the claimant delayed in issuing proceedings, such that a limitation defence arose or was likely to arise when the proceedings were subsequently mis-served, the defendant could not be criticised for failing to alert the claimant to the error. To hold otherwise would be to require defendants to forego their substantive right to a good limitation defence.²³⁴

1. 100 The two last-mentioned decisions are best understood against the background of limitation of action. Given that limitation confers a complete defence, it would not be right to expect defendants to give up the right to be free from the risk of claims merely because the claimant has fallen into error or is incompetent. Indeed, defendants’ solicitors would be in breach of their professional duties to their clients if they took steps that jeopardised their clients’ limitation defence.²³⁵ The situation might be different where the defendant becomes aware of their opponent’s mistake long before the limitation period is due to expire,

since the limitation defence is far from accrued and valuable in such circumstances.²³⁶ Nor would a defendant be allowed to benefit from a mistake which they had caused or encouraged.²³⁷ Where no loss of an accrued limitation defence is concerned greater co-operation is required, and parties are expected to alert their opponents to obvious procedural mistakes so they may be corrected and the litigation allowed to progress smoothly and expeditiously.

Pre-action protocols

Purpose of the pre-action protocols

1. 101 The duty to co-operate is engaged before proceedings have commenced as a result of the pre-action protocols. The pre-action protocols were a major innovation of the CPR, aimed at reversing the uncooperative and often acrimonious pre-CPR litigation culture. In his Final Report, Lord Woolf explained that a system was required:

“which enables the parties to a dispute to embark on meaningful negotiations as soon as the possibility of litigation is identified, and ensures that as early as possible they have the relevant information to define their claims and to make realistic offers to settle.”²³⁸

The pre-action protocols are designed to meet this objective by seeking:

- (a) to focus the attention of litigants on the desirability of resolving disputes without litigation;
- (b) to enable them to obtain the information they reasonably need in order to enter into an appropriate settlement; or
- (c) to make an appropriate offer (of a kind which can have costs consequences if litigation ensues); and
- (d) if a pre-action settlement is not achievable, to lay the ground for expeditious conduct of proceedings.”²³⁹

The Practice Direction—Pre-Action Conduct and Protocols (PD PAC) states:

“Before commencing proceedings, the court will expect the parties to have exchanged sufficient information to—

- (a) understand each other's position;
- (b) make decisions about how to proceed;
- (c) try to settle the issues without proceedings;
- (d) consider a form of Alternative Dispute Resolution (ADR) to assist with settlement;
- (e) support the efficient management of those proceedings; and
- (f) reduce the costs of resolving the dispute.”

1. 102 Essentially, the pre-action protocols set out codes of best practice which parties are expected to follow as soon as a dispute is likely to give rise to litigation. As the PD PAC makes clear, the protocols advocate greater pre-action contact between

the parties; early exchange of information; good pre-action investigation by the parties; and behaviour which is conducive to settlement or to enabling the parties to conduct litigation efficiently. There are a number of subject-specific protocols, covering areas such as personal injury, clinical negligence, construction and engineering, housing disrepair, defamation and judicial reviews.²⁴⁰ The PD PAC sets out general principles which guide implementation of the subject-specific pre-action protocols as well as more detailed provisions which apply to disputes where no specific protocol applies. For example, although no protocols directly apply to small claims, failure to behave in accordance with the spirit of the protocols may lead to adverse consequences.²⁴¹

1. 103 The pre-action protocols have become an essential part of the overall litigation framework. They give tangible expression to the culture of co-operation which is at the heart of the [CPR](#) system. Compliance with the pre-action protocols greatly contributes to the swift, proportionate and just resolution of disputes (whether by way of settlement or court adjudication), and they are therefore closely integrated with the [CPR](#) and practice directions. For example, the case management directions given by the court will take account of what steps have been taken by the parties in pursuance of the PD PAC and any relevant subject-specific pre-action protocol ([CPR 3.1\(4\)–\(6\)](#)). The Court of Appeal emphasised this aspect in *Jet 2 Holidays Ltd v Hughes*, holding that a dishonest witness statement served in purported compliance with a pre-action protocol amounted to a sufficient interference with the due administration of justice to engage the court's common law jurisdiction to commit for contempt, because “[pre-action protocols] are now an integral and highly important part of litigation architecture”.²⁴²

The pre-action protocol process

1. 104 It is not necessary for present purposes to discuss in detail each of the existing protocols. A general account of the personal injury protocol suffices to illustrate the general approach.²⁴³ At the outset, the claimant should make the defendant aware of the proposed claim by way of a letter of notification, particularly where the defendant has no knowledge of the incident giving rise to the claim or where the claimant seeks an interim payment from the defendant to facilitate early rehabilitation, but the claimant is not yet in a position to send a detailed letter before claim.²⁴⁴ Indeed, the protocol emphasises that one of the aims specific to personal injury cases is the facilitation of early rehabilitation, and the parties should keep this in view throughout the protocol process.²⁴⁵
1. 105 As soon as the claimant has evidence to support a realistic claim, they must write a letter of claim to the defendant and to the defendant's insurer, in which sufficient information must be given to enable the defendant and their insurer to assess their potential risk. The letter must include details of the accident, a description of the nature of the injuries and an outline of financial loss.²⁴⁶ The defendant is required to acknowledge receipt within 21 days of the posting of the letter of claim and respond in full within three months of the acknowledgement, either admitting or denying liability with reasons. If the defendant denies liability, they must give reasons, including mention of any alleged contributory negligence, and accompany their response with material documents.²⁴⁷ If liability is admitted, the claimant should send to the defendant a schedule of special damages as soon as practicable.²⁴⁸
1. 106 The parties are required to co-operate on the selection of experts, especially the medical expert. The protocol requires the claimant to give the defendant a list of proposed experts, and if the defendant does not object to at least one of those named within 14 days, the claimant will then instruct the expert to prepare a report. The personal injury protocol recommends that the claimant's solicitor should be responsible for organising access to the claimant's medical records and a specimen letter of instruction to a medical expert is to be annexed.²⁴⁹ If the claimant is satisfied with the report it will be disclosed to the defendant, and either party can ask questions of the expert within 28 days of service of the report. However, if the defendant objects to all of the experts named by the claimant, or is not satisfied with the report disclosed after raising questions, they may decide to retain their own expert. In the event that proceedings are issued, the court will determine whether either party has behaved unreasonably and whether the cost of two experts is justified.²⁵⁰

1. 107 It must be emphasised that a letter before action or a response is not mere formality. They cannot be generic, but rather must provide case-specific information that will enable the other party to gain a reasonable understanding of the nature of the case advanced and of the evidence supporting it. Once parties gain an understanding of each other's positions, their respective assessments of the merits of their own cases will improve and may even converge. This initial exchange of positions will in many situations induce further exchanges to find out whether the gap between their respective positions can be closed sufficiently to make a settlement possible. Even if a settlement cannot be reached, the pre-action process will in many cases have helped the parties narrow the controversy and identify the matters which needed proof, so that the litigation process could be conducted with greater focus and efficiency.
1. 108 Previously, an admission made in the course of the pre-action protocol process was outside the ambit of [CPR 14](#), with the result that the defendant was free to resile from it.²⁵¹ A limited exception applied to admissions made in the course of the various pre-action protocol processes for personal injury claims; in these cases, the former [CPR 14.1A](#) and [14.1B](#) imposed restrictions on the defendant's ability to withdraw the admission. With effect from 1 October 2023, however, these distinctions have fallen away and all admissions made before action are now governed by CPR 14, provided they are in writing.²⁵² The defendant is no longer free to unilaterally withdraw an admission, and may only do so if the recipient agrees or, once proceedings have been issued, with the court's permission.²⁵³ This development underlines the importance of the pre-action protocol process as an integral part of the overall scheme of civil litigation, and continues the trend of attaching formal consequences to the parties' pre-action conduct. At the same time, it should be noted that the letter of claim and the defendant's response do not have the same formal status as pleadings and, outside the context of admissions, do not bind the parties later (for example, as to other factual assertions made or points taken in the correspondence), provided that the party who subsequently changed their position did not intend to mislead the other.²⁵⁴

Consequences of non-compliance with the pre-action protocols

1. 109 The first point to note is that the protocols are intended to promote and not frustrate party co-operation, and to this end they are to be followed sensibly but not slavishly. To remove the risk that the protocol process would become a source of procedural wrangling, it is expressly stated that a pre-action protocol "must not be used by a party as a tactical device to secure an unfair advantage over another party. Only reasonable and proportionate steps should be taken by the parties to identify, narrow and resolve the legal, factual or expert issues."²⁵⁵ The court is concerned with compliance with the spirit of the relevant protocol, rather than its detailed provisions. Minor or technical infringements which do not run counter to the policy behind the protocols would not attract adverse consequences.²⁵⁶ Similarly, the court will not insist on compliance where in the circumstances the protocol would achieve no useful purpose.²⁵⁷
1. 110 However, where there has been a substantial failure to comply with the protocols,²⁵⁸ this will normally have serious adverse consequences for the party at fault.²⁵⁹ Although the court has no power to intervene before commencement of proceedings,²⁶⁰ it has ample powers to deal with failures to comply once proceedings are under way. For example, a stay may be imposed at the outset where the letter before claim was inadequate, contributing to the claim remaining obscure at the start of proceedings, or otherwise to enable the protocol process to be completed.²⁶¹ Moreover, the court may order a party who has not complied with a protocol to pay a sum of money into court ([CPR 3.1\(5\)-\(6\)](#)). The court will take into account non-compliance when giving directions for the management of proceedings ([CPR 3.1\(4\)](#)), and when considering whether to grant relief from sanctions. The court could, for example, refuse an extension of time to serve a statement of case or withhold permission to amend a statement of case, if the need for this would have been avoided had the party complied with the relevant protocol, or it may grant an extension subject to strict conditions.²⁶² Most significantly, the court will take non-compliance into account when making orders for costs ([CPR 44.2\(5\)](#)).²⁶³ The following provisions of the PD PAC make clear that the costs consequences that may flow from non-compliance may be heavy indeed:

“The court will consider the effect of any non-compliance when deciding whether to impose any sanctions which may include—

- (a)an order that the party at fault pays the costs of the proceedings, or part of the costs of the other party or parties;
- (b)an order that the party at fault pay those costs on an indemnity basis;
- (c)if the party at fault is a claimant who has been awarded a sum of money, an order depriving that party of interest on that sum for a specified period, and/or awarding interest at a lower rate than would otherwise have been awarded;
- (d)if the party at fault is a defendant, and the claimant has been awarded a sum of money, an order awarding interest on that sum for a specified period at a higher rate, (not exceeding 10% above base rate), than the rate which would otherwise have been awarded.”²⁶⁴

The fact that uncooperative conduct may well have severe costs consequences provides a potent incentive for adopting a reasonable approach to information-sharing and negotiation at the pre-action stage. There can be little doubt that pre-action protocols have done much to change the culture of English litigation for the better.

Footnotes

- 205 *Geveran Trading Co Ltd v Skjevesland (No. 2)* [2002] EWCA Civ 1567; [2003] 1 W.L.R. 912; *Albon (t/a NA Carriage Co) v Naza Motor Trading Sdn Bhd* [2007] EWHC 2613 (Ch); [2008] 1 W.L.R. 2380; *Gotch v Enelco Ltd* [2015] EWHC 1802 (TCC). However, CPR 1.3 cannot impose on a lawyer a duty which is at odds with the duty owed to the client: *Thames Trains Ltd v Adams* [2006] EWHC 3291 (QB); *Khudados v Hayden* [2007] EWCA Civ 1316.
- 206 *Matthews v Tarmac Bricks and Tiles Ltd* [1999] EWCA Civ 1574; [1999] All ER (D) 692.
- 207 *Mlauzi v Secretary of State for the Home Department* [2005] EWCA Civ 128.
- 208 *Lexi Holdings v Pannone and Partners* [2010] EWHC 1416 (Ch); *Denton v TH White Ltd* [2014] EWCA Civ 906; [2014] 1 W.L.R. 3926; *Gotch v Enelco Ltd* [2015] EWHC 1802 (TCC).
- 209 *Owners and/or Bailees of the Panamax Star v Owners of the Auk* [2013] EWHC 4076 (Admly), at [32] and [50]–[51]. Equally, parties must take care not to take up the court’s time with overcautious or unnecessary applications: *FMA v Secretary of State for the Home Department* [2023] EWHC 1579 (Admin); [2024] 1 W.L.R. 723 [45]–[46] (where an application under the Justice and Security Act 2013 s.8 should not have been made, as none of the documents with which the application was concerned were properly disclosable in any event).
- 210 *JSC BTA Bank v Ablyazov* [2012] EWCA Civ 1551.
- 211 *Giggs v News Group Newspapers Ltd* [2012] EWHC 431 (QB).
- 212 *Gotch v Enelco Ltd* [2015] EWHC 1802 (TCC) [43]–[49].
- 213 *Mlauzi v Secretary of State for the Home Department* [2005] EWCA Civ 128; *Kuonyehia v International Hospitals Group Ltd* [2005] EWHC 613; *Lexi Holdings v Pannone and Partners* [2010] EWHC 1416 (Ch).
- 214 See below, paras 1.117 ff; see also Ch.28 Costs paras 28.61–28.62.
- 215 See below, paras 1.101 ff.
- 216 For example, under CPR 29.4 parties are exhorted to agree case management directions in the multi-track and present them for court approval without the need for a hearing; and under CPR 35.7 they are encouraged to accede to the appointment of a joint expert.
- 217 *Cathay Pacific Airlines Ltd v Lufthansa Technik AG* [2019] EWHC 484 (Ch) [42].
- 218 *Molavi v Hibbert* [2020] EWHC 121 (Ch); [2020] 4 W.L.R. 46 [44].
- 219 *Lexi Holdings v Pannone and Partners* [2010] EWHC 1416 (Ch).
- 220 PD 57AD para.2.3. See also paras 3.2(3) (setting out the duty of legal representatives to co-operate with each other “so as to promote the reliable, efficient and cost-effective conduct of disclosure, including through the use of technology”),

- 10.3 (parties' duty to co-operate to review and update the Disclosure Review Document on an ongoing basis), and 20.2 (sanctions for failure to co-operate).
- 221 See Ch.12 Case Management Pt I paras 12.41 ff, on the parties' freedom to agree extensions of time generally.
- 222 *Hallam Estates Ltd v Baker* [2014] EWCA Civ 661; [2014] C.P. Rep. 38 [12]. See also CPR 15.5, which permits the parties to agree an extension of time of up to 28 days for the defendant to serve their defence. It would seem that this rule is now redundant in light of CPR 3.8(4).
- 223 *Denton v TH White Ltd* [2014] EWCA Civ 906; [2014] 1 W.L.R. 3926 [41]-[43]; see for example *Viridor Waste Management Ltd v Veolia ES Ltd* [2015] EWHC 2321 (Comm). It should be noted that the emphasis here is on minor and inadvertent procedural defaults that should "obviously" attract relief, and the court will not embark on protracted discussions of whether a party should have consented to the application, nor should it need to do so: *R (Idira) v The Secretary of State for the Home Department* [2015] EWCA Civ 1187; [2016] 1 W.L.R. 1694 [80]-[84].
- 224 It has been said that a party is not required to be the "nursemaid" of their opponent during litigation, and that the duty to assist the court under CPR 1.3 does not impose on a solicitor any duty contrary to that owed to the client: see for example *Thames Trains Ltd v Adams Kessler v Moore & Tibbits (a firm)* [2006] EWHC 3291 (QB) [37]. Be that as it may, the Court of Appeal has clarified that "[t]he duty of care owed by a legal representative to his client takes account of the fact that litigants are required to help the court to further the overriding objective": *Denton v TH White Ltd* [2014] EWCA Civ 906; [2014] 1 W.L.R. 3926 [43]. Consequently, while solicitors are not obliged to reveal their litigation strategy or sacrifice their client's legal rights (see *Carnegie v Drury* [2007] EWCA Civ 497 [45]; and below, para.1.99), the overriding objective will generally be furthered rather than hindered where they alert their opponent's attention to procedural slips.
- 225 *McGann v Bisping* [2017] EWHC 2951 (Comm) [22]-[26].
- 226 *Beever v Ryder Plc* [2012] EWCA Civ 1737 [62]; *McGann v Bisping* [2017] EWHC 2951 (Comm) [22]-[26]. What weight is to be attached to the party's failure is fact-sensitive, and will depend on the nature of the opponent's error, the extent to which the party contributed to it and the extent of the party's opportunity to alert the opponent to it (see for example *Thames Trains Ltd v Adams* [2006] EWHC 3291 (QB)).
- 227 *Hertsmere Primary Care Trust v Rabindra-Anandh* [2005] EWHC 320 (Ch); [2005] 3 All ER 274.
- 228 *Kessler v Moore & Tibbits (a firm)* [2004] EWCA Civ 1551; [2005] P.N.L.R. 17 [27]. However, it should be noted that the approach to be taken to applications to add or substitute a party after the limitation period has expired has proved controversial (see for example *Morgan Est (Scotland) Ltd v Hanson Concrete Products Ltd* [2005] EWCA Civ 134; [2005] 1 W.L.R. 2557; *Adelson v Associated Newspapers Ltd* [2007] EWCA Civ 701; [2008] 1 W.L.R. 585; *Insight Group Ltd v Kingston Smith (A Firm)* [2012] EWHC 3644 (QB); [2014] 1 W.L.R. 1448). See further Ch.13 Joining Claims and Parties.
- 229 For example, a defendant in a continuing relationship with a claimant (such as a landlord or employer) need not put in place arrangements to facilitate service of originating process: *Estates Acquisitions and Development Ltd v Wiltshire* [2006] EWCA Civ 533; [2006] C.P. Rep. 32; *Carnegie v Drury* [2007] EWCA Civ 497; [2007] E.M.L.R. 24.
- 230 *OOO Abbott v Econowall UK Ltd* [2016] EWHC 660 (IPEC); *Higgins v ERC Accountants and Business* [2017] EWHC 2190 (Ch); *Woodward v Phoenix Healthcare Distribution Ltd* [2019] EWCA Civ 985. See also *Bethell Construction Limited v Deloitte and Touche* [2011] EWCA Civ 1321.
- 231 *OOO Abbott v Econowall UK Ltd* [2016] EWHC 660 (IPEC) [39]; *Higgins v ERC Accountants and Business* [2017] EWHC 2190 (Ch) [41]; *Woodward v Phoenix Healthcare Distribution Ltd* [2019] EWCA Civ 985 [42].
- 232 *OOO Abbott v Econowall UK Ltd* [2016] EWHC 660 (IPEC) [39].
- 233 *Higgins v ERC Accountants and Business* [2017] EWHC 2190 (Ch) [42].
- 234 *Higgins v ERC Accountants and Business* [2017] EWHC 2190 (Ch) [42]; *Woodward v Phoenix Healthcare Distribution Ltd* [2019] EWCA Civ 985 [40]-[42] and [44]. See also *Carnegie v Drury* [2007] EWCA Civ 497; [2007] E.M.L.R. 24 [45]; and *Barton v Wright Hassall LLP* [2018] UKSC 12; [2018] 1 W.L.R. [8]-[10] and [22]-[23].
- 235 *Higgins v ERC Accountants and Business* [2017] EWHC 2190 (Ch) [42]. It might (and, it is suggested, should) also be different where the defendant has caused or contributed to the mistake: see *Kessler v Moore & Tibbits (a firm)* [2004] EWCA Civ 1551; [2005] P.N.L.R. 17; *OOO Abbott v Econowall UK Ltd* [2016] EWHC 660 (IPEC) [39].
- 236 *Woodward v Phoenix Healthcare Distribution Ltd* [2019] EWCA Civ 985 [46] (obiter).
- 237 See *Kessler v Moore & Tibbits (a firm)* [2004] EWCA Civ 1551; [2005] P.N.L.R. 17 [27]; *OOO Abbott v Econowall UK Ltd* [2016] EWHC 660 (IPEC) [39].
- 238 Woolf, Final Report, p.107.
- 239 Woolf, Final Report, p.107.
- 240 There are 14 subject-specific pre-action protocols currently in force: PD PAC para.18.

- 241 *Northfield v DSM (Southern) Ltd [2000] C.L.Y. 461*; *Linton v Williams Haulage Ltd [2001] C.L.Y. 516*. Note also **CPR 44.3(5)(a)**; and see 2025 WB C1A-005.
- 242 *Jet 2 Holidays Ltd v Hughes [2019] EWCA Civ 1858; [2020] 1 W.L.R. 844* [36]. This was so even though the relevant pre-action protocols did not require the proposed claimants to serve witness statements, and even though they never in fact issued proceedings seeking substantive relief.
- 243 See 2025 WB C2A-001 ff.
- 244 Pre-action Protocol for Personal Injury Claims para.3.
- 245 Pre-action Protocol for Personal Injury Claims para.4.
- 246 Pre-action Protocol for Personal Injury Claims para.5.
- 247 Pre-action Protocol for Personal Injury Claims para.6. The protocol includes, at Annex C, detailed specimen lists of documents which defendants should disclose with any denial of liability in particular types of case, such as highway accidents and employers' liability cases.
- 248 Pre-action Protocol for Personal Injury Claims para.10.
- 249 Pre-action Protocol for Personal Injury Claims Annex D.
- 250 Pre-action Protocol for Personal Injury Claims paras 7.2 ff.
- 251 *Sowerby v Charlton [2005] EWCA Civ 1610; [2006] 1 W.L.R. 568*.
- 252 **CPR 14** is considered in **Ch.6 Defendant's Response** paras 6.22 ff.
- 253 Slightly different provision continues to be made for admissions made under the RTA Protocol, the EL/PL Protocol and the RTA Small Claims Protocol. Where the RTA Protocol or the EL/PL Protocol applies, the defendant has a narrow window of opportunity during the “initial consideration period” to unilaterally withdraw an admission of causation: **CPR 14.3(2)(a)(i)**. Where the RTA Small Claims Protocol applies, the defendant may withdraw a pre-action admission in accordance with para.8.9 of that protocol: **CPR 14.3(3)**.
- 254 2025 WB C1A-005; see for example Pre-action Protocol for Personal Injury Claims para.5.7.
- 255 PD PAC para.4. See also the Commercial Court Guide (2022) at B3.2, which recognises that pre-action correspondence can easily get out of hand and has the tendency to encourage forum-shopping: “the parties to proceedings in the Commercial Court are not required, or generally expected, to engage in elaborate or expensive pre-action procedures, and restraint is encouraged”.
- 256 PD PAC para.13; see also *TJ Brent Ltd v Black & Veatch Consulting Ltd [2008] EWHC 1497 (TCC)*, and WB 2025, C1A-005.
- 257 *Orange Personal Communications Services Ltd v Hoare Lea (A Firm) [2008] EWHC 223 (TCC); Higginson Securities (Developments) Ltd v Hodson [2012] EWHC 1052 (TCC)*.
- 258 PD PAC para.14.
- 259 PD PAC para.15.
- 260 See Ch.12 Case Management Pt I para.12.32.
- 261 *Cundall Johnson & Partners LLP v Whippy Cross University Hospital NHS Trust [2007] EWHC 2178 (TCC); Naylor v Galliard Homes Ltd [2019] EWHC 2392 (TCC)*.
- 262 *Price v Price (t/a Poppyland Headware) [2003] EWCA Civ 888; [2003] 3 All ER 911*. Equally, the court might be more ready to grant a party an extension of time to serve a statement of case where their opponent's non-compliance meant they had not had time to adequately prepare: *Naylor v Galliard Homes Ltd [2019] EWHC 2392 (TCC)*.
- 263 See for example *Webb Resolutions Ltd v Waller Needham & Green (A Firm) [2012] EWHC 3529 (Ch); Nelson's Yard Management Company v Eziefula [2013] EWCA Civ 235; [2013] C.P. Rep. 29*. In *Williams v Secretary of State for Business Energy and Industrial Strategy [2018] EWCA Civ 852; [2018] 4 W.L.R. 147*, it was unreasonable for a claimant to intimate a claim against two defendants (which had the effect of disapplying the Pre-action Protocol for Low Value Personal Injury (Employers Liability) Claims, and consequently the accompanying fixed costs regime) in circumstances where one of the claims was extremely weak and was ultimately abandoned. The claimant's costs were limited to the fixed costs he would have been awarded had he proceeded under the proper protocol.
- 264 PD PAC para.16.

Promoting Settlement

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 1 - Overriding Objective

Promoting Settlement

1. 111 In his reports on Access to Justice Lord Woolf said that court adjudication should be seen as the last resort, to be employed only where the parties are unable to resolve their dispute otherwise.²⁶⁵ Out-of-court settlements offer considerable economies to both litigants and the court. Parties who settle are spared the cost of litigation and obtain swift resolution, and may avoid the tension, uncertainty and emotional burden that litigation often entails. Not least, an agreed outcome is more likely to be acceptable to both parties, and not just to the winner in court proceedings. Meanwhile, cases that settle need not be adjudicated by the court, enabling it to save scarce resources. As Sharp LJ explained in *Mionis v Democratic Press SA*²⁶⁶:

“... settlement does not only serve the private interests of the litigants, but the administration of justice and the public interest more generally, by freeing court resources for other cases. The law therefore encourages and facilitates the mutual resolution of disputes by various means, for very sound reasons of public policy; and there is obviously an important public interest in the finality of settlement”.

To this end, the CPR adopt a twin strategy: facilitating inter-party communications, including directing the parties to engage in ADR where appropriate,²⁶⁷ and providing economic incentives for settlement.²⁶⁸

Encouraging and directing alternative dispute resolution

1. 112 The CPR and the court employ a range of techniques for inducing parties to resolve their dispute by agreement or, failing that, to engage in an ADR process. The pre-action protocols represent the first limb of this strategy, in that the exchange of meaningful information between the parties will often lead to more realistic appraisals of their respective positions and discussions about the possibility of an agreed resolution.²⁶⁹ Indeed, the pre-action protocols exhort the parties to consider whether, in light of the material exchanged, settlement or some other form of ADR procedure would be more suitable than litigation.²⁷⁰ Further, after proceedings are issued the parties are required to consider the possibility of settlement throughout the litigation process.²⁷¹ Thus, after the defence has been served, the parties have to complete and return to court a directions questionnaire (CPR 26.4) which requires legal representatives to confirm that they have explained to their client the need to try to settle, the options available and the possible costs consequences should they unreasonably refuse to attempt to settle the claim. The form further requires parties to indicate whether they require a stay of proceedings in order to reach a settlement (under CPR 26.5), giving reasons if not. Many small claims cases are eligible for referral to the Small Claims Mediation Service operated by HMCTS (CPR 26.6), and referral is compulsory for small claims money cases issued after 22 May 2024 which meet the criteria in PD 51ZE.

1. 113 CPR 1.4(2)(f) makes it part of the court’s case management duty to help “the parties to settle the whole or part of the case”, and CPR 1.4(2)(e) allows the court to encourage or order the parties to use alternative dispute resolution procedures to facilitate settlement without litigation.²⁷² Thus, it is not left entirely to the parties to initiate settlement negotiations, and if they have not attempted to resolve their dispute by agreement the court may use the first (and, indeed, any appropriate) opportunity to draw their attention to the possibility of a stay to facilitate settlement, and to the availability of ADR facilities.²⁷³ This is particularly so where it appears that the likely cost of litigation might exceed the amount in dispute.²⁷⁴ Moreover, when setting directions,

the court should give sufficient latitude in the timetable to enable the parties to explore settlement, while ensuring that the litigation is dealt with expeditiously.²⁷⁵

1. 114 As CPR 1.4(2)(e) demonstrates, it is now recognised that the court has power to go further than merely encouraging the parties to participate in ADR, and may positively require them to do so. Formerly, following *Halsey v Milton Keynes General NHS Trust*, it had been thought that the court had no power to compel a party to engage in ADR at all, since “to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court”.²⁷⁶ In reaching this conclusion, the Court of Appeal had relied on the ECtHR’s ruling in *Deweerd v Belgium*.²⁷⁷ In that case, the applicant (a butcher charged with an offence of selling meat at an illegal profit) was ordered to close his shop until he paid an agreed fine of 10,000 francs or, failing that, until judgment was rendered in the criminal case. The applicant successfully argued that the order was in breach of his right of access to the court under art.6 of the ECHR, because it put undue pressure on him to compromise the matter instead of answering the charge in court. The weakness of the link between *Deweerd v Belgium* and the conclusion reached in *Halsey* is immediately apparent. Whereas in *Deweerd v Belgium*, the pressure exerted by the state was intended to, and did, force the applicant to *actually* compromise the matter, in *Halsey* the question was whether the court could compel a party to *merely participate* in an ADR process, in which he would have remained free to maintain his position and to refuse to settle. Provided that a party is not forced or unduly pressured to forego their legal rights²⁷⁸ or to submit them to binding adjudication by a body other than a court, mandatory referral to ADR is unobjectionable.²⁷⁹ This view is consistent with that of the CJEU, which has confirmed that it is not contrary to EU law or the ECHR art.6 for national legislation to require parties in consumer disputes to attempt mediation before they are permitted to institute court proceedings.²⁸⁰

1. 115 In these circumstances it is unsurprising that *Halsey* was frequently doubted.²⁸¹ While it should be recognised that a party must not be compelled or unduly pressured to reach a settlement,²⁸² and that a case therefore cannot legitimately be transferred out of the court process to binding forms of adjudication such as arbitration, mandatory referral to mediation and other forms of non-binding ADR is permissible where this would further the overriding objective in the circumstances of the case. This was the conclusion reached by the Court of Appeal in *Churchill v Merthyr Tydfil County Borough Council*. Vos MR laid down the current approach:

“The court can lawfully stay proceedings for, or order, the parties to engage in a non-court-based dispute resolution process provided that the order made does not impair the very essence of the claimant's right to proceed to a judicial hearing, and is proportionate to achieving the legitimate aim of settling the dispute fairly, quickly and at reasonable cost.”²⁸³

This has been embedded in the CPR by rule changes in 2023 enabling the court to order the use of ADR.²⁸⁴

1. 116 Identifying which cases would be suitable for a mandatory order to attempt ADR will be highly fact specific. What matters is that the parties should not be unduly disadvantaged by reason of such an order, particularly in circumstances where a perceived unreasonable failure to engage in the ADR could attract heavy costs consequences. Close attention ought therefore to be paid to the type of ADR proposed and whether it is likely to be effective; whether inequalities of resource and representation exist between the parties and whether they are likely to be exacerbated by, or put one of them at a disadvantage during, the ADR; what the costs of ADR are likely to be and how they will be borne; whether the case is urgent and what the impact of any additional delay caused by mandatory mediation (or some other form of alternative dispute resolution) would be; and the validity of the parties’ reasons for not wishing to engage in ADR.²⁸⁵

Economic incentives for settlement

1. 117

The court may take into account the parties' conduct before, as well as during, the proceedings when it decides what costs order to make. Failure to follow the pre-action protocols may result in a more disadvantageous costs order than the party would otherwise have received ([CPR 44.2\(5\)\(a\)](#)), as may failure to accept an invitation from the opponent or the court to participate in ADR ([CPR 44.2\(5\)\(e\)](#)). Where the court has ordered the parties to attempt ADR and one of them refuses, it may be assumed that costs consequences would normally follow, since the court will have already determined that it was reasonable to expect them to engage with the process.²⁸⁶

- 1. 118** Further, a powerful system of settlement incentives is established by [CPR 36](#).²⁸⁷ A defendant may make a [CPR 36](#) offer to settle for a certain amount of money. A claimant who declines such a settlement offer, but fails at trial to obtain a more favourable judgment than the defendant's offer, will normally be ordered to pay the costs that the defendant incurred from the time starting 21 days after the offer. Similarly, if a defendant declines a claimant's offer, and the claimant obtains a more favourable judgment, the defendant will normally be ordered to pay enhanced costs and enhanced interest. Given that litigation costs are considerable, the risk created by being presented with an offer under [CPR 36](#) provides a powerful incentive to accept reasonable offers of settlement.
- 1. 119** It might be said that imposing economic disadvantages on parties who refuse to attempt settlement is inconsistent with the court's duty to enforce rights by providing state-backed remedies for wrongs, which demands court adjudication. If economic sanctions are used to weaken parties' resistance to settlement negotiations, the argument goes, their fundamental right of access to the courts is eroded—not because the court compulsorily refers them to binding forms of alternative adjudication, a point discussed above, but because the risk of incurring punitive costs might coerce them into entering into unjust and unmeritorious settlements. This is particularly so where one party to a dispute is less able to afford high and uncertain litigation costs than their opponent, since they will be more susceptible to pressure to agree to a one-sided and unfair settlement.
- 1. 120** As a preliminary point, it should be noted that there is nothing inherently objectionable in encouraging opposing litigants to settle their differences by mutual agreement rather than court adjudication. Giving up a proportion of one's entitlement for the sake of settlement would in many situations be a price well worth paying to avoid the uncertainty and financial risk of litigation. On the other hand, it is correct to say that for a settlement to be just it has to be genuinely voluntary and not procured by undue or illegitimate pressure. Yet the question whether the risk of adverse costs consequences undermines voluntariness in this way is not straightforward because voluntariness is a matter of degree. We may contrast the situation in *Deweerd v Belgium*,²⁸⁸ discussed earlier, with the payment of a disputed parking fine to avoid investing time and energy in challenging it. In the former, the butcher's livelihood was placed at risk if he refused to settle, whereas in the latter compromise would be merely a matter of convenience and cannot seriously be characterised as involuntary. Voluntariness, in this context, turns not only on the degree to which a litigant experiences pressure but also on the nature and source of the pressure, the legitimacy of the aims to which it is directed and the extent to which their opponent feels equal pressure.
- 1. 121** In assessing the debate over ADR, one cannot ignore the reality that settlement following ADR is not always a freely consensual choice. Since the cost of litigation is high, unpredictable and could be out of all proportion to the value of the dispute, many litigants justly feel unable to insist on court adjudication. While judges and policy-makers may welcome the savings obtained by ADR, they should recognise that ADR is often not an alternative to court adjudication but the only practical way of obtaining some redress, albeit short of what is legally due. Seen in this light, ADR is more a symptom of the failure of access to justice than a sign of success. The court would do well to bear this in mind both when considering whether to direct the parties to engage in ADR, discussed above, and in determining the consequences of failure to participate in negotiations or other forms of ADR. An indigent litigant should not be penalised for failing to accept an invitation to private mediation, where her opponent could afford his share of the mediator's fee but she could not:²⁸⁹ likewise where the invitation to ADR was not genuine but rather was an attempt to delay the litigation process.²⁹⁰ Moreover, any costs consequences imposed should be compensatory and no more than proportionate to the nature of the conduct and of the wider dispute.²⁹¹ Adverse costs should not be visited upon a party who declined to participate in ADR where to do so would have served no useful purpose because it reasonably did not seem possible or appropriate to settle the dispute at that stage.²⁹²

Footnotes

- 265 Woolf, Final Report, p.4.
- 266 *Mionis v Democratic Press SA [2017] EWCA Civ 1194; [2018] QB 662* [88].
- 267 The CPR Glossary defines the expression “alternative dispute resolution” (ADR) as denoting a “collective description of methods of resolving disputes otherwise than through the normal trial process”. There are several alternative dispute resolution methods, ranging from informal mediation or conciliation systems to quasi-judicial methods such as arbitration. See generally H.J. Brown and A.L. Marriott, A.D.R. Principles and Practice, 4th edn (London: Sweet & Maxwell, 2018); D. Foskett, Foskett on Compromise, 10th edn (London: Sweet & Maxwell, 2024); D.S. Sutton, J. Gill and M. Gearing (eds), Russell on Arbitration, 24th edn (London: Sweet & Maxwell, 2015); S.C. Boyd, Mustill and Boyd on Commercial Arbitration, 3rd edn (London: LexisNexis Butterworths, 2024).
- 268 As Sharp LJ indicated in *Mionis v Democratic Press SA [2017] EWCA Civ 1194; [2018] QB 662* [88], the law also supports settlement by enforcing compliance with settlement agreements; and by treating compromised claims in the same way as proceedings concluded by judgment after trial, for the purposes of determining whether a subsequent action amounts to an abuse of process: see *Aldi Stores Ltd v WSP Group Plc [2007] EWCA Civ 1260; [2008] 1 W.L.R. 748*.
- 269 See above, paras 1.101 ff.
- 270 PD PAC para.3.
- 271 See for example *Daniels v Commissioner of Police of the Metropolis [2005] EWCA Civ 1312; [2006] C.P. Rep. 9; Ali v Channel 5 Broadcast Ltd [2018] EWHC 840 (Ch)*.
- 272 The court’s power to order the parties to engage in settlement discussions is also recorded in **CPR 3.1(2)(o)**. Further, under **CPR 3.1(2)(p)**, the court is specifically empowered to conduct an early neutral evaluation “with the aim of helping the parties settle the case”. In *Lomax v Lomax [2019] EWCA Civ 1467; [2019] 1 W.L.R. 6527*, the Court of Appeal held that this power could be exercised even in the face of objections by the parties.
- 273 PD 29 para.4.10(9) reflects this by recording that the court may give directions ordering or encouraging the parties to engage in ADR when giving directions of its own initiative without a case management conference.
- 274 See for example *Filtco Inc v Air Science Technologies Ltd [2011] EWPCC 001* [41]; *Wright v Michael Wright Supplies Ltd [2013] EWCA Civ 234; [2013] C.P. Rep. 32* [31]; *Matthews v Matthews [2018] EWHC 906 (Fam)* [28].
- 275 In *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd [2014] EWHC 3546 (TCC); [2015] 1 All ER (Comm) 765*, Coulson J observed that: “[a] timetable for trial that allows the parties to take part in ADR along the way is a sensible case management tool”; see also *Electrical Waste Recycling Group Ltd v Philips Electronics UK Ltd [2012] EWHC 38 (Ch)*. However, it will rarely be appropriate to adjourn a trial on the grounds that the parties wish to engage in ADR: *Elliott Group Ltd v GEEC (formerly GE Capital Corp) [2010] EWHC 409 (TCC)*.
- 276 *Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576; [2004] 1 W.L.R. 3002* [9].
- 277 *Deweerd v Belgium [1980] 2 E.H.R.R. 439*.
- 278 A point dealt with below, at paras 1.117 ff, in relation to economic incentives for settlement.
- 279 But see Professor Genn’s criticism of the growing emphasis on encouraging disputants to use ADR, on the ground that this devalues the constitutional function fulfilled by court adjudication: “The Hamlyn Lectures 2008”, Judging Civil Justice (Cambridge: Cambridge University Press, 2009), 52–56; see also O. Fiss, “Against Settlement” (1984) 93 Yale L.R. 1073 and S. Shipman, “Court Approaches to ADR in the Civil Justice System” (2006) 25 C.J.Q. 181.
- 280 *Alassini v Telecom Italia SpA [2010] 3 CMLR 17* and *Menini v Banco Popolare Societa Cooperativa [2018] 1 CMLR 15*.
- 281 See for example Lord Clarke MR, *The Future of Civil Mediation* (2008) 74 Arbitration 419; *Wright v Michael Wright (Supplies) Ltd [2013] EWCA Civ 234* [3]; *McParland & Partners Ltd v Whitehead [2020] EWHC 298 (Ch)* [42]; cf. Lord Dyson MR, “Halsey 10 Years On—The Decision Revisited” in Justice: Continuity and Change (Oxford: Hart, 2018).
- 282 See below, para.1.116 and paras 1.117 ff.
- 283 *Churchill v Merthyr Tydfil County Borough Council [2023] EWCA Civ 1416; [2024] 1 W.L.R. 3827* [74].
- 284 CPR 1.4(2)(e), CPR 3.1(2)(o) and PD 29 para.4.10(9), noted above.
- 285 *Churchill v Merthyr Tydfil County Borough Council [2023] EWCA Civ 1416; [2024] 1 W.L.R. 3827* [59]–[62]. See also Civil Justice Council, Compulsory ADR (June 2021), Section IV.
- 286 See Ch.28 Costs for a more detailed discussion of the exercise of the court’s discretion under **CPR 44.2**.
- 287 See Ch.27 Offers to Settle.

- 288 *Deweerd v Belgium* [1980] 2 E.H.R.R. 439.
- 289 *Arjomandkhah v Nasrouallah* (SCCO, unreported, 6 July 2018). See also *OMV Petrom SA v Glencore International AG* [2017] EWCA Civ 195; [2017] 1 W.L.R. 3465 [42], where Sir Geoffrey Vos deplored the defendant's "use of a vast asset base to seek to frustrate a claimant's attempts to reach a compromise solution".
- 290 *Re Midland Linen Services Ltd* [2005] EWHC 3380 (Ch); *AP (UK) Ltd v West Midland Fire & Civil Defence Authority* [2013] EWHC 385 (QB).
- 291 *Lynn v Borneos LLP t/a Borneo Linnels* [2015] 3 Costs L.R. 439, QB; *Laporte v Commissioner of Police of the Metropolis* [2015] EWHC 371 (QB); though see *OMV Petrom SA v Glencore International AG* [2017] EWCA Civ 195; [2017] 1 W.L.R. 3465.
- 292 *Register of the Corby Group Litigation v Corby Borough Council (Costs)* [2009] EWHC 2109 (TCC) (reasonableness of refusal to be assessed at the time the decision was made); *Uwug Ltd (In Liquidation) v Ball* [2015] EWHC 74 (IPEC) (mediation would likely have been unsuccessful); *Gore v Naheed* [2017] EWCA Civ 369 (case raising complex questions of law which made it unsuitable for mediation). See also *PJSC Aeroflot—Russian Airlines v Leeds* [2018] EWHC 1735 (Ch), where Rose LJ suggested that cases involving serious allegations of dishonesty and fraud may be "inherently unsuitable for mediation".

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Introduction

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 3 - Fair Trial

Introduction

3.1

Dealing with a case justly and at proportionate cost means, among other things, dealing with it fairly (CPR 1.1(2)(d)).¹ Although the concept of fairness is not elaborated in the CPR, it is deeply rooted in the common law. English law protects the right to fair trial by a variety of means, including statute, rules of court and common law principles that uphold fundamental constitutional rights. The “right to fair trial”, Laws J stated, “is as near to an absolute right as any which I can envisage”.² Whether it is the right to an impartial tribunal, the right to be heard or, indeed, the elementary right of access to court, these and other similar rights have for centuries found expression in case law and in the rules of procedure, including of course the CPR.³ However, the statutory and common law safeguards of procedural fairness are now overlaid with the right to fair trial established by art.6 of the European Convention of Human Rights (ECHR). The present chapter discusses the various aspects, or components, of the right to fair trial both at common law and under the ECHR.

Footnotes

¹ For discussion of the other interrelated facets of the overriding objective, see Ch.1 The Overriding Objective.

² *R v Lord Chancellor Ex p. Witham [1998] QB 575 at 585; [1997] 2 All ER 779* at 787.

³ D. Rose, “Beef and Liberty: Fundamental Rights and the Common Law”, Atkin Memorial Lecture, delivered at the Reform Club, London, 8 November 2011, [22]–[24].

The Role of the European Convention on Human Rights

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Mainwork

Chapter 3 - Fair Trial

The Role of the European Convention on Human Rights

The Human Rights Act 1998

- 3.2 The [Human Rights Act 1998 \(HRA 1998\)](#) incorporates into domestic law arts 2–12 and 14 of the ECHR, and parts of the First and Thirteenth Protocols ([s.1\(1\)](#)) (the Convention rights). The [HRA 1998 s.6\(1\)](#) renders it “unlawful for a public authority to act in a way which is incompatible with a Convention right”. Courts and tribunals are included in the definition of “public authority” ([HRA 1998 s.6\(3\)\(a\)](#)).⁴ This impacts on the courts’ decision-making in two principal ways. First, the courts are duty-bound to arrive at decisions that are compatible with Convention rights whenever they have discretion in the matter.⁵ Since the courts have extensive discretionary powers at common law and under the [CPR](#) in relation to the conduct of civil litigation, these powers must be exercised in a way that respects Convention rights generally. For instance, where a court is asked to grant an interim injunction to restrain publication it must take into consideration the need to protect the freedom of expression under the ECHR art.10 ([HRA 1998 s.12](#)).⁶
- 3.3 Second, according to the [HRA 1998 s.3\(1\)](#), both primary and secondary legislation must be interpreted, read and given effect in a way which is compatible with the Convention rights, in so far as it is possible to do so.⁷ Although the interpretative jurisdiction gives the courts considerable power to bend legislation into conformity with the ECHR, the [HRA 1998](#) does not derogate from the supremacy of Parliament in that it does not give the courts a power to strike down Acts of Parliament that are incompatible with Convention rights. However, the [HRA 1998 s.4](#) allows a superior court to make a “declaration of incompatibility”, drawing attention to the inconsistency between the legislation in question and the ECHR.⁸ In certain circumstances such a declaration triggers a ministerial power to amend the offending legislation by means of a statutory instrument.⁹ Otherwise the situation may be remedied by an Act of Parliament.¹⁰
- 3.4 Not only does the [HRA 1998](#) give the English courts direct access to the Convention standards as a decision-making parameter, it also effectively incorporates the jurisprudence of the European Court of Human Rights (ECtHR) into domestic law. The [HRA 1998 s.2](#) requires a court engaged in determining issues involving Convention rights to take account of the relevant judgments, declarations and opinions of the ECtHR, the Human Rights Commission and other Convention bodies.¹¹ ECtHR decisions do not, however, have the force of binding precedent in England. Nor is the ECtHR itself formally bound by its own previous decisions since it follows no stare decisis rule. Nevertheless, its decisions are highly influential and would normally be followed by the English courts. The position was explained by Lord Slynn:

“Although the [[HRA 1998](#)] does not provide that a national court is bound by these decisions it is obliged to take account of them so far as they are relevant. In the absence of some special circumstances it seems to me that the court should follow any clear and constant jurisprudence of the European Court of Human Rights. If it does not do so there is at least a possibility that the case will go to that court which is likely in the ordinary case to follow its own constant jurisprudence.”¹²

English courts remain, however, bound by previous English precedents of superior English courts even if later ECtHR decisions are inconsistent with such precedents.¹³

Interpreting the CPR in the light of human rights

- 3.5 Until the [HRA 1998](#), the courts were limited to construing legislation in accordance with the settled principles of statutory interpretation.¹⁴ In essence, the courts were restricted to giving legislation its literal meaning, or to interpreting it so as to give effect to the legislative purpose, if its language permitted. The [HRA 1998](#) has considerably expanded the court's interpretative freedom. In *R v A*, Lord Steyn explained that the [HRA 1998 s.3](#) places on the court a duty to strive to find an interpretation compatible with Convention rights, even if this means straining the meaning of legislation:

“In accordance with the will of Parliament as reflected in [section 3](#) it will sometimes be necessary to adopt an interpretation which linguistically may appear strained. The techniques to be used will not only involve the reading down of express language in the statute but also the implication of provisions.”¹⁵

- 3.6 This approach was followed in *Goode v Martin*.¹⁶ The claimant, who had been severely injured in a sailing accident and could not recall what had happened, sought to amend her statement of case so as to rely on the facts pleaded in the defendant's own defence. By that time the limitation period had expired. At the time, [CPR 17.4\(2\)](#) provided that an amendment which added or substituted a new claim could be allowed only if the new claim arose out of the same facts or substantially the same facts as those of the pleaded claim.¹⁷ The claimant's amendment could not be described as relying on substantially the same facts as those she had originally pleaded (which relied on an account given by a witness which differed from the defendant's version of events). However, the Court of Appeal could find no sound policy reason why the claimant should not be able to amend her claim in order to say that even if the defendant succeeded in establishing his version of the facts, she should still win because those facts, too, showed that he had been negligent. A literal interpretation of [CPR 17.4\(2\)](#) would serve no legitimate aim, and was not mandated by the language of the [Limitation Act 1980 s.35\(5\)\(a\)](#), on which the rule was based. To prevent the claimant from putting her case would impede her right of access to the court for no good reason, and the Court of Appeal therefore held that it was necessary to interpret [CPR 17.4\(2\)](#) so as to avoid this result. Brooke LJ explained:

“[The claimant] contended that we should interpret [CPR 17.4\(2\)](#) as if it contained the additional words ‘are already in issue on’. It would therefore read, so far as is material:

‘The court may allow an amendment whose effect will be to add a new claim, but only if the new claim arises out of the same facts or substantially the same facts as *are already in issue on* a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings.’ (Emphasis added.)

This would bring the sense of the rule in line with the language of the [1980 Act](#), which is the source of the authority to make the rules contained in [CPR 17.4](#).

In my judgment it is possible, using the techniques identified by Lord Steyn in *R v A*, to interpret the rule in the manner for which [the claimant] contends. In this way there would be no question of a violation of the claimant's Art.6(1) rights, and the court would be able to deal with the case justly, as we are adjured to do by the [CPR](#). I would therefore permit the amendment and allow the appeal.”¹⁸

The court's powers of interpretation in relation to the [CPR](#) are, therefore, significantly enhanced where a violation of an ECHR right might otherwise take place. The discretion is, however, a limited rather than general one. It is to read the provision in question so as to do no more than the minimum necessary to comply with ECHR art.6.¹⁹

Nature and scope of the right to fair trial under article 6 of the ECHR

3. 7

The ECHR art.6(1) is the most significant provision in relation to the civil process:

“(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

3. 8

ECHR art.6(1) is concerned with process and does not guarantee any particular content for civil rights and obligations in the substantive law of contracting states.²⁰ The provisions of art.6 are therefore not engaged unless the claimant is seeking access to court to enforce a right which exists, at least arguably, under the domestic law.²¹ Where such a right is engaged, art.6 requires the state to respect certain due process principles when adjudicating upon it. Thus, the court is duty-bound to conduct a proper examination of the submissions, arguments and evidence adduced by the parties while maintaining the due process standards dictated by art.6.²²

3. 9

By its terms, the ECHR art.6(1) applies only to civil proceedings that are determinative of rights—that is to say proceedings that dispose of a case on its merits.²³ The ECtHR has held:

“The Court recalls that the applicability of Article 6(1) under its ‘civil head’ requires the existence of a ‘dispute’ over a ‘right’ which can be said, at least on arguable grounds, to be recognised under domestic law. That dispute must be genuine and serious; it may relate not only to the existence of a right but also to its scope and to the manner of its exercise. Furthermore the outcome of the proceedings must be directly decisive for the right in question.”²⁴

For example, a trade union, which has a general interest in proceedings, cannot claim that its own civil rights and obligations are being determined by proceedings that concern the interests of some of its members.²⁵ The relevance of ECHR art.6 in the specific context of interim proceedings is considered further below at paras 3.16 ff.

3. 10

The general right to fair trial established by the ECHR art.6(1) consists of a bundle of specific rights. These may be divided into two groups: rights that are expressly mentioned in ECHR art.6(1) and rights which have been held to be implicit in it by the ECtHR. There are four express rights: the right to a fair hearing; the right to a public hearing, including the right to the public pronouncement of judgment (subject to exceptions); the right to a hearing within a reasonable time; and the right to an independent and impartial tribunal. In addition, the ECtHR has held the following rights to be implicit in the right to fair trial: the right of access to court; the right to an adversarial hearing; the right to equality of arms; the right to fair presentation of the evidence; the right to cross-examine; and the right to a reasoned judgment.

3. 11

ECHR art.6(3) also contains various specific rights, or minimum standards of fairness, applicable in criminal proceedings. These include the right to information about the accusation, sufficient time and facilities to prepare a defence, the right to free legal assistance for indigent defendants, the right to examine witnesses, and the right to assistance by an interpreter.

Although ECHR art.6(3) is expressed as applying to criminal proceedings, some of the rights protected by this part of art.6 have been held to be implicit in ECHR art.6(1). This is not surprising since to an extent art.6(3) merely elaborates that which is implied in art.6(1). For instance, the right of access to court implied in art.6(1) may in certain circumstances necessitate the provision of free assistance by an interpreter,²⁶ or of free legal assistance to litigants who cannot otherwise afford to bring or defend civil litigation.²⁷

3. 12

It has been held that the express rights contained in ECHR art.6 are absolute, in the sense that they may not be compromised or traded off against other Convention rights (such as those under ECHR arts 8–11), except where the Convention expressly allows for exceptions as in the case of the right to a public hearing.²⁸ By contrast, the implied rights are not absolute and may be subject to limitations, provided that the limitation is imposed in furtherance of a legitimate aim or public interest, and provided that any limitation is reasonably proportionate to such aim or interests. Lord Hope explained the position in *Brown v Stott*:

“the jurisprudence of the European Court tells us that the questions that should be addressed when issues raised about an alleged incompatibility with a right under article 6 of the Convention are the following: (1) is the right which is in question an absolute right, or is it a right which is open to modification or restriction because it is not absolute? (2) if it is not absolute, does the modification or restriction which is contended for have a legitimate aim or public interest? (3) if so, is there a reasonable relationship of proportionality between the means employed and the aim sought to be realized? The answer to the question whether the right is or is not absolute is to be found by examining the terms of the article in the light of the judgments of the court. The question whether a legitimate aim is being pursued enables account to be taken of the public interest in the rule of law. The principle of proportionality directs attention to the question whether a fair balance has been struck between the general interest of the community in the realisation of that aim and the protection of the fundamental rights of the individual.”²⁹

3. 13

However, the right to fair trial under the ECHR art.6 is absolute only in the following sense: if, having made all possible allowance for legitimate and proportionate limitations, the court concludes that the right to fair trial has nonetheless been infringed, there can be no justification for the derogation from the requirements of fairness. As Lord Steyn explained in *Brown v Stott*:

“once it has been determined that the guarantee of a fair trial has been breached, it is never possible to justify such breach by reference to the public interest or any other ground.”³⁰

It would be a mistake, however, to suppose that either the explicit or implicit rights contained in ECHR art.6(1) are absolute in any other sense. Virtually every component of the right to fair trial calls for a degree of evaluation, which involves a balancing of competing considerations. For example, the right to a hearing within a reasonable time is by its very nature both imprecise and flexible so that the question of whether it has been breached will depend on a multitude of factors.³¹ Even the right to an independent and impartial tribunal calls for judgement of degree, for not every relationship that a judge has to a party is sufficient to justify disqualification. Furthermore, whether there has been an infringement of the right to fair trial must be assessed by reference to the proceedings as a whole. Thus, a defect that occurred during proceedings at first instance may be cured on appeal.³²

3. 14

The ECtHR recognises that national institutions are better placed than an international court to evaluate local needs and conditions, and therefore accords national legislatures a margin of appreciation. National legislatures therefore have considerable flexibility in deciding how best to adapt their procedures to Convention requirements. At the same time, Parliament allows the court considerable discretion in how to manage and regulate court proceedings. The ECtHR would therefore not interfere in the way that national courts control trials or allocate time for oral submissions.³³ It should be noted that the margin of appreciation confers room for the choice of legislative measures and is not addressed to the court. “On

the other hand,” Lord Steyn observed, “national courts may accord to the decisions of national legislatures some deference where the context justifies it”.³⁴

- 3.15 The need to examine English procedure in the light of ECHR art.6 gave a boost to the development of English procedural law.³⁵ The need to measure our procedure against the standards of art.6 prompted English judges to articulate common law principles which had previously been ill defined or had not received adequate attention and analysis.³⁶ The principles of fairness—such as those of judicial impartiality, open trial and the right of participation—are deeply rooted in our procedural tradition, and if the incorporation of the Convention served to reinvigorate them so much the better.³⁷ The bulk of the present chapter describes the basic rights encapsulated in the right to fair trial at common law and under ECHR art.6, except for the right to timely adjudication, which has already been addressed in Ch.1.³⁸

Applicability of article 6 of the ECHR to interim proceedings

- 3.16 It is sometimes said that ECHR art.6(1) does not apply to interim proceedings because they are not determinative of rights. The following processes have been held not to come under the protection of art.6 because they do not directly decide the right in question: applications for interim relief as they do not generally determine the substantive right,³⁹ including without-notice applications for an interim anti-social behaviour order (ASBO);⁴⁰ enforcement proceedings;⁴¹ applications for permission to appeal;⁴² applications for permission to bring proceedings by a person subject to a civil proceedings order;⁴³ applications to reopen a case;⁴⁴ and official investigations even where findings are made that are detrimental to the applicants.⁴⁵ However, the ECtHR ruled that costs proceedings are a continuation of the substantive dispute and that art.6 therefore applies.⁴⁶

- 3.17 The view that the right to fair trial does not apply to interim proceedings, or in other proceedings that are not determinative of rights, cannot be taken at face value. Clearly, even in interim proceedings, the court has to respect the right to be heard, it must be impartial and independent and it must give a reasoned decision. The court is duty-bound to respect these and other similar rights in interim applications, because civil proceedings cannot be readily compartmentalised so that breach of due process standards at one stage in the proceedings would not affect the process as a whole. Interim decisions, whether they take the form of an interim injunction or the grant or refusal of an extension of time to fulfil a process requirement, frequently impact upon the outcome of the litigation so that breach of due process standards at an interim stage could well infect the process as a whole.

- 3.18 Accordingly, the right to fair trial applies not only to the trial itself but to the entire process of determining rights, of which the trial is but one component. An excessive delay in the resolution of an interim application may deny a litigant their right to adjudication within a reasonable time, as the ECtHR has accepted.⁴⁷ It may equally be said that a biased interim decision may infect the process as a whole. It is therefore misleading to say that the ECHR art.6 does not apply to interim proceedings. The real position is that not every aspect of art.6 must be fully implemented at every stage of the proceedings. The correct test of due process compliance is therefore whether the proceedings as a whole comply with art.6. It is inconceivable that the common law would tolerate partiality, unreasonable delay or a denial of the right to be heard in any interim proceedings involving a dispute between opposing parties, since such egregious breaches would taint the proceedings as a whole. Thus, for instance, in urgent cases it may be justified to deny a litigant the right of participation, provided that this is cured as soon as practicable by inter partes proceedings so that the process as a whole is not infected by the denial of the right to be heard. However, the question of whether art.6 applies to interim proceedings is largely hypothetical because it is clear that at common law most, if not all, of the requirements of procedural fairness apply equally to interim proceedings and final proceedings.⁴⁸

- 3.19 The right to a fair trial may reach beyond the purely judicial part of the proceedings. Where a jointly instructed or sole expert’s report is likely to have a preponderant influence on the court’s assessment of the facts, there may be a breach of the ECHR

art.6 if a litigant is denied the opportunity, before that report is produced, to examine and comment on the documents being considered by the expert and cross-examine witnesses interviewed by the expert and on whose evidence the report is based.⁴⁹

3. 20 The position may be different where court proceedings do not involve the determination of any dispute at all. For instance, a debtor who petitions the court for their own bankruptcy does not seek the adjudication of a dispute but merely takes advantage of a benign self-standing administrative scheme. It was therefore held that in such proceedings the legislature is under no obligation to afford access to court free of charge to impecunious applicants as it would be where a party seeks to enforce their rights against another.⁵⁰ There are other examples of non-adversarial proceedings, in the sense of proceedings that do not call for the resolution of a dispute between opposing parties, such as childcare proceedings.⁵¹ However, even in non-adversarial proceedings it would be wrong to suppose that none of the rules of procedural fairness apply.⁵² All that can be said is that some of the normal rules may be departed from in order to achieve a legitimate purpose and to the extent that it is proportionate to that purpose. It is unimaginable that the requirement of impartiality could ever be departed from in any proceedings, adversarial or otherwise.

Footnotes

- 4 However, the [HRA 1998 s.6\(1\)](#) does not apply if “as the result of one or more provisions of primary legislation, the authority could not have acted differently”. [Section 6\(2\)\(b\)](#) similarly provides that [s.6\(1\)](#) does not apply if “in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions”.
- 5 [Douglas v Hello! Ltd \[2001\] QB 967; \[2001\] 2 All ER 289, CA.](#)
- 6 [A v B plc \[2002\] EWCA Civ 337; \[2003\] QB 195](#). For discussion see [Ch.10 Interim Remedies paras 10.86 ff.](#)
- 7 2025 WB 3D–16.
- 8 2025 WB 3D-19.
- 9 [HRA 1998 s.10](#) and [Sch.2](#).
- 10 [HRA 1998 s.19](#), meanwhile, seeks to reduce the possibility of incompatibility in the first place by imposing a duty on ministers proposing legislation to make declarations of compatibility. A ministerial statement of compatibility is no more than a statement of opinion of the relevant minister, however, and cannot be ascribed to Parliament: [R \(SC\) v Secretary of State for Work and Pensions \[2021\] UKSC 26; \[2022\] AC 223](#) [170].
- 11 2025 WB 3D-9–12.
- 12 [R \(Alconbury Developments Ltd\) v Secretary of State for the Environment, Transport and the Regions \[2001\] UKHL 23; \[2003\] 2 AC 295 \[26\]; R \(Holding and Barnes Plc\) v Secretary of State for the Home Department \[2002\] UKHL 46; \[2003\] 1 AC 837 \[18\]](#). A decision of the Grand Chamber of the ECtHR is highly persuasive authority such that it should be followed unless there are highly unusual circumstances: [R \(Hallam\) v Secretary of State for Justice \[2019\] UKSC 2; \[2020\] AC 279](#), per Lord Mance at [29]–[35], Lord Sumption at [120]–[125]. As well as declining to follow Strasbourg jurisprudence where there is a sufficiently cogent reason for doing so, the English courts may also develop the protection of the Convention rights beyond the situations which have previously been considered by the ECtHR, as long as this accords with Strasbourg’s interpretation of the right in question. This does not mean, however, that English courts are entitled to find a violation of Convention rights in circumstances where the ECtHR would regard the matter as within the national legislature’s margin of appreciation: [R \(Elan-Cane\) v Secretary of State for the Home Department \[2021\] UKSC 56; \[2023\] AC 559](#).
- 13 See [Kay v Lambeth \[2006\] UKHL 10; \[2006\] 2 AC 465; R v Horncastle \[2010\] W.L.R. 47](#), although cf. [R \(RJM\) v Secretary of State for Work and Pensions \[2008\] UKHL 63; \[2009\] 1 AC 311](#) [59]–[67] (the Court of Appeal is freer to depart from one of its own previous decisions where this is inconsistent with later ECtHR jurisprudence, than from a decision of the House of Lords or Supreme Court). The courts may exceptionally depart from an otherwise binding precedent in certain exceptional circumstances where the decision pre-dated the introduction of the HRA: see [Kay v Lambeth](#) at [40]; [Price v Leeds City Council \[2006\] UKHL 10, \[2006\] 2 AC 465](#) [40]; and especially [C Plc v P \[2006\] EWHC 1226 Ch](#) [56]–[57].
- 14 D. Bailey and L. Norbury (eds), [Bennion on Statutory Interpretation](#), 8th edn (London: LexisNexis Butterworths, 2020), Ch.29.

- 15 *R v A* [2001] UKHL 25; [2002] 1 AC 45 [44]. See 2025 WB 3D-16.
- 16 *Goode v Martin* [2001] EWCA Civ 1899; [2002] 1 W.L.R. 1828. For a similarly purposive interpretation see *Cachia v Faluyi* [2001] EWCA Civ 998; [2001] 1 W.L.R. 1966.
- 17 CPR 17.4(2) is discussed below in Ch.7 Statements of Case paras 7.82 ff.
- 18 *Goode v Martin* [2001] EWCA Civ 1899; [2002] 1 W.L.R. 1828 [46]–[47]. *Goode v Martin* was affirmed by the Court of Appeal in *Mulalley & Co Ltd v Martlet Homes Ltd* [2022] EWCA Civ 32, and CPR 17.4(2) was formally amended so as to reflect Brooke LJ's interpretation by the Civil Procedure (Amendment) Rules 2023 (SI 2023/105).
- 19 Further, the standard of compliance with the ECHR art.6(1) that is required is not always uniform. For example, where it is established that proceedings involve the determination of a civil right or obligation such that they fall within the scope of art.6(1), restrictions on the right of appeal in such proceedings will only fall foul of art.6(1) if they are such as to destroy “the very essence” of the right: *Tolstoy Miloslavsky v United Kingdom* [1995] 20 E.H.R.R. 442 [59]; and see *Pomiechowski v Poland* [2012] UKSC 20 [32]–[35], applying these principles so as to read into the Extradition Act 2003 ss.26, 103 and 108 a limited discretion to extend time to file and serve an appellant's notice, in cases where a British citizen was appealing against an extradition order.
- 20 *Re S (minors) (care order: implementation of care plan)* [2002] UKHL 10; [2002] 2 AC 291 [66]; *Matthews v Ministry of Defence* [2003] UKHL 4; [2003] 1 AC 1163.
- 21 *Matthews v Ministry of Defence* [2003] UKHL 4; [2003] 1 AC 1163; *Kehoe v Secretary of State for Work and Pensions* [2005] UKHL 48; [2006] 1 AC 42 [8]; cf. *Thomas v Bridgend County Borough Council* [2011] EWCA Civ 862; [2011] RVR 241 [26].
- 22 *Kraskav v Switzerland* (1993) 18 E.H.R.R. 188 [30].
- 23 The following examples have been held to have a sufficient quality of “decisiveness” to engage ECHR art.6: a preliminary decision on an issue which is crucial to the applicant's claim (*Obermeier v Austria* [1990] 13 E.H.R.R. 290); quantum of damages assessments (*Silva Pontes v Portugal* [1994] 18 E.H.R.R. 156).
- 24 *Gustafson v Sweden* [1997] 25 E.H.R.R. 623 [38].
- 25 *Ahmed v United Kingdom* [1995] 20 E.H.R.R. CD 72, ECom HR; *Director General of Fair Trading v Proprietary Association of Great Britain* [2001] EWCA Civ 1217; [2002] 1 W.L.R. 269.
- 26 *Luedicke, Belkacem and Koç* [1978] ECHR 5; cf. *Shuker v Inspeks Ltd* [2022] EWHC 2668 (Ch).
- 27 *Airey v Ireland* (1979-80) 2 E.H.R.R. 305; *X v United Kingdom* [1984] 6 E.H.R.R. 136; *Steel and Morris v the United Kingdom* [2005] 41 E.H.R.R. 22; cf. *Perotti v Collyer-Bristow (a firm)* [2003] EWCA Civ 1521; [2004] 2 All ER 189 [23]–[26], discussed below at para.3.26.
- 28 *Montgomery v HM Advocate* [2003] 1 AC 641, PC; *Brown v Stott (Proc Fiscal Dunfermline)* [2003] 1 AC 681, PC.
- 29 *Brown v Stott (Proc Fiscal Dunfermline)* [2003] 1 AC 681 at 720, PC. The test was applied in the civil case of *R v Lord Chancellor Ex p. Lightfoot* [2000] QB 597; [1999] 4 All ER 583, CA, and in the criminal case of *R v A (No.2) (Complainant's sexual history)* [2001] UKHL 25; [2002] 1 AC 45.
- 30 *Brown v Stott (Proc Fiscal Dunfermline)* [2003] 1 AC 681 at 708, PC.
- 31 See Ch.1 The Overriding Objective para.1.53.
- 32 *Kingsley v United Kingdom* [2001] 33 E.H.R.R. 288; *Director-General of Fair Trading v Proprietary Association of Great Britain* [2001] EWCA Civ 1217; [2002] 1 W.L.R. 269.
- 33 *Brown v United Kingdom* [1999] 28 E.H.R.R. CD233.
- 34 *Brown v Stott (Proc Fiscal Dunfermline)* [2003] 1 AC 681 at 710–711, PC. The nature and effect of the margin of appreciation doctrine were considered in *R (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56; [2023] AC 559; and see Lord Sales, “The Developing Jurisprudence of the Supreme Court on Convention Rights”, Keynote Speech to the Scottish Public Law Group Conference, 5 June 2023.
- 35 Although see J. Sorabji, “Article 6—a welcome boost to the development of English procedural law?”, in D. Hoffman (ed) The Impact of the UK Human Rights Act on Private Law (Cambridge: Cambridge University Press, 2011).
- 36 See, for instance, *Al Rawi v Security Service* [2012] 1 AC 531, where both the Court of Appeal and UK Supreme Court engaged in detailed analyses of elements of the right to fair trial. This decision is discussed in detail in Ch.19 Public Interest Immunity and Closed Material Procedure paras 19.28 ff and 19.59 ff.
- 37 See for instance *Lubbe v Cape Plc* [2000] 4 All ER 268; [2000] 1 W.L.R. 1545, HL, relating to access to justice and to equality of arms. See also: *Raymond v Honey* [1983] 1 AC 1; [1982] 1 All ER 756, HL (prison governor temporarily hindering the applicant's access to court); *R v Lord Chancellor Ex p. Witham* [1998] QB 575; [1997] 2 All ER 779; *Al Rawi v Security Service* [2011] UKSC 34; [2012] 1 AC 531.
- 38 Chapter 1 The Overriding Objective paras 1.52 ff.
- 39 *X v United Kingdom* [1981] 24 DR 57, ECom HR; although see *Micallef v Malta* [2009] ECHR 1571, [75] ff; *BM v Secretary of State for the Home Department* [2009] EWHC 1572 (Admin); [2010] 1 All ER 847, applying *R (Wright)*

- v *Secretary of State for Health* [2009] UKHL 3; [2009] AC 739. There are, however, circumstances where an interim application, in particular an interim injunction, will in reality finally determine substantive rights: see Ch.10 Interim Remedies para.10.44.
- 40 R (Kenny) v Leeds Magistrates' Court [2003] EWHC 2963 (Admin); [2004] 1 All ER 133.
- 41 K v Sweden [1991] 71 DR 94, ECom HR.
- 42 Porter v United Kingdom [1987] 54 DR 207, ECom HR.
- 43 R (Ewing) v Department of Constitutional Affairs [2006] EWHC 504 (Admin). The same would no doubt be true of a civil restraint order made under CPR 3.11(2) and PD 3C.
- 44 X v Austria [1978] 14 DR 200, ECom HR.
- 45 Fayed v United Kingdom [1994] 18 E.H.R.R. 393.
- 46 Robins v United Kingdom [1997] 26 E.H.R.R. 527.
- 47 Markass Car Hire Ltd v Cyprus [2002] ECHR 51591/99.
- 48 See ABC Ltd v Y [2010] EWHC 3176 (Ch) [33]; Ntuli v Donald [2010] EWCA Civ 1276; [2011] 1 W.L.R. 294.
- 49 Re C (care proceedings: disclosure of local authority's decision-making process) [2002] EWHC 1379 (Fam); [2002] 2 FCR 673.
- 50 R v Lord Chancellor Ex p. Lightfoot [2000] QB 597; [1999] 4 All ER 583, CA. See also R v Lord Chancellor Ex p. Witham [1998] QB 575; [1997] 2 All ER 779.
- 51 Re L (a minor) (police investigation: privilege) [1997] AC 16; [1996] 2 All ER 78, HL. See also Ch.12 Case Management Pt I para.12.22.
- 52 Re P (Children) [2012] EWCA Civ 401.

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The Right of Access to Justice

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 3 - Fair Trial

The Right of Access to Justice

The general principle

3. 21 Few rights would be of practical value in the absence of a reasonable opportunity to seek court assistance to enforce them when threatened or violated. The right of access to court merely spells out what is already implied by the very existence of a right: the availability of a mechanism for enforcing the right.⁵³ The right of access to court has therefore occupied a central place in English law for a very long time. Magna Carta 1215 clause 40 states: “To no one will we sell, to no one will we deny or delay right or justice.” Blackstone elaborated this principle by stating that every person has a right “of applying to the courts of justice for redress of injuries … courts of justice must at all times be open to the subject and the law be duly administered therein.”⁵⁴ In the same vein Lord Diplock stated:

“Every civilised system of government requires that the state should make available to all its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights. The means provided are courts of justice to which every citizen has a constitutional right of access in the role of plaintiff to obtain the remedy to which he claims to be entitled in consequence of an alleged breach of his legal or equitable rights by some other citizen, the defendant. Whether or not to avail himself of this right of access to the court lies exclusively within the plaintiff’s choice; if he chooses to do so, the defendant has no option in the matter; his subjection to the jurisdiction of the court is compulsory. So, it would stultify the constitutional role of the High Court as a court of justice if it were not armed with power to prevent its process being misused in such a way as to diminish its capability of arriving at a just decision of the dispute.”⁵⁵

Similarly, as the title *Access to Justice* indicates, Lord Woolf placed this consideration at the forefront of his reports.⁵⁶

3. 22 At common law, the right of access to justice is safeguarded by a variety of means. The court will strain to interpret laws so as to ensure, insofar as it is possible, that access to justice remains unobstructed. Only a clear and unambiguous provision of primary legislation is capable of curtailing the right, in which case it will be interpreted as authorising only such intrusion as is reasonably necessary to fulfil the objective of the provision in question.⁵⁷ So, for instance, when the Lord Chancellor increased court and tribunal fees payable by claimants, the regulations were held to be ultra vires insofar as they failed to make allowance for indigent litigants; the enabling legislation contained no words authorising the prevention of access to the relevant courts and tribunals.⁵⁸ In another case, the common law presumption of statutory interpretation that Parliament does not intend to oust the court’s power of review of administrative decisions was invoked to justify overriding “the apparently plain words of an ouster clause”.⁵⁹ Even a fugitive from justice is not precluded from enforcing their rights through the courts of this country;⁶⁰ and in *Mints v PJSC National Bank Trust*, the scheme of the Sanctions and Anti-Money Laundering Act 2018 was interpreted so as to permit a claimant who was subject to sanctions to pursue a civil claim through to trial and (if vindicated) obtain judgment.⁶¹ The right of access to justice does not, however, deprive the court of the jurisdiction to strike out a claim where the claimant has engaged in fraudulent exaggeration, deceit or perjury.⁶²

3. 23

The court has acted against private interference with access to justice. For instance, where a newspaper made disparaging remarks about a pharmaceutical company because it chose to litigate rather than settle on terms demanded by the claimants, it was held that the newspaper infringed the company's right of "unhindered access to the constitutionally established courts of criminal or civil jurisdiction for the determination of disputes as to legal rights and liabilities".⁶³ Similarly, it has been held that conduct calculated to prejudice a prisoner's right of access to court, or to obstruct or interfere with the due course of justice, or with the lawful process of the court, amounted to contempt of court.⁶⁴

3. 24 The protection of access to justice has been further strengthened by the [HRA 1998](#).⁶⁵ Even express legislation is now questionable if it is incompatible with the ECHR. The right of access to justice occupies a central place in human rights jurisprudence. In *Golder v UK*,⁶⁶ the ECtHR pointed out that the detailed procedural guarantees of the ECHR art.6 would be worthless if a right of access were not included in the notion of fair trial. It therefore held that the right of access to court forms part of the right to fair trial. Underlying the European court's decisions is a concern to ensure that access is maintained as a practical right and not just as a theoretical one.⁶⁷ A right of access means a right to institute proceedings concerning civil matters in a court of law and a meaningful opportunity to sustain proceedings to a resolution.

3. 25 The ECtHR held that access may imply a right to legal representation, state-funded if necessary, where this is necessary for ensuring effective access to justice so that rights are not robbed of practical utility.⁶⁸ Preventing a prisoner from contacting their solicitor in order to bring a civil action, as in *Golder*, or denying a father's standing in adoption procedures, as in the later case of *Keegan v Ireland*,⁶⁹ amount to violations of ECHR art.6. In *Steel and Morris v UK* the court held that the failure of the UK government to provide legal representation at public cost to defendants in complex and lengthy defamation proceedings had deprived them of the opportunity to present their case effectively before the court and contributed to an unacceptable inequality of arms with the claimants, McDonald's corporation.⁷⁰ Even where legal representation is not otherwise required for compliance with art.6, as in some types of disciplinary proceedings, the nature of the allegations involved may demand that legal representation should not be refused.⁷¹ It has, however, been held that art.6 does not require that a party to proceedings in which a closed material procedure is being used—for example, proceedings where a party is a terror suspect or where the court is hearing a judicial review of a closed material proceeding⁷²—should be able to instruct legal representatives that have been appointed to represent their interests in connection with closed material.⁷³

3. 26 Unlike a criminal court,⁷⁴ a court in civil proceedings has no power to grant legal representation at public expense.⁷⁵ This does not mean that the court is helpless where no fair trial can take place without representation. Chadwick LJ observed in *Perotti v Collyer-Bristow (a firm)*⁷⁶ that if a court were to indicate that legal representation was necessary in order to ensure a fair hearing, an application for funding could be made to the Legal Services Commission, which would probably oblige.⁷⁷ The test is not, Chadwick LJ stressed, whether the court would find it easier to proceed with represented litigants. Rather, the test "is whether a court is put in a position that it really cannot do justice in the case because it has no confidence in its ability to grasp the facts and principles of the matter on which it has to decide. In such a case it may well be said that a litigant is deprived of *effective access*; deprived of effective access because, although he can present his case in person, he cannot do so in a way which will enable the court to fulfil its paramount and overarching function of reaching a just decision".⁷⁸

3. 27 As noted above (para.3.8), it is not enough for a party to simply say that they have a dispute and are therefore entitled to access to a court and to the protections of the ECHR art.6(1). The jurisprudence of the ECtHR requires a party to show that they have a genuine and serious dispute before being able to avail themselves of art.6(1)'s protection. A party who cannot point to an arguable legal right is not entitled to access to a court.⁷⁹

Access to court limited by rules

3. 28

Like any other right, the right of access to justice confers an entitlement only within certain boundaries. Court proceedings are of necessity regulated, for without rules there can be no system of justice, only anarchy or arbitrariness. These rules must themselves satisfy the requirements laid down by ECHR art.6(1) of course, but if they do, then those who seek access to justice must abide by them.⁸⁰ This was spelt out in *Ashingdane v United Kingdom*:

“Certainly, the right of access to the courts is not absolute but may be subject to limitations; these are permitted by implication since the right of access, ‘by its very nature calls for regulation by the State, regulation which may vary in time and place according to the needs and resources of the community and the individuals.’ [Golder’s case, para.38] In laying down such regulation, the Contracting States enjoy a certain margin of appreciation. Whilst the final decision as to the observance of the Convention’s requirements rests with the Court, it is no part of the Court’s function to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this field.

Nonetheless, the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, the limitation will not be compatible with Article 6(1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.”⁸¹

A similar principle was stated by Sullivan J when he said that:

“A right to a hearing is rarely unconditional, even where matters of life and liberty are at stake. One may have to appeal within a certain time, appear at a certain time, not be abusive or disruptive, file certain documents in support … and so forth. Having an opportunity for a hearing does not mean that one may not disentitle oneself from taking up that opportunity if one behaves in a certain manner.”⁸²

Brooke LJ reiterated this idea in the context of vexatious litigants:

“So far as [ECHR] Art. 6 is concerned, there is now plenty of case law, both in this court and the Court of Human Rights at Strasbourg, which makes it quite clear that, so long as the right of access to the court is not extinguished, a court is entitled to regulate its affairs so as to protect its process and the interests of other parties against whom vexatious litigation is persistently brought.”⁸³

3. 29

Unfortunately, the implications of this self-evident observation, that in order to benefit from court adjudication litigants must follow the rules and comply with court orders, have not always been fully appreciated. Like any modern procedural system, the CPR lay down rules for the conduct of litigation, and the courts are tasked with managing the cases before them as well as adjudicating on the substance of claims. For instance, the rules provide that a claimant who wants to bring a claim must issue a claim form; they cannot do so by simply sending a letter to the defendant. Failure to serve a claim form will deprive the claimant of the opportunity of proceeding with their action, but this can, by no stretch of the imagination, be condemned as a denial of access to justice. Of course, the rule that requires the issue of a claim form as a condition to proceeding must itself comply with the right to fair trial. Whether it so complies will depend on whether the rule is made in pursuance of legitimate aims, and on whether it is reasonably proportionate to these aims.⁸⁴ It is evident that the requirement of service of a claim form complies with the requirements of fair trial since there must be a formal step of commencement of proceedings. One of the most common forms of regulation consists of time limits for commencing an action, beyond which a claim cannot be brought. The ECtHR has recognised the legitimacy of limitation periods, provided they are not so short that they effectively deprive claimants of any practical opportunity to bring proceedings.⁸⁵ In certain circumstances, to take another example, a litigant may be required to

pay money into court, as security for judgment or for costs, as a precondition for prosecuting or defending a claim.⁸⁶ Such a requirement would be legitimate even if it results in debarring the litigant from the proceedings, if the amount was not beyond the means of the party in question.⁸⁷

- 3.30 These examples illustrate an important general principle. Provided that procedural requirements, whether imposed by rules or court orders, are fair and reasonable in the first place, a litigant who is denied participation or continued participation in the adjudicative process because they have failed to comply with these requirements cannot be said to be denied access to court. Dismissal of a claim for want of prosecution, or the striking out of a defence for failure to comply with a court order, may indeed deprive a litigant of the opportunity to obtain a decision on the merits, but this would be legitimate if the litigant had been given ample opportunity to comply.⁸⁸

- 3.31 This principle was recognised by Arden LJ in *CIBC Mellon Trust Co v Stolzenberg* (sanctions: non-compliance):

“the state can impose restrictions on the right of access to court provided that the restrictions serve a legitimate aim, are proportionate and do not destroy the very essence of the right. Here, the legitimate aim in imposing a sanction is to secure compliance with court orders, which in the instant case were made to ensure the effectiveness of freezing orders. The imposition of a sanction is proportionate if it is reasonably necessary for achieving that aim ...”⁸⁹

- 3.32 Since fairness must be assessed by looking at the procedure as a whole,⁹⁰ the fact that a defaulting litigant has had adequate opportunity to comply would legitimise the denial of a further opportunity after a sufficiently serious default. Although access to justice is a fundamental constitutional right, its outer bounds are marked by rules and court orders. The fact that notwithstanding procedural defaults a fair trial is still possible (in the sense that the evidence is still available and that the opponent has not suffered prejudice) is no impediment to denying the defaulting litigant further access. If it were otherwise, no sanction could be carried out and the defaulting litigant would be able to reinstate themselves merely by showing that a fair trial was still possible, no matter how flagrant or persistent their failures have been.⁹¹

- 3.33 Access may be restricted or denied not only as a consequence of failure to comply with process requirements. A limitation on access may be imposed for the protection of the litigant themselves, as with limitations on proceedings brought by children and persons lacking capacity;⁹² or for the protection of others, as with restrictions imposed on vexatious litigants⁹³ or litigants that owe their opponents costs in respect of earlier proceedings;⁹⁴ or to protect the administration of justice generally.⁹⁵ Proportionate restrictions on the right of access to the courts were justified by the “exceptional circumstances of the coronavirus pandemic”.⁹⁶ In *Arkin v Marshall*, the Court of Appeal concluded that the temporary stay imposed on all possession proceedings by PD 51Z did not infringe ECHR art.6(1), given the need to ensure neither the administration of justice nor the enforcement of possession orders endangered public health by the unnecessary transmission of the virus.⁹⁷

Access to court as a consideration in deciding forum

- 3.34 The right of access to court constitutes a powerful consideration when it comes to the choice of forum. A claimant who otherwise has a right to bring proceedings in the English courts may be prevented from doing so if the case might be tried more suitably in some other tribunal of competent jurisdiction.⁹⁸ However, even where the court has concluded that there is a more appropriate forum for trying the action, the claimant could resist the stay if they can persuade the court that justice requires that the action should be tried in England, including because they will not be able to obtain effective access to justice in the competing foreign jurisdiction.⁹⁹ In *Lubbe v Cape Plc*, it was established that South Africa was a more appropriate forum for an action in respect

of injuries sustained there. Nevertheless, the House of Lords held in favour of trying the action in England because the claimants were unlikely to obtain state-funded or contingency-based legal representation in South Africa, with the result that they would effectively be denied the means of prosecuting their claims there.¹⁰⁰ Similarly, where the court is deciding whether to grant permission for service out of the jurisdiction pursuant to CPR 6, considerations of access to justice will be important (and may be decisive) in determining whether England is “the proper place in which to bring the claim”.¹⁰¹

Waiver of the right of access to court

- 3.35 Since access to court is part and parcel of any substantive right, it follows that one may waive the right of access to court, just as one can waive one’s substantive rights.¹⁰² Given that waiver of the right of access is tantamount to forgoing the right itself, great care needs to be taken to ensure that the litigant’s conduct in waiving the right to access was indeed intended to relinquish the right itself. In the context of ECHR art.6(1), the ECtHR has stressed that while the right of access may be waived, the waiver must be voluntary and unambiguous,¹⁰³ and must not be contrary to the public interest.¹⁰⁴ Litigants are also able to waive particular components of the right to fair trial, such as the right to an impartial tribunal,¹⁰⁵ as we shall discuss later. Similarly, litigants may agree to confine their disputes to particular issues only,¹⁰⁶ though this is entailed by the right to choose whether to litigate. By contrast, the right to a public hearing cannot be waived since this is a right enjoyed not just by the individual litigants but also by the public at large (although parties can apply to the court to derogate from the right where such derogations are necessary for the proper administration of justice).¹⁰⁷
- 3.36 A distinction must be made between waiver after a dispute has arisen and waiver in advance of a dispute. Waiver after a dispute has arisen raises few difficulties, for parties are free to choose whether to litigate, and if so which of their rights they seek to enforce. Indeed, the CPR encourage litigants to choose alternative methods of settling their disputes, for example by requiring them to engage in structured pre-action correspondence designed to resolve as much of the dispute as possible without litigation,¹⁰⁸ and, post-commencement, by permitting them to seek a stay of proceedings in order to facilitate settlement (CPR 26.5(1)).¹⁰⁹ The court may also encourage or order litigants to divert their disagreement into alternative forms of dispute resolution.¹¹⁰ Encouraging or incentivising disputants to stay away from the courts does not of itself diminish the principle of access to justice since the civil court remains the final arbiter in civil disputes; and even ordering them to engage in a specified form of alternative dispute resolution need not do so, provided that their ability to invoke the court’s jurisdiction is meaningfully preserved. In this regard, care must be taken to ensure that any such order does not place undue pressure on a party to forgo their rights, for example by exacerbating the impact of resource inequality between the parties or by reason of the delay that an unsuccessful attempt at alternative dispute resolution would cause.¹¹¹
- 3.37 Waiver of the right of access to the court in advance of a dispute arising is more problematic. Complete waiver of the right to seek adjudication or enforcement of a right negates the existence of the right and is therefore inimical to the rule of law. A clause in a contract that completely ousts the court’s jurisdiction cannot be valid because it would effectively amount to denying the existence of the contract in the first place, since by its very nature a contract is meant to create rights. Such a clause is therefore considered to be contrary to public policy and void.¹¹²
- 3.38 Voluntary agreements that merely regulate or restrict the right of access are of a different character. Thus, the right of access to court does not prevent parties to a contract from agreeing on matters of jurisdiction.¹¹³ Persons may agree in advance of any dispute that the court of a particular country will have jurisdiction to deal with any controversy arising out of a particular transaction or that the law of a particular jurisdiction shall apply to their transaction. But an agreement on jurisdiction which has the effect of denying one of the parties any practical possibility of access to court will surely be invalid.¹¹⁴ The Civil Jurisdiction and Judgments Act 1982 affords employees and consumers protection from jurisdictional agreements that render difficult the enforcement of their rights.¹¹⁵

3.39 In a similar vein, an agreement to submit a dispute to binding arbitration will not normally offend against the right of access principle. Arbitration is a well-established mode of non-court resolution,¹¹⁶ which offers considerable advantages such as flexibility, privacy and freedom to choose the tribunal, the venue and the timing of the proceedings.¹¹⁷ Where the seat of the arbitration is in England, the [Arbitration Act 1996](#) (as amended by the [Arbitration Act 2025](#)) applies. This lays down the general principle of non-intervention by the court during the arbitration process ([s.1](#)), but confers on the court a supervisory jurisdiction as well as a wide range of powers to support the arbitration process itself (such as the power to extend time limits, to appoint arbitrators, and to hear appeals on points of law). Some of these powers may be excluded by agreement, including the power to entertain appeals on points of law,¹¹⁸ but the court's supervisory jurisdiction cannot be altogether excluded. In particular, an arbitration award may be challenged in the courts on grounds of serious irregularity affecting the tribunal, the proceedings or the award,¹¹⁹ or on the grounds that the arbitration tribunal had no substantive jurisdiction over the dispute in question.¹²⁰ Further, although arbitration agreements restrict access to court, a party who wishes to avoid such an agreement altogether may bring and maintain proceedings before the ordinary courts if they can show that the agreement is “null and void, inoperative, or incapable of being performed”.¹²¹

Vexatious litigants

3.40 Access to justice is maintained in order to enable aggrieved persons to seek court assistance for the protection or enforcement of their rights. But, like any other right, the right to bring proceedings may be abused and measures must be available to prevent the improper use of legal proceedings. Clearly, court proceedings should not be available to persons who initiate claims to harass opponents or to litigants who habitually make baseless applications. Accordingly, both English law¹²² and the EctHR¹²³ allow for measures to protect citizens and the court from oppressive or unreasonable proceedings. Two principal methods are available for restraining vexatious litigants: (a) on the application of the Attorney General, the High Court may make an order under the [Senior Courts Act 1981 \(the 1981 Act\) s.42](#), restraining a vexatious litigant from issuing proceedings without permission of the court for an indefinite period; and (b) under [CPR 3.11\(2\)](#) and PD 3C the court may make three types of civil restraint orders as defined by [CPR 2.3\(1\)](#).

3.41 Even before the introduction of these methods it was well-established that the court had an inherent jurisdiction to protect its process against abuse, including the power to restrain vexatious litigants.¹²⁴ Under this jurisdiction, the High Court and the county court could grant an injunction (known as a *Grepe v Loam* order)¹²⁵ prohibiting the commencement or continuation, without permission, of proceedings which were likely to be an abuse of process.¹²⁶ Such an order could also restrain a litigant who had abused the court process from making further applications without first obtaining court permission.¹²⁷ It could also bar them from the court's premises without express permission except for the purposes of attending a hearing, or restrict the means by which they could contact the court or court staff (for example by limiting contact so that it can only be made by letter).¹²⁸ Given the existence of the powerful mechanism contained in the [1981 Act s.42](#), coupled with the codification of the court's power to restrain the bringing of future applications and proceedings in [CPR 3.11](#), this jurisdiction is now a residual one.¹²⁹ It will only rarely be necessary to have recourse to it, namely where a specific form of order not covered by [CPR 3.11](#) is needed (in order to protect court administrative staff from abuse, for example).¹³⁰

3.42 The [1981 Act s.42](#) empowers the High Court to make: (a) a “civil proceedings order” applying to civil claims and applications in civil claims, or (b) an “all proceedings order” covering all civil proceedings and applications and specified criminal proceedings, where it is proved that a litigant has “habitually and persistently and without reasonable cause” instituted vexatious proceedings or applications ([s.42\(1\)](#)).¹³¹ This includes acting vexatiously as a McKenzie friend.¹³² As noted above, applications under the [1981 Act s.42](#) are made by the Attorney General and may only be granted by the High Court. The affected person must be given an adequate opportunity to resist the application. The order will remain in force indefinitely, unless it is expressed to be for a specific period ([s.42\(2\)](#)). A civil proceedings order restrains the person affected from commencing or continuing a civil

claim, and from making applications in a civil claim, without the permission of the High Court ([s.42\(1A\)](#)).¹³³ Permission will be given only if the High Court is satisfied that the claim or application is not an abuse of process and that there are reasonable grounds for bringing it ([s.42\(3\)](#)).¹³⁴ The [1981 Act s.42\(4\)](#) expressly states that there is no appeal from a refusal of permission to bring proceedings. It has been held that [s.42](#) sets up a jurisdictional and not merely a procedural bar, such that proceedings purportedly commenced without permission are a nullity which cannot be cured even by a retrospective grant of permission.¹³⁵

3.43 A “civil restraint order” (CRO) under [CPR 3.11\(2\)](#) and PD 3C is an order restraining a party: (a) from making any further applications in current proceedings (a limited CRO); (b) from issuing certain claims or making certain applications in specified courts (an extended CRO); or (c) from issuing any claim or making any application in specified courts (a general CRO), without the permission of a nominated judge.¹³⁶ Such an order may be made by the High Court, Court of Appeal or county court,¹³⁷ and may be made upon application by another party or of the court’s own initiative. Indeed, the court is required to consider of its own motion the desirability of such an order in appropriate cases. Thus, [CPR 3.4\(6\)](#) enjoins the court, when striking out a statement of case which it considers to be totally without merit, to consider whether it is appropriate to make a CRO. A similar duty is imposed by [CPR 23.12](#) when the court dismisses an application, including an application for permission to appeal or to seek judicial review.¹³⁸ Although [CPR 3.11\(2\)](#) refers to CROs “against a party to proceedings”, this is wide enough to catch persons who are not formally parties, such as McKenzie Friends and non-parties who are in reality the driving force behind the litigation.¹³⁹

3.44 A limited CRO may be made against a party that has made two or more applications that are totally without merit (PD 3C para.2.1). An extended CRO may be made against a party who has persistently issued claims or made applications that are totally without merit (PD 3C para.3.1).¹⁴⁰ This includes situations where claims and applications are made against a number of different, unconnected defendants.¹⁴¹ Typically an extended CRO will only be made where a limited CRO was previously made but proved ineffective. When assessing the question of whether to grant an extended CRO, having already made a limited CRO, the court may take into account all claims and applications made prior to the application for the extended CRO.¹⁴² There is no requirement to show that all of the claims and applications made by the allegedly vexatious party were devoid of merit, however.¹⁴³ A general CRO may be made against a party who, despite the existence of an extended CRO against them, has persisted in issuing claims or making applications which are totally without merit (PD 3C para.4.1). As noted above, the effect of a limited CRO is tied to a particular set of proceedings (PD 3C para.2.2); an extended CRO restrains a party from issuing claims or making applications concerning any matter touching upon or leading to the proceedings in which the order was made (PD 3C para.3.2). A general CRO, meanwhile, affects all claims and applications in the relevant courts (PD 3C para.4.2), and is therefore particularly appropriate in situations where the litigant adopts a shotgun approach to litigation on a number of different topics.¹⁴⁴ Extended and general CROs must be made for a specified period not exceeding three years (PD 3C paras 3.9 and 4.9), although in appropriate cases they may be extended for further periods of not more than three years each (PD 3C paras 3.10 and 4.10).¹⁴⁵

3.45 Where a CRO is made by the court of its own initiative, it is subject to [CPR 3.3\(5\)](#), and as such the party against whom it is made has the right to apply to set it aside (without needing to obtain the permission of the nominated judge in order to do so).¹⁴⁶ Otherwise, the vexatious litigant would need to appeal the decision to make the CRO.¹⁴⁷ Like most appeals, an appeal against a CRO requires court permission. A party against whom a CRO has been made may also apply for amendment or discharge of the order, though in this instance they must first obtain permission to do so from the judge named in the CRO;¹⁴⁸ notice of such an application must be served on the other party.¹⁴⁹

3.46 Where a party subject to a CRO requires permission from the nominated judge to make a claim or application,¹⁵⁰ but does so without first obtaining permission, the claim or application will be automatically dismissed without need for any further order or, indeed, for the other party to respond.¹⁵¹ In assessing whether to grant a person subject to a CRO permission to make a claim or application, or to take some other step in proceedings, a highly relevant factor will be whether the proposed claim, application or step has a realistic prospect of success.¹⁵² If it does not, it would normally be right to withhold permission,

though an exception might be made where there is some other reason which satisfies the court that the claim, application or step should be permitted. Conversely, even where the claim, application or step has a realistic prospect of success, the court may refuse permission if it would be oppressive.¹⁵³ It should be noted that a person subject to a CRO must seek permission for each application they wish to make in the course of proceedings. Thus, permission to pursue a claim at first instance does not of itself entail a right to apply to the Court of Appeal for leave to appeal; for that step, the vexatious litigant must obtain a further grant of permission under the CRO. If the court refuses to allow them to seek leave to appeal from the Court of Appeal, that is the end of the matter and they would not be able to apply to the Court of Appeal for permission to appeal.¹⁵⁴

- 3.47 Where a person subject to a CRO applies for permission to make an application or to bring proceedings and permission is refused, any application for permission to appeal that decision must be made in writing, and will be determined without a hearing.¹⁵⁵ There is a protection against abuse of this provision, in that where the person repeatedly makes meritless applications for permission under the CRO, the court may direct that any further dismissal of such an application will be final and there will be no right of appeal against it.¹⁵⁶

- 3.48 Restrictions on vexatious litigants (under the 1981 Act s.42, CPR 3.11 and the court's inherent jurisdiction) are justified both in order to protect others and to prevent the court's scarce resources from being wasted in unmeritorious litigation.¹⁵⁷ The right of access to court should be seen not just from the perspective of the individual litigant but also that of others who are waiting for access in order to vindicate their rights.¹⁵⁸ These considerations are weighty enough to justify restrictions on the right of access to justice and do not therefore offend against the ECHR art.6(1).¹⁵⁹ The 1981 Act s.42, and the way in which the court exercises its powers under CPR 3.11 and its inherent jurisdiction, meet the requirements elaborated by the ECtHR in the following respects: the restriction on access is always under the court's supervision; an order restricting access can only be made after detailed enquiry and the degree of restriction is commensurate with the seriousness of the litigant's conduct; the affected person is not wholly prohibited from engaging in further litigation but rather must surmount an additional filter stage; and they are free to seek reconsideration of the order if the circumstances change.

Children and protected parties

- 3.49 In some circumstances, fairness requires that restrictions should be placed on party autonomy. This is so where a party is incapable of adequately representing themselves or otherwise safeguarding their interests. Accordingly, CPR 21 makes provision for children and protected parties,¹⁶⁰ by restricting their ability to act and by giving the court broad discretionary powers to appoint a "litigation friend"¹⁶¹ to conduct litigation on their behalf, to approve settlements and to administer money paid to them. There is every reason to believe that such restrictions on access to justice are both necessary and proportionate to achieve the legitimate aim of ensuring that the interests of children and protected parties are safeguarded and that they are treated on an equal footing in the litigation process. Such restrictions are therefore compatible with the right to fair trial under the ECHR art.6.¹⁶²

- 3.50 Children and protected parties are normally considered to lack the capacity necessary to conduct litigation on their own and may therefore generally only participate through a litigation friend acting on their behalf (CPR 21.2).¹⁶³ A "child" is defined as a person under 18 (CPR 21.1(2)). A "protected party" is a party, or an intended party, who lacks capacity to conduct the proceedings (CPR 21.1(2)). *Lacks capacity* means lacks capacity within the meaning of the Mental Capacity Act 2005. It is incumbent on the court to ensure that a party is not deprived of their civil rights and it should therefore always investigate the question of capacity even if the issue did not seem to be contentious.¹⁶⁴ The test for capacity, in the context of civil proceedings, is whether the party is incapable of understanding, with the assistance of proper explanation from legal advisers, the issues on which their consent or decision is likely to be necessary in the course of the proceedings.¹⁶⁵ In determining whether a litigant had the mental capacity to approve a settlement on liability, the court's enquiry should be focused on a litigant's capacity to conduct the proceedings as a whole and not be judged on a piecemeal basis.¹⁶⁶

- 3.51 A child or protected party must generally have a litigation friend to conduct proceedings on their behalf, whether as claimant or defendant ([CPR 21.2](#)). There is a limited exception to this in that in appropriate circumstances, the court may permit a child to conduct proceedings without a litigation friend ([CPR 21.2\(3\)](#)).¹⁶⁷ A person may become a litigation friend without a court order if they fulfil certain conditions and procedural requirements ([CPR 21.4](#) and [21.5](#)).¹⁶⁸ A person appointed by the Court of Protection under the [Mental Capacity Act 2005](#) with power to conduct legal proceedings on behalf of a protected party is entitled to be the party's litigation friend in any proceedings to which their authority extends ([CPR 21.4\(2\)](#)). In other situations, a person must possess the following attributes in order to act as a litigation friend without a court order: that they should be able to act fairly and competently in the conduct of proceedings;¹⁶⁹ that they should have no interest adverse to that of the child or protected party; and that they undertake to pay any costs which a child or protected party claimant may be ordered to pay ([CPR 21.4\(3\)](#)).¹⁷⁰ However, the court exercises a broad supervisory jurisdiction with powers to appoint a litigation friend. Thus, the court may appoint a litigation friend ([CPR 21.6](#)).¹⁷¹ It also has the power to direct that a person should not act as a litigation friend, to terminate an appointment or to appoint a new litigation friend ([CPR 21.7](#)).¹⁷² The Official Solicitor will act on behalf of a child or protected party where there is no one else able and willing to do so.¹⁷³
- 3.52 Where the court appoints a litigation friend, the main requirement is that the court must be satisfied as to their suitability (and, as is implicit in [CPR 21.7](#), must be so satisfied throughout the proceedings). That said, a protected party capable of expressing a reasonable view (and presumably a child) must be heard where they have reservations about the appointed litigation friend.¹⁷⁴ Further, minors' and protected parties' right of access to court may require that they should be heard even where they have a litigation friend, especially where a dispute has arisen between the party and the litigation friend.¹⁷⁵
- 3.53 [CPR 21.3](#) states that where a litigation friend has not yet been appointed, a person may not make any application against a child, or a protected party, or take any step in the proceedings concerning them, without court permission, except for issuing and serving a claim form or applying for the appointment of a litigation friend. Any step taken before the appointment of a litigation friend is invalid, unless the court otherwise orders.¹⁷⁶ However, the court has discretion to regularise the position retrospectively. It will normally do so if everyone concerned has acted in good faith and there has been no manifest disadvantage to the party subsequently found to have been lacking capacity at the relevant time.¹⁷⁷
- 3.54 To ensure that the interests of children and protected parties are safeguarded, [CPR 21.10](#) provides that no settlement, compromise or payment, and no acceptance of money paid into court, shall be valid without court approval. Great care needs to be taken by both parties to ensure that failure to comply with this provision does not rob the agreement of its binding force and leave both parties free to resile from it, as happened in *Drinkall v Whitwood*.¹⁷⁸ The claimant, who had been seriously injured when she was aged 14, made a [CPR 36](#) offer to settle the issue of liability on an 80:20 basis in her favour. The offer was accepted and no proceedings were commenced. But before the claimant attained her majority the defendant withdrew from the settlement agreement, arguing that since the agreement had not received court approval as required by [CPR 21.10\(1\)\(a\)](#) it was not binding. The Court of Appeal held that a partial settlement agreement reached before proceedings relating to a claim by or on behalf of a child, like a complete settlement agreement reached in the same circumstances, was not binding on the parties and could be repudiated by either side until it had been approved by the court. Where such agreement has been reached before proceedings, Simon Brown LJ explained, it would be prudent to issue proceedings to obtain the court's approval to bind the defendant.

Abuse of process

- 3.55 The general right of access to court is available to litigants only for pursuing a legitimate interest in seeking court resolution of a dispute. As we shall see when we come to discuss the court's management powers, judges have the power to dismiss statements

of case that amount to an abuse of process ([CPR 3.4\(2\)\(b\)](#)) and to prevent litigants from using any procedural device in an abusive manner.¹⁷⁹

Footnotes

- 53 See *Matthews v Ministry of Defence* [2003] UKHL 4; [2003] 1 AC 1163; *Begum (Runa) v Tower Hamlets LBC* [2003] UKHL 5; [2003] 2 AC 430. See also L. Alexander, “Are Procedural Rights Derivative Substantive Rights?” (1998) 17 *Law and Philosophy* 19; L. Alexander, “The Relationship between Procedural Due Process and Substantive Constitutional Rights” (1987) 39 *University of Florida Law Review* 323.
- 54 W. Morrison (ed.), Blackstone’s Commentaries on the Laws of England (London: Routledge-Cavendish, 2001) Vol.1 p.141.
- 55 *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corp Ltd* [1981] 1 All ER 289, 295, HL. See also *Attorney General v Times Newspapers Ltd* [1974] AC 273, 309, HL; *Raymond v Honey* [1983] 1 AC 1 at 13; [1982] 1 All ER 756 at 760, HL; *R v Secretary of State for the Home Department Ex p. Leech (No.2)* [1994] QB 198; [1993] 4 All ER 539; *R v Lord Chancellor Ex p. Witham* [1998] QB 575; [1997] 2 All ER 779.
- 56 Lord Woolf, Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales (London: HMSO, 1996) (hereinafter “Woolf, Interim Report”); Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales (London: HMSO, 1996) (hereinafter “Woolf, Final Report”).
- 57 *R (Unison) v Lord Chancellor* [2017] UKSC 51; [2020] AC 869 [76]–[80]; *R (Haworth) v Revenue and Customs Commissioners* [2021] UKSC 25; [2021] 1 W.L.R. 3521 [59]–[61]; *Mints v PJSC National Bank Trust* [2023] EWCA Civ 1132; [2024] KB 559 [179]–[180].
- 58 *R v Lord Chancellor Ex p. Witham* [1998] QB 575; [1997] 2 All ER 779; and later *R (Unison) v Lord Chancellor* [2017] UKSC 51; [2020] AC 869 [66]–[85]. For the position of the ECtHR on the point see: *Kreuz v Poland* [2001] 11 B.H.R.C. 456. However, access to court was a constitutional right at common law only when it “was concerned with the adjudication of general disputes” and not in relation to the statutory bankruptcy scheme of the *Insolvency Act 1986*: *R v Lord Chancellor Ex p. Lightfoot* [2000] QB 597 at 609; [1999] 4 All ER 583 at 592, CA.
- 59 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147; [1969] 1 All ER 208, HL; discussed in J. Laws, “Is the High Court the Guardian of Fundamental Constitutional Rights?” [1993] PL 59; and see M. Sunkin, “The Problematic State of Access to Judicial Review” in B. Hadfield (ed.), *Judicial Review: A Thematic Approach* (Dublin: Gill and Macmillan, 1995). Supported by *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22; but contrast *R (LA (Albania)) v Upper Tribunal* [2023] EWCA Civ 1337 on a more robustly worded ouster clause.
- 60 *Polanski v Condé Nast Publications Ltd* [2005] UKHL 10; [2005] 1 W.L.R. 637.
- 61 *Mints v PJSC National Bank Trust* [2023] EWCA Civ 1132; [2024] KB 559.
- 62 *Summers v Fairclough Homes Ltd* [2012] UKSC 26. This power has been considerably strengthened in personal injury litigation by the *Criminal Justice and Courts Act 2015* s.57. For further discussion see *Ch.12 Case Management Pt II* paras 12.292 ff. In *Bandla v Solicitors Regulation Authority* [2025] EWHC 1167 (Admin), a solicitor’s appeal against a decision to strike them off was struck out as an abuse of process, the appellant having relied on multiple fictitious authorities in support of his submissions.
- 63 *Attorney General v Times Newspapers Ltd* [1974] AC 273 at 309; [1973] 3 All ER 54 at 71, HL.
- 64 *Raymond v Honey* [1983] 1 AC 1; [1982] 1 All ER 756, HL.
- 65 *Whiting Farms Ltd v Garrett* (CA, unreported, 3 July 2000).
- 66 *Golder v United Kingdom* (1979-80) 1 E.H.R.R. 524.
- 67 *Golder v United Kingdom* (1979-80) 1 E.H.R.R. 524. See also *Airey v Ireland* [1979] 2 E.H.R.R. 305. In *Osman v United Kingdom* [1998] ECHR 101; [1999] 1 F.L.R. 193, the ECtHR held that a rule which conferred on the police immunity from being sued for negligence amounted to a denial of access to court. For discussion of this controversial decision see *Matthews v Ministry of Defence* [2003] UKHL 4; [2003] 1 AC 1163; *Begum (Runa) v Tower Hamlets LBC* [2003] UKHL 5; [2003] 2 AC 430. See also *Z v United Kingdom* (2002) 34 E.H.R.R. 37 [100]; L. Hoyano, “Policing Flawed Police Investigations: Unravelling the Blanket” (1999) 62 M.L.R. 912; G. Monti, “*Osman v UK—Transforming English Negligence Law into French Administrative Law?*” (1999) 48 ICLQ 757; M. Lunney, “A Tort Lawyer’s View of *Osman v UK*” (1999) 10 King’s College Law Journal 238.
- 68 *Airey v Ireland* [1981] 3 E.H.R.R. 592; *X v United Kingdom* [1984] 6 E.H.R.R. 136.
- 69 *Keegan v Ireland* [1994] 18 E.H.R.R. 342.

70 *Steel and Morris v United Kingdom* [2005] E.M.L.R. 15; [2005] 41 E.H.R.R. 22.

71 *R (G) v X School Governors* [2009] EWHC 504 (Admin); [2009] I.R.L.R. 434.

72 The former situation is authorised by the *Justice and Security Act 2013*; the latter is permissible in certain circumstances even where the *Justice and Security Act 2013* does not authorise it—for instance where it is necessary to facilitate review of a decision of a magistrates' court or crown court taken under a statutory closed material proceeding: *R (Haralambous) v St Albans Crown Court* [2018] UKSC 1; [2018] AC 236. For further discussion of the problematic implications of this decision, and of closed material proceedings generally, see Ch.19 Public Interest Immunity and Closed Material Procedure paras 19.59 ff.

73 *Secretary of State for the Home Department v M* [2009] EWHC 572 (Admin).

74 Access to Justice Act 1999 Sch.3 2(1).

75 Where, however, proceedings for criminal contempt are brought in the civil courts, legal aid may be applied for: see *Brown v Haringey LBC* [2015] EWCA Civ 483; [2017] 1 W.L.R. 542.

76 *Perotti v Collyer-Bristow (a firm)* [2003] EWCA Civ 1521; [2004] 2 All ER 189.

77 See also *R (Jarrett) v Legal Services Commission* [2001] EWHC 389 (Admin), where it was held that guidance issued by the Lord Chancellor was wrong in indicating that the exclusions listed in the *Access to Justice Act 1999*, Sch.2, could only be overridden in cases which raised issues of wider public interest or overwhelming importance. The real test was whether “the withholding of legal aid would make the assertion of a civil claim practically impossible, or ... would lead to an obvious unfairness of the proceedings” so as to infringe an applicant’s ECHR art.6(1) right.

78 *Perotti v Collyer-Bristow (a firm)* [2003] EWCA Civ 1521; [2004] 2 All ER 189 [32].

79 *Z v United Kingdom* [2002] 34 E.H.R.R. 37; see *Matthews v Ministry of Defence* [2003] UKHL 4; [2003] 1 AC 1163; *Begum (Runa) v Tower Hamlets LBC* [2003] UKHL 5; [2003] 2 AC 430; *Akram v Adam* [2004] EWCA Civ 1601; [2005] 1 W.L.R. 2762 (for discussion of this case see Ch.5 Service paras 5.81 ff and Ch.9 Disposal Without Trial paras 9.31 ff.

80 See also Ch.12 Case Management Pt II paras 12.206 ff.

81 *Ashingdane v United Kingdom* [1985] 7 E.H.R.R. 528 [57]. In *Tolstoy Miloslavsky v United Kingdom* [1995] 20 E.H.R.R. 442 [59], the ECtHR stated: “... the Court must be satisfied, firstly, that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Secondly, a restriction must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.”

82 *R v Immigration Appeal Tribunal Ex p. S* [1998] Imm. A.R. 252 at 268, QB.

83 *R (Mahajan) v Department of Constitutional Affairs* [2004] EWCA Civ 946 [41]; and see 2025 WB 3.11.1.

84 *Ashingdane v United Kingdom* (1985) 7 E.H.R.R. 528 [57]; *Fayed v United Kingdom* (1994) 18 E.H.R.R. 393 [65]; *Tinnelly and Sons Ltd v United Kingdom* (1998) 27 E.H.R.R. 249 [72]; and *National Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v United Kingdom* (1997) 25 E.H.R.R. 127 [105].

85 *Stubblings v United Kingdom* [1996] 23 E.H.R.R. 213; *Perez de Rada Cavanilles v Spain* [1998] 29 E.H.R.R. 109. A statutory limitation period which starts running before the injured party has any means of knowing they have a claim, so as to negate or cut short their ability to bring proceedings, will offend against the principle of legal certainty and amount to an unjustified restriction on their right of access to justice: *Howald Moor v Switzerland* [2014] ECHR 257 [71]–[79] (limitation expired before the claimants were aware they had been exposed to asbestos).

86 See CPR 3.1(5); CPR 25 Pt VI.

87 *MV Yorke Motors Ltd v Edwards* [1982] 1 All ER 1024; [1982] 1 W.L.R. 444, HL; *Anglo-Eastern Trust Ltd v Kermanshahchi* [2002] C.P. Rep. 36, CA.

88 For discussion see Ch.12 Case Management Pt II para.12.212 ff.

89 *CIBC Mellon Trust Co v Stolzenberg (Sanctions: Non-compliance)* [2004] EWCA Civ 827 [161]. Note the criticism of this decision in Ch.12 Case Management Pt II paras 12.211–12.212, in applying this approach not just to ex ante considerations of proportionality in imposing directions backed by sanctions, but also to ex post facto applications for relief from such sanctions.

90 *Brown v Stott (Proc Fiscal Dunfermline)* [2001] 2 All ER 97; [2003] 1 AC 681, PC.

91 *Hansom v E Rex Makin and Co* [2003] EWCA Civ 1801 [27].

92 See below, paras 3.49 ff.

93 See below, paras 3.40 ff.

94 *Stevens v School of Oriental and African Studies, The Times*, 2 February 2001; and see CPR 3.4(4).

95 See the discussion of strike out for abuse of process in Ch.12 Case Management Pt II paras 12.250 ff.

96 *Arkin v Marshall* [2020] EWCA Civ 620 [33].

97 *Arkin v Marshall* [2020] EWCA Civ 620 [33]–[34].

- 98 *Spiliada Maritime Corp v Cansulex Ltd (The Spiliada) [1987] AC 460 at 476; [1986] 3 All ER 843* at 854, HL; *Lubbe v Cape Plc [2000] 4 All ER 268* at 273–276; *[2000] 1 W.L.R. 1545* at 1553–1555, HL; *Lungowe v Vedanta Resources Plc [2019] UKSC 20; [2020] AC 1045* [88]–[101].
- 99 For a fuller discussion, see Dicey, Morris & Collins on the Conflict of Laws, 16th edn (London: Sweet and Maxwell, 2022), paras 12R-001(2) and 12-041 ff.
- 100 *Lubbe v Cape Plc [2000] 4 All ER 268; [2000] 1 W.L.R. 1545, HL.*
- 101 CPR 6.37(3). See Dicey, Morris & Collins on the Conflict of Laws, 16th edn (London: Sweet and Maxwell, 2022), paras 12R-001(3) and 12-058–12-059; and see *Cherney v Deripaska [2009] EWCA Civ 849; [2010] 2 All ER (Comm) 456; Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd [2011] UKPC 7; [2012] 1 W.L.R. 1804; Livingstone Properties Equities Inc v JSC MCC Eurochem [2020] UKPC 31.*
- 102 See Ch.7 Statements of Case para.7.9; Ch.12 Case Management Pt I paras 12.8 ff.
- 103 *Neumeister v Austria (No.2) [1974] 1 E.H.R.R. 136*, cited in G.J.H. van Hoof et al (eds.), Theory and Practice of the European Convention on Human Rights, 5th edn (Cambridge: Intersentia, 2018) Ch.10; *Colozza and Rubinat v Italy [1985] 7 E.H.R.R. 516; Pfeifer and Plankl v Austria [1992] 14 E.H.R.R. 692* [37]; *Oberschlick v Austria [1991] 19 E.H.R.R. 389* [51].
- 104 O. J. Settem, Applications of the ‘Fair Hearing’ Norm in ECHR Article 6(1) to Civil Proceedings (Springer, 2016) pp. 176–195.
- 105 See the discussion below of waiver of a right to object to a judge on grounds of bias, at paras 3.59 ff; *Smith v Kvaerner Cementation Foundations Ltd [2006] EWCA Civ 242*.
- 106 *Air Canada v United Kingdom (1995) 20 E.H.R.R. 150.*
- 107 CPR 39.2(1); 2025 WB 39.2.1; *JIH v News Group Newspapers Ltd [2011] EWCA Civ 42; [2011] 1 W.L.R. 1645* [21(7)], CA; *XW v XH [2019] EWCA Civ 549; [2019] 1 W.L.R. 3757* [20]. On the approach under the ECHR, see *Le Compte, Van Leuven and De Meyere v Belgium (1981) 4 E.H.R.R. 1* [59]; *Hakansson and Sturesson v Sweden [1990] 13 E.H.R.R. 1* [66]–[67].
- 108 See Ch.1 The Overriding Objective paras 1.101 ff.
- 109 2025 WB 26.5.1.
- 110 CPR 1.4(2)(e); CPR 3.1(2)(o), (p); CPR 26.5(3); *Churchill v Merthyr Tydfil County Borough Council [2023] EWCA Civ 1416; [2024] 1 W.L.R. 3827* [50]–[58], [74].
- 111 See further the discussion in Ch.1 The Overriding Objective paras 1.111 ff.
- 112 Halsbury’s Laws of England, 5th edn, Vol.24A (London: Lexis Nexis, 2025) para.28; E. Peel, Treitel on The Law of Contract, 16th Ed (London: Sweet & Maxwell, 2025), paras 11-047 ff. This applies to a variety of means of ousting the court’s jurisdiction, such as clauses purporting to be “uncontestable”, agreements in a separation settlement not to apply to the court for maintenance, provisions in a testator’s will which purports to empower the trustee to conclusively determine all questions and matters of doubt arising under the will, and clauses in rules of associations which purport to give to the committee of the association exclusive jurisdiction to construe the rules.
- 113 *OT Africa Line Ltd v Hijazy (The Kribi) [2001] 1 Lloyd’s Rep. 76*; L. Collins and J. Harris (eds.), Dicey, Morris & Collins on the Conflict of Laws, 16th edn (London: Sweet and Maxwell, 2022), paras 12R-062 ff.
- 114 Though see L. Collins and J. Harris (eds.), Dicey, Morris & Collins on the Conflict of Laws, 16th edn (London: Sweet & Maxwell, 2022), paras 12R-062, 12-101 and 12-107–12-110; cf. para.12-026. The fact that the parties agreed to refer their dispute to the courts of a particular jurisdiction will be taken as clear evidence that it is an available forum, and it will not ordinarily lie in the mouth of a party to object to that court’s exercise of jurisdiction on grounds that were foreseeable at the time the contract was made. Where the contract falls within the Hague Convention on Choice of Court Agreements 2005, the claimant seeking to bring proceedings in England will need to establish that giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to public policy (art.6).
- 115 Civil Jurisdiction and Judgments Act 1982 (as amended by the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 (SI 2019/479)), ss.15A–E. See further L. Collins and J. Harris (eds.), Dicey, Morris & Collins on the Conflict of Laws, 16th edn (London: Sweet and Maxwell, 2022), para.12-071.
- 116 A number of institutions offer arbitration services, for example the London Court of International Arbitration and the International Chamber of Commerce. Various international bodies promote standardised rules for arbitrations, the most important of which is the United Nations Commission in International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration and the UNCITRAL Arbitration Rules. See A. Redfern, M. Hunter, N. Blackaby and G. Partasides, Redfern & Hunter on International Commercial Arbitration, 7th edn (Oxford: Oxford University Press, 2022).
- 117 The jurisdiction of the arbitration tribunal depends on the parties’ agreement and almost any dispute may be referred to arbitration. The ECtHR has distinguished between voluntary and compulsory arbitration, which must conform with the

requirements of the ECHR art.6(1): *Bramelid and Malmstrom v Sweden [1985] 8 E.H.R.R. 116*; cf. *Mutu and Pechstein v Switzerland [2018] ECHR 324*.

118 Appeals against arbitration awards are in any event limited in scope. An arbitration tribunal's findings of fact are conclusive: *Geogas SA v Trammo Gas Ltd (The Baleares) [1993] 1 Lloyd's Rep. 215, CA*. Appeals on points of law must substantially affect the rights of one or more of the parties and must have been raised before the tribunal: *Arbitration Act 1996 s.69(3)(a)–(b)*. The court must be satisfied that the decision of the tribunal was obviously wrong or the question is one of general public importance and the award is at least open to serious doubt: *Arbitration Act 1996 s.69(3)(c); Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema) [1982] AC 724; [1981] 2 All ER 1030, CA; Antaio Cia Naviera SA v Salen Rederierna AB (The Antaio) [1985] AC 191; [1984] 3 All ER 229, HL*. And the court must believe that it is just and proper for it to determine the matter: *Arbitration Act 1996 s.69(3)(d)*. See further D.S. Sutton, J. Gill and M. Gearing (eds.), *Russell on Arbitration*, 24th edn (London: Sweet & Maxwell, 2015), Ch.8.

119 **Arbitration Act 1996 s.68.** The court can only grant the application if it considers that the irregularity “has caused or will cause substantial injustice to the applicant”.

120 **Arbitration Act 1996 s.67**, as amended by the **Arbitration Act 2025 ss.10–11**.

121 **Arbitration Act 1996 s.9(4).**

122 Vexatious litigation has long been considered an abuse of process: *Vexatious Actions Act 1896; M. Taggart, “Alexander Chaffers and the Genesis of the Vexatious Actions Act 1896”, (2004) 63(3) Cambridge Law Journal 656*. See *Ebert v Venvil, Ebert v Birch [2000] Ch 484 at 488; [1999] 3 W.L.R. 670* at 673–674, CA.

123 *H v United Kingdom [1985] 45 DR 281* at 285, ECom HR. For a review see *R (Ewing) v Department of Constitutional Affairs [2006] EWHC 504 (Admin)*, per Sullivan J.

124 See *Ebert v Venvil, Ebert v Birch [2000] Ch 484; [1999] 3 W.L.R. 670, CA; 2025 WB 3.4.4* and 9A-150.

125 *Grepe v Loam [1887] 37 Ch D. 168, CA.*

126 *Cavannah v Blackburn with Darwen Borough Council (CA, unreported, 23 November 2000); Ebert v Venvil, Ebert v Birch [2000] Ch 484; [1999] 3 W.L.R. 670, CA.*

127 *Ebert v Venvil, Ebert v Birch [2000] Ch 484; [1999] 3 W.L.R. 670, CA.*

128 *Re de Court, The Times, 27 November 1997* (order barring litigant from court premises); *Binder v Binder (CA, unreported, 9 March 2000)* (order forbidding litigant from entering court building without permission of the court, except where attending a hearing; and from communicating with any member of the court staff by phone, fax or email without permission of the court, except in respect of attendance at a hearing); *Agarwala v Agarwala [2016] EWCA Civ 1252 [71]–[72]* (ability to restrict litigants’ communications with the court and court staff under case management powers); *Seale v Seale (ChD, unreported, 30 March 2023) [26], [31]–[34]* (court attaching a penal notice to an order prohibiting a litigant contacting court staff except in narrow circumstances).

129 By the turn of the century, the incidence of vexatious litigation had grown to such an extent that in 2003 Brooke LJ observed in *Bhamjee v Forsdick [2003] EWCA Civ 1113* [25], that “the court is having to divert the skilled attention that ought to be paid to cases of real merit which warrant early hearings to cases which have no merit at all”. These observations led to the codification of the court’s powers to prohibit the commencement of abusive applications and proceedings in **CPR 3.11**: see 2025 WB 3.11.1.

130 *R (Kumar) v Secretary of State for Constitutional Affairs [2006] EWCA Civ 990; [2007] 1 W.L.R. 536; Tombstone Ltd v Raja [2008] EWCA Civ 1444*, applying *Nelson v Clearsprings (Management) Ltd [2006] EWCA Civ 1252; [2007] 1 W.L.R. 962*.

131 See 2025 WB 9A-150 ff. See also *Attorney General v Foley [2000] 2 All ER 609, CA; Tolstoy Miloslavsky v United Kingdom [1995] 20 E.H.R.R. 442; Attorney General v Matthews, Attorney General v Covey [2001] EWCA Civ 254; Re Vernazza [1959] 2 All ER 200; [1959] 1 W.L.R. 622* (approved by the Court of Appeal: *[1960] 1 QB 197; [1960] 1 All ER 183*).

132 *Attorney General v Vaidya [2017] EWHC 2152 (Admin)*. McKenzie Friends are discussed below, paras 3.174 ff.

133 An application for permission to apply for judicial review is itself a “proceeding”, so that permission under the **1981 Act s.42** is required: *Ewing v Office of the Deputy Prime Minister [2005] EWCA Civ 1583*. In this case the court laid down guidelines for dealing with applications by vexatious litigants for permission to commence judicial review proceedings: at [36]. Judicial review claims which seek to challenge a decision made in criminal proceedings are civil proceedings and thus also subject to **s.42: R (Ewing) v DPP [2008] EWHC 2655 (Admin)**.

134 The procedure for making an application for permission was formerly set out in PD 3A para.7, however this was revoked with effect from 1 October 2022. This is unfortunate given the importance of such applications, and because the former PD 3A para.7 contained useful specific guidance – including, for example, that the litigant must set out why permission was sought and to identify the previous occasions on which they had sought permission; for the application to be served on the person(s) whom the litigant proposed to sue; and for the court to be able to deal with the application without

a hearing (a challenge to which provision was rejected in *R (Ewing) v Department of Constitutional Affairs [2006] EWHC 504 (Admin)*).

135 *Williamson v Bishop of London [2023] EWCA Civ 379; [2023] 1 W.L.R. 2472.*

136 CPR 2.3(1).

137 Note that, in relation to extended CROs and general CROs, there are certain jurisdictional limits on the level of judge who may make such an order in the county court: PD 3C, paras 3.1 and 4.1. The scope of an extended CRO and general CRO (i.e., which courts are covered by the order) depends on the level of judge who made it, with orders made by the Court of Appeal having the widest effect: PD 3C, paras 3.2 and 4.2. Although CROs under CPR 3.11(2) and PD 3C relate to proceedings in the High Court, Court of Appeal or county court, the court may also make a restraint order in relation to proceedings in an inferior court or tribunal under its inherent jurisdiction: see *Law Society v Otobo [2011] EWHC 2264 (Ch)* and 2025 WB 3.11.4.

138 See also CPR 52.20(5)–(6); and see CPR 3.3(9), which relates to situations where the court strikes out a statement of case or dismisses an application of its own initiative.

139 2025 WB 3.11.3. See *Re Purvis [2001] EWHC 827 (Admin)* [18]–[19]; *Attorney General v Purvis [2003] EWHC 3190 (QB)* [30]–[31]; *Hurst v Denton-Cox (ChD, unreported, 23 February 2011)*; *CFC 26 Ltd v Brown Shipley and Co Ltd [2017] EWHC 1594 (Ch); [2017] 1 W.L.R. 4589*; *Adelaja v Islington LBC [2019] EWHC 1295 (QB)*; cf. *Howell v Evans [2020] EWHC 2729 (QB)* (individual restrained from issuing claims as litigation friend for, or otherwise on behalf of, his son). In *Sartipy v Tigris Industries Inc [2019] EWCA Civ 225; [2019] 1 W.L.R. 5892* the Court of Appeal confirmed that a CRO may be made not only against a non-party who was the “real” party behind the proceedings, but also the named party who has allowed themselves to be used to issue the proceedings even if they are personally innocent of any misconduct.

140 *Ashcroft v Webster [2017] EWHC 887 (Ch)*, on the approach to granting an extended CRO.

141 *Couper v Irwin Mitchell LLP [2017] EWHC 3231 (Ch); [2018] 4 W.L.R. 23* [25].

142 *Society of Lloyd's v Noel [2015] EWHC 734 (QB); [2015] 1 W.L.R. 4393*, holding that the court could have regard to all without-merit applications and claims made before an earlier extended CRO was imposed, when considering a subsequent application for an extended CRO. The same reasoning in allowing prior matters to be taken account of must apply, mutatis mutandis, on an application for a general CRO. The court may also take into account meritless claims and applications issued after a CRO is sought, but before the application is determined: *Central Bridging Loans Ltd v Anwer [2020] EWHC 1745 (Ch)* [27]. In deciding whether the test for an extended or general CRO is satisfied, the court is not confined to considering only applications and claims which were certified as being totally without merit at the time they were dismissed or struck out; it may decide that such earlier proceedings were in fact totally without merit even in the absence of such certification: *Sartipy v Tigris Industries Inc [2019] EWCA Civ 225* [37]; *Central Bridging Loans Ltd v Anwer*, [15]–[16]. But an earlier certification that an application or claim was totally without merit should be treated as conclusive, and should not be revisited or questioned subsequently: *Crimson Flower Productions Ltd v Glass Slipper Ltd [2020] EWHC 942 (Ch)* [26]–[29].

143 *Thakerar v Lynch Hall and Hornby [2006] 1 W.L.R. 1511.*

144 *R (Kumar) v Secretary of State for Constitutional Affairs [2006] EWCA Civ 990; [2007] 1 W.L.R. 536.*

145 See 2025 WB 3.11.7. A CRO may be extended even after it has expired, in which case the extension will take effect from the date of expiry: *Sartipy v Tigris Industries Inc [2019] EWHC 3646 (Ch)* [23]–[24]. Note that in that case, there was no need for the court to consider how steps taken by the litigant after the expiry of the CRO, but before the retrospective extension, should be dealt with: [36].

146 *Deeds v Various Respondents [2013] EWCA Civ 1678* [13]–[15]; *Gopee v Southwark Court Court [2023] EWCA Civ 881* [36]–[37].

147 PD 3C paras 2.2(3), 3.2(3) and 4.2(3).

148 PD 3C paras 2.2(2), 3.2(2) and 4.2(2).

149 PD 3C paras 2.4, 3.4 and 4.4.

150 A request for a transcript at public expense is not an application subject to a CRO and does not require permission: *Anwer v Central Bridging Loans Ltd [2022] EWCA Civ 201* [31]–[37].

151 Whereas proceedings brought without permission in breach of an order under the 1981 Act s.42 are a nullity (see para.3.42 above and *Williamson v Bishop of London [2023] EWCA Civ 379; [2023] 1 W.L.R. 2472*), the same is not true of proceedings brought without permission in breach of a CRO. In such cases permission can be granted retrospectively provided the test for relief from sanctions in CPR 3.9 is met: *Couper v Irwin Mitchell LLP [2017] EWHC 3231 (Ch); [2018] 4 W.L.R. 23* [28]–[29].

152 *Mathew v Attorney General [2013] EWHC 3009 (Admin).*

153 *Forrester Ketley and Co v Brent [2008] EWHC 3150 (Ch).*

- 154 *Ebert v Official Receiver* [2001] EWCA Civ 340; [2001] 3 All ER 942; [2002] 1 W.L.R. 320.
- 155 PD 3C paras 2.8, 3.8 and 4.8.
- 156 PD 3C paras 2.3(2), 3.3(2) and 4.3(2).
- 157 *Ashingdane v United Kingdom* [1985] 7 E.H.R.R. 528 [57]; *Attorney General v Marcus David Jones* [1990] 2 All ER 636; [1990] 1 W.L.R. 859, CA; *Ebert v Official Receiver* [2001] EWCA Civ 340; [2002] 1 W.L.R. 320 [9]; *Mathew v Attorney General* [2013] EWHC 3009 (Admin) [23]–[24].
- 158 *Achille v Birmingham County Court* [2021] EWCA Civ 1388 [26].
- 159 *H v United Kingdom* [1985] 45 DR 281 at 285, ECom HR; *Attorney General v Matthews, Attorney General v Covey* [2001] EWCA Civ 254; *Ebert v Official Receiver* [2001] EWCA Civ 340; [2002] 1 W.L.R. 320; *R (Ewing) v Department of Constitutional Affairs* [2006] EWHC 504 (Admin).
- 160 Prior to the *Mental Capacity Act 2005* protected parties were referred to in the *CPR* as “patients” (*RSC Ord.80; CCR Ord.10*).
- 161 The old rules used the terms “legal disability” to refer to the inability of children and protected parties to conduct proceedings themselves, and litigation friends were called “guardians ad litem” and “next friends” (*RSC Ord.80; CCR Ord.10*).
- 162 As far as protected parties are concerned see: *Stewart-Brady v United Kingdom* [1997] 24 E.H.R.R. CD 38; *Ashingdane v United Kingdom* [1985] 7 E.H.R.R. 528; and *RP v United Kingdom* [2012] ECHR 1796. With respect to children see: *Golder v United Kingdom* [1975] 1 E.H.R.R. 524 [39].
- 163 CPR 21.12 provides the power for litigation friends to recover expenses incurred in proceedings. Further provisions regarding children and protected parties are scattered throughout the *CPR*: See *CPR 6.25* (service), *CPR 12.11–12* (default judgment), *CPR 14.2(10)* (judgment on admission), *CPR 22.1(5)–(6)* (statement of truth), *CPR 39.2(3)(d)* (hearings) and *CPR 46.4* (costs). See also *J (a child) v Wind* [2000] C.L.Y. 419.
- 164 *Masterman-Lister v Brutton and Co* [2002] EWCA Civ 1889; [2003] 1 W.L.R. 1511.
- 165 *Masterman-Lister v Brutton and Co* [2002] EWCA Civ 1889; [2003] 1 W.L.R. 1511 [75].
- 166 *Bailey v Warren* [2006] EWCA Civ 51.
- 167 Typically, this will be where the child is close to attaining majority, and is sufficiently mature and intelligent that they can be treated as having sufficient capacity to conduct proceedings in their own right.
- 168 2025 WB 21.4.1, 21.5.1–2. A precondition is that no other person has already been appointed as litigation friend: *CPR 21.4(1)*.
- 169 For guidance on what is meant by “fairly and competently conduct proceedings”, see *Bushby v Galazi* [2022] EWHC 136 (Ch) [55]–[60]. It includes an obligation to help the court further the overriding objective on the child or protected party’s behalf (*CPR 1.3*).
- 170 *R (Hussain) v Birmingham CC* [2002] EWHC 949 (Admin); [2002] C.P. Rep. 54.
- 171 Where the protected party and the proposed litigation friend consent to the appointment, there is adequate evidence to support the application, and there is no evidence suggesting that the application is anything but a bona fide one, the court should make the order sought without necessarily allowing the other party to dispute it: *Folks v Faizey* [2006] EWCA Civ 381.
- 172 It is implicit within *CPR 21.4(3)* that consent to act is needed from the litigation friend; accordingly, if a litigation friend withdraws their consent, the court should discharge them unless there are exceptional circumstances justifying their continued appointment against their will: *Major v Kirishana* [2023] EWHC 1593 (KB); [2024] 1 W.L.R. 4212. Loss of a trial date will not, on its own, normally amount to such circumstances.
- 173 Senior Courts Act 1981 s.90.
- 174 *JT v United Kingdom*, Application No.26494/95, 20 May 1998, ECom HR. It was held that the absence of any possibility for a patient to change her next friend on the ground of concerns about the identity of that person was a disproportionate interference with her rights under the ECHR art.8; 2025 WB 21.2.1.
- 175 *DD v Lithuania* [2012] ECHR 254.
- 176 A consent order made by a protected party without a litigation friend would be invalid even where the individual’s lack of capacity was unknown to anyone acting for either party at the time of the compromise: *Dunhill v Burgin* [2014] UKSC 18; [2014] 1 W.L.R. 933.
- 177 *Masterman-Lister v Brutton and Co* [2002] EWCA Civ 1889; [2003] 1 W.L.R. 1511 [31].
- 178 *Drinkall v Whitwood* [2003] EWCA Civ 1547; [2004] 4 All ER 378.
- 179 For discussion of abuse of process see Ch.12 Case Management Pt II paras 12.250 ff.

The Right to an Independent and Impartial Tribunal

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 3 - Fair Trial

The Right to an Independent and Impartial Tribunal

The general principles

3. 56 Courts owe a duty of impartiality to litigants and to the public at large. A judge must evaluate the dispute by reference to general rules (whether of law or of factual reasoning) which are accepted independently of the particular case, without being influenced by personal preference or animosity concerning the parties, or any other matters which are unconnected with the merits. As the Court of Appeal put it in *Locabail (UK) Ltd v Bayfield Properties Ltd*:

“All legal arbiters are bound to apply the law as they understand it to the facts of individual cases as they find them. They must do so without fear or favour, affection or ill will, that is without partiality or prejudice. Justice is portrayed as blind not because she ignores the facts and circumstances of individual cases but because she shuts her eyes to all considerations extraneous to the particular case.”¹⁸⁰

3. 57 English law insists not only on the absence of bias, but also on the absence of any appearance of bias.¹⁸¹ As Lord Hewart CJ put it, it is “of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done”.¹⁸² An appearance of impartiality is essential for public confidence in the administration of justice.¹⁸³ For this reason it is imperative that the judiciary ensure that proceedings are conducted so that a reasonable appearance of partiality or bias does not arise.¹⁸⁴ It is equally imperative that any question of alleged bias be raised and considered judicially at the earliest opportunity.¹⁸⁵ Closely related to the requirement that judicial decision-making should be, and should be seen to be, free from bias is the principle of judicial independence. As Baroness Hale explained, whereas impartiality is the tribunal’s approach to deciding cases before it, “[i]ndependence is the structural or institutional framework which secures this impartiality, not only in the minds of the tribunal but also in the perception of the public.”¹⁸⁶ The right to an independent and impartial tribunal under ECHR art.6(1) thus reflects the long-held position of English law.

3. 58 There are two separate heads of disqualification for bias.¹⁸⁷ One is concerned with the presence of a real possibility, or a reasonable apprehension, of bias and the other is described as automatic disqualification due to an interest that the judge has in the outcome of the litigation. It is, however, doubtful whether there is a meaningful difference between the two tests and whether the distinction between them serves a useful purpose. This point is discussed more fully below;¹⁸⁸ for the present it is sufficient to refer to Mummery LJ’s view in *Morrison v AWG Group Ltd*:

“I do not think that disqualification of a judge for apparent bias is a discretionary matter. There was either a real possibility of bias, in which case the judge was disqualified by the principle of judicial impartiality, or there was not, in which case there was no valid objection to trial by him. On the issue of disqualification an appellate court is well able to assume the vantage point of a fair-minded and informed observer with knowledge of the relevant circumstances. It must itself make an assessment of all the relevant circumstances and then decide whether there is a real possibility of bias.”¹⁸⁹

In either case, it is important to recognise that the scheme is based both on the right of individual litigants to an impartial tribunal, and on the need to preserve public confidence in the administration of justice. Thus, where a judge is found to be biased on one of these tests, a litigant has a right to insist that the judge should step down or else that their decision be set aside.¹⁹⁰ At the same time, as we shall see, the scope of the test for bias must be guided by considerations of public confidence. This calls for a balance to be struck. On the one hand, the courts must not be overly formalistic or pedantic when assessing allegations of bias, but rather should stand back and consider whether the circumstances, taken as a whole, might give rise to a legitimate concern that the judge was biased. On the other hand, the courts must be careful not to accede too easily to spurious allegations of bias, since this might enable litigants to forum-shop or else engage in delaying tactics.¹⁹¹

Disclosure of possible grounds of bias and waiver of objection

- 3. 59** A person may waive their right under ECHR art.6(1) to an impartial and independent tribunal, provided that the waiver is unequivocal and does not run counter to any important public interest.¹⁹² It would be clearly contrary to the public interest for a litigant to waive their right and agree to be judged by a judge who is in fact biased—for example, a judge who has accepted a bribe. But a litigant can validly waive an objection that the court is not independent, or an objection founded on the appearance of bias or on the presence of some tangential interest that the judge has in the outcome.
- 3. 60** The effectiveness of waiver was considered by the Privy Council in *Millar v Dickson (Procurator Fiscal, Elgin)*,¹⁹³ where Lord Bingham explained that for a waiver to be valid it must be a voluntary, informed and unequivocal election by a party not to raise an objection on the grounds of independence or impartiality.¹⁹⁴ Thus, waiver requires that the person who is said to have waived “has acted freely and in full knowledge of the facts”.¹⁹⁵ In *Millar* the accused were unaware that they had a valid objection to being tried by temporary sheriffs and it was therefore held that it could not be meaningfully said that they had voluntarily elected not to raise an objection to independence since they were unaware that it was open to them to do so.
- 3. 61** Waiver need not be express but may be implied. In *JSC BTA Bank v Ablyazov*¹⁹⁶ an applicant objected to the judge conducting the trial on the grounds that the judge had earlier found him guilty of contempt arising from a freezing order in the same proceedings. The Court of Appeal found that the applicant had waived his objection by having delayed making it for seven months until the eve of the trial. Rix LJ concluded that the applicant had “a duty to speak, arising out of [their] duty to help the court to further the overriding objective (CPR 1.3). It was contrary to that duty to allow the court and the other parties to waste time and resources in preparing for a trial”.¹⁹⁷ The lateness of the application and the absence of any explanation for the delay were found to be conclusive in view of the fact that the applicant was aware of all the material facts, including the fact that the judge in question was the designated trial judge, from the moment the contempt findings were made.¹⁹⁸
- 3. 62** A judge who has some connection with the case or with the parties which could give rise to a reasonable apprehension of bias, but which the judge does not regard as an impediment to their trying the case, should declare the connection at the outset and ask the parties whether they have any objection to their hearing the case.¹⁹⁹ Failure to raise an objection at that time may amount to waiver and disentitle the parties from raising it for the first time on appeal (unless of course further material facts transpire later).²⁰⁰ However, such waiver will be effective only if it was informed, free from fear that objecting to the judge would disadvantage the party in some way, and free of pressure from the party’s own legal representatives to do so.²⁰¹ A judge should therefore raise any conflicts at the earliest opportunity (including taking steps to inform themselves about such matters where appropriate); make every effort to provide a full and clear explanation of the matters within their knowledge that give rise to a possible conflict of interest; to ensure that the explanation given is properly recorded; to identify the options open to the parties (including when the case is likely to be relisted if an application to recuse is made and granted); to avoid giving the impression of a preference; and to allow the parties a short period of reflection before requiring them to decide whether to waive or object.²⁰² Where a judge fails to disclose facts that should have been disclosed, the judgment would not be automatically

liable to being set aside;²⁰³ the test of apparent bias would still need to be satisfied although the non-disclosure may give rise to the inference that it had “an improper or sinister explanation”.²⁰⁴

- 3.63 Proper disclosure of matters which could give rise to a reasonable apprehension of bias has been held to be of particular importance in the context of arbitrations.²⁰⁵ Like regular courts, arbitral tribunals are required to act fairly and impartially as between the parties ([Arbitration Act 1996 s.33](#)), and an arbitrator may be removed by the court on the grounds of actual or apparent bias ([Arbitration Act 1996 s.24\(1\)](#)). Arbitration has distinctive characteristics which could result in the integrity of the arbitral system being undermined if proper standards of disclosure are not observed and enforced.²⁰⁶ For example, arbitrators are nominated (directly or indirectly) by the parties and may have a financial interest in securing further such appointments; there is little if any public scrutiny of their awards and the courts have limited powers of review; arbitrators may be appointed to act in multiple arbitrations involving the same party or concerning the same or overlapping subject matter; and, since arbitrations are private, a party who is not privy to such other arbitrations will have no means of knowing what evidence and submissions were before the tribunal or what the arbitrator’s response to it was. For these reasons, disclosure of matters which might give rise to justifiable doubts about an arbitrator’s impartiality is not merely a matter of good practice to help shield the tribunal’s decision from future attack; it is a legal obligation which was recognised by the Supreme Court in *Halliburton Co v Chubb Bermuda Insurance Ltd* to be part and parcel of the arbitrator’s statutory duties under [s.33 of the Arbitration Act 1996](#).²⁰⁷ Following the entry into force of the [Arbitration Act 2025](#), the duty of disclosure identified by the Supreme Court in *Halliburton* has been put on an express statutory footing.²⁰⁸ Although non-disclosure of such matters will not automatically lead to the conclusion that the test of apparent bias is met, it is a relevant factor which could tip the balance in a borderline case (that is, a case where one would readily conclude that there is apparent bias in the absence of further explanation).²⁰⁹

Disqualification for bias, actual or apprehended

The test of a fair-minded and informed observer

- 3.64 Although the head of disqualification for bias (as distinguished from disqualification for interest, discussed below)²¹⁰ is sometimes referred to as a test of actual bias, it is principally concerned with the possibility, or the appearance, of bias rather than with actual bias. Actual bias is very difficult to prove, not least because the law does not allow judges to be questioned about what has influenced their decision.²¹¹ More important still, the legal test must not only ensure that the court is not biased but also that it is seen to be impartial. The need to safeguard against a public perception of bias is the key factor in this regard.²¹²

- 3.65 Given that the test has to focus on the possibility or appearance of bias, the question inevitably arises: what kind of possibility or appearance and from whose point of view? There was formerly a tension between two approaches. On the one hand, there was a line of cases that held that it was enough to show that there was room for a reasonable suspicion or apprehension of bias.²¹³ Similar approaches were followed in other jurisdictions, such as Scotland and Australia.²¹⁴ A similar test was adopted by the ECtHR, according to which a judge is disqualified if fear of bias could be objectively justified.²¹⁵ In *R v Gough*,²¹⁶ however, the House of Lords held that in order to disqualify a judge a real likelihood or possibility of bias had to be shown; mere apprehension of bias by a fair-minded observer was not enough. That decision was open to the criticism that it did not pay sufficient regard to the appearance of bias and to the need to foster public confidence in the court. For, if fair-minded members of the public have a reasonable apprehension of bias, it would not necessarily allay their misgivings that judges have decided that in practice there was no real danger of bias.

- 3.66

Following the incorporation of the ECHR into English law, the courts reverted to the pre-*Gough* position. In *Re Medicaments and related Classes of Goods (No.2)*²¹⁷ the Court of Appeal introduced “a modest adjustment” of the *Gough* position so that it was closer to the reasonable apprehension criterion and in line with the ECtHR jurisprudence. This approach was endorsed by the House of Lords in *Porter v Magill*,²¹⁸ where it was held that in determining whether there had been apparent bias on the part of a tribunal,²¹⁹ the court should no longer simply ask itself whether there was a real danger of bias. Rather, the test was whether the relevant circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the tribunal had been biased. This test was further elaborated by the House of Lords in *Lawal v Northern Spirit Ltd*, where it was said that the court should ask itself “whether in the view of a fair-minded and informed observer there was a real possibility of *subconscious bias* on the part of the [members of the tribunal in question]”.²²⁰ The *Porter* test was affirmed in *Halliburton Co v Chubb Bermuda Insurance Ltd*, in the context of arbitrations governed by the *Arbitration Act 1996*.²²¹

3. 67

A fair-minded and informed observer is taken to be a reasonable member of the public²²² who (i) takes the trouble to inform themselves on all matters that are relevant and to place them in context; (ii) adopts a balanced approach and does not reach a judgement on any point before acquiring a full understanding of both sides of the argument; (iii) reaches conclusions which are objectively justified; and (iv) is “neither unduly complacent or naïve nor unduly cynical or suspicious”; but (v) is alive to the possibility of opportunistic or tactical challenges.²²³ It is therefore enough that such a person would think that there was a real possibility that the judge might, even unconsciously and without any sense of impropriety, prefer one side over another.²²⁴ In considering a challenge to the objectivity of the court, account needs to be taken of all the material circumstances, and not just the facts known to the applicant at the time.²²⁵ These would include any explanation provided by the judge and the impression that the judge’s conduct would have had on a fair-minded person; and may also include facts that are not in the public domain. Given the importance attached to the appearance of justice it has been held that where there is any doubt whether a fair-minded observer would detect bias, that doubt should be resolved in favour of recusal.²²⁶

Knowledge of law, procedure and legal culture attributed to the fair-minded and informed observer

3. 68

No sooner was it settled that the reasonable apprehension test had to be applied from the viewpoint of a fair-minded and informed observer than the court was called upon to determine what kind of information the fair-minded observer must be assumed to possess. In *Taylor v Lawrence*²²⁷ the judge informed the parties at the outset that he had been a client of the claimants’ solicitors some years before and no objection was taken. After judgment was given it transpired that the judge had used the services of the solicitors to amend his will shortly before delivering judgment and that he was not being charged for this. The defendants applied to reopen the case. A powerful five-member panel of the Court of Appeal, including the Lord Chief Justice and the Master of the Rolls, explained what knowledge the informed observer test had to assume:

“The informed observer can be expected to be aware of the legal traditions and culture of this jurisdiction. Those legal traditions and that culture have played an important role in ensuring the high standards of integrity on the part of both the judiciary and the profession which happily still exist in this jurisdiction. Our experience over centuries is that this integrity is enhanced, not damaged, by the close relations that exist between the judiciary and the legal profession. Unlike some jurisdictions the judiciary here does not isolate itself from contact with the profession. Many examples of the traditionally close relationship can be given: the practice of judges and advocates lunching and dining together at the Inns of Court; the Master of the Rolls’ involvement in the activities of the Law Society; the fact that it is commonplace, particularly in specialist areas of litigation and on the circuits, for the practitioners to practise together in a small number of chambers and in a small number of firms of solicitors, and for members of the judiciary to be recruited from those chambers and firms.”²²⁸

The Court of Appeal concluded that it was unthinkable that an informed observer would regard it as conceivable that a judge would be influenced to favour a party with whom they had no relationship, merely because that party happened to be represented by solicitors who were acting for the judge in a purely personal matter in connection with a will.

3. 69 However, the attribution to the fair-minded observer of knowledge of the English legal tradition and its rules risks distancing the test from lay perceptions of fairness. The facts of *Taylor v Lawrence* illustrate the potential for a gulf between legal and popular conceptions of the appearance of bias. For, while a fair-minded lawyer would not see any possibility of bias arising from the fact that during the proceedings the judge had their will changed free of charge by solicitors representing one of the parties, members of the public may need a little more persuading. If the test of bias is to maintain public confidence, the standard of a detached observer must remain rooted in public conceptions of fairness and justice.
3. 70 This last point was made by Lord Steyn in *Lawal*, already mentioned.²²⁹ It was argued in that case that it was unlikely that lay members of an Employment Appeal Tribunal (EAT) would be unduly influenced by leading counsel appearing before them, who on previous occasions sat as a judge with the lay members. But Lord Steyn stressed that what was in question was not so much the likelihood of real bias but the reasonable apprehension of a fair-minded and informed person of unconscious bias or tendency to be swayed by leading counsel with whom a lay member of the EAT had sat previously and has come to respect. And he added:
- “The indispensable requirement of public confidence in the administration of justice requires higher standards today than was the case even a decade or two ago. The informed observer of today can perhaps ‘be expected to be aware of the legal traditions and culture of this jurisdiction’ as was said in *Taylor v Lawrence [2002] EWCA Civ 90* at [61]–[64] … per Lord Woolf CJ. But he may not be wholly uncritical of this culture.”²³⁰
- Since, as Lord Steyn emphasised, the very reason for the test is to foster “the confidence which must be inspired by the courts in a democratic society”,²³¹ the test of the fair-minded and informed observer must not subsume information and attitudes that the public at large does not share.²³²
3. 71 Lord Steyn’s observation that members of the public may be aware of a particular legal culture but at the same time may not approve of it should have carried more weight with the court in *A v B*.²³³ There the court ruled that the fair-minded and informed observer who was presumed to know how the legal profession worked would not consider that there was a real possibility of bias merely because, concurrently with the arbitration process, an arbitrator acted as counsel for one of the solicitors’ firms acting in the arbitration. The judge seemed to think that only an ignorant and prejudiced observer could hold a different view, but this is surely contestable. The better view is that where there is a current professional relationship between an adjudicator and one of the firms representing a party to the arbitration, the adjudicator should recuse themselves.²³⁴
3. 72 The approach taken in Australia to these questions is instructive. The High Court of Australia, applying a similar test of apprehended bias to the English courts,²³⁵ has stressed that the “hypothetical observer is not conceived of as a lawyer but a member of the public served by the courts”.²³⁶ In *Charisteas v Charisteas*, a judge presiding over financial remedy proceedings had various communications with the wife’s barrister in person, by telephone and text while seised of the matter (although not during the evidence stage of the trial). The appeal court below had imputed to the notional observer knowledge that “barristers are professional members of an independent Bar who do not identify with the client; that judges are usually appointed from the senior ranks of the Bar; and that it may be expected they will have personal or professional associations with many counsel appearing before them”. It had concluded that a fair-minded observer armed with this knowledge would be “able to tolerate” some degree of private communication between a judge and the legal representative of only one party.²³⁷ The High Court rightly rejected this approach, observing that the “alignment of the fair-minded lay observer with the judiciary and the legal profession [in this way] is inconsistent with the apprehension of bias principle and its operation and purpose … It would defy logic and render nugatory the principle to imbue the hypothetical observer with professional self-appreciation of this kind”.²³⁸ The fair-minded observer “is not to be assumed to have a detailed knowledge of the law, or of the character or ability of a particular judge,” rather, the reasonableness of any suggested apprehension of bias is to be considered only in the context of “ordinary judicial practice”.²³⁹ In the circumstances, the observer would reasonably apprehend that the trial

judge's impartiality might have been compromised by something said in the course of the communications with the wife's barrister, or by some aspect of the personal relationship exemplified by the communications.²⁴⁰

- 3.73 The High Court's reasoning is compelling and, it is submitted, achieves the underlying objective of ensuring that the hypothetical observer is imbued with enough contextual understanding of the legal system and process to enable them to arrive at a competent conclusion,²⁴¹ without eliding them with sophisticated legal operators whose conceptions of fairness and propriety might naturally differ from that of the lay public. As Lord Rodger observed, “[t]he whole point of inventing this fictional character is that he or she does not share the viewpoint of a judge”.²⁴²

Apprehended bias due to previous relationship with a party or their representatives

- 3.74 As is apparent from the foregoing discussion, in England there is traditionally a close relationship between the judiciary and the legal profession. The judiciary is drawn from among the legal profession, especially from members of the Bar. It is therefore not uncommon for judges to have more than passing familiarity with advocates as a result of sharing chambers, being partners in a law firm or appearing alongside each other in the past. Since cases are often heard by part-time judges who may still be practising members of the profession, it can happen that judges have a continuing professional relationship with the advocates appearing before them, such as sharing chambers or being led by or leading those appearing before them.²⁴³ Such relationships have had to be addressed by the court on a number of occasions. For the reasons set out above, the cases in this area should be approached with some caution; specifically, close attention should be paid to the degree of familiarity with (and acceptance of) the legal profession's traditions and culture that is imputed to the hypothetical fair-minded observer.

- 3.75 In *Locabail (UK) Ltd v Bayfield Properties Ltd* the Court of Appeal considered that the fact that a judge had shared chambers with counsel could not of itself lead to their disqualification, because barristers are sole traders, do not normally have substantial involvement in the professional affairs of other members of the same chambers and their independence is underpinned by the high professional standards observed by the Bar.²⁴⁴ However, while the fact that a part-time judge is a member of the same chambers as one or more of the advocates is not of itself a ground for complaint, financial arrangements within the chambers may give cause for concern, particularly where the advocate in question is acting under a conditional fee agreement.²⁴⁵ Further, in circumstances where a party seeking recusal has accused the advocate from the same chambers as the judge of misconduct, “the issue of recusal is acutely fact sensitive, and it is not difficult to think of cases on the other side of the line where the fair-minded observer would consider that such a situation did give rise to a real possibility of bias”.²⁴⁶

- 3.76 In *Lawal* the House of Lords considered the practice according to which a KC could appear on an appeal before the EAT which consisted of part-time lay members with whom the KC sat as a judge in other cases.²⁴⁷ The House of Lords considered that a fair-minded observer might well be concerned about the possibility of unconscious bias tending to favour the KC's submissions, and that the practice allowing the KC to appear in such circumstances tended to undermine public confidence in the system and should be discontinued.²⁴⁸

- 3.77 Where there is a history of personal friendship or animosity between the judge and a party's legal representative, this may well give rise to a reasonable apprehension of bias. In *Howell v Lees Millais*²⁴⁹ a judge had engaged in negotiations with a firm of solicitors with the aim of joining the firm, which ended acrimoniously. He later refused an application to recuse himself by a party who was represented by a partner in the same firm. The Court of Appeal found that in view of the background he should have recused himself, and moreover was highly critical of the intemperate way in which he had dealt with the application (including by cross-examining the partner as if he, the judge, was fighting his own case). *Howell* might be contrasted with *Harb v Prince Abdulaziz*,²⁵⁰ a striking case in which a High Court judge sent an extraordinary letter to a party's barristers' head of chambers between the date of the hearing and judgment, claiming that he would “no longer support [the chambers]” and “[did] not wish to be associated with [it]”. The letter was prompted by an unfavourable article

in *The Times* newspaper about the judge, written by a senior member of the chambers in question. The Court of Appeal described the letter as “shocking” and “disgraceful”, and accepted that “the informed and fair-minded observer, knowing of the article, would conclude that there was a real possibility that the judge was biased against all members of [the chambers concerned]”.²⁵¹ However, the court went on to hold that “the observer would not conclude *without more* that there was a real possibility that this bias would affect the judge’s determination of the issues.”²⁵² Since the author of the article was not directly involved in the case and the evidence showed that the judge had dictated at least the first draft of the judgment before the article was published, the court was satisfied that the allegation of bias was not made out. The problem with this reasoning is that it elides considerations of apparent and actual bias, and risks regressing to the *Gough* approach to bias rather than the modern approach following *Porter v Magill*.²⁵³ The modern approach recognises that public confidence in the justice system is the key consideration, so the court should stand back and consider whether the circumstances, taken as a whole, might give rise to a legitimate concern that the judge was biased. This should have carried more weight with the Court of Appeal in *Harb*: it is difficult to imagine more egregious comments about a set of chambers, or a statement more likely to cause the public to doubt the judge’s ability to remain impartial in cases involving any member of that chambers.

- 3.78 A history of friendship with or personal animosity towards a party is obviously likely to disqualify a judge from hearing that party’s case, but past professional association with a party (e.g. as a former client) will not of itself do so.²⁵⁴ The position is somewhat more complex where a part-time judge is currently a partner in a firm of which a party is a client. Partners are legally responsible for the professional acts of other partners, and owe a duty to clients of the firm even though they have never acted for them personally and know nothing of their affairs. The prudent course would be to conduct a conflict check within their firm before embarking of the trial of any assigned case, although it would be going too far to say that the judge should step down whenever it is discovered that a party is a client of the firm.²⁵⁵ While it is vital to safeguard the integrity of court proceedings, the rules must not be applied in a way that inhibits the increasingly valuable contribution made by solicitors to the discharge of judicial functions.

- 3.79 A judge must recuse themselves if they have had a longstanding personal relationship with a witness for one of the parties.²⁵⁶ In *Morrison v AWG Group Ltd (formerly Anglian Water Plc)*,²⁵⁷ the judge notified the parties shortly before the trial that he had had a longstanding acquaintance with one of the witnesses that the claimants proposed to call and that he would have to recuse himself because he “would have the greatest difficulty in dealing with a case in which Mr J … [the witness] was a witness where a challenge was to be made as to the truthfulness of his evidence”. The claimants thereupon notified the judge that they would not call Mr J but would instead call other witnesses to testify to the same facts. The judge decided, in the face of an objection from the defendants, that he should hear the case after all, especially in view of the fact that he had done extensive preparatory reading and that the transfer of the case to another judge would involve delay and extra burden on the administration of justice. The Court of Appeal held that the withdrawal of Mr J as a witness would not remove the perception of bias. This is because the removal of Mr J did not remove his involvement in the case. If the replacement witnesses gave the evidence that Mr J would have given, the judge would be placed in an embarrassing position similar to that in which he would have been if Mr J had actually been called to give evidence. He would still have to make findings that had implications about Mr J’s integrity. As to the implications of finding a new judge for a long and complex case so late in the day, Mummery LJ said:

“… while I fully understand the judge’s concerns … about the prejudicial effect that his withdrawal from the trial would have on the parties and on the administration of justice, those concerns are totally irrelevant to the crucial question of the real possibility of bias and automatic disqualification of the judge. In terms of time, cost and listing it might well be more efficient and convenient to proceed with the trial, but efficiency and convenience are not the determinative legal values: the paramount concern of the legal system is to administer justice, which must be, and must be seen by the litigants and fair-minded members of the public to be, fair and impartial. Anything less is not worth having.”²⁵⁸

Conduct at trial giving an impression of bias

3.80

A reasonable apprehension of bias may arise where the judge is said to have been excessively interventionist at trial—for example, by interrogating witnesses or by shutting down the presentation of a party’s case, or as a result of comments made by the judge unconnected with the conduct of the trial, which appear to evince prejudice on their part.²⁵⁹ Two points need to be borne in mind here. First, the overriding objective calls for judges to be more proactive at trial than previously.²⁶⁰ Whether a judge’s conduct at trial has strayed beyond the bounds of propriety must therefore be assessed in the light of modern norms of case management.²⁶¹ Second, there is a considerable overlap between this species of apparent bias and procedural unfairness arising from excessive interference with the presentation of the parties’ cases at trial. There is, however, a distinction between the two.²⁶² Whereas there will be apparent bias if the judge’s interventions give rise to a reasonable impression of hostility towards one party, or of prejudgment of the issues in the case,²⁶³ the existence of procedural unfairness “does not depend on appearances, or on what the objective observer of the process might think of it. Rather, the risk is that the judge’s descent into the arena … may so hamper his ability properly to evaluate and weigh the evidence before him as to impair his judgment and may *for that reason* render the trial unfair.”²⁶⁴

3.81

The relationship between apparent bias and procedural unfairness resulting from a judge’s conduct at trial recently received attention in *Serafin v Malkiewicz*.²⁶⁵ In that case, the trial judge was found by the Court of Appeal to have “not only … descended to the arena, cast off the mantle of impartiality and taken up the cudgels of cross-examination, but also to have used language which was threatening, overbearing and, frankly, bullying” towards the claimant, who was representing himself.²⁶⁶ The Court of Appeal found the trial to have been procedurally unfair, though the question of apparent bias was not expressly considered. On appeal, the Supreme Court approved the Court of Appeal’s approach of treating the issue as one of procedural unfairness rather than apparent bias.²⁶⁷ The court assumed, without deciding, that “bias” was to be given a “narrow definition”, namely “a prejudice against one party or its case for reasons unconnected with the legal or factual merits of the case”.²⁶⁸ On this basis, the court considered (albeit obiter) that it was

“far from clear that the [fair-minded] observer would consider that the judge had given an appearance of bias. A painstaking reading of the full transcripts … strongly suggests that, insofar as the judge evinced prejudice against the claimant, it was the product of his almost immediate conclusion that the claim was hopeless and that the hearing of it represented a disgraceful waste of judicial resources.”²⁶⁹

There are a number of difficulties with this reasoning. First, the meaning given to the term “bias” is unduly narrow if it results in any conduct which can be attributed to the factual or legal merits of a case escaping the fair-minded observer test. It would be possible to link most judicial remarks and interventions in some way to the facts, merits or presentation of the case. Second, and related, it is not clear why bias was discounted on the ground that the trial judge’s conduct was based on his “almost immediate conclusion” that the claimant’s case was “hopeless”. It is well established that a perception of bias may arise where the judge “expresse[s] views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind”,²⁷⁰ and not just where personal animosity towards one of the parties is shown. Finally, it is clear that the judge’s behaviour *did* suggest that he had “developed an animus towards the claimant”, as the Court of Appeal found.²⁷¹ It is therefore inconceivable that the fair-minded observer, looking at matters in the round, would conclude that there was no possibility that the trial judge’s determination would be tainted by bias. The better view is thus that the judge’s conduct in *Serafin v Malkiewicz* both produced actual unfairness in hampering the claimant’s ability to present his case, and gave rise to a reasonable apprehension of bias by demonstrating an “animus” towards the claimant himself.

Strongly held views

3.82

A judge may be affected not only by their relationship with the parties or their legal representatives but also by preconceived or strongly held views on the issues in the case. The fact that the judge had expressed strongly held views on matters pertaining to the issues in the case may well fall foul of the fair-minded observer test. In one of the appeals under consideration in *Locabail*, the Court of Appeal set aside a judgment given in a personal injury claim against an insurance company because the judge had strongly criticised the behaviour of insurance companies in academic articles. A judge who writes articles on a subject which may arise for adjudication before them should express themselves with circumspection and avoid giving the impression that they have a closed mind on the subject, the court said.²⁷² In *Davidson v Scottish Ministers (No.2)*²⁷³ the House of Lords ruled that a risk of apparent bias was liable to arise where a judge had been called upon to rule judicially on the effect of legislation that they had drafted or promoted during the parliamentary process, because the fair-minded and informed observer would conclude that there was a real possibility that the judge would subconsciously strive to avoid reaching a conclusion which would undermine the very clear assurances they had given to Parliament. This inescapable conclusion, it is suggested, strengthened the case for moving towards a stricter separation of powers and the creation of the UK Supreme Court.²⁷⁴

Earlier findings by the same judge and the risk of pre-judging

3.83

As a matter of judicial duty, a judge must maintain an open mind about the issues in the case until all the evidence has been heard and tested and all the arguments have been presented.²⁷⁵ The judge must not form a settled view about the credibility of witnesses or the merits of the issues before the conclusion of the proceedings.²⁷⁶ If they do so, they may be barred from hearing the trial²⁷⁷ or else their decision may be set aside, as in *Mengiste v Endowment Fund for the Rehabilitation of Tigray* where the judge's comments about an expert witness at a hearing and in his judgment were such that he should have recused himself from a later wasted costs application against the firm of solicitors that had tendered the expert witness.²⁷⁸ But such situations are likely to be exceptional, and are likely only to arise where the judge has expressed his views about the issues or the evidence in an extreme, unbalanced or absolute way.²⁷⁹

3.84

Indeed, it is not uncommon for a judge or arbitrator to set out a provisional view at an early stage of proceedings, so that the parties have an opportunity to correct any errors in the judge's thinking or to concentrate on matters that the judge considers important. Such practice, it was held in *Lanes Group Plc v Galliford Try Infrastructure Ltd*,²⁸⁰ was perfectly legitimate provided that a clear distinction was maintained between reaching a provisional view that was disclosed for the assistance of the parties, and reaching a final decision prematurely, which was not acceptable. If a judge dealing with an application has reached a view on the basis of written materials, they must give the applicant a fair opportunity to disabuse them of their view at an oral hearing, and must not suggest that their mind is finally made up on the issue.²⁸¹

3.85

It would be similarly unusual for apparent bias to arise solely on the basis that the judge has previously made determinations in the proceedings, since it is perfectly normal for the same judge to adjudicate on a number of different aspects (or at a number of different stages) of a case.²⁸²

An objection on the grounds of a reasonable apprehension that the judge might have pre-judged the case on account of an earlier judicial finding was considered in *JSC BTA Bank v Ablyazov*.²⁸³ The applicant objected to the designated trial judge because he had earlier found the applicant guilty of contempt arising out of a freezing order in the same proceedings. The Court of Appeal held that the mere fact that the judge made a factual finding in an interim application in the same proceedings would not normally give rise to a reasonable apprehension that the judge had pre-judged the issues that still remained to be decided, even where there was an overlap between the earlier findings and the issues. After all, Rix LJ explained, even if

a different judge tried the case, they would still be made aware of the earlier findings. The critical consideration was that a judge who had to bear in mind their own findings and observations did so as part and parcel of their judicial assessment of the litigation before them, and that the judge was not “pre-judging” by reference to extraneous matters, predilections or preferences.

3. 86

It would be wasteful of court resources and cause much delay if every time a judge who made a finding on an interim application would have to withdraw for fear that they may have pre-judged issues that still remain to be decided. Rix LJ therefore said that:

“Although no doubt matters of mere convenience cannot palliate the appearance of bias, and the application of the doctrine of apparent bias is not a matter of discretion … it is relevant to consider, through the eyes of the fair-minded and informed observer, that there is not only convenience but also justice to be found in the efficient conduct of complex civil claims with the help of the designated judge.”²⁸⁴

3. 87

The decision in *JSC BTA Bank v Ablyazov* may be contrasted with the ruling of the High Court of Australia in *British American Tobacco v Laurie*.²⁸⁵ The claimant sued BAT in negligence alleging that his lung cancer was caused by smoking BAT’s cigarettes. One of the issues was whether BAT had destroyed compromising documents. The claim was listed before a judge who in earlier unrelated proceedings had found on an interim application that BAT had a fraudulent document management policy designed to destroy such documents. The earlier action did not proceed to trial. The court by a majority held that the judge should have recused himself because his earlier decision was likely to create an impression in the mind of a reasonable observer that he had formed a view which would also influence his determination of the same issue in the present case. It was accepted that the judge’s interim finding in the earlier case would not have precluded him from trying that case, even though the same issue would have needed determination at the trial. Nonetheless, the court felt that informed public opinion might not be familiar with such legal niceties and that the maintenance of the appearance of justice should be given precedence.²⁸⁶ There is of course a critical difference between this case and *JSC BTA Bank v Ablyazov*, since there the adverse ruling was made in the same case, whereas in the Australian case the ruling was in different proceedings.

3. 88

A judge will not even necessarily be barred from determining the same matter twice, where the previous decision was made on the papers and the second benefitted from oral argument, or where a case is remitted to a judge after errors have been corrected on appeal.²⁸⁷ These possibilities are contemplated by the rules; in appropriate cases they may have positive advantages in terms of resource-allocation and quality of judicial decision-making; in both instances the judge had the benefit of an additional ingredient they did not have before (namely, oral argument or the guidance of an appeal court); and judges in such circumstances are expected and used to keeping an open mind when retaking the decision. Thus, in *Sengupta v Holmes*,²⁸⁸ an appellant was unsuccessful in objecting to the presence on the panel of a Lord Justice who had refused permission to appeal on paper (after which two different Lord Justices gave permission following oral reconsideration). Since, under the rules in force at the time,²⁸⁹ a refusal on paper was not final and the applicant had a right to request an oral hearing at which to persuade that very same judge (or another judge), that permission to appeal should be granted, it was implicit that the judge who refused permission on paper had to keep an open mind so as to be receptive to any further argument presented at an oral reconsideration, or indeed, the substantive appeal. A fundamental part of the adversarial system is that, at an oral hearing, judges would have the benefit of oral argument which could obviously lead to a change of mind.

3. 89

In *AMEC Capital Projects Ltd v Whitefriars City Estates Ltd*,²⁹⁰ it was found that the appointment of an adjudicator made under the *Housing Grants, Construction and Regeneration Act 1996* had been defective. Subsequently, the same adjudicator was appointed to hear the case again. One party objected on the grounds that, having decided the dispute against him once, the adjudicator could not decide again with complete impartiality. The Court of Appeal rejected this argument, holding that an adjudicator was not automatically disqualified merely because they had heard the case before. Adjudicators were assumed to be trustworthy and to understand that they should approach every case with an open mind. If the adjudicator were asked to re-determine an issue and the evidence and arguments were merely a repeat of what went before, they were not expected to ignore their earlier decision and to not be inclined to come to the same conclusion as before, particularly if the previous

decision was carefully reasoned. There should be such reconsideration of the matter as was reasonably necessary for them to be satisfied that their first decision was correct.

3.90

Provision is sometimes made to ensure that certain matters are not communicated to the judge. For instance, the court trying the case must not be informed of a [CPR 36](#) offer.²⁹¹ But it may occur that the judge is accidentally shown such an offer, or a [Calderbank](#) offer or other “without prejudice” communications. Such situations call for a delicate balance between two opposing considerations. On the one hand, it is desirable that a judge, who can effectively decide the case without being influenced by such information, should continue hearing the case and avoid the waste and delay that a recusal may involve. On the other hand, however, there is a need to avoid the obvious risk that a judge may, consciously or unconsciously, be prejudiced by the information. The solution to this problem depends to some extent on whether the judge believes that they can adjudicate without being influenced by the prejudicial information.²⁹² But there is also an objective element, based on whether a fair-minded and informed observer would consider that a judge with that particular knowledge could hold a fair trial.²⁹³ Court procedure would be greatly hampered and the cost of litigation greatly increased, Stanley Burnton J explained, if the court were too easily to come to the conclusion that viewing prejudicial irrelevant material necessarily disabled the court from continuing to hear the action. He warned parties not to draw the court’s attention to such materials without giving prior notice to the other party. In some situations, however, there may be no alternative by which to separate the proceedings if there is a risk that the judge would become privy to “without prejudice” information that might affect their decision on the merits.²⁹⁴

Membership of an association

3.91

A judge’s membership of an association may pose difficult problems. The House of Lords held in [Helow v Advocate General for Scotland](#) that a judge is not to be taken as biased simply by being a member of an organisation, subscribing to a specialist journal or taking an interest in particular reading matter.²⁹⁵ However, while that general assumption may be sustainable in many situations it is doubtful whether the House of Lords was justified to proceed on it in the circumstances of that case. H, a Palestinian who had been politically active with the Palestinian Liberation Organisation, was refused asylum in the UK. Her appeal against a notice of removal to Lebanon had been dismissed and permission to appeal had been refused by Lady Cosgrove, Lord Ordinary. H sought to have the decision set aside on the ground of apparent bias. Lady Cosgrove, it later emerged, was a member of the International Association of Jewish Lawyers and Jurists, which H argued was hostile to the Palestinian cause. Lord Hope had this to say about the nature of this association:

“There is no doubt that some of the articles that have been published in Justice [the association’s journals], including messages by the Association’s President … are fervently pro-Israeli. Inevitably, given the conflicts that have been taking place in the region, such a partisan stance carries with it sentiments that are hostile to those that people in Israel feel are ranged against them. It is not difficult to find publicity being given in ‘Justice’ to views that are markedly antipathetic to the Palestinian Liberation Organisation with whom the appellant, who is an ethnic Palestinian, has connections.”²⁹⁶

3.92

The House of Lords rejected the argument that Lady Cosgrove’s involvement in the case fell foul of the fair-minded and informed observer test because there was no evidence that she supported the more extreme views expressed by the association of which she was a member. Mere membership of an organisation was not enough to disqualify the judge because on its own it did not connote any form of approval or endorsement of everything which was said or done by the organisation’s officers. “No fair-minded person”, Lord Hope said, “would think that a judge who regularly takes one of the leading national newspapers circulating in this country was, simply by doing so, associating himself or herself with everything that was printed in it. In principle, this case is no different”.²⁹⁷

3.93

The analogy is flawed because a voluntary association or political organisation is generally formed and carried on in order to accomplish certain goals; and a person who takes the active step of joining such an organisation and paying its dues normally does so because that person identifies with those purposes, feels an affinity with its members or wishes to support its activities. The same cannot be said of a newspaper, except perhaps in a very loose sense. Thus, while the fair-minded observer could not object to a judge who often reads a newspaper that is generally critical of the government hearing a case against a central government department, they surely would object to a judge who was a member of a voluntary association dedicated to preserving the Green Belt hearing a challenge to a grant of planning permission to build on Green Belt land. Other things being equal, the court should infer that a judge who is a member of a voluntary association or political organisation agrees with its views,²⁹⁸ and the real question is thus whether the fact of holding those views gives rise to an apprehension of bias in light of all the circumstances.

Disqualification for interest

Scope of the interest test

3.94

In addition to the bias test, English law has developed an interest test, sometimes described as presumed bias. This test consists of disqualification due to an interest that the judge has in the outcome of the litigation. The main authority is *Dimes v Properties of the Grand Junction Canal*,²⁹⁹ where the House of Lords invoked the principle that no one should be judge in their own cause, in order to hold that a judge is disqualified whenever they have a pecuniary or proprietary interest in the outcome. Disqualification on this ground is said to be automatic, regardless of whether the judge was likely to be in any way influenced by their interest in judging the case.³⁰⁰

3.95

The scope of this test was extended in *R v Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte (No.2)*.³⁰¹ Spain sought the extradition of General Augusto Pinochet, who had been Chile's head of state, so that he could be tried for crimes against humanity. The Divisional Court refused the request on the grounds that a former head of state had immunity in respect of acts done while in office. In *R v Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte (No.1)*, the House of Lords had reversed this decision by a majority of three to two.³⁰² It later emerged that Lord Hoffmann, who was in the majority, was a director and chairperson of Amnesty International Charity Ltd (a company incorporated to promote Amnesty International's objectives), which appeared before the House of Lords and supported the extradition request. Pinochet successfully petitioned the House of Lords to set aside its earlier judgment in *Pinochet (No.2)*. The House of Lords held that the interest test should extend beyond pecuniary and proprietary interest and should include cases where the judge's decision would lead to the promotion of a cause in which the judge was involved together with one of the parties. Lord Hoffmann was thus disqualified because he was a director of a charity that was closely allied to a party to the litigation.

Redundant distinction between disqualification for bias and automatic disqualification for interest

3.96

The difference between the two tests was sought to be explained in *Locabail*. Where the interest test is fulfilled, disqualification is automatic, in the sense that no consideration needs to be given to whether the interest actually influenced the judge. This is why this form of disqualification is sometimes described as presumed bias. It follows, therefore, that the judge's ignorance of their interest in the outcome is irrelevant and they must be disqualified for the sake of the appearance of justice.³⁰³ Where, however, the test of bias is in issue, ignorance of facts that might influence the judge's mind negates the possibility of bias, since a judge cannot be influenced by something they do not know.

3. 97

The distinction drawn between the two tests is questionable. The idea that the presence of an interest in the outcome is an independent ground of disqualification goes back to the decision in *Dimes v Properties of the Grand Junction Canal*,³⁰⁴ where Lord Cottenham LC heard an appeal in a case involving a company in which he owned a substantial shareholding. On appeal, Lord Cottenham LC's decision was set aside. Lord Campbell said:

“No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest he had in this concern; but ... it is of the last importance that the maxim that no man is to be judge in his own cause should be held sacred. And it is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest.”³⁰⁵

Yet, it does not take a particularly suspicious or unreasonable mind to fear that a judge who has a substantial shareholding in a company that is a party to a case before them might be inclined, consciously or unconsciously, to favour the company. Objections founded on interest can just as easily be argued as objections founded on reasonable apprehension of bias.³⁰⁶ In practice, therefore, little difference remains between this test and the test of a real likelihood or possibility of bias, except perhaps where a judge has been ignorant of factors that might affect them.

3. 98

Furthermore, in *Locabail* the Court of Appeal held that automatic disqualification for interest does not apply if “the potential effect of the decision on the judge’s personal interest is so small as to be incapable of affecting his decision one way or another”.³⁰⁷ This suggests that automatic disqualification too turns on the possibility that the judge may be affected, or perceived to be affected, by their interest. Clearly, disqualification for interest and disqualification for bias converge into one strand: judges must be above suspicion and must be seen to be so. As Lord Hope pointed out in *Pinochet (No.2)*:

“Although the tests are described differently, their application ... is likely in practice to lead to results which are so similar as to be indistinguishable. Indeed, it may well be said that the various tests which I have mentioned, including the maxim that no one may be a judge in his own cause, that they are all founded upon the same broad principle. Where a judge is performing a judicial duty, he must not only bring to the discharge of that duty an unbiased and impartial mind. He must be seen to be impartial.”³⁰⁸

3. 99

It is said, as we have seen, that the test of interest would automatically bite where a judge had an interest in the outcome but is ignorant of it, whereas the bias test would not. However, this distinction offers scant justification for maintaining the independence of the interest test, because the bias test as presently formulated would require disqualification, given the emphasis placed on appearances and public confidence. Furthermore, it is now recognised that disqualification for apprehended bias is also automatic, in the sense that it is not discretionary, as Mummery LJ has explained:

“I do not think that disqualification of a judge for apparent bias is a discretionary matter. There was either a real possibility of bias, in which case the judge was disqualified by the principle of judicial impartiality, or there was not, in which case there was no valid objection to trial by him. On the issue of disqualification an appellate court is well able to assume the vantage point of a fair-minded and informed observer with knowledge of the relevant circumstances. It must itself make an assessment of all the relevant circumstances and then decide whether there is a real possibility of bias.”³⁰⁹

3. 100

The presence of two different criteria of disqualification has several undesirable consequences. First, the notion of an automatic test of disqualification will continually demand a refinement of the definition of the forbidden connection between the judge and the cause. In *Pinochet (No.2)* the House of Lords limited it to judges who have an active role as trustees or directors of charities that are closely allied to a party to the litigation. This decision was followed by a flood of applications for automatic disqualification, which a reinforced panel of the Court of Appeal had to confront in *Locabail*.³¹⁰ Although the

Court of Appeal was conscious of the uncertainty created by parameters of automatic disqualification and of the potential for delay and unnecessary expense, it felt bound by previous House of Lords decisions to continue operating a dual test.³¹¹ However, judges have come to realise that this duality is unnecessary.

3. 101 In *R (Kaur) v Institute of Legal Executives Appeal Tribunal*,³¹² Rix LJ sought to integrate the two tests. When referring to disqualification for interest and for apparent bias he stated:

“... it seems to me that by now it may be possible to see the two doctrines which remain in play in this appeal as two strands of a single over-arching requirement: that judges should not sit or should face recusal or disqualification where there is a real possibility on the objective appearances of things, assessed by the fair-minded and informed observer (a role which ultimately, when these matters are challenged, is performed by the court), that the tribunal could be biased. On that basis the two doctrines might be analytically reconciled by regarding the ‘automatic disqualification’ test as dealing with cases where the personal interest of the judge concerned, if judged sufficient on the basis of appearances to raise the real possibility of preventing the judge bringing an objective judgment to bear, is deemed to raise a case of apparent bias.”

3. 102 Rix LJ thought that perceiving both tests as governed by one overarching principle referable to the fair-minded and informed observer would avoid unnecessary technicality and complexity. This approach has the added advantage of avoiding the impression that automatic disqualification for interest is a mere technicality, independent of a real risk of bias. By focusing on the really important matter of avoiding the risk and appearance of bias, the approach advocated by Rix LJ is better calculated to maintain greater public confidence in the administration of justice.

Judicial independence

3. 103 We have concentrated so far on bias or partiality. ECHR art.6(1) imposes an additional requirement of judicial independence. This aspect has been given considerable attention by the ECtHR.³¹³ Since questions of independence rarely arise in respect of judges adjudicating civil proceedings, only a brief comment is called for here.³¹⁴

3. 104 A tribunal must be independent of the executive, of the parties³¹⁵ and of the legislature or Parliament.³¹⁶ The ECtHR has indicated the factors that must be taken into account when assessing the independence of a tribunal. These are “the manner of appointment of its members and the duration of the terms of their office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence”.³¹⁷ Thus a planning inspector whose appointment could be revoked at any time by the Secretary of State was not “independent” when exercising his power to decide an appeal under the *Town and Country Planning Act 1990*.³¹⁸ However, some decisions by planning authorities have been held to comply with the ECHR art.6, because of the availability of judicial review following a public hearing before an inspector.³¹⁹ The ECtHR has also held that the presence of civil servants on a tribunal would not be objectionable if sufficient guarantees for their independence existed.³²⁰

3. 105 The idea of judicial independence was explained by Lord Hoffmann in *Matthews v Ministry of Defence*:

“In the great case of *Golder v UK (1975) 1 E.H.R.R. 524* the Strasbourg court decided that the right to an independent and impartial tribunal for the determination of one’s civil rights did not mean only that if you could get yourself before a court, it had to be independent and impartial. It meant that if you claimed on arguable grounds to have a civil right, you had a right to have that question determined by a court. A right to the independence and impartiality of the judicial branch of government would not be worth much if the executive branch could stop you

from getting to the court in the first place. The executive would in effect be deciding the case against you. That would contravene the rule of law and the principle of the separation of powers ...

The rule of law and separation of powers would be equally at risk if the executive government was entitled, as a matter of arbitrary discretion, to instruct the court to dismiss your action. There are different ways in which one could draft a law to give the executive such a power.”³²¹

The Royal Court of Guernsey was held not to be independent because its president was also the Bailiff of Guernsey, and as such presided over the legislature and was head of the administration.³²²

3. 106 The Scottish High Court of Justiciary held in *Starrings v Procurator Fiscal*³²³ that it was unlawful to prosecute a person before temporary sheriffs, because they were appointed by the Lord Advocate who was also the chief prosecution officer and because their appointment was subject to annual renewal. Following that decision, the Lord President of the Court of Session directed that temporary judges should hear only cases involving private parties, and not hear criminal prosecutions or cases involving the state. Temporary judges enjoyed security of tenure for the period of their appointment, unlike temporary sheriffs who were liable to recall at any time.³²⁴ In order to avoid similar difficulties in the future, the Lord Chancellor’s Department (now the Ministry of Justice) announced that such appointments would be made for a minimum period of five years, that appointments would, with limited exceptions, be renewed automatically and that removal from office could only be made upon limited and specific grounds.³²⁵

Footnotes

- 180 *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 at 471; [2000] 1 All ER 65 at 69. This is reflected in the judicial oath, which provides “... I will do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill-will”: *Promissory Oaths Act 1868* s.4. See also *He low v Advocate General for Scotland* [2008] UKHL 62; [2008] 1 W.L.R. 2416.
- 181 This applies to arbitral proceedings as it does to civil proceedings; see, for instance, *Laker Airways Inc v FLS Aerospace Ltd* [1999] 2 Lloyd’s Rep. 45; *AT&T Construction v Saudi Cable* [2000] 2 Lloyd’s Rep 127; *Halliburton Co v Chubb Bermuda Insurance Ltd* [2018] EWCA Civ 817.
- 182 *R v Sussex Justices Ex p. McCarthy* [1924] 1 KB 256 at 259.
- 183 A lawyer should therefore not adjudicate upon a case to which their client is a party: *R v London Rent Assessment Panel Committee Ex p. Metropolitan Properties Co (FGC) Ltd* [1969] 1 QB 577, CA.
- 184 *Yuill v Yuill* [1945] P. 15, CA; *Shaw v Grouby* [2017] EWCA Civ 233; [2017] C.I.L.L. 3989.
- 185 *Baker v Quantum Clothing Group* [2009] EWCA Civ 566; [2009] C.P. Rep. 38.
- 186 *Gillies v Secretary of State for Work and Pensions* [2006] UKHL 2; [2006] 1 W.L.R. 781 [38]. Questions of independence rarely arise in respect of judges adjudicating civil proceedings and so the focus of the present discussion is disqualification for bias. The principle of judicial independence is however briefly addressed below at paras 3.103 ff.
- 187 For further discussion see C. Hollander and S. Salzedo, *Conflicts of Interest*, 6th edn (London: Sweet & Maxwell, 2020), especially Ch.11.
- 188 See below, paras 3.96 ff.
- 189 *Morrison v AWG Group Ltd (formerly Anglian Water Plc)* [2006] EWCA Civ 6 [20].
- 190 The fact that inconvenience or expense might result from a recusal is not relevant to the determination of whether there is apparent bias, and does not of itself mean that an application for recusal should be rejected: *JSC BTA Bank v Ablyazov* [2012] EWCA Civ 1551 [65]. See also *Man O’War Station Ltd v Auckland City Council (formerly Waitemata County Council)* [2002] UKPC 28 [11]; *Resolution Chemicals Ltd v H Lundbeck A/S* [2013] EWCA Civ 1515; [2014] 1 W.L.R. 1943 [35]; *Bubbles & Wine Ltd v Lusha* [2018] EWCA Civ 468 [30].
- 191 See *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451; [2000] 1 All ER 65 [21]-[22]. For a discussion of how inappropriate recusals may bring the justice system into disrepute, see: Olowofoyeku, “Inappropriate Recusals” (2016) 132 L.Q.R. 318.

- 192 *Hakansson and Sturesson v Sweden* [1990] 13 E.H.R.R. 1 [66].
193 *Millar v Dickson (Procurator Fiscal, Elgin)* [2001] UKPC D4; [2002] 1 W.L.R. 1615, PC.
194 *Millar v Dickson (Procurator Fiscal, Elgin)* [2001] UKPC D4; [2002] 1 W.L.R. 1615 [31].
195 *R v Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte (No.2)* [2000] 1 AC 119, 137, per Lord Browne-Wilkinson. In *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 431, 475, the Court of Appeal stated that “a party with an irresistible right to object to a judge hearing or continuing to hear a case may ... waive his right to object. It is however clear that any waiver must be clear and unequivocal, and made with full knowledge of all the facts relevant to the decision whether to waive or not”.
196 *JSC BTA Bank v Ablyazov* [2012] EWCA Civ 1551.
197 *JSC BTA Bank v Ablyazov* [2012] EWCA Civ 1551 [89]. In *Bates v Post Office Ltd (No.4: Recusal Application)* [2019] EWHC 871 (QB) [274]–[289], the judge was asked to recuse himself two weeks after the alleged grounds for recusal arose. That delay was sufficient to amount to waiver in the particular circumstances of the case, where the trial had been ongoing for almost two weeks and the applicant had already called almost all its witnesses of fact by the time the application was made. Cf. *Baker v Quantum Clothing Group* [2009] EWCA Civ 566; [2009] C.P. Rep. 38.
198 Although not a case of waiver per se, in *Singh v Secretary of State for the Home Department* [2016] EWCA Civ 492 [46], it was held that where a later objection is founded on comments allegedly made by the judge at trial, doubts about the content of the comments and whether they would have given an appearance of prejudice may be resolved in the judge’s favour if no exception was taken to them at the time by counsel.
199 *Davidson v Scottish Ministers (No.2)* [2004] UKHL 34; [2004] S.L.T. 895 [19]; and see *Taylor v Lawrence* [2002] EWCA Civ 90; [2003] QB 528 [64].
200 *Birmingham City Council v Yardley* [2004] EWCA Civ 1756.
201 *Smith v Kvaerner Cementation Foundations Ltd* [2006] EWCA Civ 242.
202 *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451; [2000] 1 All ER 65, CA; *Jones v DAS Legal Expenses Insurance Co* [2003] EWCA Civ 1071 [35].
203 *Fileturn Ltd v Royal Garden Hotel Ltd* [2010] EWHC 1736 (TCC).
204 *Ebner v Official Trustee in Bankruptcy* [2000] 205 C.L.R. 337 [171]. To the extent that doubt was cast on this proposition in *Helow v Advocate General for Scotland* [2008] UKHL 62; [2008] 1 W.L.R. 2416 [58], see J. Goudkamp, “Apparent bias: Helow v Secretary of State for the Home Department” (2009) 28 C.J.Q. 183, 185–186.
205 *Halliburton Co v Chubb Bermuda Insurance Ltd* [2020] UKSC 48; [2021] AC 1083.
206 *Halliburton Co v Chubb Bermuda Insurance Ltd* [2020] UKSC 48; [2021] AC 1083 [55]–[69].
207 *Halliburton Co v Chubb Bermuda Insurance Ltd* [2020] UKSC 48; [2021] AC 1083 [74]–[81]; it is also an implied term of an arbitrator’s contract with the parties. Whether the duty of disclosure is engaged in respect of multiple appointments by the same firm of solicitors in unrelated arbitrations for different parties may depend on the specific arbitral context and whether such repeat appointments are customary in that context: cf. *Aiteo Eastern E & P Co Ltd v Shell Western Supply and Trading Ltd* [2024] EWHC 1993 (Comm) and *V v K* [2025] EWHC 1523 (Comm).
208 Arbitration Act 1996 s.23A, inserted by Arbitration Act 2025 s.2.
209 *Halliburton Co v Chubb Bermuda Insurance Ltd* [2020] UKSC 48; [2021] AC 1083 [111], [117]–[118], [133]; *PAO Tatneft v Ukraine* [2019] EWHC 3740 (Ch) [57]; *Aiteo Eastern E & P Co Ltd v Shell Western Supply and Trading Ltd* [2024] EWHC 1993 (Comm).
210 See below, paras 3.94 ff.
211 *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 at 472; [2000] 1 All ER 65 at 70. See also *Warren v Warren* [1997] QB 488.
212 *Lawal v Northern Spirit Ltd* [2003] UKHL 35; [2004] 1 All ER 187 [14].
213 *R v Liverpool City Justices Ex p. Topping* [1983] 1 All ER 490; [1983] 1 W.L.R. 119; *R v Mulvihill* [1990] 1 All ER 436; [1990] 1 W.L.R. 438.
214 In Scotland see *Bradford v McLeod* 1986 S.L.T. 244. In Australia see *R v Watson Ex p. Armstrong* (1976) 136 C.L.R. 248; *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; (2000) 205 C.L.R. 337. The same approach applies in South Africa: *BTR Industries South Africa (Pty) Ltd v Metal and Allied Metal Workers’ Union* 1992 (3) S.A. 673. See also: *Webb v R* [1994] 181 C.L.R. 41; *R v McCallum and Woodhouse* [1988] 3 C.R.N.Z. 376; *R v Te Pou* [1992] 1 N.Z.L.R. 522 NZCA; *R v Cameron* [1991] 64 C.C.C. (3d) 96; *R v Lessard* [1992] 74 C.C.C. (3d) 552; *R v Horne* [1987] 35 C.C.C. (3d) 427.
215 *Piersack v Belgium* [1983] 5 E.H.R.R. 169; *Hauschildt v Denmark* [1989] 12 E.H.R.R. 266; and *Fey v Austria* [1993] 16 E.H.R.R. 387.
216 *R v Gough* [1993] AC 646 at 668; [1993] 2 All ER 724 at 735–736, HL.

- 217 *Re Medicaments and related Classes of Goods (No.2) [2001] 1 W.L.R. 700, CA.*
- 218 *Porter v Magill [2001] UKHL 67; [2002] 2 AC 356.*
- 219 *Tibbets v Attorney General of the Cayman Islands [2010] UKPC 8; [2010] 3 All ER 95*: the principle applies to a jury as tribunal of fact.
- 220 *Lawal v Northern Spirit Ltd [2003] UKHL 35; [2004] 1 All ER 187* [2], [21] (emphasis added).
- 221 *Halliburton Co v Chubb Bermuda Insurance Ltd [2020] UKSC 48; [2021] AC 1083* [52]–[55].
- 222 It has been stressed that the perspective to be adopted is that of the fair-minded member of the public, not that of a typical litigant: *Harb v Prince Abdulaziz [2016] EWCA Civ 556* [69]–[70].
- 223 *Below v Secretary of State for the Home Department [2008] UKHL 62; [2008] 1 W.L.R. 2416; Tibbets v Attorney General of the Cayman Islands [2010] UKPC 8; [2010] 3 All ER 95* [3]; *Halliburton Co v Chubb Bermuda Insurance Ltd [2020] UKSC 48; [2021] AC 1083.*
- 224 *Morrison v AWG Group Ltd (formerly Anglian Water Plc) [2006] EWCA Civ 6.*
- 225 *Virdi v Law Society [2010] EWCA Civ 100; [2010] 1 W.L.R. 2840* [43]–[48].
- 226 *Drury v BBC [2007] EWCA Civ 605.* Criticism of an individual in a previous case by a judge did not give rise to a perception of bias; however, any doubt should be resolved in favour of recusal, especially where a replacement can be found for the judge without increased cost or inconvenience to the parties.
- 227 *Taylor v Lawrence [2002] EWCA Civ 90; [2003] QB 528.*
- 228 *Taylor v Lawrence [2002] EWCA Civ 90; [2003] QB 528;* [61].
- 229 *Lawal v Northern Spirit Ltd [2003] UKHL 35; [2004] 1 All ER 187.* See above, para.3.66.
- 230 *Lawal v Northern Spirit Ltd [2003] UKHL 35; [2004] 1 All ER 187* [22]. See *Virdi v Law Society [2010] EWCA Civ 100; [2010] 1 W.L.R. 2840*, where a clerk retiring with the members of a disciplinary tribunal did not give rise to the appearance of bias.
- 231 *Belilos v Switzerland [1988] 10 E.H.R.R. 466* at 489, *Wettstein v Switzerland [2000] ECHR 695; Re Medicaments and Related Classes of Goods (No.2) [2001] I.C.R. 564* at 591; *[2001] 1 W.L.R. 700* at 726, quoted in *Lawal v Northern Spirit Ltd [2003] UKHL 35; [2004] 1 All ER 187* [14].
- 232 It may be doubted that members of the public would regard as of no consequence the fact that an arbitrator was, during the arbitration, acting as counsel in another case for the solicitors' firm representing one of the parties: *A v B [2011] EWHC 2345 (Comm)*. For discussion see *S. Atrial, "Who is the fair minded observer? Bias after Magill" [2003] C.L.J. 279*; C. Hollander and S. Salzedo, *Conflicts of Interest*, 6th edn (London: Sweet & Maxwell, 2020), Ch.14 s.3.
- 233 *A v B [2011] EWHC 2345 (Comm).*
- 234 *Re A (Children) [2010] EWCA Civ 1490.* Where there is no ongoing professional relationship as such, but a history of repeat appointments by the same firm of solicitors in respect of unrelated arbitrations involving different parties, whether there is likely to be a reasonable apprehension of bias may depend on whether such repeat appointments are customary in the specific arbitral context concerned: cf. *Aiteo Eastern E & P Co Ltd v Shell Western Supply and Trading Ltd [2024] EWHC 1993 (Comm)* and *V v K [2025] EWHC 1523 (Comm)*.
- 235 For discussion of the differences in Australian and English law, see *A. Higgins and I. Levy, "What the fair-minded observer really thinks about judicial impartiality" [2021] 84(4) M.L.R. 811.*
- 236 *Charisteas v Charisteas [2021] HCA 29* [21].
- 237 *Charisteas v Charisteas [2021] HCA 29* [20].
- 238 *Charisteas v Charisteas [2021] HCA 29* [21].
- 239 *Charisteas v Charisteas [2021] HCA 29* [12], citing *Johnson v Johnson [2000] HCA 48* [13].
- 240 *Charisteas v Charisteas [2021] HCA 29* [12], citing *Johnson v Johnson [2000] HCA 48* [15].
- 241 Cf. *R v Abdroikof [2007] UKHL 37; [2007] 1 W.L.R. 2679* per Lord Mance at [20]: the observer should be taken to have "such information as may be necessary for an informed member of the public without any particular, specialised knowledge or experience to make a dispassionate judgment". See also *Belize Bank Ltd v The Attorney General of Belize [2011] UKPC 36*, per Lord Kerr at [39].
- 242 Lord Rodger, "Bias and Conflicts of Interests – Challenges for Today's Decision-Makers", Twenty-Fourth Sultan Azlan Shah Law Lecture, delivered in Kuala Lumpur, Malaysia, 6 October 2010.
- 243 See, for instance, *Watts v Watts [2015] EWCA Civ 1297*, where a QC sitting as a deputy judge of the High Court recused herself from hearing a matter where a junior barrister she was leading in unrelated proceedings was to appear before her.
- 244 *Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451; [2000] 1 All ER 65.* See also *Birmingham City Council v Yardley [2004] EWCA Civ 1756; Smith v Kvaerner Cementation Foundations Ltd [2006] EWCA Civ 242*. In *Ameyaw v McGoldrick [2020] EWHC 1787 (QB)*, the fact that an advocate had been the judge's pupil some years previously was held not to give rise to a reasonable apprehension of bias.

- 245 *Smith v Kvaerner Cementation Foundations Ltd [2006] EWCA Civ 242* [17]. The Bar Council issued guidance in respect
of the implications of conditional fee agreements in this context: Bar Council, Conditional Fee Arrangements—Guidance
for barristers appearing before a fee paid judge who is a current member of their Chambers (London: Bar Council, 2008).
The matter was also addressed in the Guide to Judicial Conduct (London: Judicial Office, 2013), para.3.18, though this
no longer appears in the most recent version of the Guide: see Guide to Judicial Conduct (London: Judicial Office, 2023).
- 246 *Vanderbilt v Azumi and others [2017] EWCA Civ 2133* [44].
- 247 *Lawal v Northern Spirit Ltd [2003] UKHL 35; [2004] 1 All ER 187*. See above, paras 3.66 and 3.70.
- 248 *Lawal v Northern Spirit Ltd [2003] UKHL 35; [2004] 1 All ER 187*. For the application of the test to an expert member of
a disability appeal tribunal see *Gillies v Secretary of State for Work and Pensions [2006] UKHL 2; [2006] 1 All ER 731*.
- 249 *Howell v Lees Millais [2007] EWCA Civ 720*.
- 250 *Harb v Prince Abdulaziz [2016] EWCA Civ 556*.
- 251 *Harb v Prince Abdulaziz [2016] EWCA Civ 556* [68] [74].
- 252 *Harb v Prince Abdulaziz [2016] EWCA Civ 556* [74].
- 253 Contrast *R v Gough [1993] AC 646; [1993] 2 All ER 724, HL* with *Porter v Magill [2001] UKHL 67; [2002] 2 AC 356*; and see above, paras 3.65–3.66.
- 254 Though cf. *Halliburton Co v Chubb Bermuda Insurance Ltd [2020] UKSC 48; [2021] AC 1083* [131]. Owing to the
distinctive characteristics of international arbitration, the fact that an arbitrator has accepted appointments in multiple
references concerning the same or overlapping subject matter with only one common party, this may give rise to an
appearance of bias.
- 255 *Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451; [2000] 1 All ER 65, CA*.
- 256 But in *Resolution Chemicals Ltd v H Lundbeck A/S [2013] EWCA Civ 1515*, the Court of Appeal held that there could
be no reasonable apprehension of bias where an expert witness had 30 years earlier supervised the judge's research
thesis when he was at university.
- 257 *Morrison v AWG Group Ltd (formerly Anglian Water Plc) [2006] EWCA Civ 6*. See *H1 v W [2024] EWHC 382 (Comm);*
[2024] 1 Lloyd's Rep. 449 for an example in the arbitration context.
- 258 *Morrison v AWG Group Ltd (formerly Anglian Water Plc) [2006] EWCA Civ 6* [29].
- 259 For example, in *El Farargy v El Farargy [2007] EWCA Civ 1149*, the Court of Appeal held that a trial judge ought to
have recused himself as a consequence of making joking comments about one of the parties. The Court of Appeal found
the comments were disparaging of the party's status, nationality, ethnic origins and religious faith and were likely to
give the perception of unfairness in the mind of a fair-minded and informed observer. Additionally, the Court of Appeal
noted that it was invidious for a judge to sit in judgment on his own conduct in such a case. Sometimes, for practical
reasons, there would be no other option. But, if possible, a party should first make an informal approach to the judge,
making the complaint and inviting recusal. The judge could then, with honour, deny the complaint yet still pass the case
to a colleague. Alternatively, if the judge did not feel able to recuse himself, another judge could take the decision in
respect of recusal, since where the appearance of justice was at stake it was better that the recusal decision should be
taken independently of the judge in question.
- 260 *The Mayor and Burgesses of the London Borough of Southwark v Maamefowaa Kofi-Adu [2006] EWCA Civ 281* [145].
See further Ch.1 The Overriding Objective paras 1.23 ff; and Ch.22 Trial and Evidence para.22.30.
- 261 *The Mayor and Burgesses of the London Borough of Southwark v Maamefowaa Kofi-Adu [2006] EWCA Civ 281* [142].
- 262 *M & P Enterprises (London) Ltd v Norfolk Square (Northern Section) Ltd [2018] EWHC 2665 (Ch)*.
- 263 See for example *Re C (A Child) [2020] EWCA Civ 987*, where the Court of Appeal held that there was a reasonable
apprehension of bias where the judge made adverse comments about a party's honesty in the middle of her evidence,
in circumstances where serious allegations were made against her and her credibility was in issue. It did not matter that
the comments were intended to be private but were inadvertently broadcast to the participants.
- 264 *The Mayor and Burgesses of the London Borough of Southwark v Maamefowaa Kofi-Adu [2006] EWCA Civ 281* [146].
- 265 *Serafin v Malkiewicz [2020] UKSC 23; [2020] 1 W.L.R. 2455*.
- 266 *Serafin v Malkiewicz [2019] EWCA Civ 852* [114].
- 267 *Serafin v Malkiewicz [2020] UKSC 23; [2020] 1 W.L.R. 2455* [39].
- 268 *Serafin v Malkiewicz [2020] UKSC 23; [2020] 1 W.L.R. 2455* [38], citing *Bubbles & Wine Ltd v Lusha [2018] EWCA*
Civ 468, and *M & P Enterprises (London) Ltd v Norfolk Square (Northern Section) Ltd [2018] EWHC 2665 (Ch)*.
- 269 *Serafin v Malkiewicz [2020] UKSC 23; [2020] 1 W.L.R. 2455* [39].
- 270 *Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451; [2000] 1 All ER 65* [25]; and see below, paras 3.82 ff.
- 271 *Serafin v Malkiewicz [2019] EWCA Civ 852* [114].
- 272 *Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451; [2000] 1 All ER 65* [25], [89], CA.

273 *Davidson v Scottish Ministers (No.2) [2004] UKHL 34, 2004 S.L.T. 895.*

274 But see, in this context, *R. Hazell and J. Wells*, “*Judicial Input into Parliamentary Legislation*” [2018] PL 106. The authors considered a surprising practice (which has, it seems, continued even after the *Constitutional Reform Act 2005*) by which judges give evidence to parliamentary select committees on the content of bills and draft bills, sometimes offering views on how the courts are likely to interpret the proposed legislation. Whatever the implications of this practice for the separation of powers principle, it may be thought that a judge expressing a firm view on the likely meaning of a proposed provision runs the risk of an allegation of apparent bias if later called upon to interpret that provision.

275 *Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451; [2000] 1 All ER 65* [25]; *British American Tobacco Australia Services Ltd v Laurie [2011] HCA 2 (High Court of Australia).*

276 *Steadman-Byrne v Amjad [2007] EWCA Civ 625; Project v Hutt [2006] 150 S.J.L.B. 702 EAT (Scot).*

277 As in *Dar Al Arkan Real Estate Development Co v Majid Al-Sayed Bader Hashim Al Refai [2014] EWHC 1055 (Comm).* *Mengiste v Endowment Fund for the Rehabilitation of Tigray [2013] EWCA Civ 1003.*

279 *Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451; [2000] 1 All ER 65* [25]; *Mengiste v Endowment Fund for the Rehabilitation of Tigray [2013] EWCA Civ 1003* [59].

280 *Lanes Group Plc v Galliford Try Infrastructure Ltd (t/a Galliford Try Rail) [2011] EWCA Civ 1617.*

281 *Frey v Labrouche [2012] EWCA Civ 881.*

282 *Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451; [2000] 1 All ER 65* [25]. This is so even where they are dealing with contempt proceedings arising from a hearing in which they have sat: *Wilkinson v S [2003] EWCA Civ 95; [2003] 1 W.L.R. 1254; JSC BTA Bank v Ablyazov [2013] 1 W.L.R. 1845; Otkritie International Investment Management Ltd v Urumov [2014] EWCA Civ 1315; [2015] CP Rep 6.*

283 *JSC BTA Bank v Ablyazov [2012] EWCA Civ 1551.*

284 *JSC BTA Bank v Ablyazov [2012] EWCA Civ 1551* [65].

285 *British American Tobacco Australia Services Ltd v Laurie [2011] HCA 2 (High Court of Australia).*

286 For criticism see *A. Higgins*, “*BATAS v Laurie: apprehended Bias and Actual Failure of Case Management*” (2011) 30 C.J.Q. 246.

287 *JSC BTA Bank v Ablyazov [2012] EWCA Civ 1551* [66]. A judge who hands down a draft judgment in the mistaken belief that they had received all the parties’ arguments should be able to recall the judgment and reconsider it with an open mind: *Taylor v Williamson (a firm) [2003] EWCA Civ 44.*

288 *Sengupta v Holmes [2002] EWCA Civ 1104.*

289 See Ch.25 Appeal para.25.157.

290 *AMEC Capital Projects Ltd v Whitefriars City Estates Ltd [2004] EWCA Civ 1418; [2005] 1 All ER 723.*

291 CPR 36.16; and see Ch.27 Offers to Settle paras 27.100 ff.

292 *Garratt v Saxby [2004] EWCA Civ 341; [2004] 1 W.L.R. 2152.*

293 *Berg v IML London Ltd [2002] 4 All ER 87* [22]–[24], QB.

294 *ALM Manufacturing v Black and Decker [2003] EWHC 1646 (Ch).*

295 *Helow v Advocate General for Scotland [2008] UKHL 62; [2008] 1 W.L.R. 2416* [54].

296 *Helow v Advocate General for Scotland [2008] UKHL 62; [2008] 1 W.L.R. 2416* [5].

297 *Helow v Advocate General for Scotland [2008] UKHL 62; [2008] 1 W.L.R. 2416* [7].

298 *J. Goudkamp*, “*Apparent bias: Helow v Secretary of State for the Home Department*” (2009) 28 C.J.Q. 183.

299 *Dimes v Properties of the Grand Junction Canal (1852) 10 ER 301.*

300 *Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451 at 473; [2000] 1 All ER 65* at 70–71.

301 *R v Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte (No.2) [2000] 1 AC 119, HL.*

302 *R v Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte (No.1) [2000] 1 AC 61, HL.*

303 *Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451 at 487; [2000] 1 All ER 65* at 84.

304 *Dimes v Properties of the Grand Junction Canal (1852) 10 ER 301.*

305 *Dimes v Properties of the Grand Junction Canal (1852) 10 ER 301* at 315.

306 *Jones v DAS Legal Expenses Insurance Co [2003] EWCA Civ 1071.*

307 *Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451 at 473; [2000] 1 All ER 65* at 71.

308 *R v Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte (No.2) [2000] 1 AC 119* at 142, HL.

309 *Morrison v AWG Group Ltd (formerly Anglian Water Plc) [2006] EWCA Civ 6* [20]; see also [6].

310 *Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451; [2000] 1 All ER 65, CA*, the panel of which consisted of the Lord Chief Justice, the Master of the Rolls and the Vice-Chancellor.

- 311 *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 at 475; [2000] 1 All ER 65 at 72.
- 312 *R (Kaur) v Institute of Legal Executives Appeal Tribunal* [2011] EWCA Civ 1168 [45].
- 313 See K. Reid, A Practitioner's Guide to the European Convention on Human Rights, 7th edn. (London: Sweet & Maxwell, 2023).
- 314 For further discussion see P. Craig, Administrative Law, 10th edn. (London, Sweet & Maxwell, 2025).
- 315 *Southwark LBC v Kofi-Adu* [2006] EWCA Civ 281; [2006] H.L.R. 33. In practice this overlaps considerably with questions of apparent bias, considered above: see for example *Shaw v Grouby* [2017] EWCA Civ 233; [2017] C.I.L.L. 3989, where it was held that lengthy interrogation of witnesses may undermine the judge's independence.
- 316 *Ringeisen v Austria* (1971) 1 E.H.R.R. 455; *Campbell and Fell v United Kingdom* (1985) 7 E.H.R.R. 165.
- 317 *Campbell and Fell v United Kingdom* (1985) 7 E.H.R.R. 165 [78].
- 318 *Bryan v United Kingdom* (1996) 21 E.H.R.R. 342 [38].
- 319 *Begum (Runa) v Tower Hamlets LBC* [2003] UKHL 5; [2003] 2 AC 430. The same applied where a local authority outsourced the decision to a third party because of the availability of judicial review: *Heald v Brent LBC* [2009] EWCA Civ 930. See also *Chapman v United Kingdom* (2001) 33 E.H.R.R. 399. See also *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23; [2003] 2 AC 295.
- 320 *Poiss v Austria* (1987) 10 E.H.R.R. 231. For the independence of lay members of employment tribunals see: *Scanfuture UK Ltd v Secretary of State for Trade and Industry* [2001] I.C.R. 1096; [2001] I.R.L.R. 416, EAT.
- 321 *Matthews v Ministry of Defence* [2003] UKHL 4; [2003] 1 AC 1163, HL [28]–[29]. See also *Begum (Runa) v Tower Hamlets LBC* [2003] UKHL 5; [2003] 2 AC 430, HL.
- 322 *McGonnell v United Kingdom* (2000) 30 E.H.R.R. 289.
- 323 *Starrs v Procurator Fiscal* [2000] S.L.T. 42.
- 324 *Clancy v Caird* [2000] S.C.L.R. 526, Court of Session.
- 325 See Lord Chancellor's Department, *Press Release* (12 April 2000).

The Principle of Publicity and the Right to a Public Hearing

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 3 - Fair Trial

The Principle of Publicity and the Right to a Public Hearing

The general principle

3. 107 English law recognises that it is “of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done”.³²⁶ This requirement applies, as the UK Supreme Court noted in *Cape v Dring*, “to all courts and tribunals exercising the judicial power of the state”.³²⁷ Justice is therefore dispensed in open court. This principle is variously described as the open justice principle, the publicity principle or the transparency principle.³²⁸ It is an “aspect of the rule of law in a democracy”³²⁹ and cannot be generically cut down at common law except in cases of wardship, mental illness and trade secrets.³³⁰ Specific exceptions may be provided for by statute, and beyond this the court has power at common law and under the rules to derogate from the open justice principle on a case-by-case basis to protect vulnerable interests and sensitive information, and to secure the due administration of justice. Such derogations must be compatible with the Convention rights, including art.6 (the right to a fair trial), art.8 (the right to respect for private and family life) and art.10 (freedom of expression) and will often involve striking a balance between those rights.³³¹ The circumstances in which restrictions may be imposed are considered below.
3. 108 The publicity principle is one of the cornerstones of the administration of justice.³³² “Publicity”, Bentham wrote, “is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.”³³³ There are compelling reasons why the idea of open justice should be firmly rooted in English law. Exposing the judicial process to the public gaze constitutes an important safeguard against bias, unfairness and incompetence. Judges who know that they themselves are being judged by public opinion are less likely to act in an arbitrary, partial or unreasonable manner. Put differently, dispensing justice in public makes the judiciary accountable in the performance of their duties.³³⁴ Toulson LJ also explained that the purpose of publicity was “not simply to deter impropriety or sloppiness by the judge hearing the case, but was wider so as to enable the public to understand and scrutinise the justice system”.³³⁵ Transparency of court proceedings has other advantages. By reducing the scope for ill-informed and malicious criticism of their actions, open process offers protection to the judiciary itself. Publicity contributes to the determination of truth by encouraging people with relevant information to come forward and by discouraging falsehood.³³⁶ By exposing moral, social and legal issues, the open trial promotes the very public debate that is so important to the democratic shaping of moral and legal rules.³³⁷ Lastly, the sight of effective and fair proceedings tends to enhance public confidence in the administration of justice and thereby promote respect for the law and its institutions. Given these considerations, it is only to be expected that the principle of publicity should be regarded as indispensable in any well-governed democratic society.
3. 109 The right to a public hearing forms part of the ECHR art.6(1) right to fair trial, which every party to civil proceedings enjoys. The ECtHR articulated the reasons for this right:
- “... the public nature of the proceedings helps to ensure a fair trial by protecting the litigant against arbitrary decisions and enabling society to control the administration of justice. This possibility of supervision by the public, even if frequently theoretical or potential, is a guarantee to the parties to a dispute that a real endeavour will be made to establish the truth through hearings conducted by a judge whose independence and impartiality can be

verified by the way in which he conducts the hearing, summons and questions witnesses and experts, considers the relevance of proposed evidence, and respects the right to be heard.”³³⁸

The ECtHR also drew attention to the wider public benefits of publicity by pointing out that the public nature of hearing serves to ensure that the public is duly informed, principally by the press, which helps bolster confidence in the administration of justice. A public hearing is therefore a fundamental guarantee of democracy, as well as of a fair trial.³³⁹

3. 110 The publicity principle manifests in a number of ways which, individually and in combination, serve to achieve the aims outlined above. The first is that hearings should take place publicly. Second, parties and the public should be able to publicise details of proceedings including what transpires at public hearings. Third, they should be able to access documents which form part of proceedings before the court. Finally, court decisions and the reasons for them should be accessible to the public. These facets of the publicity principle are closely related and tend to facilitate and reinforce each other. They are discussed in more detail below.
3. 111 It is therefore clear that the publicity principle has both a litigant-related, or party, aspect and a public aspect. Parties to civil proceedings have a right to insist, in the interests of fairness, that their dispute is adjudicated in a place that is accessible to the public. Infringement may undermine the validity of the proceedings both at common law³⁴⁰ and under the ECHR, art.6(1). However, whilst the ECtHR has repeatedly acknowledged the wider public benefits of publicity, ECHR art.6(1) itself guarantees only the party right.³⁴¹ Yet the public aspect of the open justice principle in English law implies that members of the public, and particularly the media, have a right to learn about and comment upon court proceedings and judicial decision-making. For this reason, at common law it is not within the gift of the parties to decide between themselves to shield any part of the proceedings from public view, whether by agreeing to hold hearings in private³⁴² or by agreeing to anonymise or restrict the publication of court proceedings.³⁴³ Thus, whilst it is generally open to a litigant to waive their rights under ECHR art.6(1),³⁴⁴ this cannot of itself operate to defeat an important public interest such as the principle of open access.
3. 112 The public dimension of the publicity principle has on occasion been overlooked. In *Trustor AB v Smallbone*,³⁴⁵ the claimant company brought an action against the defendant for misappropriation of large sums of money. The events that formed the basis of the claim were subject to a criminal investigation in Sweden. The parties agreed that all interlocutory proceedings should be held in private and the court held the hearing in private, at which the claimant obtained summary judgment. The defendant sought reporting restrictions to prevent publication of parts of the judgment. Rimer J held that, given that the trial had been conducted on the basis that the claimants would not reveal certain information, it would be unjust if the court were to permit the entire judgment to enter the public domain and so to undermine the value of the undertakings.³⁴⁶ It is suggested that it is contrary to the principle of publicity, and an abdication of the court’s responsibility to uphold that principle, to allow parties to agree restrictions on publicity among themselves. Litigation in the courts is a public process, conducted at public expense and to which as a matter of constitutional principle the public should have access, save in exceptional circumstances.³⁴⁷ Careful judicial scrutiny should be applied in every instance where a derogation from the publicity principle is proposed.

Derogations from the general principle

3. 113 It is important to stress that the principle of open access will on occasion run counter to legitimate competing interests, such as protecting the administration of justice, national security, the interests of children and confidential commercial information.³⁴⁸ Particular circumstances in which the open justice principle may be derogated from on account of such interests, and the consequences of this, are considered further below as part of the discussion of the four main manifestations of the publicity principle. For present purposes it is sufficient to note, first, that any derogation from open justice may be made only upon cogent and compelling grounds.³⁴⁹ Not every interest that would be harmed by open access would be worthy of protection. Exceptions may only be granted where this is strictly necessary in the interests of justice and must also take account of the

ECHR art.10 right to freedom of expression, as the publicity principle underpins the public's and media's ability to report and discuss proceedings.³⁵⁰

3. 114 Thus, an order directing that certain matters discussed at trial should be withheld from the public cannot be made merely to protect a party's privacy or in order to avoid embarrassment.³⁵¹ The fact that the press might start a media campaign which would affect an offender's resettlement into his community could not be a general justification for banning reporting about a case concerning the offender and his possible release.³⁵² The prospect of damage to reputation as a result of litigation is unlikely of itself to justify a derogation from open justice.³⁵³ In one case, a firm of solicitors whose legal aid franchise had been terminated by the Legal Aid Board sought an order forbidding the disclosure of its identity, in order to protect its reputation pending proceedings it brought to challenge the termination. The Court of Appeal rejected the application, holding that there was no justification to single out the legal profession for special protection; they were not entitled to greater protection from publicity than any other profession.³⁵⁴ Nor should public figures and celebrities generally be entitled to a special measure of protection as regards their reputation.³⁵⁵ Even where publicity could cause a party serious economic loss, the court would not normally agree to deviate from the principle of open justice,³⁵⁶ although it might do so if there was no public interest in disclosure of the relevant information.³⁵⁷
3. 115 Second, where there is a legitimate countervailing interest which justifies a restriction on open justice, the restriction must be kept to the minimum necessary to enable justice to be done in that case.³⁵⁸ Accordingly, the court would normally exclude the public only from those parts of the proceedings that deal with confidential information, such as trade secrets or other commercially sensitive information, and not the whole trial.³⁵⁹ The court may order that the identity of any party or witness should not be disclosed only if and for as long as it is necessary in order to protect some important interest of a party or witness.³⁶⁰ Where necessary, the court may limit the disclosure of sensitive information to the parties' representatives, and forbid them to make it available to their own clients.³⁶¹ However, the court must not make such an order if it is likely to impede the ability of a litigant to present their case.³⁶²
3. 116 Third, the public aspect of the publicity principle means that interested members of the public must be permitted to challenge any fettering of public access to court proceedings: in order to promote transparency and accountability, CPR 39.2(5) provides that where any order derogating from the principle of publicity is sought: (a) any person who is not a party to the proceedings may apply to attend the hearing and make submissions on the making of the order; (b) a copy of the order shall be published on the website of the Judiciary of England and Wales; and (c) any person may apply to set aside or vary the order.³⁶³

The implications of the publicity principle

Proceedings to be held in open court

3. 117 As a general rule, trials or other hearings in which the substance of disputes is decided must be held in a court that is open to the public. This finds expression in the Senior Courts Act 1981 s.67, which provides that “[b]usiness in the High Court shall be heard and disposed of in court except in so far as it may, under this or any other Act, under rules of court or in accordance with the practice of the court, be dealt with in chambers”,³⁶⁴ together with CPR 39.2(1), which states that the “general rule is that a hearing is to be in public”. CPR 32.2(1)(a) provides that “any fact which needs to be proved by the evidence of witnesses is to be proved … at trial, by their oral evidence given in public”.³⁶⁵ As a general principle, therefore, all evidence communicated to the court should be communicated publicly. The imperative of open justice is so fundamental that the court would be justified to exclude the public only in very restricted circumstances (discussed further below).³⁶⁶

3. 118 Mere administrative convenience does not justify sitting in private in a courtroom to which the public has no access.³⁶⁷ If a hearing is convened, the default position is that it must be public, and this in turn implies that the possibility of public access must be real and meaningful, not illusory. CPR 39.2(2A) underlines this by providing that the court must take reasonable steps to ensure all hearings have an “open and public character” (unless of course it has ordered the hearing to take place in private). Practical constraints of space cannot be altogether ignored, but any limitation on public access must be kept to the bare minimum. The courts and tribunals service is required, as the occupier of court buildings, not to exclude members of the public from those buildings without judicial approval.³⁶⁸
3. 119 It should be noted that the means of facilitating public access to hearings is no longer confined to physical attendance in a courtroom. Some statutes permit certain proceedings (including those in the Court of Appeal and Supreme Court) to be recorded and televised in order to increase the transparency of proceedings and promote public understanding and accountability of the courts’ work.³⁶⁹ Following the rapid adoption of virtual hearings during the coronavirus pandemic, statutory provisions were introduced to enable the civil courts generally to direct that proceedings could be live-streamed to a designated location or accessed by members of the public via a remote link.³⁷⁰
3. 120 The general rule in CPR 39.2(1) applies equally to interim hearings as it does to trials. Interim hearings concerned with procedural matters, whether held in person or via telephone or videoconference, are often held in the judge’s chambers, where space is limited and to which the public as a matter of practical reality has restricted access. However, proceedings in chambers are not private and are not meant to be secret. The parties are free to publicise the proceedings and decisions given in chambers must be made available to the public.³⁷¹ Even where proceedings are held in chambers, therefore, the derogation from publicity is kept to a bare minimum. The judge may allow interested members of the public to attend in chambers if it is feasible, or where appropriate order the effective extension of the public gallery by providing a video-link to the proceedings or a live-stream to a courtroom or other location to which the public can have access.³⁷² Where the proceedings are of general interest, the judge would normally adjourn them to a courtroom with public access. Accordingly, the court’s powers to facilitate access through the use of technology and other means allows it to find practical solutions to limitations of space without unduly undermining publicity.
3. 121 The open justice principle does not, of course, require every decision to be made at a hearing. It would be wasteful to insist upon straightforward and uncontentious procedural matters being dealt with orally, or matters which are so obviously without merit as to be unworthy of the court’s (and by the same token the public’s) attention. Further, where adequate publicity has attached to the determination of the dispute at first instance, it may be acceptable for the appeal process, including applications for permission to appeal, to be conducted on the basis of written materials.³⁷³ As the ECtHR explained, in order to determine whether the right to a public hearing has been infringed, regard must be had to the proceedings as a whole:
- “... there are other considerations, including the right to trial within a reasonable time and the related need for expeditious handling of the courts’ caseload, which must be taken into account in determining the need for a public hearing at the stages in the proceedings subsequent to the trial at first instance. Provided a public hearing has been held at first instance, the absence of such hearing before a second or third instance may accordingly be justified by the special features of the proceedings at issue.”³⁷⁴
3. 122 Even where a decision is made without a hearing the publicity principle should still be secured in other ways, including by making the resulting order and any reasons for it publicly accessible.³⁷⁵ A decision on the papers is as much the exercise of the judicial function as one which is arrived at via an oral process, and it is therefore important that adequate means are available for the public to scrutinise it. As Fordham J put it in *UXA v Merseycare NHS Foundation Trust*, “[j]udicial determinations without a hearing must not be judicial determinations in the shadows”.³⁷⁶ In that case Fordham J had, unusually, granted a declaration that the claimant’s ECHR rights had been infringed without convening a hearing. He granted the claimant

permission to use various documents from the court file (including the skeleton arguments, the defendant's admissions, and expert reports) for the purpose of disseminating them to the media and promoting public understanding of the order that had been made, and its context. In so deciding, he drew attention to the importance of ensuring that the open justice principle was not unduly diluted merely because he had decided to proceed on the papers instead of holding a hearing.³⁷⁷ It was therefore appropriate to take steps to ensure that it was secured in other ways.³⁷⁸

Hearings in private

3. 123 Private hearings (sometimes described as hearings or proceedings "in camera") are allowed where it is necessary to protect some vulnerable interest or where publicity could defeat or pre-empt a court's decision. CPR 39.2(3) lists the situations in which a court may direct that proceedings should be held in private:

Rule 5_4b

"(3) A hearing, or any part of it, must be held in private if, and only to the extent that, the court is satisfied of one or more of the matters set out in sub-paragraphs (a) to (g) and that it is necessary to sit in private to secure the proper administration of justice –

- (a) publicity would defeat the object of the hearing;
- (b) it involves matters relating to national security;
- (c) it involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality;
- (d) a private hearing is necessary to protect the interests of any child or protected party;
- (e) it is a hearing of an application made without notice and it would be unjust to any respondent for there to be a public hearing;
- (f) it involves uncontentious matters arising in the administration of trusts or in the administration of a deceased person's estate; or
- (g) the court for any other reason considers this to be necessary to secure the proper administration of justice."

3. 124 CPR 39.2(3) does not give a litigant a right to a hearing in private merely because the case falls within one of the classes listed in the rule. In cases involving confidential information, for instance, the court has to form a view of the nature of the confidential information, its importance to the party and the damage that would be suffered by its disclosure, before deciding whether it is necessary to hold a hearing in private.³⁷⁹ "Necessary" in this context has been explained to mean "no more than the minimum strictly necessary to ensure justice is done and parties are expected to consider before applying for such an exclusion whether something short of exclusion can meet their concerns, as will normally be the case".³⁸⁰ It may, for example, be possible to proceed by screening a witness from public view and making directions to protect their identity rather than making the hearing private; or by restricting the disclosure outside court of specific sensitive information; or by excluding the public and press only from those parts of the evidence and submissions dealing with such information.³⁸¹ Where a hearing at first instance has been held in private, it does not automatically follow that any appeal hearing will be private. A fresh application for a private hearing would need to be made and the appeal court will form its own view as to whether the appeal should be private, giving appropriate weight to the opinion formed by the judge at first instance.³⁸²

3. 125 Exceptions of the kind set out in CPR 39.2(3) are compatible with ECHR art.6, which recognizes that “the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice”. The ECtHR has endorsed English arrangements for designating an entire class of cases as an exception to the general rule of publicity in the interest of promoting the welfare of children and the protection of private life.³⁸³ Proceedings relating to children in the Family Division and proceedings relating to protected parties are normally held in private in their entirety.

Right to publicise proceedings

3. 126 What has been said and done at a hearing open to the public enters the public domain and all are free to report such matters, unless the court has ordered otherwise.³⁸⁴ The right to publicise legal proceedings is also protected by the right to freedom of expression under ECHR art.10, which may be restricted only to the extent necessary to safeguard national security, health and morals, privacy, the authority of the courts and the other public interests listed in art.10(2).³⁸⁵ Protection of the art.10 right is doubly important in the context of reporting court proceedings due to the public interest in keeping members of the public informed and in promoting public confidence in the administration of justice. This was reiterated by Vos J in *Re Mobile Phone Voicemail Interception Litigation*,³⁸⁶ where he stressed the vital public interest in the dissemination of accurate information about the proceedings in question, which involved phone-hacking, a matter that was creating considerable public disquiet.

3. 127 Closely related to both the principle that hearings should be open to the public, and that the public should be free to report and comment on such proceedings, is the idea that documents which are relevant to understanding those proceedings should be accessible. The means by which the public may seek access to such documents is discussed further below.³⁸⁷ For present purposes, it is sufficient to note two matters which combine to explain and underline the importance of proper access to documents in the context of the right to publicise court proceedings. The first is that modern developments in procedure have tended to reduce the oral nature of court proceedings and as a result it has become more difficult for members of the public to understand the legal process and for the press to report it without access to certain documents.

3. 128 In the past, the English process of adjudication was much more comprehensible to onlookers than its continental counterparts due to its orality and its continuous nature.³⁸⁸ Trials would commence with opening speeches in which counsel would provide a general explanation of the issues and an outline of the evidence they intended to call. Witnesses’ testimony would be entirely oral and would be delivered in open court, counsel would read out the documentary evidence, present their legal arguments orally and even read out the relevant authorities. As a result, members of the public would be able to follow all the evidence and the legal arguments without recourse to copies of the documents concerned in the proceedings. However, constraints on court time and the massive proliferation of documents, especially electronically stored documents, in modern times has made this approach impractical.³⁸⁹

3. 129 Nowadays, parties are required to provide the judge with the documents upon which they rely in advance of the trial, together with statements from the witnesses they propose to call and skeleton arguments outlining their case in writing. The judge will review these materials ahead of the hearing, with the result that at trial, opening speeches may be very brief or altogether absent, witness statements stand as evidence in chief, and the documentary evidence would not normally be read out but only referred to in the course of cross-examination and argument.³⁹⁰ Although cross-examination of witnesses is conducted orally, members of the public may find it difficult to form a view of the testimony as a whole since they may not be aware of the full context, and cross-examination is by its nature a targeted exercise directed towards probing reliability. Even counsel’s oral argument may be limited to addressing the judge on points on which he or she requires clarification. Without some corrective to the information asymmetry that now exists between observers and parties and the court, therefore, members of the public and media attending such hearings may well be left largely in the dark about the evidence and arguments. This

would deny them the opportunity of properly comprehending the proceedings and thus of reporting and commenting upon them in a meaningful way.

3. 130

The second aspect is that it would not be rational or principled to allow the increased reliance on documents at hearings to cut down the range of material that falls to be treated as having entered the public domain. The purpose of the right to report what has been said publicly is to enable scrutiny of the conduct of proceedings and of the resulting decision. That scrutiny would be rendered ineffective and incomplete if documents which were relevant to the conduct of proceedings, or which formed part of the process by which the judge arrived at their decision, were treated as not being within the public domain merely because they were not read out in the traditional manner. Lord Woolf MR recognised this in *Barings Plc (In Liquidation) v Coopers & Lybrand* when he said “[a]s a matter of basic principle the starting point should be that practices adopted by the courts and parties to ensure the efficient resolution of litigation should not be allowed to adversely affect the ability of the public to know what is happening in the course of proceedings.”³⁹¹ He was therefore of the view that if materials “were read by the judge, in or out of court, as part of his responsibility for determining what order should be made, they should be regarded as being in the public domain. This is subject to any circumstances of the particular case making it not in the interests of justice that this should be the position”.³⁹²

3. 131

The right of the parties to use documents which have entered the public domain in this way for the purpose of publicising the proceedings finds expression in CPR 31.22(1)(a). CPR 31.22(1) imposes a general obligation on parties not to make collateral use of documents that have been disclosed to them in the proceedings (including by making such documents public), but sub-rule (a) establishes an exception for documents that have “been read to or by the court, or referred to, at a hearing which has been held in public”.³⁹³ In *Smithkline Beecham Biologics SA v Connaught Laboratories Inc*,³⁹⁴ a decision on the predecessor rule in the RSC,³⁹⁵ the Court of Appeal held that the purpose of the exception would be frustrated if it were literally restricted to what had physically happened in open court. The rule was enacted in the interests of publicity and in order to give effect to the right of free expression under ECHR art. 10. To achieve those ends, it was necessary to take as falling under CPR 31.22(1) (a) any document pre-read by the judge, even if the judge was not actually referred to the document or witness statement in court.³⁹⁶ Since it would be impractical and undesirable to have to make enquiry of the judge as to what they did or did not read in order to administer the rule,³⁹⁷ it is to be presumed (absent clear contraindications) that they read documents to which they was specifically alerted, whether by reference in a skeleton argument or witness statement, or by mention in the “reading guide” with which judges now tend to be provided in heavy cases. Material that is merely reproduced in a court bundle is not, without more, taken to have been read by the judge, even though they will presumably have had access to it.³⁹⁸

3. 132

The court may restrict a party’s ability to use and publicise disclosed documents even where they have been referred to at a public hearing (CPR 31.22(2)).³⁹⁹ Such an order requires a compelling justification in the public interest.⁴⁰⁰ If the court makes a restricting order under CPR 31.22(2), but the document in question comes into the possession of a third party, any use by the third party of the document could amount to contempt of court if they have knowledge of the restriction order.⁴⁰¹ Conversely, the court may grant permission to a party to make collateral use of a document which has not entered the public domain by virtue of being referred to at a public hearing (CPR 31.22(1)(b)). Although it has been said that “cogent reasons” are required to permit the use of such documents,⁴⁰² in *UXA v Merseycare NHS Foundation Trust*, Fordham J held that documents which had been read by him in arriving at a decision on the papers were in an analogous position to documents within the CPR 31.22(a) exception. Permission to use the documents for the purpose of publicising information about the order he had made should therefore be granted to the parties so that a light could be shone on the decision.⁴⁰³

3. 133

The ability of the public and journalists to report court proceedings is materially assisted by having access to full and accurate contemporaneous records of what transpired at a hearing. However, this has to be balanced against the significant disadvantages that uncontrolled recording of court proceedings could bring, including potentially damaging the quality of the oral evidence given by witnesses; the risk that parts of proceedings which ought not to be publicised (for example, exchanges concerning confidential information) will be captured by a member of the public’s recording and subsequently disseminated; and the risks associated with the creation of multiple records of varying completeness and quality. For these reasons, it is prohibited to take photographs, videos or other visual recordings of court proceedings.⁴⁰⁴ It is also prohibited to audio record

court proceedings, save with the permission of the court, which is not generally forthcoming. Unauthorised recording may amount to contempt of court.⁴⁰⁵ During a public hearing, details of the proceedings can be communicated through mobile telecommunications.⁴⁰⁶ Afterwards, members of the public have an automatic right to a transcript subject to payment of the appropriate fee (CPR 39.9(3)), although this can often be prohibitive.⁴⁰⁷ As noted above, statutory provision is made for certain proceedings (including those in the Court of Appeal and Supreme Court) to be recorded for broadcast, and the recordings generally remain available online even after the hearing has concluded.⁴⁰⁸

3. 134 In *Ewing v Crown Court Sitting at Cardiff and Newport*,⁴⁰⁹ the Divisional Court overruled the decision of the Crown Court to stop a member of the public from taking notes during proceedings. The right to make notes was an aspect of the principle of open justice protected at common law. The Administrative Court confirmed that a member of the public could only be prevented from taking their own notes of proceedings if there was good reason to believe that by doing so they would interfere with the proper administration of justice.

Postponing reporting of proceedings

3. 135 On occasion, contemporaneous reporting of proceedings would run the risk of causing unfairness, as where publication of sensitive information relating to a whistle-blower could result in their being intimidated or blackmailed. The *Contempt of Court Act 1981 s.4(2)* therefore permits the court to postpone the reporting of proceedings, or any part of them, “where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings, or in any other proceedings pending or imminent”. The duration of such a restriction may be only for so long as the court thinks necessary for that purpose.

Restrictions on reporting of proceedings held in private

3. 136 The publication of information relating to proceedings before a court sitting in private is not of itself contempt of court, unless it is caught by the *Administration of Justice Act 1960* (the 1960 Act) s.12:

Section 12

“(1) The publication of information relating to proceedings before any court sitting in private shall not of itself be contempt of court except in the following cases, that is to say—

(a) where the proceedings—

(i) relate to the exercise of the inherent jurisdiction of the High Court with respect to minors;

(ii) are brought under the Children Act 1989; or

(iii) otherwise relate wholly or mainly to the maintenance or upbringing of a minor;

(b) where the proceedings are brought under Part VIII of the Mental Health Act 1959, or under any provision of that Act authorising an application or reference to be made to a Mental Health Review Tribunal or to a county court;

(c) where the court sits in private for reasons of national security during that part of the proceedings about which the information in question is published;

(d) where the information relates to a secret process, discovery or invention which is in issue in the proceedings;

(e) where the court (having power to do so) expressly prohibits the publication of all information relating to the proceedings or of information of the description which is published.

(2) Without prejudice to the foregoing subsection, the publication of the text or a summary of the whole or part of an order made by a court sitting in private shall not of itself be contempt of court except where the court (having power to do so) expressly prohibits the publication.

(3) In this section references to a court include references to a judge and to a tribunal and to any person exercising the functions of a court, a judge or a tribunal; and references to a court sitting in private include references to a court sitting in camera or in chambers.

(4) Nothing in this section shall be construed as implying that any publication is punishable as contempt of court which would not be so punishable apart from this section.”

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3. 137 The relationship between the [1960 Act s.12](#) and [CPR 39.2\(3\)](#) was considered by the Court of Appeal in *Re Bournemouth & Boscombe Athletic Football Club Ltd.*⁴¹¹ It was held that an order under [CPR 39.2\(3\)](#) did not mean that all information in the proceedings was secret; for if that were so it would render the [1960 Act s.12](#) largely redundant. The position was that a person may not be committed for contempt when such an order has been made, unless the court made an order under [CPR 39.2\(3\)](#) and expressly prohibited the publication of information heard in a private hearing, which would bring the matter within the [1960 Act s.12\(1\)\(e\)](#). The Court of Appeal stressed that [s.12\(1\)\(e\)](#) would apply only where the court used express words to prohibit publication because such prohibition would not be implied.

Anonymity orders

3. 138 The identities of the parties are an “integral part” of civil proceedings and the principle of open justice requires that they be available to anyone who may wish to attend the proceedings or who wishes to provide or receive a report of them.⁴¹² Knowledge of the identity of witnesses is similarly important to enable the public to understand and scrutinise proceedings, and there is no general rule or principle that the identity of other persons who are not parties or witnesses, but who are connected with the subject matter of the dispute, should be protected.⁴¹³ It goes without saying that knowledge of the identity of the judge who has dealt with a case is essential, since otherwise the central purpose of the publicity principle, namely to ensure the accountability of judges in the exercise of their judicial functions, would be defeated. “In accepting office”, Vos MR explained, “all judges will or should be aware that [disclosure of their identity] is the expectation, because public scrutiny of judges and the justice process is essential to the rule of law”.⁴¹⁴

3. 139 Inevitably, therefore, any order which prevents knowledge or restricts the publication of the name of a party, witness or other person involves a derogation from the principle of open justice and the right to freedom of expression. Such orders, which may be referred to generally as anonymity orders, are of two kinds: withholding orders, which permit the identity of a person to be withheld from the public (for example, in court documents, during hearings and in the judgment); and reporting restriction orders, which prohibit publication of a person’s name or of other information which may enable them to be identified.⁴¹⁵ Since the purpose of anonymity may be defeated if there is no prohibition on publication, these types of orders often go hand in hand.⁴¹⁶

3. 140 CPR 39.2(4) enables the court to anonymise parties and witnesses where this is “necessary to secure the proper administration of justice and in order to protect the interests of that party or witness”. This provision codifies the court’s common law jurisdiction in respect of the anonymisation of parties and witnesses,⁴¹⁷ but the power also remains available (on the same basis as CPR 39.2(4)) in respect of other persons concerned in the proceedings who are not parties or witnesses.⁴¹⁸ It is important to stress that the court’s common law power to grant anonymity, including its power to impose reporting restrictions, is not confined to cases where it is sitting in private. Indeed, such order may be made precisely in order to enable the court to avoid the need to adopt the more drastic measure of excluding the public and press altogether from the proceedings.⁴¹⁹ In addition to the court’s common law powers, the [Contempt of Court Act 1981 s.11](#) can be invoked in order to ensure that orders for anonymity are effective, by permitting the court to back up a withholding order which it has the power to make (and which it has made) with a reporting restriction:

“In any case where a court (having power to do so) allows a name or other matter to be withheld from the public in proceedings before the court, the court may give such directions prohibiting the publication of that name or matter in connection with the proceedings as appear to the court to be necessary for the purpose for which it was so withheld.”⁴²⁰

3. 141 Anonymity orders may be made only on compelling grounds to maintain the administration of justice and to protect the legitimate interests of the person concerned. The interests of justice would require such an order to be made if revelation of the person’s identity would unfairly prejudice the proceedings or undermine the very interest that the judicial process is seeking to protect.⁴²¹ In deciding whether anonymity is necessary to protect the interests of the person seeking it, a careful balancing exercise will be required between those interests and the fundamental principle of open justice, with regard being paid to such competing ECHR rights as are engaged – in particular, the rights of the public and press to know about court proceedings (art.10), the impact on the individual’s private life if their identity is disclosed (art.8). There is no automatic hierarchy between ECHR arts 8 and 10, but if the individual would face a risk of death or degrading treatment (ECHR arts 2 and 3) if their identity is disclosed, that would necessarily take precedence.⁴²²

3. 142 Derogation from the principle of open justice may also be sought solely on the basis that reporting of a person’s identity in connection with court proceedings would constitute an interference with their ECHR rights. In such cases, it is not said that publication of such matters would frustrate or render impractical the administration of justice as such, but rather that the court’s procedures would have been allowed to be used in such a way as to infringe the applicant’s Convention rights. In order to comply with [HRA 1998 s.6](#) the court must balance the competing rights, but in doing so must attach significant weight to the principles of open justice and the imperatives of ECHR art.10. For example, in *Re S*, an anonymity order was made to protect the identity of a child (who was not party or witness) whose mother stood accused of the murder of another of her children. The child’s ECHR art.8 rights did not, however, justify extending the anonymity order to the mother and the sibling who had died.⁴²³ And in *Khuja v Times Newspapers*, the Supreme Court refused to grant an anonymity order in favour of a person who was neither a party nor a witness, but against whom allegations of child sexual abuse had been made during the course of a criminal trial. Since the allegations had already been canvassed in open court, the applicant could not have any expectation of privacy in respect of them (notwithstanding that a temporary order under the [Contempt of Court Act 1981 s.4\(2\)](#) was in force during the trial), whereas an order to restrain publication would amount to direct press censorship.⁴²⁴

3. 143 It ought to be apparent that, where a party intends to apply for an order seeking anonymity, steps may need to be taken to protect the interests of the person concerned before the court can determine whether to accede to the application. It may therefore be appropriate to list applications using anonymised initials pending determination of the application. However, an application of that nature ought to go no further than necessary to protect the interest pending determination, and so such an application ought to be listed in public.⁴²⁵

Right of access to court documents

3. 144 The principal reasons for permitting the public access to relevant documents from the proceedings, namely to facilitate public understanding of court hearings and the ability of the public and media to report upon proceedings, are explored above. Despite a hesitant start,⁴²⁶ it is now accepted that the court should, unless there are serious countervailing considerations, allow the public to obtain documents such as statements of case, witness statements and skeleton arguments insofar as this is necessary to advance the open justice principle. Here we consider the means by which parties and the public may obtain documents from the court. Access is secured principally via [CPR 5.4B](#) (for parties), [CPR 5.4C](#) and [CPR 32.13](#) (for non-parties), and pursuant to the court's inherent jurisdiction to regulate its own procedure.⁴²⁷ Where a document is no longer held by the court but is held by one of the parties, the court may in appropriate circumstances direct the party to supply it pursuant to [CPR 31.22\(1\)\(a\)](#) or its common law powers.⁴²⁸
3. 145 Parties are normally in possession of all the documents that have been produced in the proceedings. Where they are not, [CPR 5.4B](#) provides a right of access from the court records:

Rule 5_4b

“(1) A party to proceedings may, unless the court orders otherwise, obtain from the records of the court a copy of any document listed in paragraph 4.2A of Practice Direction 5A.

(2) A party to proceedings may, if the court gives permission, obtain from the records of the court a copy of any other document filed by a party or communication between the court and a party or another person.”

The list in PD 5A para.4.2A is extensive, although it does not include witness statements for trial, experts' reports for trial, parties' submissions, trial bundles, or transcripts of hearings (which would not normally form part of the court record).⁴²⁹ No court permission is required to obtain documents listed in PD 5A para.4.2A, but the court can expressly order that a document shall not be provided. An application is required only for documents which have been filed by a party and are not listed in PD 5A para.4.2A,⁴³⁰ and for copies of communications between the court and a party or another person ([CPR 5.4B\(2\)](#)).⁴³¹

3. 146 The [CPR](#) make provision for the wider public to have access to documents in a number of instances. Certain courts keep a register of claims pursuant to [CPR 5.4](#) which members of the public are entitled to search subject to payment of a fee.⁴³² Under [CPR 5.4C\(1\)](#), the general rule is that a person who is not a party to proceedings may obtain from the court records: (a) statements of case (though not any documents filed with, attached to, or intended to be served with them), and (b) judgments or orders given or made in public, whether made at a hearing or not.⁴³³ These documents are available as of right, though only from the point that all defendants have filed an acknowledgment of service or defence,⁴³⁴ the claim has been listed for a hearing, or judgment has been entered ([CPR 5.4C\(3\)](#)). Further, the public's ability to obtain statements of case as of right is tempered by the fact that a party or other person identified in a statement of case may apply to the court for an order disapplying [CPR 5.4C\(1\)](#), an order that the statement of case shall be released only to a limited class of persons, or an order that it shall only be released subject to edits or redactions ([CPR 5.4\(4\)](#)). If such an order is granted, non-parties may thereafter obtain a copy of the statement of case in question only with the court's permission ([CPR 54.5](#)).⁴³⁵

3. 147 Permission is required to obtain other documents or a copy of any communication between the court and a party or other person pursuant ([CPR 5.4C\(2\)](#)). This provision applies only to documents that could be obtained from records of the court, which the Supreme Court held means “those documents and records which the court itself keeps for its own purposes”.⁴³⁶ This is narrower than simply those documents which are filed with the court and physically (or electronically) held by it

from time to time; it refers to documents which the court as a matter of practice keeps as a permanent or long-term record of the proceedings. The court records would not normally include all the evidence which has been put before it or copies of the parties' written submissions, since the court is unlikely to need to retain this in the long term.⁴³⁷ This interpretation means that CPR 5.4C(2) suffers from two fundamental problems so far as the publicity principle is concerned. First, there are no clear rules or settled practice as to what will be retained by the court as a "record", meaning that there are still likely to be local variations in practice which will affect what is available under CPR 5.4C(2) in practice (and which it may be very difficult for members of the public to discern). Second, as the Supreme Court observed, the records that a court may choose to keep for its own administrative purposes are not necessarily the same as those which would be of greatest assistance to the public in understanding the case.⁴³⁸ In particular, witness statements and other evidence for trial, and tools of advocacy such as skeleton arguments would not normally be retained by the court for record-keeping purposes and are therefore not accessible via CPR 5.4C. Nor will the court's decision-making as to what to retain or for how long necessarily be guided by considerations of open justice.

3. 148

The net result is that CPR 5.4C as presently drafted is not fit for purpose as a mechanism (indeed, one of the principal statutory mechanisms) by which the public's right to learn about court proceedings may be secured.⁴³⁹ Where a non-party wishes to access documents not falling within CPR 5.4C, they must have recourse to a different statutory power or else the inherent jurisdiction of the court to control its own procedure.⁴⁴⁰ The most important other mechanism in the CPR is the right of the public to inspect witness statements that stand as the evidence in chief during the course of the trial, unless the court directs otherwise (CPR 32.13). This right does not extend to exhibits or other documents referred to in a witness statement, however.⁴⁴¹ Moreover, any person may seek a direction that a witness statement should not be open to public inspection during the trial (CPR 32.13(2)), although such an order would be a derogation from the principle of open justice and should only be made if and to the extent it is necessary and proportionate.⁴⁴² An example is provided by *Cox v Jones*,⁴⁴³ where the media wished to inspect a witness statement by the defendant which detailed various allegations of adultery which, by the time of trial, no longer formed part of the defendant's case and were not the subject of oral evidence. Mann J declined to excise the allegations in their entirety since the witness statement stood as the defendant's evidence in chief and the existence of the allegations was relevant to the way in which the issues had developed. However, he directed that the names of non-parties should be deleted prior to inspection, out of fairness to those individuals and because knowledge of their identities was no longer necessary to understand the proceedings in light of the way the defendant's case was now put.

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As noted above, in the absence of a specific power to order the provision of a particular document, recourse may be had to the court's inherent jurisdiction. The rules are not intended to be exhaustive and the inherent jurisdiction would only be unavailable where the rules or a statute prohibit disclosure of the document sought.⁴⁴⁴ In deciding whether to exercise its jurisdiction to provide a document to a non-party the court will undertake a fact-specific balancing exercise, weighing up the purpose of the open justice principle and the value of granting access to advancing that purpose, any risk of harm disclosure would cause to an effective judicial process or the legitimate interests of others, as well as the practicalities and proportionality of granting the request.⁴⁴⁵ The default position is that the public should be allowed access to the parties' written submissions and documents that have been placed before the court and referred to during the proceedings.⁴⁴⁶ The onus is on the person who objects to disclosure of such a document to show cause why the court should not permit it.⁴⁴⁷ There is no reason why access cannot be sought after proceedings have come to an end, although if there has been a significant lapse of time this may have a bearing on the court's assessment of whether the open justice principle would be meaningfully advanced by disclosure, and it may increase the likelihood of there being practical difficulties in acceding to the request.⁴⁴⁸

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A person seeking access to court documents must identify with reasonable precision the documents or class of documents which they seek; it will not normally be appropriate to allow a non-party to undertake a search of the whole court record in order to identify what they want.⁴⁴⁹ They must set out the grounds for the application, explaining how the open justice principle would be advanced by disclosure.⁴⁵⁰ For this reason, in practice it will often be journalists who are in the best position to justify a request for disclosure. Whilst the assumption will be that access should be afforded to documents that have been referred to or otherwise placed before the court during the proceedings, the court should be more careful in giving permission to inspect materials that have not entered the public domain in this way. The principle of open justice does not come into play in relation to documents filed only for the purposes of administration. Further, it is unlikely that materials

that have not been before the court as part of its decision-making process would need to be accessed in order to understand the proceedings. The court should only give access to such documents if there were strong grounds for thinking that it was necessary in the interests of justice to do so. It is especially unlikely that the court would grant access to witness statements prior to trial, both because statements which have not yet become evidence are not necessary to understand the proceedings, and because public reporting of such evidence could have a detrimental effect on the administration of justice.⁴⁵¹ A non-party would not generally be entitled to obtain documents, including the court's order, where the proceedings were heard in private.⁴⁵²

3. 151 The effect that a settlement had on the exercise of the court's discretion to allow inspection under its inherent jurisdiction was clarified by Colman J in *Law Debenture Trust Corp (Channel Islands) Ltd v Lexington Insurance Co*. If a case settles before the hearing commences, the jurisdiction should not normally be exercised in favour of access even if the judge has read the materials, since there would be no observer of a public hearing who has been denied knowledge of the proceedings by reason of the submissions having been committed to writing.⁴⁵³ The same would be true where there was a brief hearing as a mere formality to obtain an order reflecting the parties' settlement; but the position would be different if the judge had to exercise his or her judgment on a matter of substance in deciding whether to grant the order sought.⁴⁵⁴ Where the trial begins but the case settles before judgment, the court should normally allow inspection by the public. Although one function of the open justice principle is to facilitate public scrutiny of the quality of judgments with reference to the evidence, submissions and the law, another is to enable examination of the quality of the judge's day-to-day control of the trial. Where a document is relevant to that dimension of the judicial function (for example, because it would have informed the judge's understanding of the issues and thus their decision-making as to the proper conduct of the trial before it was abandoned), access should be granted.⁴⁵⁵

Publicity of judgments and orders

3. 152 It is self-evident that decisions of the court should be publicly available, together with their reasons. The public need to know the outcome of court decision-making in order to be guided by it, as a check on arbitrariness, and to be able to evaluate the handling and disposal of cases by the judiciary. The same is true of the reasoning underpinning the court's decisions. Justice may not be done, and will not be seen to be done, if it is not apparent to the public why the court decided as it did.⁴⁵⁶ Consequently, the open justice principle "applies with at least equal force to the judgment of the court following the hearing", as the Court of Appeal explained.⁴⁵⁷ ECHR art.6(1) requires that judgment should "pronounced publicly" (although this does not mean that it must be read out in public; it is enough that it should be made public).⁴⁵⁸

3. 153 Where it has been necessary to hold a hearing in private, the same considerations may lead to the conclusion that the court's judgment should be withheld from the public in whole or part.⁴⁵⁹ This is not axiomatic, however, and it may well be that the judgment should be freely accessible even after a private hearing (for example, where the reasons for holding the hearing in private, such as a threat to the fairness of proceedings, have dissipated as a result of the dispute having been determined; or because confidential information was involved but, on analysis, it is possible to give judgment without revealing that information).⁴⁶⁰ As Lord Judge explained, it is crucial that any restrictions on the publication of judgments and orders are kept to an absolute minimum:

"... where litigation has taken place and judgment given, any disapplication of the principle of open justice must be rigidly contained, and even within the small number of permissible exceptions, it should be rare indeed for the court to order that any part of the reasoning in the judgment which has led it to its conclusion should be redacted. As a matter of principle it is an order to be made only in extreme circumstances."⁴⁶¹

But there is no reason to allow public access to a confidential schedule to a Tomlin order; the open justice principle is not concerned with unearthing the private terms of a settlement agreement.⁴⁶²

Footnotes

- 326 *R v Sussex Justices Ex p. McCarthy [1924] 1 KB 256* at 259. See also *Scott v Scott [1913] AC 417* at 477, HL; *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs [2010] EWCA Civ 65* [36]–[40]; *Global Torch Ltd v Apex Global Management Ltd [2013] EWCA Civ 819* [13]–[22]; Report of the Committee on Super-Injunctions: Super-Injunctions, Anonymised Injunctions and Open Justice (London: Judicial Office, 2011) at paras 1.17 ff; A. Zuckerman, “*Super Injunctions—Curiosity-Suppressant Orders Undermine the Rule of Law*” (2010) 29 C.J.Q. 131.
- 327 *Cape Intermediate Holdings Ltd v Dring (Asbestos Victims Support Groups Forum UK) [2019] UKSC 38; [2020] AC 629* [41]. For the application of the publicity principle to Court of Protection proceedings see *A v Independent News and Media Ltd [2010] EWCA Civ 343; [2010] 1 W.L.R. 2262*.
- 328 *Attorney-General v Leveller Magazine Ltd [1979] AC 440*, 449H–450D.
- 329 *Re BBC [2014] UKSC 25; [2015] AC 588* [23]; and see *Bank Mellat v Her Majesty's Treasury (No. I) [2013] UKSC 38; [2014] AC 700* [2].
- 330 *Global Torch Ltd v Apex Global Management Ltd [2013] EWCA Civ 819* [13].
- 331 *Al-Rawi v Security Service [2011] UKSC 34; [2012] 1 AC 531; Home Office v Tariq [2011] UKSC 35; [2012] 1 AC 452; Global Torch Ltd v Apex Global Management Ltd [2013] EWCA Civ 819* [15]–[18].
- 332 See J. Jaconelli, *Open Justice: A Critique of the Public Trial* (Oxford: Oxford University Press, 2002).
- 333 Quoted by Lord Diplock in *Harman v Secretary of State for the Home Department [1982] 1 AC 280* at 303, HL. See also *Al-Rawi v Security Service [2011] UKSC 34; [2012] 1 AC 531*.
- 334 *Scott v Scott [1913] AC 417, HL*—see in particular Lord Shaw at 475, referring to the 1688 constitutional settlement and his emphasis on open justice as a means to secure civil liberties as against the judiciary; *R v Sussex Justices Ex p. McCarthy [1924] 1 KB 256* at 259; *Ambard v A-G for Trinidad and Tobago [1936] AC 322* at 335; [1936] 1 All ER 704 at 709, PC; *Attorney General v Leveller Magazine Ltd [1979] AC 440* at 450; [1979] 1 All ER 745 at 750, HL.
- 335 *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court [2012] EWCA Civ 420; [2013] QB 618* [79], endorsed by the UK Supreme Court in *Kennedy v Charity Commission (Secretary of State for Justice intervening) [2014] UKSC 20; [2015] AC 455* [47], [108]–[110] and [152]; and *Cape Intermediate Holdings Ltd v Dring (Asbestos Victims Support Groups Forum UK) [2019] UKSC 38; [2020] AC 629* [36]–[40].
- 336 *R v Legal Aid Board Ex p. Kaim Todner (a firm) [1999] QB 966* at 977; [1998] 3 All ER 541 at 549–550.
- 337 *Al-Rawi v Security Service [2011] UKSC 34; [2012] 1 AC 531*, at 532; O. Fiss, “Against Settlement” (1984) 93 Yale L.J. 1073.
- 338 *Axen v Germany (ECom HR Report, unreported, 14 December 1981)* [76].
- 339 *Axen v Germany (ECom HR Report, unreported, 14 December 1981)* [77]. See also *Pretto v Italy (1984) 6 E.H.R.R. 182; Axen v Germany (1984) 6 E.H.R.R. 195; B v UK, P v UK [2001] 2 F.C.R. 221; [2001] 2 F.L.R. 261, ECtHR*.
- 340 *McPherson v McPherson [1936] AC 177, PC; Storer v British Gas Plc [2000] 2 All ER 440; [2000] 1 W.L.R. 1237, CA; R (O'Connor) v Aldershot Magistrates Court [2016] EWHC 2792 (Admin); [2017] 1 W.L.R. 2833*.
- 341 Cf. *Axen v Germany (ECom HR Report, unreported, 14 December 1981); Pretto v Italy (A/71) (1984) 6 E.H.R.R. 182; Axen v Germany (1984) 6 E.H.R.R. 195*. Access to court proceedings may of course also engage the ECHR art.10 rights of persons other than just the parties, since such access underpins their right to publicise and comment on the proceedings.
- 342 CPR 39.2(1). See also *McPherson v McPherson [1936] AC 177 at 201, PC*; at 204–205 it was suggested that the Attorney General (in that case, of Alberta) would have the right to seek to have a decision set aside on the ground that the public were unlawfully excluded from the proceedings in his or her capacity as guardian of the public interest, even if neither of the parties sought to appeal the decision.
- 343 *JIH v News Group Newspapers Ltd [2011] EWCA Civ 42; [2011] W.L.R. 1645* [21].
- 344 Including the right to a public hearing: see *Le Compte, Van Leuven and De Meyere v Belgium (1982) 4 E.H.R.R. 1* [59]; *Hakansson and Sturesson v Sweden (1991) 13 E.H.R.R. 1* [66]–[67].
- 345 *Trustor AB v Smallbone [2000] 1 All ER 811, Ch.*
- 346 Contrast *Manchester City Football Club Ltd v Football Association Premier League Ltd [2021] EWCA Civ 1110; [2021] 1 W.L.R. 5513*. In that case, the Court of Appeal upheld a judge’s decision to publish a judgment on a challenge to an arbitral award under the *Arbitration Act 1996 ss.67–68*. The challenge had been heard in private and both parties objected to the publication of the judge’s judgment, but those considerations were outweighed by the fact there was

- a significant public interest in the subject matter of the challenge and the fact that publication would not lead to the disclosure of extensive confidential information.
- 347 *Scott v Scott* [1913] AC 417, at 463 and 476, HL; and *McPherson v McPherson* [1936] AC 177, PC.
- 348 *Scott v Scott* [1913] AC 417, HL; *Cape Intermediate Holdings Ltd v Dring (Asbestos Victims Support Groups Forum UK)* [2019] UKSC 38; [2020] AC 629.
- 349 *Attorney General v Leveller Magazine Ltd* [1979] AC 440; [1979] 1 All ER 745, HL; *Hodgson v Imperial Tobacco Ltd* [1998] 2 All ER 673 at 686, CA. See also *Lilly Icos Ltd v Pfizer Ltd* [2002] EWCA Civ 2; [2002] 1 W.L.R. 2253; *Clayton v Clayton* [2006] EWCA Civ 878 (where the policy of the family court preventing the parties from publicising child proceedings was relaxed in favour of publicity); and *Re Mobile Phone Voicemail Interception Litigation* [2012] EWHC 397 (Ch).
- 350 See the discussion of so-called “super injunctions” in Ch.10 Interim Remedies paras 10.108 ff.
- 351 *Attorney General v Leveller Magazine Ltd* [1979] AC 440; [1979] 1 All ER 745, HL; *R v Evesham Justices Ex p. McDonagh* [1988] QB 553; [1988] 1 All ER 371; *Birmingham Post and Mail Ltd v Birmingham City Council* (1993) 17 B.M.L.R. 116; *V v T* [2014] EWHC 3432 (Ch); [2015] W.T.L.R. 173 [13].
- 352 *R (SF) v Secretary of State for Justice* [2013] EWCA Civ 1275.
- 353 *Global Torch Ltd v Apex Global Management Ltd* [2013] EWCA Civ 819.
- 354 *R v Legal Aid Board Ex p. Kaim Todner (a firm)* [1999] QB 966; [1998] 3 All ER 541, CA.
- 355 *JIH v News Group Newspapers Ltd* [2011] EWCA Civ 42; [2011] 1 W.L.R. 1645 [24].
- 356 *R v Dover Justices Ex p. Dover District Council and Wells* (1991) 156 J.P. 433.
- 357 *Re BBC* [2014] UKSC 25; [2015] AC 588 [41].
- 358 *Bank Mellat v Her Majesty's Treasury (No.1)* [2013] UKSC 38; [2014] AC 700 [2]; see also *Ambrosiadou v Coward* [2011] EWCA Civ 409 [50]–[51].
- 359 See *General Motors-Holden's Ltd v David Syme and Co Ltd* [1985] F.S.R. 413 (Supreme Court of New South Wales); and *Polly Peck International Plc v Nadir (No.2)* [1992] 4 All ER 769, CA; *Wallace Smith Trust Co Ltd v Deloitte Haskins and Sells (a firm)* [1996] 4 All ER 403; [1997] 1 W.L.R. 257, CA. See also *C v S* [1999] 2 All ER 343; [1999] 1 W.L.R. 1551, CA.
- 360 *Arab Monetary Fund v Hashim* [1989] 3 All ER 466; [1989] 1 W.L.R. 565; *Ntuli v Donald* [2010] EWCA Civ 1276; and *CVB v MGN Ltd* [2012] EWHC 1148 (QB).
- 361 *Werner-Lambert Co v Glaxo Laboratories Ltd* [1975] R.P.C. 354; and *Roussel Uclaf v ICI Plc* [1990] F.S.R. 25; [1990] R.P.C. 45, CA.
- 362 *Dyson Appliances Ltd v Hoover Ltd (No.3)* [2002] EWHC 500 (Pat); [2003] R.P.C. 42, Pat Ct.
- 363 See also the guidance issued by the Master of the Rolls in April 2019 on the application of CPR 32.9(5): “*Practice Guidance (Sen Cts: Privacy and Anonymity Orders: Publication)*” [2019] 1 W.L.R. 3082. This does not however prevent an order derogating from the open justice principle being made without notice to the public and press, provided there is a sufficient opportunity to challenge it thereafter: *Re BBC* [2014] UKSC 25; [2015] AC 588.
- 364 See 2025 WB 9A-248–252; the words “in court” mean “in open court”, in a court to which the public and the press are entitled to be admitted: *R v Lewes Prison (Governor) Ex p. Doyle* [1917] 2 KB 254 at 271.
- 365 2025 WB 32.2.1; cf. *Attorney General v Leveller Magazine Ltd* [1979] AC 440; [1979] 1 All ER 745, HL.
- 366 *Three Rivers DC v Bank of England* [2005] EWCA Civ 933; [2005] C.P. Rep. 47, where the Court of Appeal refused an application to cross-examine a witness in private in order to protect information about his medical condition. See also: *Al-Rawi v Security Service* [2011] UKSC 34; [2012] 1 AC 531; *Church v MGN Ltd* [2012] EWHC 693, QB.
- 367 *Storer v British Gas Plc* [2000] 2 All ER 440; [2000] 1 W.L.R. 1237, CA. The ECtHR has stated that the need to reduce the workload of the courts was not a matter which justified dispensing with public hearings: *Axen v Germany (ECom HR Report, unreported, 14 December 1981)* [78].
- 368 *R (O'Connor) v Aldershot Magistrates Court* [2016] EWHC 2792 (Admin); [2017] 1 W.L.R. 2833.
- 369 Crime and Courts Act 2013 s.32; Court of Appeal (Recording and Broadcasting) Order 2013 (SI 2013/2786); and Constitutional Reform Act 2005 s.47. Also see *Tripathi v Supreme Court of India* (No.1,232 of 2017) (Supreme Court of India) for an overview of common law approaches to televised hearings.
- 370 Courts Act 2003 s.85A; Remote Observation and Recording (Courts and Tribunals) Regulations 2022 (SI 2022/705). The *Coronavirus Act 2020* inserted the original version of s.85A on a temporary basis; this was then replaced by a similar provision with effect from 28 June 2022 pursuant to the *Police, Crime, Sentencing and Courts Act 2022* s.198. For how the earlier version has been interpreted, see: *R (Good Law Project Ltd) v Secretary of State for Health and Social Care* [2021] EWHC 346 (Admin). The later version is slightly broader than the earlier formulation, in that it permits remote access to and live-streaming of in-person and hybrid proceedings as well as wholly remote ones. For discussion of how the court’s ability to maintain control (for example over recording of proceedings) is diminished where live transmission

- takes place because the judge does not have the same visibility over what happens in court, see *Gubarev v Orbis Business Intelligence Ltd* [2020] EWHC 2167 (QB); [2020] 4 W.L.R. 122 [51]–[52].
- 371 *Hodgson v Imperial Tobacco Ltd* [1998] 2 All ER 673; [1998] 1 W.L.R. 1056, CA; *Clibbery v Allan* [2002] EWCA Civ 45; [2002] Fam. 261; cf. CPR 5.4C(1).
- 372 See para.3.119 above.
- 373 *Axen v Germany* [1984] 6 E.H.R.R. 195. Cf. CPR 52.5(1), which provides for applications for permission to appeal which are made to the Court of Appeal to be determined on the papers without any right to demand oral reconsideration.
- 374 *Fejde v Sweden* (1994) 17 E.H.R.R. 14 [31]; see also *Helmers v Sweden* (1993) 15 E.H.R.R. 285.
- 375 CPR 5.4C(1) guarantees the public a right of access to judgments and orders irrespective of whether the decision was made on the papers or at a hearing, provided that the court has not directed that the decision should remain private.
- 376 *UXA v Merseycare NHS Foundation Trust* [2021] EWHC 3455 (QB); [2022] 4 W.L.R. 30 [43]; see also *Dian AO v Davis Frankel and Mead (a firm)* [2004] EWHC 2662 (Comm); [2005] 1 All ER 1074.
- 377 Cf. *SmithKline Beecham Biologicals SA v Connaught Laboratories Inc* [1999] 4 All ER 498, CA.
- 378 *UXA v Merseycare NHS Foundation Trust* [2021] EWHC 3455 (QB); [2022] 4 W.L.R. 30 [43], [49].
- 379 *Re Timothy Edward Shuldhham* [2012] EWHC 1420 (Ch).
- 380 Report of the Committee on Super-Injunctions: Super-Injunctions, Anonymised Injunctions and Open Justice (London: Judicial Office, 2011), p.78; and see *Ntuli v Donald* [2010] EWCA Civ 1276; [2011] 1 W.L.R. 294 [50]–[54]; *Ambrosiadou v Coward* [2011] EWCA Civ 409; [2011] Fam Law 690 [50]–[54]; and *CVB v MGN Ltd* [2012] EWHC 1148 (QB).
- 381 *Bank Mellat v Her Majesty's Treasury (No.1)* [2013] UKSC 38; [2014] AC 700 [32]; *Khuja v Times Newspapers Ltd* [2017] UKSC 49; [2019] AC 161 [14]; *Pink Floyd Music Ltd v EMI Records Ltd* [2010] EWCA Civ 1429; [2011] 1 W.L.R. 770 [63].
- 382 *Pink Floyd Music Ltd v EMI Records Ltd* [2010] EWCA Civ 1429; [2011] 1 W.L.R. 770 [66]–[69].
- 383 *B v UK, P v UK* [2001] 2 F.C.R. 221; [2001] 2 F.L.R. 261, ECtHR.
- 384 *Harman v Secretary of State for the Home Department* [1983] 1 AC 280, HL. See further below, paras 3.135 ff and Ch.10 Interim Remedies paras 10.116 ff.
- 385 *B v UK, P v UK* [2001] 2 F.C.R. 221; [2001] 2 F.L.R. 261, ECtHR; *JIH v News Group Newspapers* [2011] EWCA Civ 42; [2011] 1 W.L.R. 1645 [21(3)]; *Re BBC* [2014] UKSC 25; [2015] 1 AC 588.
- 386 *Re Mobile Phone Voicemail Interception Litigation* [2012] EWHC 397 (Ch).
- 387 See paras 3.144 ff.
- 388 In continental procedures, by contrast, there has tended to be greater reliance on written materials, and trials could consist of a series of hearings held at various intervals. Members of the public in those countries would find it much more difficult to follow a trial from start to finish in any event. P.F. Schlosser, “Trial and Court Procedures in Continental Europe” in C. Platto (ed.), Trial and Court Procedures Worldwide (London: Graham & Trotman, International Bar Association, 1991). See also D. Campbell and C.T. Campbell (eds.), International Civil Procedures (London: Lloyd’s of London Press, 1995).
- 389 See *Lilly Icos Ltd v Pfizer Ltd* [2002] EWCA Civ 2; [2002] 1 W.L.R. 2253 [13]. See also *Re Guardian Newspapers Ltd (Court Record: Disclosure)* [2004] EWHC 3092 (Ch); [2005] 1 W.L.R. 2965.
- 390 *SmithKline Beecham Biologicals SA v Connaught Laboratories Inc* [1999] 4 All ER 498, CA.
- 391 *Barings Plc (In Liquidation) v Coopers and Lybrand* [2000] 3 All ER 910 at 920; [2000] 1 W.L.R. 2353 at 2364.
- 392 *Barings Plc (In Liquidation) v Coopers and Lybrand* [2000] 3 All ER 910 at 922; [2000] 1 W.L.R. 2353 at 2367. It should be noted that those remarks were made in the context of the Banking Act 1987 s.82, which forbids publication of documents and information gathered under the Act but which makes an exception for “information which at the time of the disclosure has already been made available to the public from other sources ...” See also *Clibbery v Allan* [2002] EWCA Civ 45; [2002] Fam. 261, CA.
- 393 For further discussion of this rule and its exceptions, see Ch.15 Disclosure paras 15.263 ff.
- 394 *SmithKline Beecham Biologicals SA v Connaught Laboratories Inc* [1999] 4 All ER 498 at 522, CA.
- 395 RSC Ord.24 r.14A. This was introduced following an application to the ECtHR (*Harman v United Kingdom* [1985] 7 E.H.R.R. 146) in consequence of *Harman v Secretary of State for the Home Department* [1983] 1 AC 280, HL. 2025 WB 31.22.1.
- 396 *Barings Plc (In Liquidation) v Coopers and Lybrand* [2000] 3 All ER 910 at 922; [2000] 1 W.L.R. 2353 at 2367; and *Lilly Icos Ltd v Pfizer Ltd* [2002] EWCA Civ 2; [2002] 1 W.L.R. 2253 [8].
- 397 *Lilly Icos Ltd v Pfizer Ltd* [2002] EWCA Civ 2; [2002] 1 W.L.R. 2253 [8]; *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2012] EWHC Civ 420; [2013] QB 618; and *Cape Intermediate Holdings Ltd v*

- 399 *Dring (Asbestos Victims Support Groups Forum UK) [2019] UKSC 38; [2020] AC 629 [44]*. This is reflected in the Commercial Court Guide (2022) at J5.1 and J8.6.
- 400 See for example *White v Southampton University Hospitals NHS Trust [2011] EWHC 825 (QB)*.
- 401 See further Ch.15 Disclosure paras 15.265 ff.
- 402 *Lilly Icos Ltd v Pfizer Ltd [2002] EWCA Civ 2; [2002] 1 W.L.R. 2253 [5]*.
- 403 *Tchenguiz v Grant Thornton UK LLP [2017] EWHC 310 (Comm) [66]; [2017] 1 W.L.R. 2809, Lakatamia Shipping Co Ltd v Su [2020] EWHC 3201 (Comm); [2021] 1 W.L.R. 1097 [53]*.
- 404 *UXA v Merseycare NHS Foundation Trust [2021] EWHC 3455 (QB); [2022] 4 W.L.R. 30 [43]*.
- 405 Criminal Justice Act 1925 s.41; *Barber v Lloyd's Underwriters [1987] QB 103*; and *R v Loveridge, Lee and Loveridge [2001] EWCA Crim 973*.
- 406 Contempt of Court Act 1981 s.9.
- 407 *Practice Guidance (Court Proceedings: The Use of Live Text-Based Forms of Communication) (No.2) [2012] 1 W.L.R. 12*.
- 408 Where the hearing has been in private, court permission is required for a transcript: see *Revenue and Customs Commissioners v Banerjee [2009] EWHC 1229 (Ch); [2009] 3 All ER 930*.
- 409 See above, para.3.119.
- 410 *Ewing v Crown Court Sitting at Cardiff and Newport [2016] EWHC 183 (Admin); [2016] 4 W.L.R. 21*. The Divisional Court noted that the issue of the right to take notes in court had not been considered by the ECtHR under any of the ECHR arts 6, 10 or 14.
- 411 See 2025 WB 9B-15 ff.
- 412 *Re Bournemouth and Boscombe Athletic Football Club Ltd [2007] EWCA Civ 848; [2007] 1 W.L.R. 2614*. Cf. also *Clibbery v Allan [2002] EWCA Civ 45; [2002] Fam 261*.
- 413 *X (A Child) v Dartford and Gravesham NHS Trust [2015] EWCA Civ 96; [2015] 1 W.L.R. 3647 [17]*.
- 414 See *Re S (A Child) [2004] UKHL 47; [2001] 1 AC 593; Khuja v Times Newspapers Ltd [2017] UKSC 49; [2019] AC 161 [35]*; cf. *Cox v Jones [2004] EWHC 1006 (Ch)*.
- 415 *Tickle v BBC [2025] EWCA Civ 42 [50]*.
- 416 See *PMC v Cwm Taf Morgannwg University Health Board [2025] EWCA Civ 1126 [2]*, regarding the historically variable use of terminology in this context.
- 417 *Lupu v Rakoff [2020] E.M.L.R. 6 [41]*.
- 418 *PMC v Cwm Taf Morgannwg University Health Board [2025] EWCA Civ 1126 [88]*.
- 419 *Brearley v Higgins & Sons (A Firm) [2021] EWHC 1342 (Ch) [13]–[14]*, referring to *Khuja v Times Newspapers Ltd [2017] UKSC 49; [2019] AC 161*. In *Brearley*, it was appropriate to order that the name of a source who had supplied information for an expert report should be redacted from court documents.
- 420 *C v Secretary of State for Justice [2016] UKSC 2; [2016] 1 W.L.R. 444*; and cf. *X (A Child) v Dartford and Gravesham NHS Trust [2015] EWCA Civ 96; [2015] 1 W.L.R. 3647* (infant approval hearings do not generally need to be heard in private, but anonymity orders would usually be appropriate to protect the child's interests and those of their family).
- 421 In *PMC v Cwm Taf Morgannwg University Health Board [2025] EWCA Civ 1126*, the Court of Appeal held that the existence of the s.11 power did not abrogate the court's common law power to impose an anonymity order, including reporting restrictions. In any case, the s.11 power is available in a more limited range of circumstances than the common law power, namely where a person's identity or other specified information has already been ordered to be withheld from the public, and the reporting restriction is "necessary for the [same] purpose for which [the name or other matter] was ... withheld": see [8], [95]. In *R v Evesham Justices Ex p. McDonagh [1988] QB 553; [1988] 1 All ER 371*, it was held to be a misuse of the s.11 power for magistrates to prohibit the publication of a defendant's address in order to protect him from possible harassment by his former wife.
- 422 *Attorney General v Leveller Magazine Ltd [1979] AC 440; [1979] 1 All ER 745, HL; Ntuli v Donald [2010] EWCA Civ 1276; [2011] 1 W.L.R. 294; Pink Floyd Music Ltd v EMI Records Ltd, Practice Note [2011] 1 W.L.R. 770; Global Torch Ltd v Apex Global Management Ltd [2013] EWCA Civ 819*.
- 423 *Re BBC [2014] UKSC 25; [2015] AC 588; XXX v Camden London Borough Council [2020] EWCA Civ 1468; [2020] 4 W.L.R. 165*.
- 424 *Re S (A Child) [2004] UKHL 47; [2001] 1 AC 593*.
- 425 *Khuja v Times Newspapers Ltd [2017] UKSC 49; [2019] AC 161*.
- 426 *V v T [2014] EWHC 3432 (Ch); [2015] W.T.L.R. 173*; approved in *MN v OP [2019] EWCA Civ 679*.
- See the first edition of this work, at paras 2.97–2.100.

- 427 Court documents are exempt from the provisions of the [Freedom of Information Act 2000](#), and similarly the [Data Protection Act 2018](#) contains exemptions for data processed by courts and tribunals “acting in a judicial capacity” (which should be interpreted broadly so as to cover all judicial functions: *X v Transcription Agency LLP [2023] EWHC 1092 (KB); [2024] 1 W.L.R. 33*).
- 428 *NAB v Serco Ltd [2014] EWHC 1225 (QB); Blue v Ashley [2017] EWHC 1553 (Comm); [2017] 1 W.L.R. 3630 [10]*.
- 429 See *Cape Intermediate Holdings Ltd v Dring (Asbestos Victims Support Groups Forum UK) [2019] UKSC 38; [2020] AC 629 [21]–[22]*; and see *Law Debenture Trust Corp (Channel Islands) Ltd v Lexington Insurance Co [2003] EWHC 2297 (Comm)*. This point is discussed further below in the context of [CPR 5.4C](#), at para.3.147.
- 430 Although a request by a non-party to access court documents under [CPR 5.4C](#) is a “communication between the court and a [non-party]”, it does not form part of the records of the court within the meaning of [CPR 5.4B](#). A party may not, therefore, obtain disclosure of the identity of the non-party who made the request pursuant to [CPR 5.4B\(2\)](#): *Hayden v Associated Newspapers Ltd [2022] EWHC 2693 (KB) [62]–[68]*.
- 431 Written communications between the court and a party must normally be copied to the other parties to the proceedings in any event: [CPR 39.8](#).
- 432 [CPR 5.4\(2\)](#); see 2025 WB 5.4.2.
- 433 For what is caught by the term “statement of case”, see 2025 WB 5.4C.3; and *In the Matter of Mobile Voicemail Interception Litigation [2012] EWHC 397 (Ch)*.
- 434 If there are multiple defendants and at least one but not all of them have filed an acknowledgment of service or defence, a non-party may still seek copies of statements of case in the proceedings, but requires the permission of the court: [CPR 5.4C\(3\)\(b\)\(ii\)](#).
- 435 Given that such an order abrogates what would otherwise be a right of access, strong reasons are required and the intervention should be kept to the minimum necessary to protect the interests of the applicant or the administration of justice: *WH Holding Ltd v E20 Stadium LLP [2024] EWHC 817 (Comm) [11]*.
- 436 *Cape Intermediate Holdings Ltd v Dring (Asbestos Victims Support Groups Forum UK) [2019] UKSC 38; [2020] AC 629 [23]–[24]*.
- 437 *Cape Intermediate Holdings Ltd v Dring (Asbestos Victims Support Groups Forum UK) [2019] UKSC 38; [2020] AC 629 [31]*; and see *Law Debenture Trust Corp (Channel Islands) Ltd v Lexington Insurance Co [2003] EWHC 2297 (Comm)*.
- 438 *Cape Intermediate Holdings Ltd v Dring (Asbestos Victims Support Groups Forum UK) [2019] UKSC 38; [2020] AC 629 [24]*.
- 439 Cf. *Cape Intermediate Holdings Ltd v Dring (Asbestos Victims Support Groups Forum UK) [2019] UKSC 38; [2020] AC 629 [51]*; *Hayden v Associated Newspapers Ltd [2022] EWHC 2693 (KB) [68]*. Since the decision in *Cape*, the CPRC has consulted on a proposal to amend [CPR 5.4C](#) which would make a much wider range of documents available as of right, and would make provision for witness statements and skeleton arguments to be supplied to members of the public by the parties themselves during hearings: see <https://www.gov.uk/government/organisations/civil-procedure-rules-committee/about#court-documents-consultation> (accessed 28 August 2025).
- 440 *Cape Intermediate Holdings Ltd v Dring (Asbestos Victims Support Groups Forum UK) [2019] UKSC 38; [2020] AC 629 [34], [41]*. This is assuming of course that the document sought is actually available on the court file. If it is not, the non-party may in appropriate circumstances seek a direction that the document be supplied by a party pursuant to [CPR 31.22\(1\)\(a\)](#) or under the court’s common law powers: *NAB v Serco Ltd [2014] EWHC 1225 (QB); Blue v Ashley [2017] EWHC 1553 (Comm); [2017] 1 W.L.R. 3630 [10]*.
- 441 *GIO Personal Investment services Ltd v Liverpool & London Steamship Protection & Indemnity Association Ltd [1999] 1 W.L.R. 984, CA; Cape Intermediate Holdings Ltd v Dring (Asbestos Victims Support Groups Forum UK) [2019] UKSC 38; [2020] AC 629 [31]*.
- 442 *Greystoke v Financial Services Authority [2020] EWHC 1011 (QB) [32]*.
- 443 *Cox v Jones [2004] EWHC 1006 (Ch)*.
- 444 *Cape Intermediate Holdings Ltd v Dring (Asbestos Victims Support Groups Forum UK) [2019] UKSC 38; [2020] AC 629 [34], [41]*.
- 445 *Cape Intermediate Holdings Ltd v Dring (Asbestos Victims Support Groups Forum UK) [2019] UKSC 38; [2020] AC 629 [45]–[47]*.
- 446 *R (Guardian News and Media Ltd) v City of Westminster Magistrates’ Court [2012] EWCA Civ 420; [2013] QB 618; Cape Intermediate Holdings Ltd v Dring [2019] UKSC 38; [2020] AC 629; [2020] AC 629 [44]*. See also the discussion above in the context of [CPR 31.22\(1\)\(a\)](#), paras 3.131–3.132. The “default position” should not be taken to mean, however, that access will be granted to every document referred to, no matter how many are sought or how tangential their relevance to advancing public understanding; considerations of proportionality are important and the focus is likely to be on key documents such as skeleton arguments which summarise the issues, evidence and arguments: *Moss v*

- Upper Tribunal [2024] EWCA Civ 1414; [2024] 4 W.L.R. 99 [27]. For this reason, advocates would be well-advised to anticipate journalistic requests for access to skeleton arguments and come to hearings prepared to supply copies: *R (Metropolitan Police Commissioner) v Police Misconduct Panel* [2025] EWHC 1462 (Admin) [5].
- 447 *Re Guardian Newspapers Ltd (Court Record: Disclosure)* [2004] EWHC 3092 (Ch); [2005] 1 W.L.R. 2965.
- 448 *Cape Intermediate Holdings Ltd v Dring (Asbestos Victims Support Groups Forum UK)* [2019] UKSC 38; [2020] AC 629 [47]; cf. *Re Guardian Newspapers Ltd (Court Record: Disclosure)* [2004] EWHC 3092 (Ch); [2005] 1 W.L.R. 2965 and *Dian AO v Davis Frankel and Mead (a firm)* [2004] EWHC 2662 (Comm); [2005] 1 All ER 1074.
- 449 *Dian AO v Davis Frankel and Mead (a firm)* [2004] EWHC 2662 (Comm); [2005] 1 All ER 1074.
- 450 *Cape Intermediate Holdings Ltd v Dring (Asbestos Victims Support Groups Forum UK)* [2019] UKSC 38; [2020] AC 629 [45]–[47].
- 451 *Blue v Ashley* [2017] EWHC 1553 (Comm); [2017] 1 W.L.R. 3630 [15]–[16]. It was noted that until witness evidence is given at trial, the witness is not protected by witness immunity. Hence disclosure prior to trial of witness statements would place the witness at risk of legal action concerning the content of their statement. Such a risk could have a chilling effect on witness evidence, which itself would undermine the administration of justice.
- 452 *ABC Ltd v Y* [2010] EWHC 3176 (Ch).
- 453 *Law Debenture Trust Corp (Channel Islands) Ltd v Lexington Insurance Co* [2003] EWHC 2297 (Comm) [29]; cf. *NAB v Serco Ltd* [2014] EWHC 1225 (QB) [38]–[43].
- 454 As in *SmithKline Beecham Biologicals SA v Connaught Laboratories Inc* [1999] 4 All ER 498 at 522, CA. See *Law Debenture Trust Corp (Channel Islands) Ltd v Lexington Insurance Co* [2003] EWHC 2297 (Comm) [27]–[28]; and see *UXA v Merseycare NHS Foundation Trust* [2021] EWHC 3455 (QB); [2022] 4 W.L.R. 30.
- 455 *Law Debenture Trust Corp (Channel Islands) Ltd v Lexington Insurance Co* [2003] EWHC 2297 (Comm) [34]. Where certain issues are abandoned so that the judge no longer needs to rule on them, this should not normally operate to cut down what the public are entitled to inspect. Those issues, and the documents read by the judge that touch upon them, are still likely to be relevant to the conduct of the proceedings as a whole. Further, it is likely to be disproportionately difficult and time-consuming to weed out references to the abandoned issues.
- 456 See further the discussion of the right of the parties to a reasoned decision below at paras 3.216 ff.
- 457 *JC Bamford Excavators Ltd v Manitou UK Ltd* [2023] EWCA Civ 840; [2024] Ch 215 [74].
- 458 *Pretto v Italy* (1984) 6 E.H.R.R. 182; *Axen v Germany* (1984) 6 E.H.R.R. 195.
- 459 *Y v Attorney General* [2003] EWHC 1462 (Ch).
- 460 See for example *Manchester City Football Club Ltd v Football Association Premier League Ltd* [2021] EWCA Civ 1110; [2021] 1 W.L.R. 5513.
- 461 *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2010] EWCA Civ 65; [2011] QB 218 [41].
- 462 *Zenith Logistics Services (UK) Ltd v Coury* [2020] EWHC 774 (QB).

Equality before the Law

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 3 - Fair Trial

Equality before the Law

The general principle

3. 154 Litigants are entitled to be treated as equal before the law. This does not mean that the parties must receive the same treatment, for obviously there is going to be a winner and a loser in litigation. What it does mean is that the parties must have equal process rights. The right to equal treatment is recognised at common law.⁴⁶³ It is, for instance, inherent in the right to be informed of the opponent's case, to call witnesses or obtain evidentiary disclosure. ECHR art.6 requires that litigants be afforded equality of arms.⁴⁶⁴ CPR 1.1(2)(a) stipulates that litigants must be treated on an equal footing,⁴⁶⁵ and the CPR generally are to be applied equally to all litigants, irrespective of whether they are legally represented or not.⁴⁶⁶
3. 155 The equality principle has ramifications throughout the entire litigation process, as the following examples suggest. Parties must have equal access to the records and other documents in the case.⁴⁶⁷ A rule that gives a litigant a right to obtain their opponent's documents but denies a comparable right to the opponent would fall foul of the requirement of equality in procedure.⁴⁶⁸ In one case, the claimant, who had been taken into care as a baby, brought an action against the local authority in respect of harm suffered by him as a result of inadequate treatment. The Court of Appeal held that the local authority was entitled to immunity from disclosing the files dealing with the claimant's care history,⁴⁶⁹ thereby denying the claimant the only means of making out his claim. The denial of access to his treatment records was found to contravene ECHR art.8.⁴⁷⁰ Similarly, the principle of equality of arms is infringed where a state intervenes in litigation by passing a law to secure for itself a favourable outcome in proceedings to which it is a party.⁴⁷¹
3. 156 As we shall presently see, the requirement of treating litigants on an equal footing does not mean that litigants must always be given exactly the same opportunities in procedure.⁴⁷² Circumstances may justify differential treatment provided that such treatment does not unduly disadvantage one of the litigants as against another. For instance, when the court orders disclosure the circumstances may make it reasonable to limit one party's duty of search differently from that of the opponent. Similarly, a court may allow one party to call two expert witnesses when it limits the other to one expert, provided that this places the other at no disadvantage.⁴⁷³
3. 157 What the court must not do is to unfairly handicap one party. Therefore, equality of arms requires that both parties be afforded an equal and reasonable opportunity to present their case and to learn their opponent's case and respond to it, under conditions which do not substantially advantage or disadvantage either side.⁴⁷⁴ A party is entitled to see documents previously only made available to the court.⁴⁷⁵ A party must have the same ability to summon witnesses as their opponent.⁴⁷⁶ The Court of Appeal has held that in order to achieve equality in procedure the court may require a party to provide their opponent with information that enables them to make a realistic CPR 36 offer to settle or respond to such an offer.⁴⁷⁷ During the Covid-19 pandemic, the Court of Appeal held that the fact that one party's counsel had to attend trial by video link (unlike the other advocates who were physically present in court) would not amount to an inequality of arms for the purposes of ECHR, art.6.⁴⁷⁸ Whilst this may have been true in the circumstances of that case, it should not be elevated to a statement of general principle. Each case turns on its own facts, and the potential value to a party of being able to physically attend court along with their lawyers should not

be underestimated. Ultimately the question is whether the conditions under which the party or their representatives are made to appear puts them at a real disadvantage so as to prevent them from participating effectively.⁴⁷⁹

3. 158 Inequality in procedure may arise not only from uneven procedural arrangements, but also from inequality of some personal attributes of the parties. For instance, a litigant with a learning disability is likely to fare worse than a litigant without, all else being equal. Of course, the law cannot iron out all possible inequality, but it must try to prevent injustices that could follow from gross disparities. For this reason, the [CPR](#) make special provision for children and protected parties.⁴⁸⁰ Further, in April 2021 [CPR 1.1\(2\)\(a\)](#) was amended to give specific expression to the idea that placing the parties “on an equal footing” includes ensuring that vulnerable parties and witnesses “can participate fully in proceedings and … give their best evidence”.⁴⁸¹

Minimising the consequences of resource inequality

General considerations

3. 159 Disparity of economic resources can be a source of inequality in procedure and different procedural arrangements may be more or less susceptible to aggravating the consequences of resource disparity. For instance, where litigation demands substantial investment in money, access to justice would almost inevitably be denied to those who cannot afford the expense. Lord Woolf saw resource-based inequality as one of the main defects of the old system. He found that richer litigants could obtain advantage in litigation by ratcheting up its costs or by protracting proceedings until the poorer opponent was exhausted. He observed that “[h]igh costs bear more heavily upon the weaker litigant and are inconsistent with my objective of securing equality of arms between litigants”.⁴⁸²
3. 160 Saving costs is part of the overriding objective.⁴⁸³ Under the [CPR](#) the court must have regard to the financial circumstances of the parties in a variety of contexts. The requirement of “ensuring that the parties are on an equal footing” ([CPR 1.1\(2\)\(a\)](#)) combines with the aims of saving expense ([CPR 1.1\(2\)\(b\)](#)) and of dealing with a case in ways which are proportionate “to the financial position of each party” ([CPR 1.1\(2\)\(c\)\(iv\)](#)), to impose a duty on the court to exercise its case management powers with a view to reducing resource inequality as much as practicable. Relative resources are relevant when determining the appropriate track for a claim ([CPR 26.13\(1\)\(i\)](#)). Resources have been taken into account in applications for protective costs orders,⁴⁸⁴ applications for security for costs of an appeal⁴⁸⁵ and applications for interim payment.⁴⁸⁶ The aim of cutting down process costs is behind most other [CPR](#) innovations. However, in its first decade the [CPR](#) system was not successful in driving down litigation costs,⁴⁸⁷ and even after Jackson LJ’s reforms the problem remains endemic in many respects.⁴⁸⁸ Indeed, it is notable that where there is a special public interest in promoting access to court, special provision has to be made to ensure that access is affordable for both sides. In cases falling within the scope of the Aarhus Convention,⁴⁸⁹ which requires the UK government to facilitate affordable access to justice in environmental claims, [Section IX of CPR 46](#) establishes a bespoke system of caps on recoverable costs taking into account the relative resources of the parties.⁴⁹⁰
3. 161 Viewed from other European procedural systems, the cost of litigation in England has been considered an obstacle to access to justice. In *Gustave Pordea v Times Newspapers*,⁴⁹¹ a French claimant brought defamation proceedings against the defendant newspaper in the High Court. He was ordered to provide security for costs and failed to do so. As a result, his action was dismissed. The defendant then obtained an order for costs from the High Court, which it sought to enforce in France. The French Cour de Cassation found that it would be contrary to public policy to enforce such an order, because the costs were set at a disproportionately high level. The high costs of litigation had presented an obstacle to the original claimant’s access to justice contrary to ECHR art.6(1). The court stated:

“[A] decision which fixes an excessive sum of costs due from the plaintiff in a defamation action which did not succeed because he was unable to pay the equally excessive security required is contrary to French public policy and therefore incapable of being subject to an enforcement order in France, since it is contrary to the principle of proportionality, which must govern any award of costs relating to freedom of expression or the protection of rights of personality and having the result of deterring, or even making impossible, access to a court to obtain redress for an infringement of such rights. In allowing enforcement under such conditions the appeal court disregarded Articles 8, 10 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 and also Articles 31, 34 and 27 of the Brussels Convention.”⁴⁹²

- 3. 162** It is of course impossible to devise a system in which economic resources make no difference in litigation. But the principle of equality of arms dictates that the law should try to ensure, as much as possible, that litigants compete on a level playing field. This point was stressed by the ECtHR in the notorious “McLibel” case where the McDonald’s Corporation sued two environmental campaigners for defamation.⁴⁹³ The ECtHR reiterated that “it is not incumbent on the State to seek through the use of public funds to ensure total equality of arms between the assisted person and the opposing party, as long as each side is afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis the adversary”. In England, legal aid is not available for defamation claims. But the ECtHR found that in a case of this complexity (which involved voluminous documentation, numerous applications and hearings running into many months) denying the defendants legal assistance at public expense amounted to an unacceptable inequality of arms.
- 3. 163** Before the [CPR](#) the main measure for promoting equality of arms consisted in publicly funded legal aid.⁴⁹⁴ During the 1990s legal aid was withdrawn from most money claims and instead a system of conditional fee agreements ([CFAs](#)) was introduced.⁴⁹⁵ Under a typical CFA a claimant agreed with their solicitor that the latter would charge nothing if the claimant lost. The claimant would also normally take out an after-the-event insurance policy to cover any liability they may incur in respect of the defendant’s cost, should the claimant fail in their action. If the claimant won, their solicitor would recover their normal hourly fee plus a success fee of up to 100 per cent of the recoverable costs—both payable by the unsuccessful defendant.⁴⁹⁶ This system was criticised by Jackson LJ as the “most bizarre and expensive system that it is possible to devise”,⁴⁹⁷ and in *Coventry v United Kingdom* the ECtHR held that the excessive and arbitrary burden it imposed on uninsured defendants infringed the principle of equality of arms.⁴⁹⁸ In the earlier case of *MGN Ltd v United Kingdom*, the system had been held to be incompatible with the ECHR art.10 rights of the defendant newspaper (who was insured) because of the egregious effect that exposure to such costs could have on newspapers’ willingness and ability to print stories that could expose them to suit.⁴⁹⁹
- 3. 164** The recoverability of success fees and ATE premiums was abolished for most cases as from 1 April 2013, following recommendations by Jackson LJ.⁵⁰⁰ Under the new arrangements litigants would be able to obtain legal representation under CFAs (albeit without the possibility of recovering success fees and ATE premiums), or on the basis of contingency (damages-based) fee agreements which were not permitted before 2013.⁵⁰¹ However, in mesothelioma proceedings success fees and ATE premiums remain recoverable,⁵⁰² and ATE premiums remain recoverable in publication and privacy claims⁵⁰³ and in clinical negligence claims (though only for the cost of obtaining reports on liability and causation).⁵⁰⁴ While most defendants in mesothelioma and clinical negligence claims will be insured, in defamation cases the continued recoverability of ATE premiums may be incompatible with Convention rights if it exposes defendants to excessive and unjustified costs.⁵⁰⁵

Court assistance to litigants in person

- 3. 165** A person who litigates without the assistance of legal representation is known in this jurisdiction as a litigant in person (LIP).⁵⁰⁶ The prevalence of LIPs poses a challenge to the system of court management of litigation. As we have seen, the

court's ability to manage cases effectively depends on the co-operation of litigants and their ability to assist the court in carrying out its task.⁵⁰⁷ To be able to assist the court effectively, a litigant has to be familiar with the court's procedure, with the rules and practice directions, with the form, with the court's administrative arrangements and the like. This to be expected of legally qualified practitioners, without whom the adversarial system cannot operate effectively, but the same cannot generally be said for LIPs.⁵⁰⁸ In *Barton v Wright Hassall LLP*,⁵⁰⁹ the UK Supreme Court considered that, as a general rule, LIPs were to be taken as being capable of understanding the CPR. Only where rules or practice directions were "particularly inaccessible or obscure" would a LIP not be expected to be capable of familiarising themselves with the rules.⁵¹⁰ However, given the nature of the drafting style adopted for the rules, which follows drafting conventions for statutory instruments, the complexity of the rules and the extent to which their meaning and application is elaborated in case law, there is an air of unreality about the Supreme Court's approach.⁵¹¹ The absence of realism here is compounded when reflecting on the problems that many LIPs must encounter, for instance, in drafting witness statements and complying with other procedural formalities.⁵¹²

- 3. 166** It is inevitable that LIPs require the assistance of the court's administrative staff and of the court itself. With the reduction in civil legal aid, the number of LIPs has increased substantially.⁵¹³ This has in turn increased the pressure on the judiciary and courts' administration to assist them in navigating the procedural complexities and articulating legal points (so far as is practicable, without becoming identified with the LIP's case and without risking impartiality).⁵¹⁴ Increasingly, court staff provide administrative assistance through, for instance, the preparation of court bundles for LIPs.⁵¹⁵ Equally, judges spend more time engaging in what Sir Alan Ward referred to as the micromanagement of cases to ensure that the dispute is heard fairly.⁵¹⁶ For instance, a court will take special care when a LIP appears to concede or abandon a point of significance and will seek to ensure that the LIP understands the significance of the concession.⁵¹⁷ Courts may also take a more investigative or activist approach to case and trial management under CPR 3.1A. That rule was introduced to make clear that it is permissible for the court to offer LIPs assistance such as helping them to identify relevant evidence to be secured, or to examine witnesses.⁵¹⁸ The exercise of this power remains subject to the requirement that a judge assisting a LIP remains impartial, and continues to be seen by all parties as impartial.⁵¹⁹ It is, however, doubtful whether a judge can maintain an adequate appearance of impartiality while assisting one litigant to present its case, bearing in mind the risk of unconscious as well as overt bias.⁵²⁰ In particular, it would not be appropriate for a judge to ask leading questions designed to cast doubt on a witness' evidence on a LIP's behalf, so as to relieve the LIP of the need to cross-examine themselves; in doing so they would be acting as a "quasi-advocate" for the LIP.⁵²¹

Person (London: Judicial Office, 2013). See *Williams v Nilsson and another* [2021]

- 3. 167** Where a case involves a LIP, duties of assistance are imposed on the legal representatives of other parties. For example, the Commercial Court Guide explains that the position of LIPs requires special consideration, such as expecting the legal representative of other parties to facilitate the LIP's opportunity to prepare and put their case.⁵²² In particular, the legal representatives of other parties are expected to inform the court of the decisions and legislation affecting the LIP's case, and draw attention to any procedural irregularities. It is incumbent on the legal representatives to prepare the necessary litigation bundles even if the LIP is unable or unwilling to do their part.⁵²³

Justified departures from the principle of equality

- 3. 168** Complete equality of treatment in procedure is not always practically feasible, and on occasion it may not even be desirable. ECtHR jurisprudence accepts that parity of treatment, which is implied within the right to fair trial, may be sacrificed in the interests of justice or in order to protect other important rights. However, an exception must be founded on paramount considerations of justice and must be kept to the bare minimum compatible with the aim for which the exception is created.⁵²⁴ Further, an exception must be accompanied by adequate safeguards to protect the affected litigant. The treatment of the burden

and standard of proof provides an example of a reasonable derogation from equality. In civil cases the claimant is required to prove the claim on the balance of probabilities. This means that the claimant is subject to a higher risk of error because judgment must be given for the defendant where, at the end of the trial, the court concludes that it is as likely that the claimant is in the right as the defendant. The requirement of proof on the balance of probabilities is nonetheless justified by the need to provide a tiebreak in situations where, at the end of the trial, the judge is in doubt whether the claimant's version of the facts or that of the defendant is correct. At the same time, however, the requirement that claimants should prove their case on the balance of probabilities exposes them to only a slightly higher risk of error compared with defendants, so that the departure from equality of treatment is minimal and proportionate.

3. 169 Departure from equality in procedure may be justified where it is necessary in order to avoid a greater harm. Where a litigant requires urgent court action to protect their rights, it may be justified to temporarily deny their opponent the right to participate in the process so that the court may take immediate measures to safeguard rights until a hearing in the presence of both parties can be held. Similarly, where a claimant has reason to fear that the defendant would take precipitate action to dissipate their assets as soon as they hear of the proceedings, the court may issue a freezing order without prior notice to the defendant in order to prevent the latter from defeating the object of the process. However, an applicant for an order without notice must make full and frank disclosure of all relevant facts, including those that favour the absent party, and the order itself would normally be of only short duration and will provide the absent party with an early opportunity to present their case.⁵²⁵

Footnotes

- 463 *Al-Rawi v Security Service* [2011] UKSC 34; [2012] 1 AC 531, per Lord Kerr at 591; and *Tariq v The Home Office* [2011] UKSC 35; [2012] 1 AC 452 at 513. For other common law approaches see, for instance, *Caldwell v Texas* 137 US 692 (1891) (US Supreme Court), at 699; and *Tomasevic v Travaglini* [2007] VSC 337 (Supreme Court of Victoria).
- 464 *Neumeister v Austria* [1968] 1 E.H.R.R. 91, holding that equality of arms is implicit in ECHR art.6(1). See for example *McMichael v United Kingdom* [1995] 20 E.H.R.R. 205 [82], on the availability of documents to interested parties.
- 465 See Ch.1 The Overriding Objective paras 1.47–1.49; and see 2025 WB 11-11.
- 466 *Nata Lee Ltd v Abid* [2014] EWCA Civ 1652 [53]; and *Ogiehor v Belinfantie* [2018] EWCA Civ 2423, [2018] 6 Costs L.R. 1329 [44]. See also the discussion of LIPs at para.3.165 below; and in Ch.12 Case Management Pt II paras 12.242 ff.
- 467 *Ruiz-Mateos v Spain* [1993] 16 E.H.R.R. 505, in relation to proceedings before the Spanish Constitutional Court; and *Lobo Machado v Portugal* [1997] 23 E.H.R.R. 79. See also *McGinley and Egan v United Kingdom* [1998] 27 E.H.R.R. 1; *McElduff v United Kingdom* [1998] 4 B.H.R.C. 393, ECtHR; *McMichael v United Kingdom* [1995] 20 E.H.R.R. 205; and *Feldbrugge v Netherlands* [1986] 8 E.H.R.R. 425. Mechanisms to ensure all the relevant evidence is before the court are discussed below at paras 3.203 ff; and restrictions on equal access such that one party is only afforded partial access to the relevant material, compared with their opponent, is discussed below as a facet of the right to be heard, at paras 3.190–3.192.
- 468 Until the *Crown Proceedings Act 1947*, no order for discovery could be made against the Crown, and any disclosure the Crown chose to make was voluntary. Thus, when the Crown was a party to civil litigation, it had, in effect, a procedural advantage over its opponent, as it would benefit from discovery but would itself be immune from it. The situation changed with the *Crown Proceedings Act 1947*, which gave the Court, rather than the executive, the final word over which documents would be covered by public interest immunity. See J.M. Jacob, “The Debates Behind an Act: Crown Proceedings Reform, 1920–47” [1992] PL 452, and J.M. Jacob, “From Privileged Crown to Interested Public” [1993] PL 121. See also *Al Rawi v Security Service* [2010] EWCA Civ 482; [2010] 4 All ER 559, and *Al-Rawi v Security Service* [2011] UKSC 34; [2012] 1 AC 531, per Lord Dyson.
- 469 *Gaskin v Liverpool City Council* [1980] 1 W.L.R. 1549, CA.
- 470 Subsequently, Parliament passed the *Access to Personal Files Act 1987* (and later, the *Data Protection Act 1998*), which enabled citizens to obtain information of this kind. The relevant legislation is now the *Data Protection Act 2018*.
- 471 *Stran Greek Refineries v Greece* [1995] 19 E.H.R.R. 293. However, such interference may be permissible where it is justified by compelling grounds in the wider public interest: *Zielinski v France* (2001) 31 E.H.R.R. 19 [57]; *National & Provincial Building Society v United Kingdom* (1998) 25 E.H.R.R. 127 [112]; *Reilly v Secretary of State for Work and Pensions* [2016] EWCA Civ 413.
- 472 See Ch.1 The Overriding Objective paras 1.47–1.49; and see 2025 WB 11-11.

- 473 See for instance *Kirkman v Euro Exide Corp (CMP Batteries Ltd) [2007] EWCA Civ 66; [2007] C.P. Rep. 19.*
- 474 *Dombo Beheer BV v Netherlands* [1993] 18 E.H.R.R. 213; *Mantovanelli v France*, (1996) 24 E.H.R.R. 370; *Van de Hurk v Netherlands* [1994] 18 E.H.R.R. 481; and *W.J. v Austria* [1999] 27 E.H.R.R. CD 83. For a general discussion see J. Mashaw, “Administrative Due Process: The Quest for a Dignitary Theory” (1981) 61 B.U.L. Rev. 885; and W.B. Rubenstein, “The Concept of Equality in Civil Procedure”, (2002) 23 Cardozo L. Rev. 1865. See also *Al Rawi v Security Service* [2010] EWCA Civ 482; [2010] 4 All ER 559, and *Al-Rawi v Security Service* [2011] UKSC 34; [2012] 1 AC 531, per Lord Dyson.
- 475 *McMichael v United Kingdom* (1995) 20 E.H.R.R. 205.
- 476 *Dombo Beheer BV v Netherlands* [1993] 18 E.H.R.R. 213; and regarding summoning of experts see also *Zumtobel v Austria* [1993] 17 E.H.R.R. 116.
- 477 *Gnitrow Ltd v Cape Plc* [2000] 3 All ER 763; [2000] 1 W.L.R. 2327, CA.
- 478 *Re C (Children) (Covid-19: Representation)* [2020] EWCA Civ 734 [23]–[24].
- 479 See *R (Michael) v Governor of Whitemoor* [2020] EWCA Civ 29; [2020] 1 W.L.R. 2524 [35]–[42], where it was legitimate to require a Category A prisoner to attend the hearing of their civil claim via video link from prison, given the logistical difficulties and expense of facilitating his attendance in person.
- 480 See CPR 21 and above, paras 3.49 ff.
- 481 To this end, CPR 1.6 and PD 1A were introduced in April 2021, setting out the steps the court should consider taking when confronted with party or witness vulnerability. See further Ch.1 The Overriding Objective paras 1.42 and 1.48. Woolf, Interim Report p.199; see also Woolf, Final Report Ch.1 para.9 and Ch.7 paras 2–5.
- 482 See generally Ch.1 The Overriding Objective.
- 483 *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192; and *R (Buglife: The Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corp* [2008] EWCA Civ 1209.
- 484 *Fernhill Mining Ltd v Kier Construction Ltd* [2000] C.P. Rep. 69, CA.
- 485 *Harmon CFEM Façades (UK) Ltd v Corporate Officer of the House of Commons* [2000] 72 Con. L.R. 21.
- 486 Jackson LJ, Review of Civil Litigation Costs: Preliminary Report (London: HMSO, 2009) (hereinafter “Jackson, Preliminary Report”); Jackson LJ, Review of Civil Litigation Costs: Final Report (London: HMSO, 2010) (hereinafter “Jackson, Final Report”). See also M. Zander, “Where Are We Heading with the Funding of Civil Litigation?” (2003) 22 C.J.Q. 23; and G. Lightman, “The Civil Justice System and Legal Profession—The Challenges Ahead” (2003) 22 C.J.Q. July 235.
- 487 Jackson LJ, Review of Civil Litigation Costs: Supplemental Report (London: HMSO, 2017); Briggs LJ, Civil Court Structure Review: Interim Report (London: Judicial Office, December 2016), at para.5.24; and Briggs LJ, Civil Court Structure Review: Final Report (London: Judicial Office, July 2016), at para.5.14.
- 488 UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (“the Aarhus Convention”), 25 June 1998.
- 489 Prior to 1 October 2023, Section VII of CPR 45.
- 490 *Gustave Pordea v Times Newspapers Ltd* [2000] I.L. Pr. 763 Cases (F) (Cour de Cassation, France).
- 491 *Gustave Pordea v Times Newspapers Ltd* [2000] I.L. Pr. 763 Cases (F) (Cour de Cassation, France), at 764–765.
- 492 *Steel and Morris v United Kingdom* [2005] E.M.L.R. 15 (2005) 41 E.H.R.R. 22 [62].
- 493 See P.T. Hurst, L. Graham and S. Morgans, Legal Aid Practice: 1996–97 (London: Sweet & Maxwell, 1996).
- 494 See Lord Chancellor’s Department, Access to Justice with Conditional Fees (London: HMSO, 1998), and Lord Irvine of Lairg, “Community Vision under Fire” (1999) 27(May) Law Society Gazette 1.
- 495 *Callery v Gray (Nos 1 and 2)* [2002] UKHL 28; [2002] 1 W.L.R. 2000.
- 496 Jackson, Final Report, Ch.32 para.3.8. These comments were made in context of defamation claims but are generally applicable to the system of recoverable success fees and ATE premiums.
- 497 See *Associated Newspapers Ltd v United Kingdom* [2025] 81 E.H.R.R. 1.
- 498 *MGN Ltd v United Kingdom* (2011) 53 E.H.R.R. 195.
- 499 Jackson, Final Report, Executive Summary para.2.1.
- 500 Legal Aid, Sentencing and Punishment of Offenders Act 2012 ss.44, 46.
- 501 Legal Aid, Sentencing and Punishment of Offenders Act 2012 s.48.
- 502 Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No 13) Order 2018 (SI 2018/1287), bringing Legal Aid, Sentencing and Punishment of Offenders Act 2012 s.44 into force for publication and privacy claims, but not s.46 on ATE premiums.
- 503 Recovery of Costs Insurance Premiums in Clinical Negligence Proceedings (No 2) Regulations 2013 (SI 2013/739).

- 505 *Coventry v United Kingdom* 6016/16 (unreported, 11 October 2022).
- 506 *Practice Guidance (Terminology for Litigants in Person)* [2013] 2 All ER 624. For a short period before this guidance was issued, there was an attempt to replace the term “litigant in person” with “self-represented litigant” (a term used in a number of other common law jurisdictions); see the 3rd edition of this work, where the term was used. The guidance clarified that the attempt was to be abandoned.
- 507 See the discussion of the parties’ duty to assist the court in furthering the overriding objective (under CPR 1.3) in Ch.1 The Overriding Objective paras 1.92 ff.
- 508 See Ch.1 The Overriding Objective paras 1.92 ff; and see Ch.12 Case Management Pt II para.12.242. Considering the specific problems posed by LIPs, see *Wright v Michael Wright (Supplies) Ltd* [2013] EWCA Civ 234 [2]; and see A.A.S. Zuckerman, “No Justice Without Lawyers—The Myth of an Inquisitorial Solution” (2014) 33 CJQ 355.
- 509 *Barton v Wright Hassall LLP* [2018] UKSC 12; [2018] 1 W.L.R. 1119.
- 510 *Barton v Wright Hassall LLP* [2018] UKSC 12; [2018] 1 W.L.R. 1119 [18].
- 511 See further Ch.12 Case Management Pt II paras 12.242 ff.
- 512 See *Otuo v Brierley* [2015] EWHC 1938 (Ch) for an example of the problems that can arise where an LIP is required to draft a witness statement.
- 513 In this regard, the (further) reduction in legal aid following the introduction of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 merely promotes a false economy. This policy has the effect of increasing the number of LIPs before the courts, effectively transfers the financing of their litigation to the court system and at a cost that is likely to be higher than it would have been if funded via the legal aid scheme.
- 514 A.A.S. Zuckerman, “No Justice Without Lawyers—The Myth of an Inquisitorial Solution” (2014) 33 CJQ 355.
- 515 *Mole v Hunter* [2014] EWHC 658 (QB) [107]–[119]; and *Re R (a child)* [2014] EWCA Civ 597 [6]–[7].
- 516 *Wright v Michael Wright (Supplies) Ltd* [2013] EWCA Civ 234.
- 517 *Segor v Goodrich Actuation Systems Ltd* (EAT, unreported, 10 February 2012).
- 518 CPR 3.1A was introduced in 2015 by Civil Procedure (Amendment No.4) Rules 2015 (SI 2015/1569) following recommendations made in the Report of the Judicial Working Group on Litigants in Person (London: Judicial Office, 2013). See *Williams v Nilsson and another* [2021] EWHC 3184 (Ch), in which the court granted a LIP permission to rely on fresh evidence obtained at a late stage, the court below having been made aware of the existence of the evidence but having provided the LIP with no guidance as to how to obtain it.
- 519 *Drysdale v Department of Transport (Maritime and Coastguard Agency)* [2014] EWCA Civ 1083; [2014] CP Rep. 43, provides a summary of the approach taken to assisting LIPs in the Employment Tribunals, which is analogous to the approach under CPR 3.1A.
- 520 A.A.S. Zuckerman, “No Justice Without Lawyers—The Myth of an Inquisitorial Solution” (2014) 33 CJQ 355; and see above, paras 3.80–3.81.
- 521 *Rea v Rea* [2022] EWCA Civ 195 [67]–[73]. The corollary of this is that LIPs should not be deprived of the opportunity to cross-examine a witness merely because the judge “forms the view that such opportunity would not have been well-used” by the LIP: [60], [63].
- 522 Commercial Court Guide (2022) Pt M; and 2025 WB 3.1A.1.
- 523 However, the court will only require the represented party to go so far. In *Axnoller Events Ltd v Brake* [2021] EWHC 1706 (Ch), the principle of equality of arms did not require the court to order a represented party to provide a litigant in person with a hard copy of a bundle free of charge, in circumstances where the litigant in person had been provided with an electronic bundle but claimed they could not afford to print it out in readiness for the trial.
- 524 *Rowe and Davis v United Kingdom* [2000] Crim. L.R. 584; [2000] 30 E.H.R.R. 1; *Jasper v United Kingdom* (2000) 30 E.H.R.R. 441; and *Fitt v United Kingdom* [2000] 30 E.H.R.R. 480.
- 525 These matters are discussed further below, in the context of the right to be heard: see paras 3.188 ff.

The Right to Representation in Litigation

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 3 - Fair Trial

The Right to Representation in Litigation

The right to self-representation and to legal representation

3. 170 Representation is a fundamental right which litigants enjoy. The right to representation has two distinct aspects. The first is the common law right of individual litigants to represent themselves.⁵²⁶ A litigant is entitled to decide whether and how to conduct litigation without interference or hindrance.⁵²⁷ This includes the right to appear in person before the court and conduct proceedings on one's own behalf.⁵²⁸ As a general rule common law systems hold that legal representation cannot be forced on reluctant litigants.⁵²⁹ There are, however, exceptions to the general principle. Persons who lack the necessary capacity to manage their affairs, such as protected parties and children, must be represented by a litigation friend.⁵³⁰ The second aspect of the right consists in the right of a litigant to choose a representative to conduct proceedings on their behalf;⁵³¹ although the law regulates which persons qualify as legal representatives.⁵³²
3. 171 The right to represent oneself in legal proceedings should be distinguished from the right to be heard in person.⁵³³ In civil proceedings, according to ECtHR jurisprudence, there is no absolute right to be present at one's trial, except in respect of a limited category of cases, such as those where the personal character and manner of life of the person concerned are directly relevant to the subject matter of the case, or where the decision involves the person's conduct. Thus, ECtHR jurisprudence allows for the possibility that the court may determine a case on the basis of written materials only, or for compulsory representation, as is common in civilian jurisdictions. At common law, by contrast, the orality of civil proceedings is taken for granted and there are very few instances where the court may adjudicate on the basis of written materials only without either the consent of the parties or the opportunity to seek oral reconsideration.
3. 172 The right to be represented in litigation is entailed by the right to fair trial—for access to court would be of little value without an additional right to professional assistance in litigation. The substantive law and the litigation process could be of such complexity that without professional representation even meritorious claims and defences would be likely to founder. In such cases the denial of legal assistance could amount to a denial of effective access to justice.⁵³⁴ In the absence of expert legal assistance a litigant facing intricate and complex issues may be deprived of an effective opportunity to participate in the proceedings and of equality of arms. The unavailability of legal aid or of contingency fee representation in a foreign and otherwise more suitable jurisdiction was held to be a powerful consideration in favour of holding proceedings in this country.⁵³⁵
3. 173 There is no express mention in the ECHR art.6(1) of a right to legal assistance at public expense, though an obligation to provide such assistance to impecunious litigants is mentioned in ECHR art.6(3)(c), which applies to criminal proceedings. However, the ECtHR has held that such a right is implicit in the notion of access to court and of equality of arms. In *Airey v Ireland*, the ECtHR held that where a litigant could not adequately manage proceedings without legal assistance, it was incumbent upon the state to provide such assistance at public expense if the litigant was indigent.⁵³⁶ The ECtHR will be slow to interfere with a domestic legislature's assessment of the circumstances in which civil legal aid is called for, or as to what financial thresholds should apply in order for a litigant to qualify for assistance.⁵³⁷ Further, there is no obligation to deploy public funds in order to ensure total equality of arms between litigants; the degree of assistance to be provided depends on what is strictly necessary

to afford the litigant a reasonable opportunity to present their case under conditions that do not place them at a substantial disadvantage.⁵³⁸ Thus, the obligation to provide legal assistance at public expense arises only where the procedure is complex, where difficult points of law are raised or where the examination of witnesses and expert evidence demands expertise.⁵³⁹ It is more likely to arise where the proceedings themselves concern the protection of a Convention right,⁵⁴⁰ and the assessment of a litigant's ability to present their case effectively should take account of their vulnerabilities such as learning difficulties.⁵⁴¹ Clearly, there is no need to provide legal aid in relation to proceedings on the small claims track, which are designed to be simple and easily comprehensible by LIPs.

Representation by a McKenzie Friend

- 3.174 Quite apart from the right to be represented by a lawyer, English law recognises the right of litigants to have assistance during legal proceedings from a person, who may be a friend, relative or other lay person, known colloquially as a "McKenzie Friend".⁵⁴² Such a person may assist in court by prompting, taking notes and giving advice.⁵⁴³ The right is subject to the court's power to restrict its exercise.⁵⁴⁴ It is recognised as applying to both natural and legal persons.⁵⁴⁵ A McKenzie Friend is not a legal representative and may not address the court on behalf of a party. Such a person merely assists a litigant to present their own case. The right of an LIP to be assisted by a McKenzie Friend applies equally to proceedings in open court and in chambers.⁵⁴⁶ Such assistance can be invaluable, if the Friend is well-informed and experienced. It may also be highly problematic where, for instance, the McKenzie Friend is purporting to provide legal advice where they may not be properly qualified to do so, or where they seek to advance their own agenda or interests through the assistance they provide.⁵⁴⁷ Even where the Friend is incapable of giving legal advice, their presence may still be of great help to the LIP, by providing practical help, such as taking notes, and giving comfort or moral support. A McKenzie Friend, Lord Woolf explained, may assist in achieving equality between the parties and may also assist in reducing the length of the hearing.⁵⁴⁸ The facility of a McKenzie Friend is thus not merely an indulgence; it is dictated by the right to a fair trial. If the trial judge refuses to permit a litigant to exercise their right to such assistance, the decision may be reversed on appeal.⁵⁴⁹ A litigant may be deprived of this right only for good reason, as where the McKenzie Friend has been disruptive.⁵⁵⁰ The costs recoverable in respect of assistance provided by a McKenzie Friend are dealt with in Ch.28.⁵⁵¹
- 3.175 The court would normally confine the role of a McKenzie Friend to advising the LIP, prompting them and taking notes. The court may, on occasion, permit a McKenzie Friend to exercise a right of audience or carry out the conduct of litigation for the LIP.⁵⁵² The court may do this for a number of reasons, such as where the McKenzie Friend is a close relative of the litigant, health or other problems preclude the litigant from effectively conducting litigation or they are unable to afford a qualified legal representative.⁵⁵³ A McKenzie Friend may in such circumstances not only assist the LIP but also help the court in speeding up the proceedings and saving costs.
- 3.176 However, the court will normally be slow to allow a McKenzie Friend to represent a LIP rather than merely assist the litigant to represent themselves.⁵⁵⁴ It will need to be persuaded of the existence of adequate grounds of the kind indicated in *Practice Guidance (McKenzie Friends: Civil and Family Courts)*.⁵⁵⁵ The court will not permit persons to act in such capacity if they are likely to disrupt the proceedings or bring them into disrepute,⁵⁵⁶ and may in appropriate circumstances make them subject to either a civil restraint order,⁵⁵⁷ restricting their ability to act as such generally or in particular proceedings, or a civil proceedings order.⁵⁵⁸ The court will normally withhold permission to act as a McKenzie Friend to persons who are found to act in this capacity on a regular basis, as to do otherwise would tend to undermine the statutory regulatory scheme governing the exercise of rights of audience.⁵⁵⁹

Footnotes

- 526 The common law right of self-representation was previously recognised in England by [RSC Ord.5 r.6](#), and is now enshrined in the [Legal Services Act 2007 Sch.3 para.1\(6\)](#). An LIP is entitled to recover costs in respect of work done and any outlays or losses incurred by them as a result of representing themselves: [Litigants in Person \(Costs and Expenses\) Act 1975 s.1\(2\)](#); and see [CPR 46.5](#), PD 46 para.3.1. In Hong Kong, a right to self-representation continues to be guaranteed by Rules of the High Court Ord.5 r.6. In the US, a right to self-representation is guaranteed in 28 USC s.1654 (previously the Judiciary Act of 1789 s.35). Whether the right is protected by the US Constitution has not been resolved by the Supreme Court: see *O'Reilly v The New York Times Company* 692 F2d 863 (1982) 870; *Andrews v Betchel Power Corp* 780 F2d 124 (1985) 137; *Iannaccone v Law* 142 F3d 553 (1998) 557–8; and *Berrios v New York City Housing Authority* 564 F3d 130 (2009) 133.
- 527 *R. Pound*, “*Do We Need a Philosophy of Law?*” (1905) 5 *Colum.L.R.* 339 at 347; *R. Moorhead*, “*Access or Aggravation? Litigants in Person, McKenzie Friends and Lay Representation*” (2003) 22 *C.J.Q.* 133. For other jurisdictions, see *R. Engler*, “*And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*” (1999) 67 *Fordham Law Review* 1987; *C. Cameron and E. Kelly*, “*Litigants in Person in Civil Proceedings: Part I*” (2002) 32 *Hong Kong Law Journal* 313, 317.
- 528 For a different view see: *R. Assy*, “*Revisiting the Right to Self-Representation in Civil Proceedings*” (2011) 30(3) *C.J.Q.* 268; *R. Assy*, “*Can the Law Speak Directly to its Subjects? The Limitation of Plain Language*” (2011) 38(3) *Journal of Law and Society* 376; *R. Assy*, *Injustice in Person: The Right to Self-Representation*, (Oxford: OUP, 2015); and *H. Genn*, “*Do-it-yourself law: Access to justice and the challenge of self-representation*” (2013) 32 *C.J.Q.* 411.
- 529 *R v Woodward* [1944] KB 118; *R v Lyons* (1979) 68 Cr. App. R. 104, CA; *R v Jisl et al.* (CA, unreported, 14 July 2000). The right is non-delegable: *Gregory v Turner* [2003] EWCA Civ 183; [2003] 1 W.L.R. 1149; and *Ndole Assets Ltd v Designer MandE Services UK Ltd* [2018] EWCA Civ 2865; [2019] B.L.R. 147.
- 530 See above, paras 3.49 ff.
- 531 See *Owen v Black Horse Ltd* [2023] EWCA Civ 325; [2023] 1 W.L.R. 3331 [105]. A judge was wrong to strike out a small claim under on the ground that the claimant had failed to attend in person; he was entitled to attend via a representative and [CPR 27.9\(2\)](#) could not be read as cutting down or impinging upon that right.
- 532 See [Legal Services Act 2007 Pt 3](#) and [Schs 2–3](#).
- 533 Which again is distinct from the broader right to effective participation in legal proceedings, discussed below at paras 3.177 ff.
- 534 *Steel and Morris v United Kingdom* [2005] E.M.L.R. 15; (2005) 41 E.H.R.R. 22, discussed above at paras 3.25 and 3.162; see also *A.A.S. Zuckerman*, “*No Justice Without Lawyers—The Myth of an Inquisitorial Solution*” (2014) 33 CJQ 355.
- 535 See *Lubbe v Cape Plc* [2000] 4 All ER 268; [2000] 1 W.L.R. 1545, HL; and see above, para.3.34.
- 536 *Airey v Ireland* [1981] 3 E.H.R.R. 592.
- 537 *Steel and Morris v United Kingdom* [2005] E.M.L.R. 15; (2005) 41 E.H.R.R. 22 [60], [62].
- 538 *Steel and Morris v United Kingdom* [2005] E.M.L.R. 15.; (2005) 41 E.H.R.R. 22 [62].
- 539 *Aerts v Belgium* [1998] 5 B.H.R.C. 382 [60], ECtHR. And see *Steel and Morris v United Kingdom* [2005] E.M.L.R. 15; (2005) 41 E.H.R.R. 22.
- 540 *Timofeyev and Postupkin v Russia* [2021] ECHR 43 [102].
- 541 *Dragan Kovačević v Croatia* [2022] ECHR 364 [35]–[36].
- 542 After the case of *McKenzie v McKenzie* [1971] P. 33; [1970] 3 All ER 1034, CA.
- 543 *Collier v Hicks* (1831) 2 B and Ad. 663, 109 ER 1290; *McKenzie v McKenzie* [1971] P. 33; [1970] 3 All ER 1034, CA. *R v Leicester City Justices Ex p. Barrow* [1991] 2 QB 260; [1991] 3 All ER 935, CA; *O (Children) (Representation: McKenzie friend)* [2005] EWCA Civ 759; [2006] Fam. 1; and see *Lay Representatives (Rights of Audience) Order 1999* (SI 1999/1225); 2025 WB 13-18. See further *R. Moorhead*, “*Access and Aggravation? Litigants in Person, McKenzie Friends and Lay Representation*” (2003) 22 C.J.Q. 133.
- 544 *R v Leicester City Justices, Ex p. Barrow* [1991] 2 QB 260, 289.
- 545 In *Bank St Petersburg PJSC v Arkhangelsky* [2015] EWHC 2997 (Ch); [2016] 1 W.L.R. 1081, it was accepted that a company may be assisted by a McKenzie Friend.
- 546 *R v Bow County Court Ex p. Pelling* [1999] 4 All ER 751; [1999] 1 W.L.R. 1807, CA. A litigant in person may apply to court for a grant of a right of audience to a particular person in relation to the proceedings: [Legal Services Act 2007](#)

- Sch.3 para.1(2); *Practice Guidance (McKenzie Friends: Civil and Family Courts) [2010] 1 W.L.R. 1881*. See *Clarkson v Gilbert [2000] 3 F.C.R. 10; [2000] 2 F.L.R. 839, CA.*
- 547 *Re F (Children) [2013] EWCA Civ 726.*
- 548 *R v Bow County Court Ex p. Pelling [1999] 4 All ER 751 at 758; [1999] 1 W.L.R. 1807* at 1825, CA.
- 549 *R v Leicester City Justices Ex p. Barrow [1991] 2 QB 260; [1991] 3 All ER 935, CA; Re H (minors) (chambers proceedings: McKenzie friend) [1997] 3 F.C.R. 619; [1997] 2 F.L.R. 423, CA; Andrews v Bryson Charitable Group [2023] NIC 26.*
- 550 *R v Bow County Court Ex p. Pelling [1999] 4 All ER 751; [1991] 1 W.L.R. 1807, CA.* See also *Re G (a minor) (Chambers Proceedings: McKenzie friend) [1999] 1 W.L.R. 1828; [1999] 2 F.L.R. 59.*
- 551 Ch.28 Costs, para.28.258.
- 552 *Practice Guidance (McKenzie Friends: Civil and Family Courts) [2010] 1 W.L.R. 1881.*
- 553 *Practice Guidance (McKenzie Friends: Civil and Family Courts) [2010] 1 W.L.R. 1881* [21]; and *Ravenscroft v Canal and River Trust [2016] EWHC 2282 (Ch).*
- 554 *Re J (A Child) (Residential Assessment: Rights of Audience) [2009] EWCA Civ 1210.*
- 555 *Practice Guidance (McKenzie Friends: Civil and Family Courts) [2010] 1 W.L.R. 1881.* In *Park v Hadi [2020] EWHC 2612 (QB)* there were “special circumstances” so as to justify extending rights of audience to a McKenzie Friend; the claimant had a poor grasp of English and of what he needed to say to put his case, the proposed McKenzie Friend was a neighbour acting altruistically, and it was in everyone’s interests that the matter was not adjourned.
- 556 *R v Leicester City Justices Ex p. Barrow [1991] 2 QB 260; [1991] 3 All ER 935 (CA); Re Purvis [2001] EWHC (Admin) 827*, as approved in *Attorney-General v Purvis [2003] EWHC (Admin) 3190.*
- 557 *Re Purvis [2001] EWHC 827 (Admin) [18]–[19], Attorney General v Purvis [2003] EWHC 2190 (QB) [30]–[31].*
- 558 See above, paras 3.40 ff; and see *Re Purvis [2001] EWHC 827 (Admin); Attorney General v Purvis [2003] EWHC 3190 (QB); Attorney General v Vaidya [2017] EWHC 2152 (Admin).*
- 559 *Practice Guidance (McKenzie Friends: Civil and Family Courts) [2010] 1 W.L.R. 1881* [23].

The Right to be Heard

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Mainwork

Chapter 3 - Fair Trial

The Right to be Heard

The general principle

- 3.177 It is a basic requirement of procedural fairness that any person affected by a judicial decision should have an opportunity to be heard before the decision is made.⁵⁶⁰ Lord Sumption explained in *Cameron v Liverpool Victoria Insurance Co Ltd* that the right to be heard encompasses two related principles: the right to receive due notice of the proceedings, which provides the court with jurisdiction over the dispute; and the right to be afforded an opportunity of “*substantially presenting [one’s] case before the court*”.⁵⁶¹ Implicit within this is that each litigant is entitled to knowledge of the content of their opponent’s case, arguments and evidence so that they can properly set out their own case; the primary purpose of the right to be heard is to give the affected person an opportunity to present their side of the story and respond to the case against them, in order that they may have a genuine chance to persuade the court of their position. The general principle has been elaborated in the context of administrative law.⁵⁶² In *O'Reilly v Mackman*, Lord Diplock said:

“... the requirement that a person ... should be given a fair opportunity of hearing what is alleged against him and of presenting his own case, is so fundamental to any civilised legal system that it is to be presumed that Parliament intended that a failure to observe it should render null and void any decision reached in breach of this requirement.”⁵⁶³

- 3.178 The ECtHR has stressed on many occasions that the principle of adversarial proceedings and equality of arms, which are elements of the broader concept of a fair hearing, requires that each party be given a reasonable opportunity to have knowledge of and comment on the other party’s arguments and evidence and to present their case under conditions that do not place them at a substantial disadvantage.⁵⁶⁴ In some circumstances, it also requires non-parties, such as witnesses, who may be subject to adverse comment in a judgment, to be given an opportunity to know the content of the court’s proposed comments and to have an opportunity to be heard. A failure to provide a person whose professional reputation was likely to suffer from an adverse comment an opportunity to be heard was held to breach both the common law and the ECHR art.6 right to fair trial.⁵⁶⁵

- 3.179 The general principle that each party be given a reasonable opportunity to know and challenge the case against them and present their own case, long established at common law and articulated in rules of court,⁵⁶⁶ was forcefully reiterated by both the Court of Appeal and the Supreme Court in *Al-Rawi v Security Service*.⁵⁶⁷ In the Court of Appeal, Lord Neuberger MR stated that:

“... the principle that a litigant should be able to see and hear all the evidence which is seen and heard by a court determining his case is so fundamental, so embedded in the common law, that, in the absence of parliamentary authority, no judge should override it, at any rate in relation to an ordinary civil claim, unless (perhaps) all parties to the claim agree otherwise. At least so far as the common law is concerned, we would accept the submission that this principle represents an irreducible minimum requirement of an ordinary civil trial. Unlike principles such as open justice, or the right to disclosure of relevant documents, a litigant’s right to know the case against him and to know the reasons why he has lost or won is fundamental to the notion of a fair trial.”⁵⁶⁸

3. 180 On appeal to the Supreme Court, Lord Dyson identified the principle of natural justice as “fundamental” to the conduct of a common law trial (whether civil or criminal)⁵⁶⁹ and explained it as comprising “a number of strands”, one of which was that:

“[a] party has a right to know the case against him and the evidence on which it is based. He is entitled to have the opportunity to respond to any such evidence and to any submissions made by the other side. The other side may not advance contentions or adduce evidence of which he is kept in ignorance.”⁵⁷⁰

Lord Dyson then drew attention to the case of *Kanda v Government of Malaya*, in which Lord Denning said:

“If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them.”⁵⁷¹

3. 181 The right to be heard dictates that parties must be provided with a practically meaningful opportunity to present their case and to challenge that of the opponent.⁵⁷² Consequently, it entails a right to prior and timely notice of the case that one has to meet and a reasonable opportunity to respond by presenting evidence or advancing argument.⁵⁷³ We may refer to this bundle of rights as the right to effective participation in the proceedings.⁵⁷⁴ A considerable proportion of the CPR consists of arrangements designed to implement and regulate the right to participation. For the present, it is sufficient to outline the general principle applicable under the common law and the ECHR and to draw attention to the more prominent exceptions.
3. 182 As already noted, the right to be heard is not confined to merely expressing one’s own arguments but contains a right to fair and timely notice of the case that one has to meet.⁵⁷⁵ Notice is required not only of the argument that the opponent proposes to advance, but also of the legal points and the sources on which the court proposes to rely of its own motion. Lord Diplock made this point when he criticised Lord Denning for referring to Hansard on a question of interpretation of statute at a time when references to this source were not allowed:

“Under our adversary system of procedure, for a judge to disregard the rule by which counsel are bound has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice: the right of each to be informed of any point adverse to him that is going to be relied on by the judge and to be given an opportunity of stating what his answer to it is.”⁵⁷⁶

3. 183 Where an oral hearing is involved, a tribunal must:

- (a) consider all relevant evidence which a party wishes to submit;
- (b) inform every party of all the evidence taken into account, whether derived from another party or independently;
- (c) allow witnesses to be questioned; and
- (d) allow comment on the evidence and arguments on the whole case.⁵⁷⁷

3. 184 Similar requirements are dictated by the right to fair trial under ECHR art.6. ECtHR jurisprudence refers to this type of bundle of rights as a right to an adversarial process, which means a right to be informed of all the evidence adduced in the case and the arguments presented and an opportunity to respond.⁵⁷⁸ The ECtHR has stressed that each party must have a genuine opportunity to respond to the evidence relied upon by the other side.⁵⁷⁹ The court should ensure that the parties have sufficient opportunities

to respond to any submissions made by an advocate to the court (formerly *amicus curiae*),⁵⁸⁰ or by someone in a similar role.⁵⁸¹ Similarly, where the court has received advice from assessors the consultation between the assessors and the court should take place openly as part of the assembling of evidence, and the parties must be given an opportunity to put questions to the assessors and comment on their advice.⁵⁸² The court may be required to ensure effective and adequate representation of non-parties who may be affected by the proceedings.⁵⁸³

3. 185 In *Raja v van Hoogstraten*,⁵⁸⁴ the claimant applied for the defendant to be committed for contempt for failing to comply with an order directing him to make a disclosure of assets. By an administrative error, the prison service did not produce the defendant for the hearing of that application. In his absence, the court found the defendant to be in contempt. The Court of Appeal held that it was inconsistent with the ECHR art.6(3) for a judge to proceed with an effective hearing of an application to commit where he knew that the alleged contemnor wished to be heard but was prevented from being present, even if the judge thought that there was no possible excuse for the failure to comply with the order.

Exceptions to the right to be heard—general requirements

3. 186 The right to be heard (including the right to see and respond to the opponent's evidence)⁵⁸⁵ is not absolute. It may be restricted for a legitimate purpose, provided that such limitation is no more than proportionate to such purpose.⁵⁸⁶ The ECtHR ruled that in a criminal trial evidence may be withheld from the accused to protect national security or protect witnesses from harm. At the same time, however, the court stressed that sufficient procedural safeguards are to be put in place to ensure that the accused receives a fair trial.⁵⁸⁷ The need to limit exceptions to legitimate purposes and to ensure proportionality has been stressed by the ECtHR time and again.⁵⁸⁸ It has also insisted on the need for putting in place adequate safeguards to protect the interests of the party whose right to participation has been restricted.⁵⁸⁹ Similar principles are followed at common law. But the right is not absolute and maybe curtailed or limited, such as where a party is disrupting proceedings.⁵⁹⁰
3. 187 The exceptions fall into three broad groups. The first type concerns situations where the denial of an opportunity to participate is only temporary, and it is followed shortly afterwards by a hearing at which the without-notice decision is reconsidered in the presence of both parties. The second type of exception concerns partial denial of access to evidence or information, where material is withheld from a party but disclosed to the party's legal representatives or experts. The third type of exception involves a total denial of the opportunity of participation. In addition, the right to participate is somewhat moderated in the context of proceedings that are non-adversarial in character; this too is considered below.

Proceedings without notice

3. 188 The most common exception concerns applications without notice (also known as "ex parte" proceedings). Suffice it to note here that orders without notice are limited to situations of urgency or where disclosure of the application for an order to the opponent would defeat the interests of justice.⁵⁹¹ Orders made without notice are of limited duration and are followed by a with-notice hearing, at which the earlier ex parte decision is reconsidered in the presence of all affected parties. As is explained in Ch.10, without-notice proceedings involve safeguards designed to protect the interests of the absent party as much as possible.⁵⁹² Accordingly, an applicant for a without-notice order is duty-bound to make full and frank disclosure of all relevant material, including that which favours the absent party.⁵⁹³ Further, the applicant is normally required to give an undertaking in damages to compensate the absent litigant for any undue harm.

3. 189

Examples of urgency include situations where there is no practical opportunity to notify the respondent, as where the applicant seeks to restrain the respondent's departure from the country when the latter is about to board a flight. Asset freezing orders illustrate the second type of exceptions, where notice to the respondent is withheld in order to prevent them from defeating the court's jurisdiction by dissipating their assets. A similar justification is given for interim without notice anti-social behaviour orders.⁵⁹⁴

Partial denial of access to evidence or information

Common law exceptions

3. 190 The interests of justice may require the screening of sensitive or confidential information from one of the parties.⁵⁹⁵ For instance, the disclosure of secret technical information to the opponent in a patent dispute may irredeemably harm the disclosing party's interests. To avoid this, and at the same time enable the opponent to defend their interests, the court may direct that trade secrets should be disclosed only to legal representatives and experts, but not to the opponent themselves,⁵⁹⁶ in what is known as a "confidentiality ring or club".⁵⁹⁷ However, limitations on disclosure must not interfere with an opponent's ability to present their case, and must rest on solid grounds.⁵⁹⁸

3. 191 In one case, an application was made that the defendant disclose information concerning missing assets. The court accepted the defendant's argument that disclosure of the identity of third parties living in Iraq might endanger their safety and directed that disclosure should be made to the claimants' lawyers but should be withheld from the claimants.⁵⁹⁹ As Morritt J explained, the courts have:

"a limited jurisdiction to be exercised only in exceptional circumstances, whereby the court can direct that facts disclosed by one party are not disclosed to the other party, provided, of course, that they are disclosed to someone on that party's side who can effectively deal with the matter."⁶⁰⁰

Statutory exceptions

3. 192 For discussion of statutory exceptions, and in particular closed material procedure under the [Justice and Security Act 2013](#), see [Ch.19](#), which deals with public interest immunity and the closed material procedure.

Holding a trial in absentia

3. 193 A trial in absentia is one where a party does not attend either personally (unless specifically required to attend in person by court order) or by representation.⁶⁰¹ It may be permitted under ECHR art.6 where the state has acted diligently, but unsuccessfully, to give an accused effective notice of the hearing.⁶⁰² For a trial in absentia to be justified it must be demonstrated unequivocally that the person in question was sufficiently aware of the opportunity to exercise the right of participation in the proceedings and that it may be inferred that that person waived the right to appear in court.⁶⁰³ In the absence of notification the right to be heard

can neither be seen to have been waived nor to have been exercised effectively.⁶⁰⁴ Denying a party an opportunity to participate may be justified where the party has refused to comply with court orders.⁶⁰⁵ The court would be justified in denying a party the opportunity to participate, or indeed in striking out the party's statement of case, if by disobeying a court order that party has made it impossible for the court to deal fairly with a dispute, as where a party has refused to obey a disclosure order.⁶⁰⁶

Right to participation in non-adversarial proceedings

- 3. 194** An exception to the right of participation is said to be justified in non-adversarial proceedings.⁶⁰⁷ In proceedings concerning the welfare of children, such as proceedings under the [Children Act 1989](#), the paramount duty of the court is to protect the welfare of children. It is therefore said that in such cases requirements of procedural fairness must give way to the need for the promotion of child welfare.⁶⁰⁸ It has been suggested that such proceedings are not adversarial because the court is not called upon to adjudicate a lis between opposing parties; it is only called upon to protect child welfare. Lord Devlin put the matter as follows:

“Where the judge sits as an arbiter between two parties, he need consider only what they put before him. If one or other omits something material and suffers from the omission, he must blame himself and not the judge. Where the judge sits purely as an arbiter and relies on the parties for his information, the parties have a correlative right that he should act only on information which they have had the opportunity of testing. Where the judge is not sitting purely or even primarily as an arbiter but is charged with the paramount duty of protecting the interests of one outside the conflict, a rule that is designed for just arbitrament cannot in all circumstances prevail.”⁶⁰⁹

- 3. 195** This explanation is at odds with the view that principles of natural justice are not confined to situations where there is a dispute between two opposing parties, but extend to any public or other body fulfilling a quasi-judicial function or whose decision can affect the rights of a citizen.⁶¹⁰ “Experience has shown”, Wade and Forsyth write “that there are remarkably few true exceptions to this ‘duty [to follow the rules of natural justice] laying upon every one who decides anything’, at any rate anything which may adversely affect legal rights or liberties”.⁶¹¹ In view of the serious consequence of a denial of procedural justice, it has been held that the discretion to deny to one of the parties information placed before the court must be exercised only in exceptional circumstances, where there is no escape from the dilemma of either respecting procedural rights or, alternatively, harming a child.⁶¹²

Non-adversarial childcare proceedings

- 3. 196** In childcare proceedings the appeal to the non-adversarial nature of the process is primarily invoked in order to withhold information from one or both of the parents of the child in question. However, it is suggested that in the absence of a probing challenge from those most closely involved with the child it is doubtful whether the court could safely arrive at a well-founded decision. If information is provided by one parent and denied to the other, there is a risk that the reliability of the information may not be adequately tested. This risk does not disappear where the information is provided by a welfare agency, because it is not unknown for well-meaning welfare officers to be mistaken or misguided. To say that the interests of the child must override the interests of the parents does not dispose of the problem because the risk of error poses a danger not only to the parents but also to the child whose welfare the court seeks to protect. In sum, in the absence of the normal procedural safeguards it is very difficult to determine what is best in the interests of children, the parents or the family as a whole.⁶¹³ For this reason, even in care proceedings non-disclosure of relevant information is the exception rather than the rule and should only be ordered when the case for it was compelling and only if the interests of the persons affected in receiving a fair trial can be safeguarded.⁶¹⁴

- 3. 197**

Not only is it important to allow parents to be heard in care proceedings; wherever possible the affected child too must be heard. In a carefully considered judgment Peter Jackson J set out the right approach, saying that it was no longer to be presumed that a child's attendance at court was likely to be harmful, and nor should a child have to prove that their attendance was in their interests. The exclusion of the child would be justified only where there was a real risk that the child's attendance would harm the child's welfare.⁶¹⁵ Failure to hear a child when the decision turned on allegations about the child's conduct was a fundamental denial of natural justice, the Supreme Court has held.⁶¹⁶

3. 198 The ECtHR held that the non-adversarial nature of proceedings cannot displace altogether the right to fair trial under the ECHR art.6.⁶¹⁷ Even in childcare proceedings the court must respect the parents' right to an adversarial process. The ECtHR has held that the lack of disclosure to parents of vital social reports is capable of affecting the ability of parents not only to influence the outcome of the proceedings but also to assess their prospects of making an appeal, and is therefore a violation of art.6.⁶¹⁸ The failure to disclose evidence of abuse to a parent, so that the parent may refute it, could amount to a violation of ECHR art.8.⁶¹⁹

3. 199 That is not to say that the right to notice of the proceedings and to participation can never be curtailed. Indeed, limitations may be imposed on these rights in furtherance of a legitimate aim or public interest, provided always that such limitation is reasonably proportionate to such aim or interests. The correct approach is set out in *Re D and another (minors) (adoption reports: confidentiality)*,⁶²⁰ where the House of Lords considered whether in adoption proceedings it was justified to withhold a report of the children's views from the parents. The court must start with the assumption that all parties have a right to notice of the case that has to be met and then proceed as follows:

“... the court should first consider whether disclosure of the material would involve a real possibility of significant harm to the child.

If it would, the court should next consider whether the overall interests of the child would benefit from non-disclosure, weighing on the one hand the interest of the child in having the material properly tested, and on the other both the magnitude of the risk that harm will occur and the gravity of the harm if it does occur.

If the court is satisfied that the interests of the child point towards non-disclosure, the next and final step is for the court to weigh that consideration, and its strength in the circumstances of the case, against the interest of the parent or other party in having an opportunity to see and respond to the material. In the latter regard the court should take into account the importance of the material to the issues in the case.

Non-disclosure should be the exception and not the rule. The court should be rigorous in its examination of the risk and gravity of feared harm to the child, and should order non-disclosure only when the case for doing so is compelling.”⁶²¹

Other non-adversarial proceedings

3. 200 Other proceedings, besides proceedings involving children, have also been held to be non-adversarial: for instance, proceedings under the *Insolvency Act 1986 ss.236 and 366*, which are designed to help interested persons obtain information concerning the affairs of insolvent companies.⁶²² Similarly, applications by trustees for directions as to whether the trustees should bring proceedings against a beneficiary have been held to be non-adversarial.⁶²³ Whether such arrangements are consistent with ECHR art.6 would depend on whether the exception is proportionate to the interest it is supposed to serve and on whether adequate safeguards exist for the protection of the interests of the affected party. It is doubtful that these conditions are fulfilled with regard to the two instances just mentioned.

- 3.201 In *Re British and Commonwealth Holdings Plc (Nos 1 and 2)*,⁶²⁴ the Court of Appeal held that under the **Insolvency Act 1986** the courts have a discretion to withhold from the person against whom the application is made information which, if disclosed, would enable that person to defeat the purpose of the proceedings, but it went on to hold that:

“inspection … [of confidential information] should prima facie be allowed where the court is of the opinion that it will or may be unable fairly and properly to dispose of the application if part of the evidence is withheld from the person against whom the order is sought. It will then be for the office-holder [the applicant for the order] to satisfy the court that confidentiality … is nevertheless appropriate.”⁶²⁵

It is difficult to see how a court could hold that confidentiality is appropriate notwithstanding that it may prevent the court from fairly disposing of the case. It is submitted that, as a minimum requirement of fairness, the affected party should be given an indication of the objections raised against them so that they may be able to answer them.⁶²⁶

- 3.202 It has been held that in an application for an injunction under the **Forced Marriage (Civil Protection) Act 2007**, where applications are made without notice, it would be justified to withhold disclosure of certain information from the respondent if such disclosure is likely to risk the safety of others.⁶²⁷ The withholding of the information could be justified on grounds of public interests. Besides, the primary aim of the jurisdiction, the court explained, was to protect the applicant. Granting the applicant protection could not in any way derogate from the respondent’s rights since no one had a right to force another to marry. The court held that there was no justification for the appointment of special advocates in such proceedings. In childcare proceedings there might, however, be situations where sensitive information, especially about risk of harm to children, deserved protection on grounds of public interest immunity. It might be justified in such situations to appoint a special advocate to assist the Family Court in its fact-finding task.⁶²⁸

Footnotes

- 560 Lord Loreburn LC said in *Board of Education v Rice [1911] AC 179, 183*, that acting in good faith and listening fairly to both sides “is a duty lying upon everyone who decides anything”.
- 561 *Cameron v Liverpool Victoria Insurance Co Ltd [2019] UKSC 6; [2019] 1 W.L.R. 1471* [17]. For a critique of this decision, see Ch.5 Service paras 5.136 ff.
- 562 Any body which by its decisions is capable of affecting the interests of others has a duty to conform with the principles of natural justice: W. Wade and C.F. Forsyth, *Administrative Law*, 12th edn (Oxford: Oxford University Press, 2022), Ch.14; and M. Supperstone, J. Goudie and P. Walker, *Judicial Review*, 7th edn (London: LexisNexis, 2024), Ch.11. See also *R v Westminster Assessment Committee Ex p. Grosvenor House (Park Lane) Ltd [1941] 1 KB 53; [1940] 4 All ER 132, CA*; and *Ridge v Baldwin [1964] AC 40; [1963] 2 All ER 66, HL*.
- 563 *O'Reilly v Mackman [1983] 2 AC 237 at 276; [1982] 3 All ER 1124* at 1127, HL. This view was echoed by Lord Donaldson MR the same year: “I cannot at the moment visualise any circumstances in which it would be right to give a judge information on an ex parte application which cannot at a later stage be revealed to the party affected by the result of the application … Clearly the matter has to be considered solely on the basis of evidence which is known to both parties, and in so far as any judge concerned has other evidence or information he must ignore it”: *WEA Records Ltd v Visions Channel 4 Ltd [1983] 2 All ER 589* at 591, CA. See also the key decisions in *Ridge v Baldwin [1964] AC 40; [1963] 2 All ER 66, HL*; and *Re S (a child) [2001] 1 All ER 362; [2001] 1 W.L.R. 211*.
- 564 See above, para.3.10. See further W. Wade and C.F. Forsyth, *Administrative Law*, 12th edn (Oxford University Press, 2022) Ch.14; and M. Supperstone, J. Goudie and P. Walker, *Judicial Review*, 7th edn (London: LexisNexis, 2024) Ch.11.
- 565 *W (A child) (Care Proceedings: Non-Party Appeal) [2016] EWCA Civ 1140; [2017] 1 W.L.R. 2415*.
- 566 Including the rules concerning service: see *Porter v Freudenberg [1915] 1 KB 857, CA*; and *Cameron v Liverpool Victoria Insurance Co Ltd [2019] UKSC 6; [2019] 1 W.L.R. 1471* [21].
- 567 *Al-Rawi v Security Service [2010] EWCA Civ 482; [2010] 3 W.L.R. 1069; Al-Rawi v Security Service [2011] UKSC 34; [2012] 1 AC 531*.

- 568 *Al-Rawi v Security Service* [2010] EWCA Civ 482; [2010] 3 W.L.R. 1069 [30]. See also *Fred Perry (Holdings) Ltd v Brands Plaza Trading Ltd (t/a Brands Plaza)* [2012] EWCA Civ 224.
- 569 *Al-Rawi v Security Service* [2012] 1 AC 531 [10].
- 570 *Al-Rawi v Security Service* [2012] 1 AC 531 [12].
- 571 *Kanda v Government of Malaya* [1962] AC 322, 337, PC.
- 572 Lord Mustill said: “... it is a first principle of fairness that each party to a judicial process shall have an opportunity to answer by evidence and argument any adverse material which the tribunal may take into account when forming its opinion. This principle is lame if the party does not know the substance of what is said against him (or her), for what he does not know he cannot answer.” *Re D (minors) (adoption reports: confidentiality)* [1996] AC 593 at 603–604; [1995] 4 All ER 385 at 388, HL. See also *R v Secretary of State for the Home Department Ex p. Doody* [1994] 1 AC 531; [1993] 3 All ER 92, HL; *Pomiechowski v Poland* [2012] UKSC 20; and *Dunbar Assets Plc v Dorcas Holdings Ltd* [2013] EWCA Civ 864.
- 573 *R v London Quarter Sessions Appeal Committee Ex p. Rossi* [1956] 1 QB 682; [1956] 1 All ER 670, CA; *Stevenson v United Road Transport Union* [1976] 3 All ER 29; and *Taylor v National Union of Seamen* [1967] 1 All ER 767; [1967] 1 W.L.R. 532. Proceedings held in the absence of the affected party are inherently biased: *Siporex Trade SA v Comdel Commodities Ltd* [1986] 2 Lloyd's Rep. 428 at 436; [1986] N.L.J. Rep. 538 at 539; *Columbia Picture Industries Inc v Robinson* [1987] Cat 81–82; [1986] 3 All ER 338 at 375; *R (Morgan Grenfell and Co Ltd) v Special Commissioners of Income Tax* [2001] EWCA Civ 329; [2003] 1 AC 563; *Al Rawi v Security Service* [2010] EWCA Civ 482; [2010] 3 W.L.R. 1069; and *Al Rawi v Security Service* [2011] UKSC 34; [2012] 1 AC 531.
- 574 Closely related to this is the right to equal treatment before the court (discussed above, paras.3.154 ff). Even if a party and their lawyers are not altogether excluded from a hearing or prevented from accessing the evidence on which their opponent relies, the party’s effective participation in the proceedings will be impeded if the conditions under which they are permitted to learn their opponent’s case and respond to it put them at a substantial disadvantage.
- 575 *R v Thames Magistrates’ Court Ex p. Polemis* [1974] 2 All ER 1219; [1974] 1 W.L.R. 1371; *Mahon v Air New Zealand Ltd* [1984] AC 808; [1984] 3 All ER 201, PC; *Newman (t/a Mantella Publishing) v Modern Bookbinders* [2000] 2 All ER 814; [2000] 1 W.L.R. 2559, CA; *Pamplin v Express Newspapers Ltd* [1985] 2 All ER 185 at 186; [1985] 1 W.L.R. 689 at 691; and *Re S (a child)* [2001] 1 All ER 362 at 370.
- 576 *Hadmor Productions Ltd v Hamilton* [1983] 1 AC 191 at 233; [1982] 1 All ER 1042 at 1056, HL.
- 577 See W. Wade and C.F. Forsyth, Administrative Law, 12th edn (Oxford: Oxford University Press, 2022) Ch.14 and the authorities there cited. Administrative bodies need not always hold a hearing. When no hearing is involved, the last two requirements will obviously not apply. But even then, the decision-making body would have to act fairly and therefore conform with the first two requirements.
- 578 *Lobo Machado v Portugal* (1996) 23 E.H.R.R. 79. See also: *Ruiz-Mateos v Spain* [1993] 16 E.H.R.R. 505; *Edwards v United Kingdom* [1993] 15 E.H.R.R. 417; *Feldbrugge v Netherlands* [1986] 8 E.H.R.R. 425 [44]; *Nideröst-Huber v Switzerland* [1998] 25 E.H.R.R. 709 [101]; *Werner v Austria: Szücs v Austria* [1998] 26 E.H.R.R. 310 [66]; *Kostovski v Netherlands* [1989] 12 E.H.R.R. 434; *Cardot v France* [1991] 13 E.H.R.R. 853; *Vermeulen v Belgium* [2001] 32 E.H.R.R. 15; and *Ankerl v Switzerland* [2001] 32 E.H.R.R. 1 [38].
- 579 *Van de Hurk v Netherlands* [1994] 18 E.H.R.R. 481.
- 580 For the procedure for the appointment of an advocate to the court, see PD 3F.
- 581 *Van Orshoven v Belgium* [1997] 26 E.H.R.R. 55.
- 582 *Admiralty Commissioners v Owners of the Ausonia* [1920] 2 Ll. L. Rep. 123, 124, HL; *Nwabueze v General Medical Council* [2000] 1 W.L.R. 1760, PC; *Owners of the Bow Spring v Owners of the Manzanillo II* [2004] EWCA Civ 1007; [2005] 1 W.L.R. 144, CA; and *Owners of the Global Mariner v Owners of the Atlantic Crusader (The Global Mariner, The Atlantic Crusader)* [2005] EWHC 380 (Admiralty); [2005] 1 Lloyd's Rep. 699. See Ch.21 Experts para.21.122. See also *Hatton v Connew* [2013] EWCA Civ 1560, in relation to the court hearing an expert witness in the absence of the parties (discussed in Ch.21 Experts at para.21.32).
- 583 *Keegan v Ireland* (1994) 18 E.H.R.R. 342. See also *Royal Borough of Kingston-Upon-Thames* [2023] EWHC 27 (KB) [116]–[119].
- 584 *Raja v van Hoogstraten* [2004] EWCA Civ 968; [2004] 4 All ER 793.
- 585 This overlaps with the right to equality before the law; see above, para.3.155. Note that mechanisms to ensure all the relevant evidence is before the court are discussed below at paras 3.203 ff.
- 586 *Stanev v Bulgaria* [2012] 55 E.H.R.R. 22 [230]; *Sabeh El Leil v France* [2012] 54 E.H.R.R. 14 [52]–[54]; *Borisov v Russia* [2012] ECHR 441 [34]; *Cudak v Lithuania* [2010] ECHR 370 [54]–[59]; *Cordova v Italy (No.1)* [2003] ECHR 47 [54]; *Prince Hans-Adam II of Liechtenstein v Germany* [2001] ECHR 467 [44]; *Fayed v United Kingdom* [1994] 18 E.H.R.R. 393 [54]; *Lithgow v United Kingdom* [1986] 8 E.H.R.R. 329 [194]; *Ashingdane v United Kingdom* [1985] 7

- E.H.R.R.* 528 [57]. See further W. Wade and C.F. Forsyth, *Administrative Law*, 12th edn (Oxford: Oxford University Press, 2022) Ch.14.
- 587 *Edwards and Lewis v United Kingdom* [2005] 40 E.H.R.R. 24 [53]. See also *Rowe and Davis v U.K.* [2000] 30 E.H.R.R. 1 [54].
- 588 *Ashingdane v United Kingdom* [1985] 7 E.H.R.R. 528 [57]; *Stubbings v United Kingdom* [1996] 23 E.H.R.R. 213 [48]; and *The National and Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v United Kingdom* [1997] 25 E.H.R.R. 127 [105]. See also: *Golder v United Kingdom* [1975] 1 E.H.R.R. 524; and *Deweerd v Belgium* [1980] 2 E.H.R.R. 439. Any limitations must also be also legally certain: *Societe Levage Prestations v France* [1996] 24 E.H.R.R. 351 [40]–[50].
- 589 *Jasper v United Kingdom* [2000] 30 E.H.R.R. 441; and *Fitt v United Kingdom* [2000] 30 E.H.R.R. 480.
- 590 *Attorney General of Zambia v Meer Care and Desai (A Firm)* [2006] EWCA Civ 390; [2006] 1 C.L.C. 436. See also *Da Costa v Sargaco* [2016] EWCA Civ 764; [2016] C.P. Rep. 40 [59]–[65], in which the Court of Appeal held that exceptions of this kind were not precluded by the decision in *Al-Rawi v Security Service* [2011] UKSC 34; [2012] 1 AC 531. The Court of Appeal further considered that such exceptions were permissible where, notwithstanding a party being excluded from the trial or part of the trial, the proceedings as a whole were fair. On the approach where a witness is to be excluded from the trial, see *Luckwell v Limata* [2014] EWHC 536 (Fam); [2014] 2 F.L.R. 1252.
- 591 *Ntuli v Donald* [2010] EWCA Civ 1276.
- 592 See Ch.10 Interim Remedies paras 10.216 ff; see also Ch.8 Interim Applications paras 8.30 ff.
- 593 See *Deutsche Bank Suisse SA v Khan* [2013] EWCA Civ 1149, discharging an order for the restoration of possession of property due to an absence of full and frank disclosure.
- 594 *R (Kenny) v Leeds Magistrates' Court* [2003] EWHC 2963 (Admin); [2004] 1 All ER 133.
- 595 *Carphone Warehouse Group Plc v Office of Communications* [2009] CAT 37.
- 596 *Werner-Lambert Co v Glaxo Laboratories Ltd* [1975] R.P.C. 354; *Roussel Uclaf v ICI Plc* [1990] F.S.R. 25; [1990] R.P.C. 45, CA; *Church of Scientology of California v Department of Health* [1979] 3 All ER 97; [1979] 1 W.L.R. 723, CA (a party seeking restrictions on the disclosed materials must establish that the restrictions are necessary for the proper administration of justice); and *Arab Monetary Fund v Hashim* [1989] 3 All ER 466; [1989] 1 W.L.R. 565.
- 597 *Wallace Smith Trust Co. Ltd (In Liquidation) v Deloitte Haskins and Sells* [1997] 1 W.L.R. 257, 271.
- 598 *Dyson Appliances Ltd v Hoover Ltd (No.3)* [2002] EWHC 500 (Pat); [2003] R.P.C. 42; and *Re Coroin Ltd* [2012] EWHC 1158 (Ch).
- 599 *Arab Monetary Fund v Hashim* [1989] 3 All ER 466; [1989] 1 W.L.R. 565.
- 600 *Arab Monetary Fund v Hashim* [1989] 3 All ER 466 at 476; [1989] 1 W.L.R. 565 at 577. See also *Re Coroin Ltd* [2012] EWHC 1158 (Ch).
- 601 *Rouse v Freeman, The Times*, 8 January 2002, QBD; and *Falmouth House Ltd v Abou-Hamdan* [2017] EWHC 779 (Ch). See Ch.22 Trial and Evidence paras 22.130 ff.
- 602 *Colozza and Rubinat v Italy* [1985] 7 E.H.R.R. 516; and trial in absentia may also be permitted in the interests of administration of justice in some cases of illness, such as hunger strike: *Ensslin, Baader and Raspe v Germany* (1978) 14 D.R. 64, ECom HR.
- 603 *Nelson v Clearsprings (Management) Ltd* [2006] EWCA Civ 1252; [2007] 1 W.L.R. 962.
- 604 *Stoyanov v Bulgaria* [2012] ECHR 184.
- 605 *Hadkinson v Hadkinson* [1952] P.288; *United States v Montgomery (No.2)* [2003] EWCA Civ 392; [2003] 1 W.L.R. 1916.
- 606 *United States v Montgomery (No.2)* [2003] EWCA Civ 392; [2003] 1 W.L.R. 1916; but see T. Hartley, “Human rights as a bar to enforcement of a foreign judgment” (2004) 120 L.Q.R. 120, 211. For discussion of striking out for non-compliance with court orders see Ch.12 Case Management Pt II paras 12.193 ff.
- 607 *Arab Monetary Fund v Hashim* [1989] 3 All ER 466; [1989] 1 W.L.R. 565. See also *Coca-Cola Co v Gilbey* [1995] 4 All ER 711.
- 608 In *Scott v Scott* [1913] AC 417 at 437, HL, Viscount Haldane LC said: “In the two cases of wards and lunatics the court is really sitting primarily to guard the interests of the ward or the lunatic. Its jurisdiction is in this respect paternal and administrative, and the disposal of controverted questions is an incident only in the jurisdiction.”
- 609 *Official Solicitor to the Supreme Court v K* [1965] AC 201 at 240; [1963] 3 All ER 191 at 210. See also *Re C (a minor: irregularity of practice)* [1991] F.C.R. 308; [1991] 2 F.L.R. 438, CA.
- 610 *Ridge v Baldwin* [1964] AC 40; [1963] 2 All ER 66, HL. See W. Wade and C.F. Forsyth, *Administrative Law*, 12th edn (Oxford: Oxford University Press, 2022) Ch.14.
- 611 W. Wade and C.F. Forsyth, *Administrative Law*, 12th edn (Oxford: Oxford University Press, 2022) p.411.

- 612 *Re B (a minor) (disclosure of evidence) [1993] Fam. 142; [1993] 1 All ER 931, CA; Re A (A Child) (Disclosure of Third Party Information) [2012] EWCA Civ 1204*, and the Supreme Court's decision in the same case, *Re A (Sexual Abuse: Disclosure) [2012] UKSC 60*.
- 613 *Re P (Children) [2012] EWCA Civ 401*.
- 614 *W (children) (care proceedings: disclosure) [2003] EWHC 1624 (Fam); [2004] 1 All ER 787; Principal Reporter v K [2010] UKSC 56; A City Council v T [2011] EWHC 1082 (Fam); Re P (Children) [2012] EWCA Civ 401; Re A (A Child) (Disclosure of Third Party Information) [2012] EWCA Civ 1204*, and see the Supreme Court's decision in the same case: *Re A (Sexual Abuse: Disclosure) [2012] UKSC 60*.
- 615 *A City Council v T [2011] EWHC 1082 (Fam)*.
- 616 *Principal Reporter v K [2010] UKSC 56*.
- 617 The failure to conduct an oral hearing at some stage in care proceedings has been held to be a breach of ECHR art.6: *L v Finland [2000] 3 F.C.R. 219; [2000] 2 F.L.R. 118, ECtHR*.
- 618 *McMichael v United Kingdom (1995) 20 E.H.R.R. 205*.
- 619 See for example the ECtHR's decision in *TP and KM v United Kingdom [2001] 2 F.C.R. 289; [2001] 2 F.L.R. 549, ECtHR*; see also *Re A (A Child) (Disclosure of Third Party Information) [2012] EWCA Civ 1204* and *Re A (Sexual Abuse: Disclosure) [2012] UKSC 60*.
- 620 *Re D (minors) (adoption reports: confidentiality) [1996] AC 593; [1995] 4 All ER 385, HL*.
- 621 *Re D (minors) (adoption reports: confidentiality) [1996] AC 593 at 615; [1995] 4 All ER 385 at 399, HL*. Followed in *A Local Authority v A [2009] EWHC 1574 (Fam)*. See also *Re A (A Child) (Disclosure of Third Party Information) [2012] EWCA Civ 1204* and *Re A (Sexual Abuse: Disclosure) [2012] UKSC 60*.
- 622 *Re Murjani (a bankrupt) [1996] 1 All ER 65; [1996] 1 W.L.R. 1498*. It should be noted, however, that the information which was withheld was relevant only to the justification for making an ex parte application. See also *Law Society v Karim [2007] EWHC 3548 (Ch)*.
- 623 *Re Moritz, Midland Bank Executor and Trustee Co Ltd v Forbes [1960] Ch 251; [1959] 3 All ER 767*.
- 624 *Re British and Commonwealth Holdings Plc (Nos 1 and 2) [1992] 2 All ER 801, CA*.
- 625 *Re British and Commonwealth Holdings Plc (Nos 1 and 2) [1992] 2 All ER 801* at 810, CA. See also *Re Murjani (a bankrupt) [1996] 1 All ER 65* at 76.
- 626 *R v Gaming Board for Great Britain Ex p. Benaim and Khaida [1970] 2 QB 417; [1970] 2 All ER 528, CA*, a case involving an application for a gaming licence. See also *Re Pergamon Press Ltd [1971] Ch 388; [1970] 3 All ER 535, CA*, concerning a report prepared by Board of Trade inspectors. If the Home Secretary, when considering an application for naturalisation, has doubts about the applicant's good character, they need not divulge to the applicant the information they received, but they must identify the matter causing them difficulty and must provide an opportunity for the applicant to make representation with regard to those matters: *R v Secretary of State for the Home Department Ex p. Fayed [1997] 1 All ER 228; [1998] 1 W.L.R. 763, CA*.
- 627 *Re A (Forced Marriage: Special Advocates) [2010] EWHC 2438 (Fam)*.
- 628 *Re T (Wardship: Impact of Police Intelligence) [2009] EWHC 2440 (Fam)*.

Court Assistance to Secure Evidence

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 3 - Fair Trial

Court Assistance to Secure Evidence

- 3. 203** For access to court to be practically meaningful parties need court assistance to reach the evidence required to establish their rights. Other than bias and corruption, nothing is more calculated to erode public confidence in the administration of justice than the perception that judgments are given in ignorance of material evidence that could have been produced in court. A system in which, for instance, witnesses are free to withhold information which others know they possess would command little respect. All modern systems provide some compulsory measures that allow litigants to bring relevant evidence before the court. The right of access to evidence is of particular importance in an adversarial system, such as the English procedure, where it is up to litigants to identify relevant evidence and present it to the court.⁶²⁹
- 3. 204** The right to the law's assistance to secure evidence in court proceedings is part and parcel of the right to fair trial under the ECHR art.6, which requires courts to give litigants their assistance in order to protect and enforce rights.⁶³⁰ A system that left witnesses free to refuse to testify and allowed litigants to withhold relevant documents from their opponents would fail to provide citizens with an effective and meaningful procedure for vindicating their rights. Similarly, such a system would fail to accord litigants equality of arms, for parties in possession of records and other documents would have a distinct procedural advantage over opponents who lack documentary evidence.⁶³¹ Unless both parties have an equal opportunity to learn each other's case the process cannot be said to be conducted on an equal footing. Litigants therefore have extensive rights to seek court assistance to compel production of evidence relevant to the issues in the case from their opponents and from non-parties.⁶³² Parties to civil proceedings are normally required to disclose all relevant documents even if they tend to undermine their own case.⁶³³ The English court is prepared to go to the lengths of issuing what are, in effect, civil search warrants in order to secure evidence.⁶³⁴
- 3. 205** English law provides more comprehensive access to evidence than its continental counterparts. Unlike some of the continental systems, it has not developed a distinction between procedural truth and real truth. Those systems that make use of the concept of procedural truth are prepared to allow a judicial finding to stand, notwithstanding that it is at variance with the real facts, provided that it was reached by procedurally correct means.⁶³⁵ English law, by contrast, is reluctant to accommodate judicial findings of fact that are known to be factually incorrect or that have been reached without consideration of relevant evidence that is known to exist and which could have been produced. It is in the public interest, Lord Lloyd said, "that all relevant material should be available to courts when deciding cases. Courts should not have to reach decisions in ignorance of documents or other material which, if disclosed, might well affect the outcome".⁶³⁶ "It would be artificial and undesirable", Lord Woolf observed, "for the actual evidence, which is relevant and admissible, not to be placed before the judge who has the task of trying the case".⁶³⁷ There is therefore a general presumption in our law that all relevant evidence is admissible and should be accessible.
- 3. 206** The impression is sometimes given that the English trial process is not concerned with the completeness of evidence, but that the court's only duty is to reach a verdict on the basis of such evidence that has been presented.⁶³⁸ However, this is a misleading impression since, as we observed in Ch.1 and as we shall see in Ch.15, English law is committed to striving for correct outcomes in litigation.⁶³⁹ Thus, in *Flight v Robinson*,⁶⁴⁰ Lord Langdale MR said:

"However disagreeable it may be to make the disclosure, however contrary to [a party's] personal interests, however fatal to the claim upon which he may have insisted, he is required and compelled, under the most solemn sanction, to set forth all he knows, believes, or thinks in relation to the matters in question ... [By this means] the

greatest security ... is afforded, for the discovery of all relevant truth, and by means of such discovery, this Court ... has, at all times, proved to be of transcendent utility in the administration of justice.”

Meanwhile, Lord Donaldson MR explained that “litigation ... is designed to do real justice between opposing parties and, if the court does not have all the relevant information, it cannot achieve this object”.⁶⁴¹ Lord Denning MR stressed that “... the primary duty of the court is to ascertain the truth by the best evidence available. Any witness who has seen the facts or who knows the facts can be compelled to assist the court and should assist the court by giving that evidence.”⁶⁴²

- 3.207 The general principle is therefore that the court will assist parties to obtain all evidence relevant to the issue before the court, as Lord Edmund Davies explained in *D v NSPCC*:

“It is a serious step to exclude evidence relevant to an issue, for it is in the public interest that the search for truth should, in general, be unfettered. Accordingly, any hindrance to its seeker needs to be justified by a convincing demonstration that an even higher public interest requires that only part of the truth should be told.”⁶⁴³

He went on to state that “it would be unthinkable to vest the judiciary with a power to exclude in its discretion evidence relevant to the issues in civil proceedings merely because one side wants it kept out and the judge thinks that its disclosure is likely to prove embarrassing. In other words, the exclusion of relevant evidence always calls for a clear justification”.⁶⁴⁴ Lord Scott explained that there “is a strong public interest that in criminal cases the innocent should be acquitted and the guilty convicted, that in civil cases the claimant should succeed if he is entitled to do so and should fail if he is not, that every trial should be a fair trial and that to provide the best chance of these desiderata being achieved all relevant material should be available to be taken into account”.⁶⁴⁵

Compulsory testimonial obligations

- 3.208 At the request of a party the court may issue a witness summons requiring the witness to attend court to give evidence or to produce documents to the court.⁶⁴⁶ Similarly, at the request of a party, the court may issue a summons directing a person to adduce documents relevant to legal proceedings.⁶⁴⁷ Disobeying a witness summons in the High Court amounts to contempt of court and is punishable as such.⁶⁴⁸ Disobedience of a witness summons in the county court is punishable with a fine.⁶⁴⁹
- 3.209 A person cannot excuse themselves from the duty to testify or produce documents by saying that they are otherwise engaged, or that they are under a contractual duty not to divulge information, or that the information is private.⁶⁵⁰ The duty to comply with a witness summons overrides all such excuses.⁶⁵¹ A contract by which a witness binds themselves not to give evidence before the court on a matter on which the judge could compel them to testify is contrary to public policy and unenforceable.⁶⁵² Generally, rights of confidentiality must give way to the interest of the administration of justice in the disclosure of all relevant information needed for the fair disposal of litigation.⁶⁵³ The duty of confidentiality owed by a doctor may be subordinate to the doctor’s duty to disclose information in furtherance of the public interest.⁶⁵⁴ As Bray on Discovery observed long ago, “when the defendant said he was under a promise not to give the information that was a reason why he should be compelled to give it”.⁶⁵⁵ In *Arab Monetary Fund v Hashim (No.2)*,⁶⁵⁶ Hoffmann J observed that “in a civil action the court does not have a discretion to permit a witness giving evidence at the trial to refuse to disclose relevant and admissible facts which are not covered by any recognised privilege”.

The obligation to testify truthfully

- 3.210 Witnesses are duty-bound to tell the truth. Giving false testimony on oath amounts to perjury, which is a serious criminal offence.⁶⁵⁷ A person is guilty of perjury whether the false statement was made before the court itself or otherwise for the purpose of judicial proceedings (for example, by affidavit or witness statement).⁶⁵⁸ Furthermore, proceedings for contempt of court may be brought against any person who makes a false statement in a document verified by a statement of truth (CPR 32.14).⁶⁵⁹

Witness immunity from suit

- 3.211 To encourage witnesses to come forward and tell the truth the law grants them complete immunity from action in respect of anything they say in court proceedings.⁶⁶⁰ The rationale of the rule was explained by Salmon J in *Marrinan v Vibart*:

“It has been well settled law for generations—certainly since Lord Mansfield’s time—that witnesses enjoy absolute immunity from actions being brought against them in respect of any evidence they may give in a court of justice. This immunity exists for the benefit of the public, since the administration of justice would be greatly impeded if witnesses were to be in fear that any disgruntled or possibly impecunious persons against whom they gave evidence might subsequently involve them in costly litigation.”⁶⁶¹

Originally, absolute privilege from suit was accorded only to witnesses who testified in legal proceedings. The rule was extended to statements made in connection with legal proceedings by potential witnesses in advance of the trial.⁶⁶² However, immunity will arise only where the statement had an immediate link with legal proceedings.⁶⁶³ It was held in *Taylor v Director of the Serious Fraud Office* that the immunity attached to statements and documents provided in connection with criminal prosecutions, in order to encourage persons to come forward and assist the police or prosecuting authorities.⁶⁶⁴

- 3.212 The purpose of the witness immunity rule was explained by Lord Hoffmann:

“The immunity from suit ... is designed to encourage freedom of speech and communication in judicial proceedings by relieving persons who take part in the judicial process from the fear of being sued for something they say. It is generated by the circumstances in which the statement was made and it is not concerned with its use for any purpose other than as a cause of action. In this respect, however, the immunity is absolute and cannot be removed by the court or affected by subsequent publication of the statement.”⁶⁶⁵

Collins J elaborated this further:

“Immunity from suit extends to the honest as well as the dishonest witness. It is based on public policy which requires that witnesses should not be deterred from giving evidence by the fear of litigation at the suit of those who may feel that the evidence has damaged them unjustifiably. It is not the result of the litigation that matters but the burden upon the witness of having to defend himself whether or not he may be confident of the outcome.”⁶⁶⁶

- 3.213 The immunity conferred on witnesses extends beyond claims for defamation, and as a general rule prevents their evidence from being used as the basis for any cause of action levelled against them. However, it no longer prevents parties from instigating

disciplinary or legal proceedings against expert witnesses whom they have instructed (other than defamation claims, in respect of which experts continue to enjoy immunity). Nor does it protect expert witnesses from wasted costs orders. This application of the immunity had been long established, but the immunity has now been found to be an unjustified and unnecessary way of encouraging expert witnesses to give full and frank evidence.⁶⁶⁷ This reflects the fact that the immunity has the capacity to cut across the rights of others to a legal remedy, and should therefore not be extended beyond its present scope unless necessary, and equally may be dispensed with if, exceptionally, it is not truly needed in order to ensure the proper administration of justice. Where the court is considering whether to extend the immunity into new terrain, it should consider not only the nature of the “proceedings” in which the statement sought to be protected was made (including whether they are properly classed as “judicial”), but also the wider context of those proceedings, the role of the person who made the statement in them, whether the person was acting in that capacity when they made the statement, and the extent and nature of the connection between the statement itself and the proceedings.⁶⁶⁸

- 3. 214** It must be stressed, however, that the immunity from suit does not prevent prosecution for perjury. Similarly, there is no immunity from actions for malicious prosecution where the cause of action consists in abusing the legal process by maliciously and without reasonable excuse setting the law in motion against the defendant.⁶⁶⁹ Finally, in addition to the removal of expert witnesses’ immunity from suit in both legal actions brought by a party, and disciplinary proceedings brought at their behest, the court remains free to refer an expert to the relevant professional body if it is satisfied that their conduct has fallen so far below what is expected of them as to merit some disciplinary action,⁶⁷⁰ or to make a wasted costs order against them in the action at hand.⁶⁷¹

Exceptions

- 3. 215** There are exceptions to the right of access to evidence, which include legal professional privilege, the privilege against self-incrimination and public interest immunity.⁶⁷² But these exceptions are narrowly defined and only go to underscore the importance of the general principle, as the [Contempt of Court Act 1981 s.10](#) illustrates:

“No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.”⁶⁷³

This section was primarily designed to protect the sources of information of the press. The interest of the public in a free and well-informed press must be respected as much as possible. However, in the end it must give way to the greater interest of the administration of justice.⁶⁷⁴

Footnotes

629 See generally [Ch.15 Disclosure](#).

630 *Golder v United Kingdom* [1979-80] 1 E.H.R.R. 524; and *Airey v Ireland* (1979-80) 2 E.H.R.R. 305.

631 *Ruiz-Mateos v Spain* [1993] 16 E.H.R.R. 505; *Lobo Machado v Portugal* [1996] 23 E.H.R.R. 79. See also *McGinley and Egan v United Kingdom* [1998] 27 E.H.R.R. 1; *McElduff v United Kingdom* [1998] 4 BHRC 393, ECtHR; *Dombo Beheer BV v Netherlands A/274* [1993] 18 E.H.R.R. 213; *Commissioner of Police of the Metropolis v Times Newspapers Ltd* [2011] EWHC 2705 (QB). And see *Alame v Shell plc* [2024] EWCA Civ 1500 [81]–[83]; the Court of Appeal held that where there was significant asymmetry of information between the parties, the court should not be too rigid in confining the scope of disclosure to the facts and issues the claimant had so far been able to plead.

- 632 *Glasgow Corp v Central Land Board* [1955] UKHL 7; [1956] *SC 1* at 18–19; *Conway v Rimmer* [1968] *AC 910* at 955; [1968] *1 All ER 874* at 890; and *D v National Society for the Prevention of Cruelty to Children* [1978] *AC 171* at 225; [1977] *1 All ER 589* at 600.
- 633 *Secretary of State for Health v Servier Laboratories Ltd* [2013] *EWCA Civ 1234*: an English court may order disclosure and the provision of information, notwithstanding the argument that compliance would put defendant French companies in breach of a French “blocking” statute and at risk of criminal prosecution in France.
- 634 Civil Procedure Act 1997 s.7; and CPR 25.1(1)(h). The order was formerly known as an *Anton Piller* order: *Anton Piller KG v Manufacturing Processes* [1976] *Ch 55*; [1976] *1 All ER 779, CA*; see the section on search orders in Ch.15 Disclosure paras 15.221 ff for detailed discussion.
- 635 P.F. Schlosser, “Trial and Court Procedures in Continental Europe”, and W. Habscheid and S. Berti, “European Summary”, in C. Platto (ed.), Trial and Court Procedures Worldwide (London: Graham & Trotman, 1991). See also K. Kusano and H. Tezuka, “Japan” in C. Platto (ed.), Pre-Trial and Pre-Hearing Procedures Worldwide (London: Graham & Trotman, 1990). However, the right to equality of arms under the ECHR art.6 may come to a litigant’s assistance in this regard: *Commissioner of Police of the Metropolis v Times Newspapers Ltd* [2011] *EWHC 2705 (QB)*.
- 636 *R v Derby Magistrates’ Court Ex p. B* [1996] *1 AC 487* at 510; [1995] *4 All ER 526* at 543–544, HL.
- 637 *Jones v University of Warwick* [2003] *EWCA Civ 151*; [2003] *1 W.L.R. 954*.
- 638 Lord Wilberforce said in *Air Canada v Secretary of State for Trade (No.2)* [1983] *2 AC 394* at 438; [1983] *1 All ER 910* at 919: “In a contest purely between one litigant and another, such as the present, the task of the court is to do, and to be seen to be doing, justice between the parties, a duty reflected in the word ‘fairly’ in the rule [RSC Ord.24 r.13]. There is no higher additional duty to ascertain some independent truth. It often happens, from the imperfection of evidence, or the withholding of it, sometimes by the party in whose favour it would tell if presented, that an adjudication has to be made which is not, and is known not to be, the whole truth of the matter; yet, if the decision has been in accordance with the available evidence and with the law, justice will have been fairly done.”
- 639 See Ch.1 The Overriding Objective, especially paras 1.43–1.44; and see Ch.15 Disclosure, especially 15.1–15.2. The commitment to correct outcomes is not however to be equated with an extreme pursuit of perfect justice between the parties, which cannot take precedence over considerations of cost and proportionality in the allocation of resources.
- 640 *Flight v Robinson* (1844) *8 Beav 22*, at 33–34. Non-availability of a witness is not, however, a sufficient reason to stay civil proceedings: *Secretary of State for Health v Norton Healthcare Ltd* [2003] *EWHC 1905 (Ch)*.
- 641 *Davies v Eli Lilley and Co* [1987] *1 All ER 801* at 804; [1987] *1 W.L.R. 428* at 431.
- 642 *Harmony Shipping Co SA v Davies* [1979] *1 W.L.R. 1380* at 1385.
- 643 *D v National Society for the Prevention of Cruelty to Children* [1978] *AC 171* at 242; [1977] *1 All ER 589* at 615, HL.
- 644 *D v National Society for the Prevention of Cruelty to Children* [1978] *AC 171* at 243; [1977] *1 All ER 589* at 616, HL.
- 645 *Three Rivers DC v Governor and Company of the Bank of England (No.4)* [2004] *UKHL 48*; [2005] *1 AC 610* [28].
- 646 CPR 34.2; 2025 WB 34.2.1. The summons to testify was formerly known as the subpoena ad testificandum, and the summons to produce documents as the subpoena duces tecum.
- 647 Senior Courts Act 1981 s.34; County Courts Act 1984 s.53; and see CPR 31.17 and 2025 WB 31.17.1.
- 648 For the procedure for committal for contempt see Ch.24 Enforcement. See also Senior Courts Act 1981 s.36; and *Phonographic Performance Ltd v Amusement Caterers (Peckham) Ltd* [1964] *Ch 195* at 198; [1963] *3 All ER 493* at 494. Even ministers of the Crown and civil servants are liable to committal for contempt if they disobey court orders: *M v Home Office* [1993] *3 All ER 537, HL*.
- 649 County Courts Act 1984 s.55.
- 650 *Parry-Jones v Law Society* [1968] *1 All ER 177*, at 180, CA. A duty of confidence is subject to, and overridden by, the duty of any party to comply with the law of the land: *D v National Society for the Prevention of Cruelty to Children* [1978] *AC 171*; [1977] *1 All ER 589*, HL; *Science Research Council v Nassé, Leyland Cars v Vyas* [1980] *AC 1028*; [1979] *3 All ER 673, HL*; *British Steel Corp v Granada Television Ltd* [1981] *AC 1096*; [1981] *1 All ER 417*; *XLtd v Morgan-Grampian (Publishers) Ltd* [1991] *AC 1*; [1990] *2 All ER 1, HL*; and *Marcel v Metropolitan Police Commissioner* [1992] *Ch 225*; [1992] *1 All ER 72, CA*.
- 651 Bentham wrote: “Are men of first rank and consideration—are men high in office—men whose time is no less valuable to the public than to themselves—are such men to be forced to quit their business, their functions, and what is more than all, their pleasure, to the beck of every idle or malicious adversary, to dance attendance upon every petty cause? Yes, as far as it is necessary, they and everybody ... Were the Prince of Wales, the Archbishop of Canterbury, and the Lord High Chancellor, to be passing by in the same coach, while a chimney-sweeper and a barrow-woman were in dispute about a halfpenny worth of apples, and the chimney-sweeper or the barrow-woman were to think proper to call upon them for their evidence, could they refuse it? No, most certainly”: in Bowring (ed.), The Works of Jeremy Bentham, Vol.IV, Principles of Judicial Procedure (Edinburgh: William Tait, 1838-43) pp. 320–321.

- 652 *Harmony Shipping Co SA v Davies* [1979] 3 All ER 177; [1979] 1 W.L.R. 1380, CA.
- 653 *Duchess of Kingston's Case* [1776] 20 State Tr 355; *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171; [1977] 1 All ER 589, HL; *Science Research Council v Nassé, Leyland Cars v Vyas* [1980] AC 1028; [1979] 3 All ER 673, HL; *British Steel Corp v Granada Television Ltd* [1981] AC 1096; [1981] 1 All ER 417; and *South Tyneside MBC v Wickes Building Supplies Ltd* [2004] EWHC 2428 (Comm).
- 654 *W v Egdell* [1990] Ch 359; [1990] 1 All ER 835.
- 655 E. Bray, *The Principles and Practice of Discovery* (London: Reaves & Turner, 1885) p.304. See also *Duchess of Kingston's Case* (1776) 20 State Tr 355 at 586–591.
- 656 *Arab Monetary Fund v Hashim (No.2)* [1990] 1 All ER 673 at 681.
- 657 **Perjury Act 1911 s.1(1):** “If any person lawfully sworn as a witness or as an interpreter in a judicial proceeding wilfully makes a statement material to that proceeding, which he knows to be false or does not believe to be true, he shall be guilty of perjury, and shall on conviction thereof on indictment, be liable to imprisonment for a term not exceeding seven years, or to a fine or to both such imprisonment and fine.”
- 658 **Perjury Act 1911 s.1(3):**
- 659 See also 2025 WB 32.14.1, and Ch.24 Enforcement.
- 660 *Munster v Lamb* (1883) 11 QBD 588 at 607; [1881–5] All ER Rep. 791 at 797; *Watson v M'Ewan, Watson v Jones* [1905] AC 480 at 486, HL; *Marrinan v Vibart* [1963] 1 QB 234; [1962] 1 All ER 869 (upheld by the Court of Appeal: *Marrinan v Vibart* [1963] 1 QB 528; [1962] 3 All ER 380); *Arthur J.S Hall and Co (a firm) v Simons* [2002] 1 AC 615; [2000] 3 All ER 673, HL; *Taylor v Serious Fraud Office* [1997] 4 All ER 887, CA; and *Harris v Scholfield Roberts and Hill (a firm)* [2002] 1 AC 615; [2000] 3 All ER 673, HL.
- 661 *Marrinan v Vibart* [1963] 1 QB 234 at 237; [1962] 1 All ER 869 at 869 (confirmed by the Court of Appeal: *Marrinan v Vibart* [1963] 1 QB 528; [1962] 3 All ER 380).
- 662 *Watson v M'Ewan, Watson v Jones* [1905] AC 480.
- 663 *Waple v Surrey County Council* [1998] 1 All ER 624; [1998] 1 W.L.R. 860, CA, where legal proceedings might have been avoided and therefore it could not be said that the statement had the requisite link with proceedings. A letter sent by a medical director to the General Medical Council's Fitness to Practise Directorate (a quasi-judicial body) expressing concerns about a doctor's probity and conduct was subject to absolute privilege giving him immunity from suit in the doctor's libel claim: *White v Southampton University Hospitals NHS Trust* [2011] EWHC 825 (QB).
- 664 Similarly, a document created for submission to an investigation by a financial regulator attracted absolute privilege: *Mahon v Rahn (No.2)* [2000] 4 All ER 41; [2000] 1 W.L.R. 2150, CA.
- 665 *Taylor v Director of Serious Fraud Office* [1999] 2 AC 177 at 208; [1998] 4 All ER 801 at 808, HL.
- 666 *Meadow v General Medical Council* [2006] EWHC 146, QB (Admin) [13].
- 667 *Jones v Kaney* [2011] UKSC 13; [2011] 2 AC 398 [42]–[62]. For discussion see Ch.21 Experts paras 21.96 ff.
- 668 *In re MBI International & Partners Inc (in liquidation)* [2021] EWCA Civ 1190; [2022] Ch 212 [61]. The immunity extended to statements made by an examinee during an examination conducted under the *Insolvency Act 1986* s.236. Although such examinations do not bear all the hallmarks of a typical “judicial” proceeding, they take place in the context of a broader compulsory liquidation procedure which is supervised by the court, and other participants in the wider proceedings (including the judge and liquidators) enjoyed immunity.
- 669 For the conditions to be satisfied in an action for malicious prosecution see: *Mahon v Rahn (No.2)* [2000] 4 All ER 41; [2000] 1 W.L.R. 2150, CA. For the application of the tort to civil proceedings, see *Willers v Joyce (Re Gubay (Deceased) No. 1)* [2016] UKSC 43; [2018] AC 779, and the discussion in Ch.12 Case Management Pt II paras 12.290 ff.
- 670 *Meadow v General Medical Council* [2006] EWHC 146 (Admin) [26].
- 671 *Jones v Kaney* [2011] UKSC 13; [2011] 2 AC 398; see also *Phillips v Symes (No.2)* [2005] 1 W.L.R. 2043; and *X Local Authority v Trimega Laboratories Ltd* [2014] 2 FLR 232.
- 672 Discussed in detail Ch.16 Legal Professional Privilege, Ch.18 Self-Incrimination and Ch.19 Public Interest Immunity and Closed Material Procedure, respectively.
- 673 2025 WB 3C-17 ff.
- 674 *XLtd v Morgan-Grampian (Publishers) Ltd* [1991] 1 AC 1; [1990] 2 All ER 1, HL; *Michael O'Mara Books Ltd v Express Newspapers Plc* [1998] E.M.L.R. 383; and *Camelot Group Plc v Centaur Communications Ltd* [1999] QB 124; [1998] 1 All ER 251, CA. For the relationship between the Contempt of Court Act 1981 s.10 and ECHR art.10, see *Various Claimants v MGN Ltd* [2019] EWCA Civ 350 [18]–[20]; *Vardy v Rooney* [2022] EWHC 1209 (QB) [10]–[19].

The Right to a Reasoned Decision

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Mainwork

Chapter 3 - Fair Trial

The Right to a Reasoned Decision

3. 216 The judicial duty to provide reasons for court decisions is dictated both by the right to fair trial and by the principle of publicity.⁶⁷⁵ Reasons are required in order to render court decisions comprehensible by the parties and acceptable by the public at large, as well as the parties. In the absence of reasons, a litigant is denied the ability to challenge the decision and the appellate court is denied a platform for a meaningful review of the decision given by the lower court. The principle of publicity requires that court proceedings should be held in public, so that justice may not only be done but also be seen to be done.⁶⁷⁶ Lord Phillips MR observed that “justice will not be done if it is not apparent to the parties why one has won and the other has lost”.⁶⁷⁷ By the same token, it may be said that justice will not be seen to be done if it is not apparent to the public why the court decided as it did.⁶⁷⁸ To further public understanding, the parties may be ordered to take steps to publicise a judgment.⁶⁷⁹ Justice may also not be done, as Lord Phillips MR recognised, if a judgment is arbitrary rather than properly reasoned. The requirement to give a reasoned decision thus acts as a check on the arbitrary exercise of judicial power;⁶⁸⁰ it is a form of democratic accountability applied to the judicial process.⁶⁸¹ The right to a reasoned decision is recognised as part of the right to fair trial under ECHR art.6.⁶⁸² Referring to the duty to give reasons, the Court of Appeal explained:

“The duty [to provide reasons] is a function of due process, and therefore of justice. Its rationale has two principal aspects. The first is that fairness surely requires that the parties—especially the losing party—should be left in no doubt why they have won or lost. This is especially so since without reasons the losing party will not know ... whether the court has misdirected itself, and thus whether he may have an available appeal on the substance of the case. The second is that a requirement to give reasons concentrates the mind; if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not.”⁶⁸³

3. 217 It is not always possible to spell out exactly what led the court to arrive at a conclusion, nor is it always sensible, or a proper use of the court’s scarce resources, to elaborate the court’s attitude to each and every point raised by the parties no matter how peripheral. The ECtHR has therefore accepted that the extent of the court’s duty to give reasons varies according to the nature of the decision and the circumstances of the case.⁶⁸⁴ According to the ECtHR, the court need only address specifically those points raised by a party which would be decisive if accepted.⁶⁸⁵ A violation of ECHR art.6 was found where the court found the applicant guilty of “gross negligence” without particularising matters said to constitute that negligence.⁶⁸⁶

3. 218 English law has evolved similar principles. Full reasons must be given for a decision on the merits, although it is not necessary to address every single argument, let alone provide a detailed answer to every point made by the parties. Lord Phillips MR explained, in *English v Emery Reimbold & Strick Ltd*:

“... if the appellant process is to work satisfactorily, the judgment must enable the appellant court to understand why the judge reached his decision. This does not mean that every factor which weighed with the judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the judge’s conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the judge to identify and record those matters which were critical to his decision. If the critical issue was one of fact, it may be enough to say that one witness was preferred to another because the one manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied on.”⁶⁸⁷

3. 219 It is always desirable that a judgment should be comprehensible upon first reading, and the first instance judgment in *English v Emery Reimbold & Strick Ltd* was not. However, that was not the test of adequacy of reasons. Adequacy must be tested in the context of the knowledge and understanding of the evidence and submissions at trial.⁶⁸⁸ A finding of liability in a personal injury case may be quashed if the trial judge failed to give adequate reasons for concluding that the evidence of the claimant was truthful when it was inconsistent with the evidence of two other witnesses. Gage LJ stressed that there was no reason why the court should not express its reasons briefly, provided the reasons were sufficiently clear, so that the appeal court could follow the process which led to the conclusion.⁶⁸⁹ In cases involving a conflict of expert evidence a court has to provide an explanation why it accepted the evidence of one expert and rejected that of another. It may have to engage in the intellectual exchange between the experts and set out the analysis that led to the acceptance of one view rather than another.⁶⁹⁰ As Henry LJ had previously explained in *Glicksman v Redbridge Healthcare NHS Trust*, in such cases it was necessary to set out the “building blocks of the reasoned judicial process”.⁶⁹¹
3. 220 The extent to which the court must account for the reasons for its decisions depends, as already noted, on the nature of the proceedings and the issues.⁶⁹² By their very nature, applications for permission to appeal involve a different type of decision-making process from a decision on the merits.⁶⁹³ All the court needs to do is to indicate in broad terms the grounds on which the decision was reached, which may involve no more than an endorsement of the lower court’s decision. Indeed, where permission to appeal needs to be based on a real prospect of success, or on the existence of a question of principle of general importance, it may be sufficient for the court to indicate, without any further elaboration, that the appeal has no real chance of success or that the appeal raises no question of general public importance.⁶⁹⁴
3. 221 Where the court refuses permission to appeal against an arbitration award, the court is discouraged from addressing the issues or giving elaborate reasons. The court need only indicate which of the tests for permission to appeal the applicant has failed.⁶⁹⁵ However, further articulation may be required where the application for permission is founded on the ground that the tribunal’s decision was obviously wrong or open to serious doubt. It may be enough to say that the court accepts the reasons given by the arbitrators. But any further reasons need only be brief so as to show the losing party why they have lost.⁶⁹⁶
3. 222 Costs decisions give rise to some difficulty in this regard. On the one hand, they are original decisions capable of imposing a substantial financial burden. On the other hand, however, they are consequential decisions following decisions on the merits and it is important that the court should be able to dispose of costs applications in a straightforward and expeditious manner without unnecessarily adding to the complexity of the process and its cost. In the past, it was sufficient for the court to merely direct who is to pay costs and the basis for the calculation. The Court of Appeal has recognised that ECtHR jurisprudence requires the court to provide reasons for costs decisions.⁶⁹⁷ It held that judges should state clearly their reasons for making orders for costs, especially where the costs incurred were out of proportion to the amount in issue.⁶⁹⁸ Where no express explanation has been given for a costs order, an appellate court will approach the material facts on the assumption that the judge will have had good reasons for the award made, and that where it is apparent that there is a perfectly rational explanation for the order made, the court is likely to draw the inference that this is what motivated the judge in making the order.⁶⁹⁹
3. 223 Since the costs of litigation may be as high as, if not higher than, the subject matter in dispute, the decision of who should pay costs may be as important to the parties as the decision on the merits. It is, therefore, suggested that a party has just as much a right to an explanation of why they should pay the opponent’s costs. It is unnecessary to dilute the requirement of providing reasons in the interests of economy, because the reasons for a costs decision will not usually require a lengthy explanation. The court would not normally have to say more than that it applies the principle that costs follow the event. Where the court has decided not to follow this general principle, as where the court decides to attach costs consequences to a party’s conduct in the litigation, justice requires that the court should state the reasons for its decision and identify those aspects of the party’s conduct that led to an adverse costs decision.

3. 224 Failure to provide an adequately reasoned judgment is a sufficient ground for reversal on appeal,⁷⁰⁰ and may even justify ordering a rehearing.⁷⁰¹ But it must be remembered that setting aside a decision for lack of reasons may amount to visiting the court's sins on the successful party, who may well have succeeded in establishing their case by persuasive facts and convincing arguments. It would not be fair to the respondent if the appeal court were to overturn a decision for lack of reasons where the reasons could be inferred from the circumstances. Accordingly, a judgment would be set aside on these grounds only if the appeal court, after reviewing the judgment in the context of the evidence and submissions presented at the trial, is unable to determine why the court below reached its decision. If, having carried out such a review, the appeal court is satisfied that the reason is apparent and that it provides a valid basis for the judgment, the judgment would be allowed to stand.⁷⁰²
3. 225 To avoid the quashing of judgments for lack of reasons, a practice has developed whereby the parties invite the judge to amplify the reasons or, if that has not been done, the appeal court may adjourn the application for permission to appeal (or indeed the appeal itself) in order to do so.⁷⁰³ Typically, counsel would request clarification upon delivery of an oral judgment or circulation of a draft written judgment. However, this facility should not be used as an opportunity to reiterate arguments, or to cite evidence not specifically mentioned in the judgment as a means of seeking to reopen the decision. "Just as the trial is 'not a dress rehearsal' but rather 'the first and last night of the show'", Baker LJ explained, "so the judgment is not a draft paper for discussion but the definitive recording of the judge's decisions and the reasons for reaching them".⁷⁰⁴ The nature of counsel's responsibility is to draw the judge's attention to any material omission of which they are aware, since it would be unsatisfactory to advance as a ground for appeal an omission to deal with a point in a judgment when the matter had not been brought to the judge's attention, despite there being a ready opportunity to do so.⁷⁰⁵

Footnotes

- 675** See *D. Shapiro, "In Defence of Judicial Candor"* (1987) 100 *Harv. L. Rev.* 731; and *J.A. Jolowicz, "A Duty to Give Reasons"* (2000) 59 *C.J.Q.* 265. The duty is distinct from, though not unrelated to, the public law duty that public authorities may have to give reasoned decisions: see for example *M. Fordham, "Reasons: The Third Dimension"* [1998] *Judicial Review* 158; and *M. Elliott, "Has the Common Law Duty to Give Reasons Come of Age Yet?"* [2011] *PL* 57. For further discussion of the scope of the duty see W. Wade and C.F. Forsyth, *Administrative Law*, 12th edn (Oxford: Oxford University Press, 2022), pp.440–446.
- 676** For discussion of the publicity principle see above, paras 3.107 ff.
- 677** *English v Emery Reimbold & Strick Ltd* [2002] *EWCA Civ* 605; [2002] *1 W.L.R.* 2409 [16].
- 678** Members of the public have a right to obtain a transcript of proceedings held in open court, *CPR* 39.9; and see *Practice Direction (Audio Recording of Proceedings: Access)* [2014] *1 W.L.R.* 632, *Bath v Escott* [2017] *EWHC* 1101 (Ch).
- 679** *Samsung Electronics (UK) Ltd v Apple Inc* [2012] *EWCA Civ* 1339; *Samsung Electronics (UK) Ltd v Apple Inc* [2012] *EWCA Civ* 1430.
- 680** *English v Emery Reimbold & Strick Ltd* [2002] *EWCA Civ* 605; [2002] *1 W.L.R.* 2409 [17].
- 681** *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No.2)* [2011] *QB* 218 [39].
- 682** See *Campbell and Fell v United Kingdom* [1984] 7 *E.H.R.R.* 165; *Hiro Balani v Spain* [1994] 19 *E.H.R.R.* 566; and *Garcia Ruiz v Spain* [1999] 31 *E.H.R.R.* 589. For a review of ECtHR jurisprudence see: *North Range Shipping Ltd v Seatrans Shipping Corp* [2002] *EWCA Civ* 405; [2002] *1 W.L.R.* 2397. There is no need for judgments to be pronounced in public; it is enough that they are made available to the public: *Pretto v Italy* [1983] 6 *E.H.R.R.* 182.
- 683** *Flannery v Halifax Estate Agencies Ltd* [2000] *1 All ER* 373 at 377; [2000] *1 W.L.R.* 377 at 377–378, CA. See also: *Tanfern Ltd v Cameron-MacDonald* [2000] *2 All ER* 801; [2000] *1 W.L.R.* 1311, CA; and *Hadjianastassiou v Greece* [1992] 16 *E.H.R.R.* 219.
- 684** See for example *Skoczyłas v Ireland* (2021) 73 *E.H.R.R. SEII* [61]: "the obligation under art.6(1) for domestic courts to provide reasons for their decisions cannot be understood to mean that a detailed answer to every argument is required. The extent of that obligation may vary according to the nature of the decision. It is necessary to take into account, inter alia, the diversity of the submissions that a litigant may bring before the courts and the differences existing in the Contracting States with regard to statutory provisions, customary rules, legal opinion and the presentation and drafting

of judgments. That is why the question of whether or not a court has failed to fulfil the obligation to provide reasons can only be determined in the light of the circumstances of the case".

685 *Ruiz Torija v Spain* [1994] 19 E.H.R.R. 553. See also *Hadjianastassiou v Greece* [1992] 16 E.H.R.R. 219.

686 *Georgiadis v Greece* [1997] 24 E.H.R.R. 606.

687 *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605; [2002] 1 W.L.R. 2409 [19]; see also the summary set out by McCombe LJ in *Simetra Global Assets Ltd v Ikon Finance Ltd* [2019] EWCA Civ 1413 [46].

688 *Harris v CDMR Purfleet Ltd* [2009] EWCA Civ 1645.

689 *Baird v Thurrock BC* [2005] EWCA Civ 1499. See also *Southwark LBC v Kofi-Adu* [2006] EWCA Civ 281; *H v East Sussex CC* [2009] EWCA Civ 249.

690 *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605; [2002] 1 W.L.R. 2409 [19].

691 *Glicksman v Redbridge Healthcare NHS Trust* [2001] EWCA Civ 1097, (2002) 63 BMLR 109 [10]–[11]; cf. *Re B (A Child) (Adequacy of Reasons)* [2022] EWCA Civ 407; [2022] 4 W.L.R. 42 [59]–[60].

692 See for example: *H v East Sussex CC* [2009] EWCA Civ 249: the Special Educational Needs Tribunal (now the Special Educational Needs and Disability List, which is part of the Health, Education and Social Care Chamber of the First-Tier Tribunal) should provide a summary of its reasons, rather than a comprehensive analysis of the case.

693 See Ch.25 Appeal paras 25.104 ff.

694 *Mousaka Inc v Golden Seagull Maritime Inc* [2002] 1 All ER 726; [2002] 1 W.L.R. 395, QB; *North Range Shipping Ltd v Seatrans Shipping Corporation* [2002] EWCA Civ 405; [2002] 1 W.L.R. 2397. See, in the ECHR context, *Kukkoken v Finland (No.2)* [2009] ECHR 58 (in relation to applications for leave to appeal); and *Garcia Ruiz v Spain* (1999) 31 E.H.R.R. 589 (in relation to substantive decisions on appeal).

695 *North Range Shipping Ltd v Seatrans Shipping Corp* [2002] EWCA Civ 405; [2002] 1 W.L.R. 2397 [27].

696 *North Range Shipping Ltd v Seatrans Shipping Corp* [2002] EWCA Civ 405; [2002] 1 W.L.R. 2397 [27]; see also *Mousaka Inc v Golden Seagull Maritime Inc* [2002] 1 All ER 726; [2002] 1 W.L.R. 395, QB.

697 *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605; [2002] 1 W.L.R. 2409 [27].

698 *Lavelle v Lavelle* [2004] EWCA Civ 223.

699 *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605; [2002] 1 W.L.R. 2409 [30].

700 *Flannery v Halifax Estate Agencies Ltd* [2000] 1 All ER 373; [2000] 1 W.L.R. 377, CA. To remedy the failure the appellate court will need to pursue the most appropriate of the following options: requiring the judge below to spell out their reasons (if they are still fresh in their mind), exercise its own judgment on the issue (if sufficient materials exist on the record) or order a new trial.

701 *Adami v Ethical Standards Board for England* [2005] EWCA Civ 1754. See also *Lewis v Secretary of State for Trade and Industry* [2001] 2 B.C.L.C. 597, where it was held that before ordering a rehearing the court would first seek to obtain reasons for the decision below.

702 *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605; [2002] 1 W.L.R. 2409 [26].

703 *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605; [2002] 1 W.L.R. 2409 [25]; *Re A (Children) (Judgment: Adequacy of Reasoning)* [2011] EWCA Civ 1205; [2012] 1 W.L.R. 595 [13]–[19]. See also, in a slightly different context, *Hicks v Russell Jones and Walker* [2007] EWCA Civ 844; [2009] 1 W.L.R. 487, where the first instance judge was invited to make findings on contingently relevant matters which would only arise if his primary findings were upset on appeal.

704 *Re YM (Care Proceedings) (Clarification of Reasons)* [2024] EWCA Civ 71; [2024] 1 W.L.R. 3873 [9]. Baker LJ noted, at [10], that an “unchecked and ill-disciplined” approach to requests for clarification by counsel could make matters worse rather than better, by obscuring the judge’s reasoning or introducing inconsistencies.

705 *Re T (A Child) (Contact: Alienation: Permission to Appeal)* [2002] EWCA Civ 1736 [50], per Arden LJ; *Paulin v Paulin (Note)* [2010] 1 W.L.R. 1057; [2009] 3 All ER 88. See also *Municipio de Mariana v BHP Group Plc (formerly BHP Billiton Plc)* [2020] EWHC 2471 (TCC) [49]–[51], where the claimants were criticised for failing to invite the judge to give further reasons for refusing to allow them to introduce a new issue towards the end of an eight-day application hearing, instead seeking permission to appeal direct from the Court of Appeal shortly after the hearing. Whilst the claimants could not be prevented from taking this course, it was appropriate in the circumstances to delay handing down the judgment pending the Court of Appeal’s decision on permission to appeal: [88]–[89].

Introduction

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Chapter 6 - Defendant's Response

Introduction

6. 1

Under the standard procedure, a defendant need do nothing until they have received the particulars of claim ([CPR 9.1](#)). In many cases the particulars of claim will be included in the claim form, or served with it. If the particulars of claim were not served at the same time as the claim form, the claimant must serve the particulars of claim later, within 14 days after service of the claim form, and no later than the latest time for serving the claim form ([CPR 7.4](#)). Once the particulars of claim have been served, the defendant has, broadly speaking, the following options: do nothing and risk an adverse default judgment; admit the claim; contest the jurisdiction; or contest the claim on the merits. This chapter discusses acknowledgement of service, admissions and disputing the court's jurisdiction.

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Acknowledgment of Service

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Mainwork

Chapter 6 - Defendant's Response

Acknowledgment of Service

- 6.2 A defendant who has been served with the particulars of claim is required by [CPR 9.2](#) to respond in one of the following ways:

[Rule 9.2](#)

“When particulars of claim are served on a defendant, the defendant may—

- (a) file or serve an admission in accordance with Part 14;
 - (b) file a defence in accordance with Part 15,
- (or do both, if he admits only part of the claim); or
- (c) file an acknowledgment of service in accordance with Part 10.”

[1](#)

Thus, a defendant who intends to defend the claim on the merits has an alternative: either file a defence in response to the particulars of claim, or file an acknowledgment of service in accordance with [CPR 10.2](#).² In either case, the general rule is that they have 14 days in which to do so ([CPR 15.4](#), [CPR 10.3](#)). The response time is longer where the claim form has been served out of the jurisdiction ([CPR 10.3\(2\)\(a\)](#), [6.37\(5\)](#)) and may be longer in certain other situations ([CPR 6.12\(3\)](#), [6.15\(4\)\(c\)](#)). If the defendant serves an acknowledgment, they must follow it with service of their defence within 28 days after service of the particulars of claim ([CPR 15.4\(1\)\(b\)](#)).³ An acknowledgment of service must be carefully completed, as an acknowledgment that does not contain an address for service within the UK, as required by [CPR 10.5\(b\)](#), is not one which has been filed in accordance with Pt 10.⁴

- 6.3 In the case of [CPR 8](#) claims, the defendant must file an acknowledgment of service, not a defence, within 14 days of the service of the claim form ([CPR 8.3](#)).⁵ A defendant who wishes to rely on written evidence must file it when they file their acknowledgment of service.⁶ Similarly, in the Commercial Court the defendant must always file an acknowledgment of service within 14 days after service of the claim form, whether or not it is accompanied by particulars of claim ([CPR 58.6](#) and the Admiralty and Commercial Courts Guide B.9.1, B.9.2 and B.9.4). It should be noted though that the claimant may apply for summary judgment as soon as the defendant has filed an acknowledgment of service ([CPR 24.4](#)). If a claimant applies for summary judgment against a defendant who has not yet filed a defence, the defendant need not do so before the hearing of the application ([CPR 24.4\(4\)](#)).⁷

- 6.4 If a defendant fails to file an acknowledgment of service within the period specified in [CPR 10.3](#), fails to file a defence within the period specified by [CPR 15](#) and fails to file an admission in accordance with Pt 14, the claimant may obtain default judgment in accordance with [CPR 12](#) ([CPR 10.2](#)). A party wishing to respond outside the time limits is required to get the consent of the other party or obtain the court’s permission. However, if the defendant files an acknowledgment late, but before a default judgment is ordered by the court, it will generally be the case that the claimant will not be able to obtain a default judgment, notwithstanding the lateness of the acknowledgment.⁸ This follows from the rule that an error in procedure does not invalidate any step taken in proceedings unless the court orders otherwise ([CPR 3.10](#)).⁹ But if the defendant files an acknowledgment of

service late, and wishes to challenge a default judgment, contest the court's jurisdiction, or file a defence, they will need to file for relief from sanctions.¹⁰ Furthermore, a defendant who has missed the deadline for acknowledging service or for serving a defence will normally be allowed to do so, but if the claimant has in the meantime applied for a default judgment, the court would normally extend the time for serving the defence on terms that the defendant pays the claimant's costs.

6.5 In the acknowledgment of service (Form N9) the defendant is required to indicate whether they intend to defend all or part of the claim and whether they intend to contest the jurisdiction. If they intend to contest the jurisdiction, they must state this. The acknowledgment of service must be signed by the defendant or by their representative, and must include the defendant's address for service ([CPR 10.5](#)). In the case of a company, the acknowledgment must be signed by a person in a senior position (PD 10.5(3)). Where the defendant is a partnership, the acknowledgment may be signed by any partner or person authorised by any of the partners to sign ([CPR 10.5\(5\)](#)). If an acknowledgment of service is signed by a person who was a partner at the time that a cause of action accrued, or by a person who was authorised to sign by any such partner, it will be effective on behalf of those who were partners at that time, notwithstanding any lack of actual authority as between the partners themselves.¹¹ A child or protected party may sign an acknowledgment only through their litigation friend or legal representative, unless the court orders to the contrary ([CPR 10.5\(6\)](#)).

6.6 The acknowledgment must be filed with the court, which must notify the claimant that it has been filed ([CPR 10.4](#)). An acknowledgment of service may be amended or withdrawn only with the court's permission ([CPR 10.6\(4\)](#)). An acknowledgment of service does not amount to a waiver of any irregularity, whether relating to the claim form, its purported service or the court's jurisdiction.¹² Indeed, filing an acknowledgment of service is a precondition to disputing the jurisdiction ([CPR 11\(2\)](#)).

Footnotes

¹ Particulars of claim are served with a response pack that includes a form for acknowledging service, defending the claim or admitting the claim ([CPR 7.8\(1\)](#)).

² "Filing" consists of delivering, by post or otherwise, to the court office. This may be done by electronic means (PD 5B).

³ The defendant may apply for an extension of time to serve the acknowledgment of service. The likelihood of obtaining an extension will depend on all the circumstances of the case, but may be influenced by factors such as the amount of time sought and whether an extension has already been granted once: *R (Singh) v Secretary of State for the Home Department [2013] EWHC 2873 (Admin)*.

⁴ *AELF MSN 242 LLC v Surinaamse Luchtvaart Maatschappij NV DBA Surinam Airways [2021] EWHC 3482 (Comm); [2022] 1 W.L.R. 2181.*

⁵ See Ch.4 Commencement paras 4.63 ff.

⁶ [CPR 8.5\(3\)](#).

⁷ This is significant because the court cannot allocate a case to a track before a defence has been filed ([CPR 26](#)). Fast track and intermediate track fixed costs will nevertheless apply if the claim would normally be allocated to these tracks: [CPR 45.43\(1\)](#) and [45.49\(1\)](#).

⁸ *ESR Insurance Services Ltd v Clemons [2008] EWHC 2023 (Comm)*; though the claimant is free to apply for summary judgment if it thinks that the defence is groundless.

⁹ *Cunico Resources v Daskalakis [2018] EWHC 3382 (Comm)*.

¹⁰ *FXF v English Karate Federation Limited [2023] EWCA Civ 891; [2024] 1 W.L.R. 1097.*

¹¹ *Brooks v AH Brooks & Co (A Firm) [2010] EWHC 2720 (Ch)*.

¹² *Towers v Morley [1992] 2 All ER 762; [1992] 1 W.L.R. 511, CA*; see also the *Civil Jurisdiction and Judgments Act 1982 s.33*.

Admissions

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 6 - Defendant's Response

Admissions

The purpose of the admission procedure—early closure

6.7 As a matter of general principle, parties are free to choose whether to litigate and what to litigate. This principle is sometimes referred to as the principle of party autonomy or the principle of free disposition.¹³ Parties are therefore free to admit what they do not wish to dispute or, having entered into a legal dispute, they are free to withdraw from it, by, among other options, making an admission. If a party admits an allegation of fact made by its opponent, or simply fails to deny it, no issue will arise in respect of that particular allegation and the court will have nothing to decide. Quite apart from formally admitting an allegation in a statement of case, a person may admit a fact at any time and in any form. However, admissions of fact made informally may only be relied on as evidence of the fact admitted. In such circumstances a legal process is still required to achieve resolution; and while that process is ongoing, the party who made the informal admission would remain free to contest the fact and challenge the probative value of the admission.

6.8 An admission may become legally binding if it forms part of a contract. For example, parties may enter into a binding compromise based on an admission.¹⁴ However, an admission is not one and the same as an offer to settle, and it is important to keep the distinctions in view.¹⁵ Where there is no agreement as such, a party may be held bound to an admission under estoppel principles. Thus, a defendant will not be allowed to resile from an admission if they made it knowing that the claimant would rely on it and the claimant did so to their detriment, and if the court considers that it would be unjust for the defendant to withdraw the admission. Binding admissions of this kind are supported by the rules governing substantive legal obligations, rather than the exigencies of modern civil procedure.

6.9 Modern procedure must, however, provide means that enable the parties to resolve issues early in the proceedings so as to avoid effort and resources being unnecessarily expended in dealing with undisputed issues. Such a procedure is provided by CPR 14. It permits a defendant (though of course any party may make admissions) to admit the claimant's case, or part of it, both before and after commencement of proceedings. Once an admission has been made, a judgment may be obtained on the admission (CPR 14.1(2)(a) and 14.4(1)), except in relation to a CPR 8 claim (CPR 8.9(b)). However, Part 14 also empowers the court to permit the withdrawal of an admission so that judgment may not be entered in reliance on it. Withdrawal can occur in narrow circumstances, as discussed further at para.6.11 below. A judgment on an admission is a judgment on the merits and subject to the normal rules concerning finality.¹⁶

Previous High Court authority held that Part 14 is directed to admissions of distinct elements or ingredients of another party's case which would entitle that party to judgment (for example, breach of duty or causation) rather than, say, the time, date and place of an accident in a road traffic claim.¹⁷ However, more recent High Court authority has interpreted the words of CPR 14.1(1), being an admission of "*the whole or any part of another party's case*", as "[meaning] *what they say*".¹⁸ Judge Pelling QC, sitting as a Judge of the High Court, held that there was nothing within the rule, or any of the other provisions of Part 14, that required an admission under Part 14 to be one that relates to "*a distinct element or ingredient*" of another party's case that would be dispositive of a claim (or part of a claim). Judge Pelling QC's approach is to be preferred, given the purpose of Part 14 is broader than resolving disputes. Admissions are also useful in narrowing and simplifying the dispute between the parties for determination by the court. Furthermore, amendments made to Part 14, which came into effect on 1 October 2023, have altered the language used in respect of a person's ability to make an admission. Under the old CPR 14.1 and CPR 14.1A, reference was

made to a person admitting “*the truth*” of a matter, whereas the new **CPR 14.1(1)** and **14.2(1)** removes that language and simply refers to a person admitting “the whole or any part of another party’s claim” or case.¹⁹ Admissions are therefore not confined to admissions of fact, reflecting a broader understanding of the function of admissions and their role in dispute management.

6.10 It is important to be clear at the outset about the purpose of **CPR 14** admissions. The rule is designed to enable the party in receipt of an admission to proceed safe in the belief that the litigation is effectively over in respect of the subject matter of the admission, thereby relieving them of the need to invest any further effort and expense in preparation for a contest on the admitted case. Reasonable confidence that an admission has brought an end to the contest over the admitted case is therefore essential. If a **CPR 14** admission did not provide such security, the recipient of an admission would be unable to confidently rely on it, would have to continue their preparations to prove their case in respect of it and no savings would be achieved; thereby defeating the purpose of the admission procedure.

6.11 The rationale of the admission rule does not, however, require the admission to be irrevocable for all time because, like all obligations, the admission must be capable of being amended or revoked in certain circumstances. Accordingly, as already noted, **CPR 14** confers on the court a jurisdiction to permit withdrawal of an admission. But the jurisdiction to permit withdrawal must not undermine the security that claimants may obtain from admissions. Otherwise admissions would be incapable of inspiring sufficient confidence to deliver the advantage that the admission rule is intended to produce. In sum, the purpose of the admission procedure is to provide closure subject to the availability of withdrawal on strictly limited grounds.

6.12 **CPR 14** establishes a free-standing procedure for obtaining judgment on an admission which is independent of contract and of estoppel. Some decisions have drawn attention to the similarity between a **CPR 14** admission and the equitable doctrine of estoppel.²⁰ In the present context, an estoppel may arise where one party makes a representation of fact to another (an admission) which is intended to be relied upon by the other and which has been so relied upon to the other party’s detriment so that the party making the representation would not then be allowed to deny it if it would be unjust to do so.²¹ However, although there is a similarity between a **CPR** admission and an estoppel-based admission, they are quite different. Estoppel is traditionally considered to provide only a shield,²² whereas a **CPR** admission provides an entitlement to obtain judgment on the admission. A party relying on estoppel must establish the case for it, whereas a party relying on a **CPR** admission does not have to do anything other than seek judgment on the admission. Detrimental reliance is critical in the case of estoppel, whereas it is not in the case of a **CPR 14** admission, which achieves the additional purpose of procedural efficiency.

Admissions made after commencement

6.13 A party may admit the whole or any part of another party’s claim or case (**CPR 14.2(1)**). Such admission must be given by notice in writing which, in practice, is generally included in a statement of case or a letter. Where an admission has been given in accordance with **CPR 14.2(1)**, any other party may apply for judgment on the admission and the court will give such judgment as the applicant is entitled to on the admission (**CPR 14.4**).²³ It should be noted that it is not just the party in receipt of the admission that can rely on it but any other party in the same proceedings. A party cannot, in the same proceedings, make an admission which is limited to only one party; once an admission is made to one party it may be relied upon by all other parties to the proceedings. Further, judgment on an admission may not always be for the entire claim. For instance, if a defendant admits negligence but not that the claimant suffered damage, the claimant would not be able to obtain judgment on liability based on that admission alone.

Prior to 1 October 2023, **Part 14** dealt with a number of situations in which admissions may be made, and provided specific rules for admitting the whole or part of a claim for a specified amount of money, and the whole or part of a claim for an unspecified amount of money. **Part 14** has been simplified, with **CPR 14.2** now summarising all of the applicable rules relating to admissions made after commencement of proceedings.

6.14

CPR 14.2(2) states that where the claim is for money only, a defendant may make the following admissions:

Rule 14_1:(3)

- (a) the whole or part of the claim for a specified amount;
- (b) the whole or part of the claim for an unspecified amount; or
- (c) liability for an unspecified amount to be determined.

The defendant may also offer a sum in satisfaction of a claim for a specified or unspecified amount, in an effort to compromise the claim (CPR 14.2(3)). A defendant making such an admission may also request time to pay (CPR 14.6). Where a defendant admits liability to pay the whole or part of a claim for a specified sum of money, or an unspecified amount of money, or admits liability and offers a sum in satisfaction of the claim, the claimant may file a request for judgment (CPR 14.2(4)). The claimant has a right to judgment upon making a request in accordance with CPR 14.2(5). A request judgment is an administrative act, which does not involve any judicial evaluation of the claim. Accordingly, the court will enter judgment unless the claimant or defendant is a child or protected party, in which case the court's approval is required (CPR 14.2(10)).

6. 15 Prior to the changes implemented to Part 14 of the CPR on 1 October 2023, the old version of CPR 14.4 referred to the admission of the whole or part of a claim for "*a specified amount of money*", which was understood to include not just a debt but also any claim on which the claimant has given a specific figure for the amount of damages they seek, which they are prepared to accept if the defendant admits the claim. Thus, the rule could apply to a negligence claim arising out of a motor accident if the claimant was prepared to accept a particular amount in compensation. Whilst the language and structure of Part 14 has been amended, there is no reason for this interpretation of an admission of "*a specified amount*" to have changed. However, in the context of CPR 12.5(2), which entitles a claimant to default judgment where a claim is for a "*specified amount of money*", this interpretation is the subject of conflicting authority. Master Matthews in *Merito Financial Services Ltd v Yelloly*²⁴ regarded a specified amount of money to include an amount determined by way of damages, as long as that amount were sufficiently particularised by the claimant. Master Dagnall in *Edward v Okeke*²⁵ disagreed with the analysis in *Merito* and held that damages in the circumstances of the claim were not specified amounts, even if their sums had been identified by the claimant. In light of the purpose of Part 14, as discussed at paragraph 6.12 above, and the imprimatur that Part 14 provides to parties to admit parts of or the whole of claims, Master Matthews' judgment in *Merito* is to be preferred. Defendants who wish to accept the sum identified by claimants as the amount of general or special damages should have judgment entered in respect of that amount, per CPR 14.2(6) (discussed further below). There is no reason to have the court interpose itself in the total or partial resolution of a dispute, except in special circumstances, such as those provided for by CPR 14.2(10) (being where a claimant or defendant is a child or protected party).

6. 16 Where a defendant admits liability to pay the whole or part of a claim for a specified sum of money, or offers a sum in satisfaction of the claim that is agreed by the claimant, the court will enter judgment for that amount, less any payments already made by the defendant and costs incurred (CPR 14.2(6)). The judgment will also give effect to any agreement between the parties regarding the time the defendant has to pay (CPR 14.2(6)(a)), unless the payment date agreed between the parties has already passed by the time the court's judgment is entered, in which case CPR 14.2(8) applies:

- (a) if the whole amount owed is due by the date that has passed, the judgment must state that payment must be made immediately;
- (b) if the amount owed is to be paid by instalments and the date the first instalment is due has passed, the judgment must state that the first instalment must be paid by the date falling one calendar month after the date of the judgment, with subsequent instalments payable at calendar monthly intervals after that.

If the date by which the parties have agreed that the whole or part of the amount owed is to be paid has not yet passed, and the defendant has not requested time to pay, the judgment will provide for payment on a date or at a rate specified by the claimant (CPR 14.2(6)(c)).

If the parties have not agreed to the date and rate by which payment is to be made, and the defendant has requested time to pay, the judgment will specify the rate and due date for payment ([CPR 14.2\(6\)\(b\)](#)). If the defendant has not requested time to pay, and the claimant has not specified a payment date, the judgment will provide for payment to be made immediately ([CPR 14.2\(6\)\(d\)](#)).

- 6.17 Where the defendant admits liability to pay the whole of a claim for an unspecified amount of money under [CPR 14.2\(4\)\(b\)](#), or the defendant offers to admit liability for a sum of money under [CPR 14.2\(4\)\(c\)](#) and that offer is rejected, judgment will be entered for an amount decided by the court, plus costs ([CPR 14.2\(7\)](#) and [\(9\)](#)).
- 6.18 A claimant filing a request to enter judgment on an admission, or a defendant who has admitted all or part of a money claim, may specify in their request or admission the date by which the judgment debt is to be paid, or the times and rate at which it is to be paid by instalments ([CPR 14.6\(1\)](#)), as well as a calculation of interest up to the date of the application or request and continuing thereafter ([CPR 14.6\(2\)](#)).
- 6.19 A defendant who has made an admission of liability under [CPR 14.1](#) or [14.2](#) may make a request for time to pay. A defendant requesting time to pay must include a statement of income, outgoings, assets and liabilities ([CPR 14.6\(3\)](#)).
- 6.20 The power to enter a judgment determining the rate of payment may be exercised by a court officer, where the amount is no more than £50,000 (including costs, which will be fixed costs under [CPR 45](#)) ([CPR 14.6\(4\)](#)). The determination by a court officer is made without a hearing. The exercise is largely governed by prescriptive guidelines. The matter will only be determined by a judge in two circumstances. First, if the amount exceeds £50,000 and, second, if a party requests a re-determination by a judge within 14 days of the court officer's determination ([CPR 14.6\(5\)](#)). Where a judge is to determine the time and rate of payment, they will do so without a hearing unless they direct otherwise ([CPR 14.6\(6\)](#)).
- 6.21 Prior to 1 October 2023, PD 14 specified that the initial determination of the time and rate of payment was based on a 'statement of means' filed by the defendant with the admission. Whilst this level of detail has been expunged from the [CPR](#), there is no reason to conclude that the courts will change their approach. Accordingly, where a defendant has requested time to pay and filed a statement of income, outgoings, assets and liabilities under [CPR 14.6\(3\)](#), the time and rate of payment is likely to be based on this statement. A claimant may challenge the defendant's statement by adducing evidence to that effect.

When the court determines the time for payment by reason of a defendant's request for time to pay under [CPR 14.2\(6\)\(b\)](#), the court will have regard to the interests of the judgment creditor and the judgment debtor. It will bear in mind that where enforcement could take place within the jurisdiction, the judgment creditor would be free to choose from the available methods of enforcement, including a petition to secure the bankruptcy or the winding-up of the debtor. An inability to pay would not usually justify a pre-execution extension of time, because the insolvent debtor must take the usual consequences of insolvency.²⁶ Where the debtor was in a parlous financial situation, the interests of their other creditors and possibly those of their workforce and suppliers would be taken into consideration. However, in *Gulf International Bank v Al Ittefaq Steel Products Co*,²⁷ Field J explained that since the bankruptcy and winding-up regimes in England and Wales were designed to take account of those interests, they would very rarely justify an extension of time where the debtor was liable to be wound up or made bankrupt within the jurisdiction. He went on to say that when a debtor was liable to be wound up or made insolvent under a foreign insolvency regime, the protection of third party interests was a matter for that regime rather than the English court. In summary, Field J stated, the court would only exceptionally exercise its discretion under the former [CPR 14.10](#) and [CPR 40.11](#) to extend time, and then it would only do so where the judgment debtor was solvent, and for a relatively short period of time. In reaching its decision the court would consider whether to make some provision in respect of interest.

Pre-action admissions

- 6.22 CPR 14.1 provides for admissions before proceedings commence. A person may, by giving notice in writing, admit the whole or any part of another party's case before commencement of proceedings. This rule was introduced to remedy the defect that emerged following the decision in *Soverby v Charlton*,²⁸ where it was held that Part 14 applied only to admissions made after commencement of the proceedings and had no effect on pre-commencement admissions. As a result, a claimant could not rely on an admission made by the defendant in response to a letter before claim and would have to press on with proceedings regardless. CPR 14.1 puts such admissions on a similar basis as formal admissions made during proceedings. A claimant is now able to obtain judgment on an admission made before commencement of proceedings, which can only be withdrawn by agreement between the parties or with court permission (CPR 14.1(1)(b) and CPR 14.1(2)(b)).
- 6.23 Prior to 1 October 2023, the ability to make pre-action admissions under Part 14 was only possible in respect of cases within the three pre-action protocols for personal injury, clinical disputes, and disease and illness claims. The amendment to Part 14 removes this restriction so that a pre-action admission made in a dispute of any type may be relied upon by the claimant. Pre-action admissions serve a useful role in minimising or negating the costs involved in commencing proceedings, as a claimant may rely on a pre-action admission made given that such an admission can only be withdrawn with the claimant's agreement or, after proceedings have commenced, with the permission of the court.²⁹ Special provision is made in CPR 14.3 for admissions made before commencement of proceedings in cases to which the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents, the Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims, and the Pre-Action Protocol for Personal Injury Claims below the Small Claims Limit in Road Traffic Accidents (the RTA Small Claims Protocol) apply. A defendant may withdraw an admission of causation in the special circumstances provided by CPR 14.3(2)(a). A defendant may also withdraw an admission after the commencement of proceedings if all the parties to the proceedings consent, with the court's permission, or in special circumstances provided for in the RTA Small Claims Protocol (CPR 14.3(2)(b) and CPR 14.3(3)).

Withdrawal of admission

- 6.24 Court permission is required to amend or withdraw an admission made after commencement of proceedings (CPR 14.2(11)). If a party fails to apply to withdraw an admission, they may not attempt to dispute at the trial the facts they had admitted.³⁰ Whereas parties are able to agree to the withdrawal of an admission made prior to the commencement of proceedings under CPR 14.1(1)(b), there is no such equivalent rule in respect of admissions made after proceedings commence. Where there are more than two parties, the consent of all the parties must be required because any other party may apply for judgment on an admission under CPR 14.1(2)(a). CPR 14.1 makes provision for withdrawal of pre-action admissions. A party may, by giving notice in writing, withdraw a pre-action admission before commencement of proceedings if the party to whom the admission was made agrees (CPR 14.1(1)(b)). If the party to whom the admission was made does not consent to its withdrawal, the party seeking to withdraw would have to start proceedings (or wait for proceedings to be commenced) to engage the court's jurisdiction. After commencement of proceedings a pre-action admission may be withdrawn only with the permission of the court (CPR 14.1(2)(b)). CPR 14.1(2) states that, after commencement of proceedings, any party may apply for judgment on the pre-action admission; but only the party who made the pre-action admission may apply to withdraw it (CPR 14.1(2)(b)). Once judgment has been entered on an admission, it is final and it is too late to apply for permission to withdraw the admission.³¹
- 6.25 In circumstances where the court grants a party permission to withdraw an admission under CPR 14.1(2)(b), it is not clear what evidential or other value the previously-made admission can still serve. It is possible that an admission that has been successfully withdrawn could still give rise to an estoppel as between the parties, but this is a factor that would be taken into account by the court considering whether to have granted permission to withdraw the admission under CPR 14.5(d), which

is discussed further below. It is also unclear whether an admission retains its evidential quality in circumstances where it has been successfully withdrawn and may be relied upon as evidence of the fact admitted. Under the pre-2023 [Part 14](#) regime, not all pre-action admissions were governed by the [CPR](#), and a party could adduce an admission of liability as evidence in support of an application for summary judgment. For instance, a claimant could rely on a pre-action admission that fell outside the old [CPR 14.1A](#) in an application to strike out the defence on one of the grounds set out in [CPR 3.4\(2\)](#): (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim; or (b) 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. But the opponent would then be free to challenge the probative value of the admission—for example, by showing that it was given by mistake or obtained by misrepresentation. Under the current [CPR 14.5](#) these factors are captured by the court's exercise of discretion, which applies to all admissions, in deciding whether to give permission for an admission to be withdrawn. Accordingly, in circumstances where the court has exercised its discretion to permit the withdrawal of an admission, the court will have already taken into account the evidential weight to be afforded to the admission, and the reliance that a party could otherwise place on the admission in the context of the proceedings. In those circumstances, it would be contrary to the exercise of judicial discretion to seek to maintain reliance on the admission for the purposes of summary judgment.

6. 26 Where a party applies for permission to withdraw an admission, the court must have regard to all the circumstances of the case including the following ([CPR 14.5](#)):

- “(a)the grounds for seeking to withdraw the admission;
- (b)whether there is new evidence that was not available when the admission was made;
- (c)the conduct of the parties;
- (d)any prejudice to any person if the admission is withdrawn or not permitted to be withdrawn;
- (e)what stage the proceedings have reached; in particular, whether a date or period has been fixed for the trial;
- (f)the prospects of success of the claim or part of it to which the admission relates; and
- (g)the interests of the administration of justice.”

6. 27 The considerations listed in [CPR 14.5](#) are drawn from earlier decisions. With respect to the prejudice to any person if an admission were permitted to be withdrawn, the proper approach to such a criterion was considered in *Walley v Stoke-on-Trent City Council*.³² A pre-action admission of liability was made on behalf of a local authority by an incompetent employee of their loss adjusters. The Court of Appeal held that to establish abuse of process it would usually be necessary to show that the defendant had acted in bad faith. A claimant who advances the argument that a withdrawal would obstruct the just disposal of the proceedings would usually be required to show that they would suffer prejudice if they could not rely on the admission. Clearly, prejudice in this context has to entail something other than the loss of the benefit of the admission. Therefore, prejudice has to be some real disadvantage caused by the claimant's reliance on the admission which cannot be overcome once the admission is withdrawn. The following were mentioned as examples of such prejudice: the claimant agreed to the destruction of real evidence, or refrained from seeking expert inspection which is no longer possible, or witnesses became unavailable.³³ However, any effect that a withdrawal would have on a litigation funding arrangement would be unlikely to count in this regard.

6. 28 Reliance and prejudice are central considerations where a court entertains a strike-out application under [CPR 3.4\(2\)\(b\)](#) on the grounds that a withdrawal of an admission is likely to obstruct the just disposal of the proceedings, as is illustrated by *White v Greensand Homes Ltd*.³⁴ The claimants sought damages for structural damage caused by the defendants' design of the foundations of their property. In response to a letter before action the defendants admitted that they were the authors of the designs and subsequently repeated the admission in their defence, but denied liability on other grounds. A few months later, the defendants applied for permission to amend the defence by withdrawing the admission that they had designed the foundations, having discovered that the design work had been carried out by a third party. The judge accepted that the defendants had an arguable case that the foundations had been designed by the third party and that the admission was the result of a mistake.

The Court of Appeal agreed that the claimants suffered no prejudice by relying on the admission because they lost nothing by refraining from pursuing the third party, which had been dissolved as insolvent three years before the proceedings.³⁵

- 6.29 Although the considerations listed in **CPR 14.5** were largely drawn from earlier decisions,³⁶ this approach to the exercise of discretion is problematic. The Court of Appeal held in *Woodland v Stopford*³⁷ that PD 14 para.7.2 (which previously set out the factors now included in **CPR 14.5**) confers a wide discretion on the court to be exercised by reference to all the circumstances. A judge dealing with an application to withdraw an admission, the Court of Appeal explained, must have regard to each and every one of the factors now in **CPR 14.5**, give each due weight, take account of all the circumstances of the case and strike a balance with a view to achieving the overriding objective.
- 6.30 The exercise advocated by the Court of Appeal seems to be in the nature of ticking off the relevant factors rather than engaging in a reasoning process. For a reasoning process would require more than just mentioning each factor; it would require some principle to guide decision-making, some ordering of the importance of different factors or some other system of moving from a statement of fact to a normative conclusion. Given the absence of any relative importance as between the different factors, or a combination thereof, the court was effectively free to reach any decision it deemed fit.³⁸ Moreover, the Court of Appeal indicated in *Woodland* that an appellate court will not interfere with the judge's decision, as long as the lower court took the trouble of indicating that it paid attention to all the relevant factors.
- 6.31 The whole purpose of **CPR 14** is to enable a claimant to obtain judgment on an admission without having to establish a contract or estoppel. The purpose of a **CPR 14** admission is to allow the party in receipt of such an admission to proceed safe in the assumption that the litigation is effectively over in respect of the admitted case and avoid any further effort and expense in preparation for a contest on the admitted case. If an admission did not provide such security, the recipient of the admission would be unable to rely on it, would have to continue preparation for proving the case and no savings would be achieved; thereby defeating the purpose of the admission procedure.³⁹
- 6.32 The rationale of the **CPR** admission procedure does not entail that an admission must be wholly irreversible. But it does require that the grounds for withdrawal of permission should be consistent with the rationale and not undermine it. It would be consistent with the rationale to permit withdrawal where the admission was flawed in the first place. For example, it would be unjust to hold a party to an unintended admission, to one obtained by misrepresentation of facts⁴⁰ or to an admission given by mistake.⁴¹ An obvious example of mistake is where a party made an admission on the basis of an assumption of fact common to both parties which is falsified by subsequently emerging evidence.⁴² Notably, the emergence of new facts provides justification for undoing other procedural consequences intended to be final. Thus, for instance, although the general rule is that on appeal a party may not rely on facts which had not been pleaded at the trial, a party is allowed to adduce fresh evidence where they had been unaware of it before and could not have discovered it by exercising due diligence.⁴³ Similarly, an offer to settle under **CPR 36** must be open for at least 21 days (**CPR 36.3(5)**), but court permission may be obtained to withdraw the offer within this period where new evidence has emerged.⁴⁴ Common to both these instances is the need for certainty which may be disturbed only where matters were overtaken by unforeseen developments.
- 6.33 The factors identified by the judge and the Court of Appeal in *Woodland*⁴⁵ do not give sufficient weight to the need for certainty which underpins the **CPR 14.1** and **14.2** admissions, but rather undermine it. The judge considered that the fact that the defendant had a viable defence argued in favour of permitting withdrawal. Yet it is precisely where there is an arguable defence that a claimant should be able to rely on an admission, because where there is no real defence the claimant may obtain summary judgment. The judge, and seemingly the Court of Appeal, gave weight to the consideration that refusing permission to withdraw could result in a judgment which is at odds with the facts. Yet, if an admission could be undone wherever the admitting party is able to show a good prospect of proving the facts to be otherwise, the other party would feel bound to continue investigating the issue in case it occurred to the admitting party that they could succeed on the issue after all. It should be noted that the mere possibility of proving the facts to be otherwise is not sufficient for raising fresh points on appeal or for withdrawing a **CPR 36** offer.⁴⁶

- 6.34 Two further considerations weighed with the judge. One was the size of the potential recovery. It is not clear why this should have carried much weight when the admission was in effect made on behalf of insurers who were perfectly able to meet the award and in full appreciation of its potential size. A further factor considered significant by the judge was that, if the admission stood, litigation was likely to follow against the claim handlers who made the admissions. It is not self-evident why this should count in favour of withdrawal when, if the claim handlers had breached their duty, such a claim would have resulted in the vindication of the defendant's rights in having lost the opportunity to properly defend the claim, and might well have forced the claim handlers to internalise the cost of the trouble their admission caused. If *Woodland* is right, it seems that claimants would be unable to rely on admissions made by the defendant's agents if they could be undone whenever the defendant became dissatisfied with the agents' conduct. The law of agency does not even provide this luxury; where an agent acts with the principal's apparent authority, the principal will be bound by the agent's conduct. It is unclear as to why different principles should apply in circumstances where claims handlers have made decisions in the course of litigation on a party's behalf.
- 6.35 It is suggested that precedence should be given to the need to show a good reason for the withdrawal. This does not mean that the other factors mentioned in CPR 14.5 would become redundant. The conduct of the parties (CPR 14.5(c)) would become relevant where, for instance, the admission was induced by the other party's misrepresentation. Prejudice that would be caused by the withdrawal (CPR 14.5(d)) might justify refusal of permission even though the admission was made by mistake, as where in reliance on the admission the party had foregone opportunities to preserve evidence,⁴⁷ or failed to sue the correct party.⁴⁸ Similarly, withdrawal may be refused despite good reasons and fresh evidence if the withdrawal is made near a trial which has been prepared on the basis of the admission (CPR 14.5(e)).
- 6.36 The approach advocated here is reflected in a number of decisions on the subject. In *American Reliable Insurance Co v Willis*,⁴⁹ Steel J considered proof of good reason for the withdrawal and the emergence of fresh evidence to be a threshold requirement on the facts of that case. In *Gunn v Taygroup Ltd*,⁵⁰ the principal reason for the permission to withdraw was the fact that the defendants admitted a claim which was quantified at £637,000 only to be faced with a claim of £3.4 million. The admission initially made in that case could be said to have been fundamentally different from the one to which the claimant sought to hold the defendant.
- 6.37 In *Bayerische Landesbank Anstalt Des Offentlichen Rechts v Constantin Medien AG*,⁵¹ Popplewell J refused to allow an admission to be withdrawn, because the claimant made the admission after careful consideration with the benefit of professional advice, there was no evidence that the claimant no longer believed it to be true, and withdrawal would unfairly prejudice the defendant and go against the interests of the administration of justice. Similarly, in *Aldersgate Investments Ltd v Bank of Scotland PLC*,⁵² Phillips J expressed "considerable sympathy" for the views of Steel J in *American Reliable Insurance Co v Willis*. Phillips J considered that the applicant had to show that "something had gone wrong" in relation to the initial admissions. He dismissed the application to withdraw, finding that the admissions had been made after careful consideration and with a commercial end in mind, in circumstances where nothing had changed, other than the bank's own view. Similarly, in *SL Claimants v Tesco PLC*, Hildyard J, in refusing an application to withdraw an admission, observed that "where all that is relied on is a change of mind, the burden of justifying any adverse impact on the proceedings seems to me to be particularly heavy".⁵³
- 6.38 These decisions suggest that the starting point should be to ask whether a good reason has been given for freeing the applicant from an admission freely given. To show good reason, it is suggested, the applicant must persuade the court that the admission could no longer be upheld because it was unintended, made in ignorance of facts which could not have been ascertained at the time or induced by misrepresentation or some other similar reason. Only this approach can ensure that the exercise of the jurisdiction to permit withdrawal of admissions is predictable, coherent and compatible with its underlying rationale.
- 6.39 The decision in *Woodland* is liable to bring about the kind of unproductive practices that were associated with the multi-factorial checklist of CPR 3.9 before it was replaced in April 2013. Under the old CPR 3.9, the court had to consider nine factors, as well as any other relevant circumstances, before granting relief from sanctions. As a result, much time was consumed in

considering each factor even though on its own this exercise produced no firm conclusion. Instead, a conclusion would emerge not from judicial reasoning guided by principle but from individual judicial preference coloured by sympathy to this or that party and the weight that the particular judge gave to the importance of enforcing rules and court orders. As a result, relief from sanctions became easy to obtain, undermining the normative force of rules and orders and impeding efficient case management. At the same time, the unstructured exercise of discretion meant it was difficult to reliably predict the outcome in advance and inevitably increased satellite litigation over compliance. The approach in *Woodland*, if followed slavishly, would produce similar unpredictability and inconsistency, as well as unnecessary satellite litigation, all of which are bound to undermine the value of the Part 14 admission procedure.

6. 40 If an admission of liability results in a compromise agreement, the claimant is entitled to enforce the agreement. In *Telling v OCS Group Ltd*,⁵⁴ the claimant's husband was killed in the course of his employment by the defendants, who admitted liability under Part 14. Conscious that such an admission was not strictly binding in that the defendants could seek permission to rescile from it, the claimant sought confirmation that the defendants would irrevocably undertake to consent to judgment on liability in accordance with Part 14, in consideration of her ceasing her investigations into liability. The defendants replied that they had no intention of withdrawing the admission and that they would consent to judgment on that issue. It was held that the claimant had given something of value in return for the admission as she ceased investigating the circumstances of the accident. The judge further found that there was an intention to create a legally binding obligation based on the admission which resulted in an enforceable compromise of the claim. The judge was correct in holding that where the communications between the parties resulted in a binding agreement to compromise the claim by accepting liability, the agreement must be enforceable just as any other valid contract. It is unlikely, however, that there would be many situations where such a contract could be found, since parties who wish to compromise their dispute would normally do so expressly rather than by the roundabout way of a binding admission.

Footnotes

13 See Ch.12 Case Management Pt I paras 12.8 ff.

14 *Telling v OCS Group Ltd unreported, 7 April 2008*: the claimant and defendant agreed that the claimant would cease investigations into liability in consideration of the defendant admitting liability and agreeing to entry of judgment under CPR 14. However, in the absence of a clear and express agreement of this kind, a party's solicitors may wish to think carefully before ceasing investigations, given that the other party may later seek to amend or revoke the admission under CPR 14.5.

15 *Dorchester Group Ltd (t/a Dorchester Collection) v Kier Construction Ltd [2015] EWHC 3051 (TCC)*.

16 *Kojima v HSBC Bank Plc [2011] EWHC 611 (Ch)*. See Ch.26 Finality of Litigation paras 26.104 ff and 26.109.

17 *Mack v Clarke [2017] EWHC 113 (QB)*.

18 *Sabbagh v Khouri [2019] EWHC 3004 (Comm); [2020] 1 W.L.R. 187* [40].

19 WB 2025 14.1.1.

20 *Gunn v Taygroup Ltd [2010] EWHC 1665 (TCC)* and *White v Greensand Homes Ltd [2007] EWCA Civ 643*. See also *Walley v Stoke-on-Trent City Council [2006] EWCA Civ 1137; [2007] 1 W.L.R. 352* [35].

21 In *Hughes v Metropolitan Railway Co (1877) 2 App. Cas. 439, 448* Lord Cairns LC said: "it is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties". See also *Central London Property Trust Ltd v High Trees House Ltd [1947] KB 130*.

22 The position is different where a proprietary estoppel is asserted: see *Crabb v Arun District Council [1976] Ch 179; [1975] 3 All ER 865*.

23 See *Northern Rock (Asset Management) Plc v Chancellors Associates Ltd [2011] EWHC 3229 (TCC); [2012] 2 All ER 501*: here, the defendant filed an acknowledgement of service which in error stated that the defendant admitted the claim, following which judgment was entered by request. Akenhead J held that the court had jurisdiction under CPR 3.1(2)(m) to set the judgment aside, because it had been irregularly obtained.

- 24 [2016] EWHC 2067 (Ch).
- 25 [2023] EWHC 1192 (KB). Johnson J declined to resolve the inconsistent authorities on appeal in *Edward v Okeke* [2023] EWHC 2932 (KB).
- 26 *Gipping Construction Ltd v Eaves Ltd* [2008] EWHC 3134 (TCC); and *Gulf International Bank v Al Ittefaq Steel Products Co* [2010] EWHC 2601 (QB).
- 27 *Gulf International Bank v Al Ittefaq Steel Products Co* [2010] EWHC 2601 (QB).
- 28 *Sowerby v Charlton* [2005] EWCA Civ 1610.
- 29 WB 2025 14.1.1.
- 30 *Nageh v David Game College Ltd* [2013] EWCA Civ 1340.
- 31 *Kojima v HSBC Bank Plc* [2011] EWHC 611 (Ch).
- 32 *Walley v Stoke-on-Trent City Council* [2006] EWCA Civ 1137; [2007] 1 W.L.R. 352.
- 33 *Walley v Stoke-on-Trent City Council* [2006] EWCA Civ 1137; [2007] 1 W.L.R. 352 [35].
- 34 *White v Greensand Homes Ltd* [2007] EWCA Civ 643.
- 35 See *Archlane Ltd v Johnson Controls Ltd* (10 May 2012) (TCC), where a contractor was refused permission to amend its defence to a negligence claim to withdraw an admission that it or its sub-contractor had carried out certain work, as it was fanciful to suggest that a stranger had carried out the work, and because the defendant was the author of any prejudice it would suffer if the amendment were refused.
- 36 *Braybrook v Basildon and Thurrock University NHS Trust* [2004] EWHC 3352 (QB) [45]; approved by the Court of Appeal in *Sowerby v Charlton* [2005] EWCA Civ 1610.
- 37 *Woodland v Stopford* [2011] EWCA Civ 266.
- 38 Perhaps this is why the judge in *Moore v Worcestershire Acute Hospitals NHS Trust* [2015] EWHC 1209 (QB) [29], distinguished *Woodland v Stopford* on the facts and described it as “not in itself of great importance”. Compare *Tutt v Ministry of Defence* [2023] EWHC 2834 (KB).
- 39 *Flaviis v Pauley (t/a Banjax Bike Hire) unreported, 29 October 2002.*
- 40 *Hamilton v Hertfordshire County Council* [2003] EWHC 3018 (QB).
- 41 See *Simmons v City Hospitals Sunderland NHS Foundation Trust* [2016] EWHC 2953 (QB). The defendant hospital trust had consented to judgment being entered into following its admissions of breach of duty and causation in its defence. It later sought to withdraw those admissions on the basis that subsequent expert evidence seemed to undermine the agreed version of events. Leggatt J concluded that it was just to allow withdrawal of the admissions. Compare with *Clark v Braintree Clinical Services Ltd* [2015] EWHC 3181 (QB), in which the emergence of further expert evidence was not sufficient to justify a withdrawal.
- 42 See Ch.25 Appeal paras 25.239 ff and 25.244 ff. Note also the jurisdiction to exceptionally reopen the final determination of an appeal following the principle set down in *Taylor v Lawrence* [2002] EWCA Civ 90; [2003] QB 528, now enshrined in CPR 52.30. This jurisdiction is discussed in Ch.25 Appeal paras 25.283 ff.
- 43 See discussion in Ch.27 Offers to Settle paras 27.33–27.40.
- 44 *Woodland v Stopford* [2011] EWCA Civ 266.
- 45 See Ch.25 Appeal paras 25.244 ff and Ch.27 Offers to Settle paras 27.38 ff.
- 46 *Sollitt v D J Broady Ltd* [2000] CPLR 259, CA.
- 47 *Sollitt v DJ Broady Ltd* [2000] CPLR 259, CA.
- 48 *American Reliable Insurance Co v Willis Ltd* [2008] EWHC 2677 (Comm). The Court of Appeal in Woodland subsequently confirmed, though, that Steel J’s observations could not be elevated into a threshold test in all cases: see *Woodland v Stopford* [2011] EWCA Civ 226 [26].
- 49 *Gunn v Taygroup Ltd* [2010] EWHC 1665 (TCC).
- 50 *Bayerische Landesbank Anstalt Des Offentlichen Rechts v Constantin Medien AG* [2017] EWHC 131 (Comm).
- 51 *Aldersgate Investments Ltd v Bank of Scotland PLC* [2018] EWHC 2601 (Comm).
- 52 *SL Claimants v Tesco PLC* [2019] EWHC 3312 (Ch) [39].
- 53 *Telling v OCS Group Ltd* (Sheffield County Court, unreported, 7 April 2008).

Disputing the Court's Jurisdiction

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Mainwork

Chapter 6 - Defendant's Response

Disputing the Court's Jurisdiction

- 6. 41** A defendant may wish to dispute the court's jurisdiction to try the claim or, alternatively, to argue the court ought not to exercise its jurisdiction to try it. Such a defendant may apply to court for an order declaring that it has no jurisdiction or should not exercise any jurisdiction which it may have ([CPR 11\(1\)](#)).⁵⁵ This applies not only to disputes involving an extra-territorial element, where the objection is that the courts of this country have no competence over the dispute, but also where the defendant argues that the court should not exercise its jurisdiction for some other reason, such as considerations of comity or non-justiciability, or because the action was brought after the expiry of a strict statutory time limit. Before making an application under this rule, the defendant must file an acknowledgment of service in accordance with [CPR 10](#) ([CPR 11\(2\)](#)), unless they are a non-party served out of the jurisdiction, who is seeking to challenge jurisdiction ([CPR 6.39\(2\)](#)). The acknowledgment of service must be filed within the usual time limit (normally 14 days from service of the particulars of claim served within the jurisdiction, although different time limits will apply where a claim form is served out of the jurisdiction ([CPR 10.3](#))). A defendant must indicate on the acknowledgment of service that they intend to contest the court's jurisdiction.⁵⁶ However, failure to tick the correct part of the acknowledgment of service form indicating an intention to contest jurisdiction is not fatal to a defendant's application.⁵⁷
- 6. 42** An application for an order declaring that the court has no jurisdiction must be made within 14 days of filing an acknowledgment of service ([CPR 11\(4\)\(a\)](#)). Such applications are subject to [CPR 23](#) and PD 23A. The application must be supported by evidence ([CPR 11\(4\)\(b\)](#)). No defence needs to be served before the hearing of the application ([CPR 11\(9\)](#)). [CPR 11\(4\)](#) is mandatory: thus, a defendant who wishes to challenge jurisdiction but has failed to file an acknowledgment of service must apply for an extension of time; such an application will be governed by the principles of relief from sanctions.⁵⁸ A defendant who files an acknowledgment of service but does not make an application to contest jurisdiction within the 14-day period is to be treated as having accepted that the court has jurisdiction to try the claim ([CPR 11\(5\)](#)).⁵⁹ Moreover, taking any step in the proceedings, other than acknowledging service for the purpose of objecting to the jurisdiction, may be considered as a voluntary submission to the jurisdiction of the court.⁶⁰ Consequently, a request by a defendant for an extension of time for service of a defence cannot be construed as also being a request for an extension of time for making an application to contest the jurisdiction; and may even be capable of amounting to a submission to the jurisdiction.⁶¹ In these circumstances, it is unsurprising that an extension of the time to serve a defence does not of itself extend the period for objecting to jurisdiction.⁶²
- 6. 43** At the same time, the period for filing a defence continues to run even as the 14-day period provided for a defendant to make an application under [CPR 11\(4\)](#) runs, so that if an application is not made within that period, the defendant may find that the time for service of the defence has expired unless an application is made to extend it (which, as noted above, may in some circumstances amount to submission to the court's jurisdiction).⁶³ Further, making an application for service to be set aside before filing an acknowledgment of service does not excuse the defendant from complying with the requirements of [CPR 11](#).⁶⁴ Accordingly, only if a challenge to jurisdiction is pursued within the time limit provided for in [CPR 11\(4\)](#) will the defendant's position usually be adequately protected. Even if the challenge fails, the court will give directions for the filing and service of a further acknowledgment of service and a defence ([CPR 11\(7\)](#)).
- 6. 44** On an application under [CPR 11](#) the burden is on the claimant to establish that the court has jurisdiction or, as the case may be, that it should exercise it. At the conclusion of the hearing to determine jurisdiction the court has a number of options. It may dismiss the defendant's objection to the jurisdiction, in which case the acknowledgment of service ceases to have effect and the defendant must file a fresh acknowledgment within 14 days of the order or such other period as the court directs ([CPR 11\(7\)](#)),

which will be treated as acceptance of jurisdiction ([CPR 11\(8\)](#)). If the court accepts the objections, it will make a declaration that it has no jurisdiction, or that it will not exercise its jurisdiction ([CPR 11\(6\)](#)). In addition, the court may order that the claim form or its service should be set aside, it may discharge any interim order that has been made in the proceedings or it may stay the proceedings. Where a defendant is challenging the jurisdiction, the claimant can still apply for summary judgment, but the court would normally dispose of the jurisdictional objection first.⁶⁵

Footnotes

- 55 Note that the court can decline jurisdiction and strike out a claim on forum non conveniens grounds even if the defendant does not make such an application, and even where the defendant admits liability: [Cook v Virgin Media Ltd \[2015\] EWCA Civ 1287](#).
- 56 See [Ch.5 Service paras 5.210 ff](#); and see 2025 WB 11.1.4 ff.
- 57 [Pitalia v NHS England \[2023\] EWCA Civ 657](#).
- 58 [Le Guevel-Mouly v AIG Europe Ltd \[2016\] EWHC 1794 \(QB\)](#). For the principles which apply to extending time to bring the application to challenge jurisdiction itself, see [Caine v Advertiser and Times Ltd \[2019\] EWHC 39 \(QB\)](#).
- 59 [Uphill v BRB \(Residuary\) Ltd \[2005\] EWCA Civ 60](#); [2005] 3 All ER 264; [Hoddinott v Persimmon Homes \(Wessex\) Ltd \[2007\] EWCA Civ 1203](#); [2008] C.P. Rep. 9.
- 60 [Simon Bain Building Services Ltd v Cardone \[2023\] EWHC 2916 \(Ch\)](#).
- 61 [Burns-Anderson Independent Network Plc v Wheeler \[2005\] EWHC 575](#); [2005] 1 Lloyd's Rep. 580. On the other hand, ticking the "intention to defend" box in the acknowledgement of service, filing the "defence" in the response pack and waiting almost a year to bring an application under CPR 11 did not amount to a submission to the jurisdiction in the exceptional circumstances of [American Leisure Group Ltd v Wright \(Ch, unreported, 30 June 2015\)](#). The defendants were unrepresented until after the expiry of the time limit in CPR 11(4); moreover, they had been invited to file the acknowledgement of service in exchange for an assurance that the proceedings against them would be stayed.
- 62 [Montrose Investments Ltd v Orion Nominees \[2001\] C.P. Rep. 109, Ch.](#)
- 63 [Flame SA v Primera Maritime \(Hellas\) Ltd \[2009\] EWHC 1973 \(Comm\).](#)
- 64 [Hoddinott v Persimmon Homes \(Wessex\) Ltd \[2007\] EWCA Civ 1203](#); [2008] C.P. Rep. 9.
- 65 [Speed Investments Ltd v Formula One Holdings Ltd \[2004\] EWHC 1772 \(Ch\)](#); [2005] 1 W.L.R. 1233; [Rishad Moloobhy v Shams Mohamed Kanani \[2013\] EWCA Civ 600](#); [Trafigura Beheer BV v Renbrandt Ltd \[2017\] EWHC 3100 \(Comm\)](#).

Introduction

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Mainwork

Chapter 7 - Statements of Case

Introduction

Functions of statements of case

- 7.1 A party's right to be informed of its opponent's case is part and parcel of the fundamental right to be heard. Lord Neuberger MR stressed this when he said that "a civil claim should be conducted on the basis that a party is entitled to know, normally through a statement of case, the essentials of its opponent's case in advance, so that the trial can be fairly conducted, and, in particular, the parties can properly prepare their respective evidence and arguments at trial".¹ Only once the disputed issues have been identified can the parties know what they need to argue and prove, and can the court give appropriate directions for the management of the case.
- 7.2 The process of identifying the issues in dispute is carried out by exchanging statements of case, previously known as pleadings. As the Court of Appeal held in *AXA Sun Life Plc v HMRC*, the "purpose of pleading is to identify the facts alleged by the claimant which are said to justify the claim that he makes".² Pleadings are guided by principles of party autonomy: a judge may invite parties to modify pleaded issues, but must ultimately respect the parties' decision.³ In turn, under our adversarial system, judges may be compelled to reject a claim despite the fact that the claim may have succeeded if pleaded differently.⁴ Further, the overriding objective and procedural fairness considerations necessitate that parties are "entitled to rely on the pleaded case as defining the ambit of the issues to be decided at trial",⁵ meaning that, generally, judges cannot resolve disputes on a basis which was not pleaded.⁶
- 7.3 Statements of case are documents exchanged by the parties, in which they each mark out the parameters of the case they seek to advance.⁷ The term "statement of case" is defined in CPR 2.3(1) as meaning the claim form, particulars of claim (where these are not included in a claim form), defence, counterclaim or other additional claim, or reply to defence and any further information given voluntarily or by court order under CPR 18.1. Although the claim form is considered a statement of case, the first statement of case to advance the claimant's case in a fully informative way is the particulars of claim. Particulars of claim must be contained in or served with the claim form; or served within 14 days after service of the claim form (CPR 7.4(1)). If the particulars of claim are not contained in the claim form or served with it, the claimant must state in the claim form that the particulars of claim will follow (CPR 16.2(2)). The defendant does not need to respond until the particulars of claim have been served (CPR 9.1(2)).
- 7.4 Once the particulars of claim have been served, a defendant who wishes to resist the claim must respond by serving their own statement of case: the defence.⁸ In most cases, the exchange of particulars of claim and defence should suffice to identify and define the issues. Indeed, properly drafted statements of case should "contain all the information necessary to define the issues which the court has to decide and to ensure that each party knows the case which it has to meet".⁹ Occasionally however, the claimant may deem it necessary to file a reply to the defence in order to make admissions, put forward an assertion in response to something contained in the defence or in order to cut down the issues (CPR 15.8). After the reply, if any, no party may serve any statement of case without the court's permission (CPR 15.9). Further exchanges are known as rejoinder to the claimant's reply, followed by the claimant's surrejoinder, followed by the defendant's rebutter. However, these would be allowed only in

exceptional circumstances. Non-parties can generally obtain from court records a copy of the state of case,¹⁰ reflecting the principle that the allegations which parties to civil proceedings make are public.¹¹

- 7.5 This process of exchange establishes what is in dispute and enables the parties to understand what they each need to prove at trial.¹² Pleadings, Saville LJ observed, are therefore “not a game to be played at the expense of the litigants, nor an end in themselves, but a means to the end, and that end is to give each party a fair hearing”.¹³ To this it might be added that the end is also to achieve the efficient and proportionate management of litigation in accordance with the overriding objective,¹⁴ since the parties’ statements of case provide the court with vital information which will guide it in making case management decisions. For example, the value and nature of the dispute, as indicated by the pleadings, will determine which is the appropriate track to allocate the case to;¹⁵ and the court will decide which issues can be disposed of summarily and which require trial on the basis of the pleadings.¹⁶

Issues of content common to all statements of case

- 7.6 In its statement of case, a party needs to state all the material facts pertinent to their case.¹⁷ Where a claimant has not pleaded a fact necessary to establish a particular cause of action, the court has no jurisdiction to give judgment on that basis. That is, claimants must plead facts which cover each of the elements necessary to make out the cause of action relied upon.¹⁸ This includes material facts which relate to grievances which are obvious.¹⁹ Only facts which have already happened can be pleaded: one cannot plead a “future fact”.²⁰ For instance, in *AXA Sun*, the court held that a claim in restitution was insufficiently pleaded because the claimant merely *anticipated* that he would make a payment of unlawfully demanded tax in the future.²¹
- 7.7 Likewise, a defendant who has chosen not to plead all the essential factual ingredients of a given defence cannot rely on that defence. This arises out of the principle of party autonomy which is embedded in the English adversarial system, by which the parties are free to choose whether to litigate, what to litigate and what evidence to call in support of their respective allegations. The court thus has no power to insist that the parties litigate issues they do not wish to raise, or to direct them to obtain and rely on evidence which they do not wish to adduce.²² Consequently, unless and until the parties put a point in dispute through their statements of case, there is no controversy requiring court resolution.²³ However, as we shall see, this is not the end of the matter since the court has the power to allow a party to amend its statements of case so as to ensure that the real issues are brought out, and in some circumstances the court may base its decision on an issue which was unpleaded but which was otherwise fully addressed by all the parties. But the court will not entertain an unpleaded issue which is raised at the last moment.²⁴
- 7.8 Statements of case should be concise. The particulars of claim, for instance, must include a concise statement of the facts on which the claimant relies: CPR 16.4(1)(a).²⁵ Pleadings which are vague and unparticularised are liable to be struck out.²⁶ Nonetheless, the details required to be pleaded are determined by questions of degree and proportionality guided by the particular circumstances of the case.²⁷ A question raised by CPR 16.4(1) is the extent to which the parties are permitted to plead evidence and points of law. There is no ban on pleading evidence; CPR 16.4(1) is drafted in inclusive, not exhaustive, terms. Indeed, such a ban would risk unfairly prejudicing litigants in person, who may not understand the fine and often blurry distinctions between facts, evidence and law. Accordingly, statements of case may include references to points of law supporting the claim or defence, and they may identify witnesses or documents that a party considers necessary to the claim or defence, including expert reports (see PD 16 para.12.2). Indeed, the line between allegations of “primary fact”, “particulars” and “evidence” is often a “matter of “pragmatic art”.²⁸ But as a matter of general practice, evidence should not be included in a statement of case and should be reserved instead to the witness statements. This was confirmed by Chief Master Marsh when he stated that:

“There may be instances where it is helpful to refer to particular items of evidence by way [of] illustration, or to refer to authority, but normally it is far more helpful for a statement of case, and especially particulars of claim, to

set out only the essential facts which are necessary to make out the cause or causes of action that are relied upon, broken down by reference to their constituent elements, and an explanation for the relief that is claimed.”²⁹

7. 9 It must be appreciated that while averments of law may be made in pleadings, they do not have the same effect as allegations of fact. Only allegations of fact define the scope of the controversy. Litigation cannot be disposed of on the basis of factual matters that were not advanced by the parties. In *Jacobs v Chalcot Crescent (Management) Co Ltd*, the High Court allowed an appeal on the basis of an unpleaded defence.³⁰ The court is not bound to find the law to be as the parties assert in their statements of case, even where the parties are ad idem on the point.³¹ At the same time, however, if the court is to raise points of law that have not been considered by the parties, it must give them an opportunity to respond and “address new issues arising from the judge’s departure from the proposition of law on which the case was conducted”.³²
7. 10 Implicit in the requirement for concise statements of claim is an obligation to avoid overburdening the pleadings with excessive detail. As held in *Al Saud v Gibbs*, “clarity is usually better served by brevity than prolixity”.³³ This is because excessive particulars “can obscure the issues rather than providing clarification”.³⁴ Indeed, in *Standard Life Assurance Ltd v Building Design Partnership Ltd*, Coulson LJ said that:
- “The days of the court requiring parties in detailed commercial and construction cases to plead out everything to the nth degree are over. It is not sensible; it is not cost-effective; it is not proportionate. Of course, in certain types of construction dispute, it will be necessary to investigate... ‘the grinding detail’... but that investigation should only ever be commensurate with the overriding objective. Pleading out every last detail at the outset of the proceedings should not be regarded as the paradigm method of framing such disputes, particularly if there are more proportionate alternatives which still enable the defendant to know the case that it has to meet.”³⁵
7. 11 One such tool for promoting concision is the sampling and extrapolation of pleadings. In *Standard Life Assurance*, the claimant sought to plead *at the outset* an “extrapolated” claim, whereby a small sample of the allegations were pleaded in detail, but not the remaining pool of the allegations.³⁶ Under this approach, the claimant identified links between the sample and the pool of all the allegations, and explained how any findings on the sample would give rise to liability for the whole or part of the pool. Coulson LJ noted held that an extrapolated approach was permissible in the circumstances because: (i) the overriding objective and principles of proportionality were best served by an extrapolated approach where there were 3,437 proposed pleading variations;³⁷ and (ii) the respondent was “fully aware” of the case that they had to meet.³⁸
7. 12 The expectation is that the parties’ compliance with the pre-action protocols will assist them in achieving concision. Part of the idea behind the pre-action protocols is that by the time the parties come to draft their statements of case, they will have become sufficiently familiar with each other’s position and with the relevant evidence so as to be able to articulate their own case with relative ease and simplicity.³⁹ The need for extensive particularity and detail is further reduced by the fact that witness statements will later have to be exchanged. “In the majority of proceedings”, Lord Woolf MR observed, “identification of the documents upon which a party relies, together with copies of that party’s witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise”.⁴⁰
7. 13 However, while simplicity of statements of case may be a virtue in most cases, this is not always so.⁴¹ In a complex commercial claim, oversimplification could be a vice. Where the dispute involves complicated factual situations or difficult questions of law, precise and detailed pleadings are crucial to the clarification of the issues and to effective and economic case management. In the absence of clearly identified points of dispute it might be impossible to carry out a focused and efficient disclosure process, nor would it be possible to know what witness statements to produce and how much detail witnesses should provide. Furthermore, generality and lack of precision in statements of case may necessitate late amendments, lead to unnecessary disputes and waste

court and party resources. What is required of statements of case is therefore not brevity and simplicity per se, but a level of precision and detail that is proportionate to the needs of the case.

- 7.14 Parties must also refrain from squabbling over unimportant detail or raising tactical objections to statements of case.⁴² If a dispute over the terms of a statement of case does require court attention, the court should not deal with it in isolation but should use the opportunity to try to get to the root of the dispute, identify the issues and give adequate case management directions so that any further disputes over pleadings can be avoided.⁴³ The court will not allow a case to proceed on the basis of unclear pleadings, even if the parties are content to do so.⁴⁴ If, even after exchange of statements of case, some issues are still in need of clarification, the court can order a party to clarify a matter in dispute or to give additional information in relation to any such matter under [CPR 18.1](#). Further, if as a result of the exchange of the statements of case, or for any other reason, a party needs to change the grounds of their claim or defence, they may seek permission in accordance with [CPR 17](#) to amend their statement of case.
- 7.15 All statements of case must contain the following information (PD 7A para.3 (Form N1), 4.1–4.2 and 7): the name of the court in which the action is proceeding; the claim number (which is assigned by the court upon issue of the claim form); the title of the action; identification of the type of statement of case (for example, whether it is a particulars of claim or defence) ([CPR 16.2](#), [16.4–16.5](#), PD 16 paras 2–3). All statements of case must be verified by a statement of truth ([CPR 22.1\(1\)](#)).

Footnotes

- 1 *Al Rawi v Security Service* [2010] EWCA Civ 482; [2010] 4 All ER 559 [18].
- 2 *AXA Sun Life Plc v HMRC* [2024] EWCA Civ 1430; [2025] 1 W.L.R. 2179 [136]. See also *Crane Bank Ltd v Dfcu Bank Ltd* [2025] EWHC 1915 (Comm) [14].
- 3 *Jacobs v Chalcot Crescent (Management) Co Ltd* [2024] EWHC 259 (Ch) [34]; *Al-Medenni v Mars UK Ltd* [2005] EWCA Civ 1041 [21].
- 4 *Jacobs v Chalcot Crescent (Management) Co Ltd* [2024] EWHC 259 (Ch) [34]; *Al-Medenni v Mars UK Ltd* [2005] EWCA Civ 1041 [21].
- 5 *Jacobs v Chalcot Crescent (Management) Co Ltd* [2024] EWHC 259 (Ch) [57].
- 6 *Jacobs v Chalcot Crescent (Management) Co Ltd* [2024] EWHC 259 (Ch) [65].
- 7 *Loveridge v Healey* [2004] EWCA Civ 173, (2004) S.J.L.B. 264 [23]; and *Prudential Assurance Co Ltd v Revenue and Customs Commissioners* [2016] EWCA Civ 376 [20] (later overruled by the Supreme Court, but this point was not doubted: see *Prudential Assurance Co Ltd v Revenue and Customs Commissioners* [2018] UKSC 39; [2019] AC 929).
- 8 Though the defendant may first file an acknowledgement of service and then follow up a defence: [CPR 9–10](#).
- 9 *Al Saud v Gibbs* [2022] EWHC 706 (Comm); [2022] 1 WLR 3082 [40]; *Ventra Investments Ltd v Bank of Scotland Plc* [2019] EWHC 2058 (Comm) [22]–[25].
- 10 See [CPR 5.4C](#).
- 11 *Various Claimants v Mercedes-Benz Group AG* [2025] EWHC 1931 (KB) [15].
- 12 *Conticorp SA v Central Bank of Ecuador* [2007] UKPC 40.
- 13 *British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd* [1994] 45 Con. L.R. 1, 5. At that time, however, pleadings could all too easily provide fertile ground for technical and expensive procedural skirmishes because the rules of pleading had accumulated a considerable body of technical case law. As a result, a considerable amount of time and effort could be spent in drafting pleadings with no guarantee that they would greatly contribute to the clarification of the issues.
- 14 *Crane Bank Ltd v Dfcu Bank Ltd* [2025] EWHC 1915 (Comm) [17].
- 15 See [Ch.12 Case Management Pt I para.12.90 ff.](#)
- 16 See generally [Ch.9 Disposal Without Trial](#).
- 17 [CPR 16.4\(1\)\(a\)](#), for example, states that the particulars of claim must give “a concise statement of the facts on which the claimant relies”.

- 18 See *AXA Sun Life Plc v HMRC* [2024] EWCA Civ 1430; [2025] 1 W.L.R. 2179.
- 19 *Prudential Assurance Co Ltd v Revenue and Customs Comrs* [2016] EWCA Civ 376; [2017] 1 W.L.R. 4031 [14]
- 20 *AXA Sun Life plc v HMRC* [2024] EWCA Civ 1430; [2025] 1 W.L.R. 2179 [135].
- 21 *AXA Sun Life Plc v HMRC* [2024] EWCA Civ 1430; [2025] 1 W.L.R. 2179 [135]–[141], [145]–[146].
- 22 See *Jacobs v Chalcot Crescent (Management) Co Ltd* [2024] EWHC 259 (Ch); Ch.12 Case Management Part I paras 12.8 ff.
- 23 See *Al-Medenni v Mars UK Ltd* [2005] EWCA Civ 1041 [21], quoted and applied in *Jacobs v Chalcot Crescent (Management) Co Ltd* [2024] EWHC 259 (Ch) [34]. See also *Loveridge v Healey* [2004] EWCA Civ 173, (2004) S.J.L.B. 264; and *Lombard North Central Plc v Automobile World (UK) Ltd* [2010] EWCA Civ 20.
- 24 *Lombard North Central Plc v Automobile World (UK) Ltd* [2010] EWCA Civ 20.
- 25 This rule should be taken to apply to other statements of case, given that this was the position under the old rules and is in keeping with the spirit of the CPR. See the Chancery Guide (2022) at para.4.2, which states that any statement of case “must be as concise as possible … Evidence should not be included, and a general factual narrative is neither required nor helpful”; and the King’s Bench Guide (2025) at para.5.24, which states that statements of case “must inform the other parties and the court as to the case which they must meet. They should be concise and allow the reader to understand the case being put forward”. See also *Ventra Investments Ltd v Bank of Scotland Plc* [2019] EWHC 2058 (Comm) [24].
- 26 *Standard Life Assurance Ltd v Building Design Partnership Ltd* [2021] EWCA Civ 1793; [2022] 1 W.L.R. 878 [41], citing *Towler v Wills* [2010] EWHC 1209 (Comm) [18].
- 27 *Standard Life Assurance Ltd v Building Design Partnership Ltd* [2021] EWCA Civ 1793; [2022] 1 W.L.R. 878 [89].
- 28 *Crane Bank Ltd v Dfcu Bank Ltd* [2025] EWHC 1915 (Comm) [15].
- 29 *Willers v Joyce* [2017] EWHC 1225 (Ch) [31]. See also the comments of Christopher Clark LJ in *Hague Plant v Hague* [2014] EWCA Civ 1609 [76].
- 30 *Jacobs v Chalcot Crescent (Management) Co Ltd* [2024] EWHC 259 (Ch) [65].
- 31 Consequently, the parties are not bound either, and may change their position on what the legal consequences of the facts alleged are, or take new legal points: *Loveridge v Healey* [2004] EWCA Civ 173, (2004) S.J.L.B. 264 [29].
- 32 *Pantorno v The Queen* [1989] 166 C.L.R. 466, 473 (High Court of Australia). See also *Friend v Brooker* [2009] HCA 21 (High Court of Australia), per Heydon J.
- 33 *Al Saud v Gibbs* [2022] EWHC 706 (Comm); [2022] 1 W.L.R. 3082 [40]. See also *Kyndryl UK Ltd v Jaguar Land Rover Ltd* [2025] EWHC 1354 (TCC) [40].
- 34 *McPhilemy v Times Newspapers Ltd* [1999] 3 All ER 775 at 793, quoted in *Al Saud v Gibbs* [2022] EWHC 706 (Comm); [2022] 1 W.L.R. 3082 [40].
- 35 *Standard Life Assurance Ltd v Building Design Partnership Ltd* [2021] EWCA Civ 1793; [2022] 1 W.L.R. 878 [92].
- 36 *Standard Life Assurance Ltd v Building Design Partnership Ltd* [2021] EWCA Civ 1793; [2022] 1 W.L.R. 878 [42]–[43].
- 37 *Standard Life Assurance Ltd v Building Design Partnership Ltd* [2021] EWCA Civ 1793; [2022] 1 W.L.R. 878 [56]–[61].
- 38 *Standard Life Assurance Ltd v Building Design Partnership Ltd* [2021] EWCA Civ 1793; [2022] 1 W.L.R. 878 [63].
- 39 See Ch.1 The Overriding Objective paras 1.101 ff.
- 40 *McPhilemy v Times Newspapers Ltd* [1999] 3 All ER 775 at 792–793, CA. In the Commercial Court, after the service of the defence the parties must liaise with a view to producing an agreed list of the important issues in the case, which should include both issues of fact and issues of law: Commercial Court Guide (2017), D6.1.
- 41 But cf *Standard Life Assurance Ltd v Building Design Partnership Ltd* [2021] EWCA Civ 1793; [2022] 1 W.L.R. 878 [92].
- 42 *McPhilemy v Times Newspapers Ltd* [1999] 3 All ER 775 at 793, CA.
- 43 *McPhilemy v Times Newspapers Ltd* [1999] 3 All ER 775 at 793, CA. The court will often deal with disputes concerning statements of case at a case management conference, as part of its duty to actively manage cases by dealing with as many aspects of a case as it can on the same occasion: CPR 1.4(2)(i).
- 44 *Loveridge v Healey* [2004] EWCA Civ 173, (2004) S.J.L.B. 264 [30].

Particulars of Claim

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Mainwork

Chapter 7 - Statements of Case

Particulars of Claim

General requirements

- 7.16 The particulars of claim must set out the foundation of the claim; that is, the facts that entitle the claimant to the remedy that they seek from the defendant. Wherever practicable, the particulars of claim should be set out in the claim form (PD 16 para.3.1). If this is impractical, for example due to length or complexity, the particulars of claim may be contained in a separate document,⁴⁵ which must either be served with the claim form or served separately within 14 days of service of the claim form, but no later than the latest time for service of the claim form (CPR 7.4(1)).⁴⁶

Content of the particulars of claim

- 7.17 The matters that the particulars of claim must include are set out in CPR 16.4 and PD 16 paras 3–9. CPR 16.4 provides that particulars of claim must include, amongst other things: a concise statement of the facts on which the claimant relies (CPR 16.4(1)(a)); and details concerning interest (CPR 16.4(1)(b), (2)), or aggravated, exemplary or provisional damages (CPR 16.4(1)(c)–(d)).

- 7.18 The drafting of the particulars of claim requires a balance to be struck between the need to set out the grounds of the claim in a comprehensive way and with sufficient detail, on the one hand, and the need for clarity and brevity, on the other. Statements of case which are excessively protracted and flout the prescribed page limits are liable to be struck out,⁴⁷ although in practice such a draconian consequence is unusual.⁴⁸ If the dispute is complex, it may be desirable to outline at the beginning of the particulars of claim the background to the dispute so that the material facts that are set out thereafter are placed in a comprehensible context. Where there is a dispute about the applicable law, a litigant could draw attention to a particular authority or statute (PD 16 para.12.2). Similarly, as noted above, a claimant may attach to the particulars of claim documents supporting the claim, or indicate the names of the witnesses who can support their allegations (PD 16 para.12.2). A claimant is not obliged to include in their claim all the losses sustained and they are perfectly free to claim only in respect of some of them.⁴⁹ Consistently with the principle that statements of case cannot bind the court as to the law to be applied,⁵⁰ the court may grant a remedy to which the claimant is entitled on the pleaded facts even if it is not specified in the claim form (CPR 16.2(5)).

- 7.19 The fundamental rule is that the claimant must state in the particulars of claim facts that establish a complete cause of action. The test is whether the facts relied upon would, if proved, entitle the claimant to the remedy they seek, or possibly to a different remedy. Generally, a pleading “should strictly speaking *only* plead material facts, that is those that are necessary for formulating a cause of action or defence”.⁵¹ In an oft quoted passage Brett J defined a “cause of action” as “every fact which is material to be proved to entitle the plaintiff to succeed”.⁵² Diplock LJ explained it as “simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person”.⁵³ A claim for damages for breach of contract, for example, must allege a contract, a breach thereof and a resulting loss.⁵⁴ Similarly, a claimant who seeks damages for negligence

must state facts that give rise to a duty of care, establish a breach of that duty and identify the injury suffered as a result. There is normally no need to set out the law giving rise to the remedy claimed; it hardly needs stating that loans must be repaid or that persons who negligently harm others must pay for the damage caused by such negligence.⁵⁵ The ultimate purpose of the particulars of claim is to inform the defendant of the case against them. The fact that the particulars of claim leave the precise ambit or extent of the relief sought to argument does not necessarily justify striking out the statement of claim provided the basic allegations were sufficiently clear.⁵⁶ But a claim was struck out as an abuse of process where it contained few details and was brought only to protect the claimant from the expiry of the limitation period in the event that the claimant was sued by a third party.⁵⁷ Further, a pleading of dishonesty must, at the outset, include a clear, concise statement of relevant facts in support of the allegation that the court will be asked to decide at trial.⁵⁸

7.20

The rules and practice directions contain some specific requirements concerning particular types of claims or defences. For instance, a claimant who seeks to recover interest must provide details and must indicate whether interest is claimed under the terms of a contract, under statute or on some other basis (**CPR 16.4(1)(b), (2)**). Similarly, if a claimant is claiming a liquidated sum, they must indicate the rate of interest claimed and the period for which it is claimed (such information would be necessary to facilitate the entry of a default judgment). Where a claim is based on a written agreement, the contract should be attached (PD 16 para.7.3). Allegations of fraud, illegality, misrepresentation, breach of trust, notice or knowledge of a fact, undue influence, wilful default and facts relating to mitigation must be clearly and specifically set out (PD 16 para.8.2).⁵⁹ Practice directions set out additional matters that must be mentioned in the particulars of claim of a number of common types of claim.⁶⁰ Personal injuries claims are singled out in the practice directions for special guidance so that, for example, the claimant must attach a schedule of the past and future expenses and losses that they claims, as well as medical reports concerning their injuries.⁶¹ Similarly, the claimant must indicate whether they claim provisional damages and the grounds upon which they are claiming them (**CPR 16.4(1)(d)**). A claimant may serve separate particulars of claim on different defendants against whom different causes of action are asserted in the same case.⁶²

Footnotes

- 45** A claim included in the claim form but omitted from the particulars of claim is not deemed to have been irrevocably abandoned: *British Credit Trust Holdings v UK Insurance Ltd* [2003] EWHC 2404 (Comm), approved in *Football Association Premier League Ltd v O'Donovan* [2017] EWHC 152 (Ch).
- 46** In the Commercial Court, where it is compulsory for a defendant to file an acknowledgement of service in every case, the deadline for serving a particulars of claim which is not contained in the claim form is 28 days after the acknowledgement of service is filed: **CPR 58.5(1)(c)**.
- 47** *Tchenguiz v Grant Thornton UK LLP* [2015] EWHC 405 (Comm).
- 48** See *Ventra Investments Ltd v Bank of Scotland Plc* [2017] EWHC 199 (Comm), in which *Tchenguiz v Grant Thornton UK LLP* [2015] EWHC 405 (Comm) was not applied on the facts.
- 49** *Khiaban v Beard* [2003] EWCA Civ 358; [2003] 3 All ER 362; though as we shall see in Ch.26 Finality of Litigation, a claimant would not normally be able to institute fresh proceedings to recover losses omitted in an earlier action.
- 50** See above, para.7.9.
- 51** *AXA Sun Life Plc v HMRC* [2024] EWCA Civ 1430; [2025] 1 W.L.R. 2179 [138], citing *Tchenguiz v Grant Thornton UK LLP* [2015] 1 All ER (Comm) 961 [1].
- 52** *Cooke v Gill* [1873] L.R. 3 C.P. 107, 116.
- 53** *Letang v Cooper* [1965] 1 QB 232, 242, quoted in *AXA Sun Life Plc v HMRC* [2024] EWCA Civ 1430; [2025] 1 W.L.R. 2179 [137]; *Office Properties PL Ltd (In Liquidation) v Adcamp LLP* [2025] EWHC 170 (Ch); [2025] 1 W.L.R. 2287 [44]. See also *Smith v Henniker-Major & Co* [2002] EWCA Civ 762; [2003] Ch 182; *Roberts v Gill* [2010] UKSC 22; [2011] 1 AC 240; and *Blue Tropic Ltd v Chkhartishvili* [2016] EWCA Civ 1259.
- 54** *AXA Sun Life Plc v HMRC* [2024] EWCA Civ 1430; [2025] 1 W.L.R. 2179 [137].
- 55** There are, of course, exceptions. For example, if it is alleged that the defendant has breached a statutory duty, it is helpful to set out in the particulars of claim the provision which gives rise to the duty. See also above, paras 7.8–7.9.
- 56** *Conticorp SA v Central Bank of Ecuador* [2007] UKPC 40.

- 57 *Nomura International Plc v Granada Group Ltd [2007] EWHC 642 (Comm).*
- 58 *AXA Insurance UK Plc v Kryeziu [2023] EWHC 3233 (KB)* [34]–[35]; *Sofer v Swissindependent Trustees SA [2020] EWCA Civ 699* [23]–[24].
- 59 See, in relation to the requirement to clearly and specifically particularise allegations of fraud, see *Three Rivers District Council v Governor and Company of the Bank of England (No.3) [2001] UKHL 16; [2003] 2 AC 1*. The position in relation to allegations of fraud or dishonesty in the defendant's defence is different: see below, para.7.23.
- 60 These include personal injuries claims, fatal accident claims, hire-purchase claims, claims for the cost of hiring replacement vehicles on credit following road traffic accidents and claims for injunctions or declarations in respect of land: PD 16 para.4–7.
- 61 PD 16 para.4.1. The term “personal injuries” includes “any disease and any impairment of a person’s physical or mental condition”: *CPR 2.3(1)*.
- 62 *Biddle & Co v Tetra Pak Ltd [2010] EWHC 54 (Ch).*

Defence

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Mainwork

Chapter 7 - Statements of Case

Defence

Filing a defence

- 7.21 A defendant who wishes to defend the claim, or part of it, must file a defence ([CPR 15.2](#)). The rules under [CPR 15](#) relating to the filing of defences and replies have been amended from 1 October 2022.⁶³ The requirement to file a defence applies equally to a claimant who is a defendant to a counterclaim ([CPR 20.3](#)). A copy of the defence must be served on every other party ([CPR 15.6](#)). In the case of [CPR 8](#) claims, the defendant must instead serve an acknowledgment of service ([CPR 8.3\(1\)](#)), since [CPR 15](#) does not apply to [CPR 8](#) claims ([CPR 15.1](#)). As a general rule, the defence must be filed within 14 days after the service of the particulars of claim ([CPR 15.4\(1\)\(a\)](#)), or 28 days if the defendant has filed an acknowledgment of service ([CPR 15.4\(1\)\(b\)](#)). [CPR 15.4\(2\)](#) provides that the general rule under [CPR 15.4\(1\)](#) is subject to the rules in [CPR 3.4\(7\)](#), [6.12\(3\)](#), [6.35](#), [11](#) and [24.4\(4\)](#).⁶⁴ The parties may agree to extend the time for filing a defence for up to 28 days and the defendant must notify the court in writing of such an agreement ([CPR 15.5](#)). In the Commercial Court, extensions for serving a defence that are longer than 28 days need to be approved by the court, however, the court may be invited to make a consent order if the parties are able to agree the extension.⁶⁵
- 7.22 A defendant who wishes to dispute the court's jurisdiction does not need to file a defence before the determination of their objection to jurisdiction ([CPR 11\(9\)](#)). Indeed, they would be ill-advised to do so, because filing a defence would amount to submission to the jurisdiction.⁶⁶ If the claimant has applied for summary judgment before the defendant has filed a defence, the defendant need not file one before the hearing of the application ([CPR 24.4\(4\)](#)). Nevertheless, as a matter of practice, a defendant against whom summary judgment is sought would be wise to draft a defence and exhibit it to their witness statement in order to add precision and force to their arguments against the entry of summary judgment. Where a defendant's objection to the jurisdiction is dismissed, or a claimant's application for summary judgment is rejected, the court will give directions for filing a defence. Lastly, there are special rules for claims served out of the jurisdiction.⁶⁷
- 7.23 If a defendant "fails to file a defence", the claimant may obtain default judgment if [CPR 12](#) permits it ([CPR 15.3](#)). The criteria for obtaining default judgment pursuant to [CPR 12](#) have been substantially amended since 2022.⁶⁸ A claimant may obtain judgment in default of an *acknowledgment of service* only if at the date on which judgment is entered: (a) the defendant has not filed an acknowledgment of service or a defence to the claim (or any part of the claim); and (b) the relevant time for doing so has expired ([CPR 12.3\(1\)](#)). A claimant may obtain judgment in default of a *defence* only: (a) where an acknowledgment of service has been filed but, at the date on which judgment is entered, a defence has not been filed; or (b) in a counterclaim made under [rule 20.4](#), where at the date on which judgment is entered a defence has not been filed; and, in either case, the relevant time limit for doing so has expired ([CPR 12.3\(2\)](#)). Finally, [CPR 12.3\(3\)](#) provides a range of circumstances where a claimant may not obtain default judgment, including where, *at the time the court is considering the issue*, the defendant has applied for summary judgment or to strike out the statement of case (and the application has not been dealt with).
- 7.24 It should be noted that there is in any event a six-month time limit within which default judgment may be obtained, because [CPR 15.11\(1\)](#) provides that a claim will be stayed where: (i) at least six months have expired since the end of the period for filing a defence under [CPR 15.4](#); and (ii) no defendant has served or filed an admission, defence or counterclaim; and (iii) no

party has applied for a default or summary judgment; and (iv) no defendant has applied to strike out all or part of the claim.⁶⁹ The language of “no defendant” in CPR 15.11(1)(b) means that, where there are multiple defendants, and one defendant serves a defence, the power to stay is not enlivened.⁷⁰ As Foxton J stated, the “clear purpose of CPR 15.11 is to avoid there being claims which continue in being but are not being progressed nor otherwise subject to judicial case management”.⁷¹ If the claim is stayed, any party may apply under CPR 23 for the stay to be lifted (CPR 15.11(2)), though the court may refuse to exercise its discretion under CPR 15.11(2) if it considers that there were no good reasons for the delay.⁷² A stay imposed by CPR 15.11 is a sanction.⁷³ The stay may be lifted having regard to the seriousness and significance of the breach, the reasons why the breach occurred, and all of the circumstances of the case.⁷⁴

Service of the defence

- 7.25 Although CPR 15.3 and 12.3 are ostensibly concerned with the filing of the defence, it naturally still has to be communicated to the parties. CPR 15.6 therefore states that a copy of the defence must be served on every party. The rule is, however, silent as to who is to carry out this service. The obligation to serve a document usually falls on the party who prepared it, under CPR 6.21(1).⁷⁵ It is therefore more prudent for a defendant to serve its defence, rather than filing additional copies with the court in the hope that the court will serve it instead.

Content of the defence

- 7.26 The particulars of claim provide the reference point for the defence. The defendant’s response has to address the points made in the particulars of claim. Accordingly, the defendant must state which allegations in the particulars of claims they deny, which they admit and which they are unable to admit or deny but which they require the claimant to prove (CPR 16.5(1)). A defendant who fails to admit allegations that are plainly true may be penalised in costs. Indeed, a claimant may demand a specific admission by serving a notice to admit under CPR 32.18. However, a defendant is not obliged to make enquiries of third parties before pleading that they are unable to admit or deny an allegation; the truth or falsity of the claimant’s allegation need only be within the defendant’s knowledge or capable of being readily ascertained from information at its disposal.⁷⁶ This is correct in principle: a defence is intended to narrow the issues between the parties; not to set the parties on a long and expensive fact-finding process before those issues have been identified.

- 7.27 Where the defendant denies the claimant’s allegations, they must state the reasons for their denial; and if they intend to advance a different version of events from those stated by the claimant, they must set out their own version (16.5(2)).⁷⁷ The function of the defence is to provide a comprehensive response to the particulars of claim so that when the two documents are read together one can learn precisely which matters are in dispute. That function is undermined if the defendant does not set out the competing version of events which is said to answer the claimant’s claim. Unlike a claimant, a defendant need not expressly allege fraud or fabrication in their defence; it is sufficient for the defence to fully set out the facts from which they will invite the judge to conclude that the claimant’s claim is untruthful.⁷⁸ In particular, failure to specifically allege fraud or dishonesty will not prevent a defendant from inviting the court to make a finding of “fundamental dishonesty” under the Criminal Justice and Courts Act 2015 s.57 or for the purposes of disapplying the protection of the qualified one-way costs shifting regime under CPR 44.16.⁷⁹

- 7.28 The rules underwrite the principle of comprehensiveness by providing that “a defendant who fails to deal with an allegation shall be taken to admit that allegation” (CPR 16.5(5)). There are, however, two riders to this presumption. First, if a defendant has failed to address directly some of the claimant’s allegations but has set out the nature of their own case in relation to the issue to which the allegation is relevant, the claimant is required to prove the allegation (CPR 16.5(3)).⁸⁰ Secondly, for money

claims, the claimant must prove any allegation relating to the amount of money claimed, unless the defendant expressly admits the allegation ([CPR 16.5\(4\)](#)).⁸¹

7.29 Where the claimant is required to state certain matters in the particulars of claim, the defendant comes under a corresponding duty to address them. For example, if in a personal injury claim the claimant has attached a medical report to the particulars of claim, the defendant must state whether they agree with the report, dispute it, or neither agree nor dispute it because they have no knowledge of the matter. If they dispute the medical report, they must give reasons and if they wish to rely on a medical report they have obtained they must attach it (PD 16 para.11.1). This provides a good illustration of the [CPR](#) strategy of encouraging early preparation. Although the defendant is not obliged to procure a medical report for the purpose of their defence, they may well find it difficult to give adequate reasons for disputing the claimant's report in the absence of a medical report of their own. It is likely that such matters will have been ironed out long before the exchange of statements of case, where parties have followed the personal injury pre-action protocol.⁸² If the defendant disputes the statement of value which [CPR 16.3](#) requires the claimant to make in the claim form,⁸³ the defendant must give their reasons and state their own value ([CPR 16.5\(6\)](#)).

7.30 Lord Phillips MR held in *Loveridge v Healey*⁸⁴ that an allegation by the claimants that they gave a notice that called upon the defendant to remedy the alleged breach of the licence was an allegation of fact, albeit that the fact had important legal implications, which the defendant was required to deal in his defence. Since the defendant failed to do so he was taken to have admitted the allegation in accordance with [CPR 16.5\(5\)](#). Buxton LJ stressed that [CPR 16.5\(5\)](#) does not apply to an allegation of law made in a statement of case "because of the well-worn principle that the parties cannot, and certainly cannot within the confines of particular litigation, by agreement withdraw from the court the decision of a question of law".⁸⁵

Footnotes

63 See [Civil Procedure \(Amendment No.2\) Rules 2022 \(SI 2022/783\)](#), in force from 1 October 2022.

64 See [Civil Procedure \(Amendment\) Rules 2024 \(SI 2024/106\)](#) r.4.

65 Commercial Court Guide (2022) C3.2(c).

66 See [Ch.6 Defendant's Response](#) paras 6.42 ff.

67 See [CPR 6.35](#) regarding the period for filing a defence where the claim form is served out of the jurisdiction in circumstances where the court's permission is not required. Where permission is required and an order for service out of the jurisdiction has been obtained, it will specify the date by which a defence should be filed: [CPR 6.37\(5\)](#). For service out of the jurisdiction generally, see [Ch.5 Service](#) paras 5.172 ff.

68 See [Civil Procedure \(Amendment\) Rules 2022 \(SI 2022/101\) Sch.2 para.1](#); [Civil Procedure \(Amendment\) Rules 2023 \(SI 2023/105\) r.9](#); [Civil Procedure \(Amendment No. 2\) Rules 2022 \(SI 2022/783\) r.10\(1\)](#); [Civil Procedure \(Amendment No. 3\) Rules 2023 \(SI 2023/788\) r.5\(1\)](#).

69 See [Civil Procedure \(Amendment No. 2\) Rules 2022 \(SI 2022/783\) Sch.1 para.1](#). Where the four conditions outlined at [CPR 15.11\(1\)–\(4\)](#) are not satisfied, a stay pursuant to [CPR 15.11](#) cannot be made: *Wadhwanı v Natwest Markets Plc [2024] EWHC 1103 (Ch)* [45], [67]–[68].

70 *Bank of America Europe DAC v CITTA Metropolitana Di Milano [2022] EWHC 1544 (Comm)* [5].

71 *Bank of America Europe DAC v CITTA Metropolitana Di Milano [2022] EWHC 1544 (Comm)* [5], quoted in *Wadhwanı v Natwest Markets Plc [2024] EWHC 1103 (Ch)* [46].

72 Ch.9 Disposal Without Trial para.9.11.

73 *Michael Wilson & Partners Ltd v Short [2024] EWHC 2113 (Ch)* [37]; *Bank of America Europe v Citta Metropolitana di Milano [2022] EWHC 1544 (Comm)*; [2022] 2 C.L.C. 205.

74 *Michael Wilson & Partners Ltd v Short [2024] EWHC 2113 (Ch)* [38]–[50]; *Denton v TH White Ltd [2014] EWCA Civ 906*; [2014] 1 W.L.R. 3926.

75 2025 WB 15.6.1.

76 *SPI North Ltd v Swiss Post International (UK) Ltd [2019] EWCA Civ 7*; [2019] 1 W.L.R. 2985.

77 The old practice of bare denials and "holding defences" was wasteful and is no longer acceptable.

- 78 *Kearsley v Klarfeld [2005] EWCA Civ 1510.*
- 79 *Howlett v Davies [2017] EWCA Civ 1696; [2018] 1 W.L.R. 948* [25] ff; *Pinkus v Direct Line [2018] EWHC 1671* [5] ff. For a discussion of the Criminal Justice and Courts Act 2015 s.57, see Ch.12 Case Management Pt II paras 12.305 ff; and for a discussion of fundamental dishonesty in the QOCS context, see Ch.28 Costs paras 28.179 ff.
- 80 Civil Procedure (Amendment No. 2) Rules 2022 (SI 2022/783) r.12(4).
- 81 Civil Procedure (Amendment No. 2) Rules 2022 (SI 2022/783) r.12(4).
- 82 Pre-Action Protocol for Personal Injury Claims 1.1–1.4 and 2.1. The parties are encouraged to agree on the joint selection of an expert. If the parties fail to agree on a mutually acceptable expert, the court may decide that one of them had acted unreasonably: Pre-Action Protocol for Personal Injury Claims 7.2–7.11, esp. 7.7.
- 83 A claim form must include a statement of value; see Ch.4 Commencement para.4.38.
- 84 *Loveridge v Healey [2004] EWCA Civ 173, (2004) 148 S.J.L.B. 264* [15].
- 85 *Loveridge v Healey [2004] EWCA Civ 173, (2004) 148 S.J.L.B. 264* [29].

Reply and Further Statements of Case

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Mainwork

Chapter 7 - Statements of Case

Reply and Further Statements of Case

- 7.31 In many cases the exchange of particulars of claim and of defence should be sufficient to identify the disputed issues, so that no further exchange will be needed for this purpose. But in some, a reply to the defence may prove necessary, as where the defendant has gone beyond a denial of the claimant's grounds for the claim and has alleged new facts in support of their defence. In a claim for breach of contract a defendant may, for example, admit the breach and the damage but raise the defence of frustration. The reply provides the claimant with an opportunity for addressing such a defence. As already stated, no statements of case may be served beyond the reply, without permission of the court ([CPR 15.9](#)). Such permission is unlikely to be given, save in exceptional circumstances.
- 7.32 A reply should not be used for repeating the allegations in the particulars of claim or for bolstering them by challenging the defendant's denials. It should be used only for dealing with matters that could not have been addressed in the particulars of claim. To ensure that claimants do not feel obliged to reply, [CPR 16.7](#) provides that a defendant must prove the matters raised in the defence where: (i) the claimant does not reply to the defence ([CPR 16.7\(1\)](#)); or (ii) the claimant does reply but fails to deal with a matter raised in the defence ([CPR 16.7\(2\)](#)). A subsequent statement of case must not contradict an earlier one; in particular, a reply must not contradict or be inconsistent with the particulars of claim (PD 16 para.9.2). Where new matters have come to light, parties may seek the court's permission to *amend* their statement of case (PD 16 para.9.2).
- 7.33 An important limitation on reply is that it cannot advance a new claim (PD 16 para.9.2). ⁸⁶ If the claimant wishes to advance a new cause of action following service of the defence they must seek permission to amend their claim, provided that the limitation period for the fresh claim is still current. ⁸⁷ But if the facts alleged by the claimant in the reply are simply a rebuttal of the defence allegations, the reply cannot be faulted even though such facts may form the basis of a new cause of action.

Footnotes

⁸⁶ *D&G Cars Ltd v Essex Police Authority [2013] EWCA Civ 514*, [70]. See also *Sabbagh v Khoury [2019] EWHC 3004 (Comm)*; *[2020] 1 WLR. 187*.

⁸⁷ See discussion below at paras [7.63](#) ff, and see para. [7.95](#).

Further Information

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 7 - Statements of Case

Further Information

- 7.34** The exchange of statements of case should normally suffice to provide the parties with the information they require to respond to each other's case. Indeed, "it will not usually be either necessary or proportionate... to request (or for the court to order) a party who has served a compliant but concise statement of case to expand upon that pleading by the provision of more detailed further information".⁸⁸ Nonetheless, it may occasionally happen that a party finds it difficult to respond to their opponent's statement of case without some further information or clarification. In that situation, [CPR 18](#) allows the court to order a party to clarify a matter in dispute or to provide additional information regarding such matters.⁸⁹ It must be noted, however, that unlike the former procedure under the [Rules of the Supreme Court \(RSC\)](#) for seeking "further and better particulars",⁹⁰ this rule is not confined to obtaining information concerning the matters raised in the statements of case. Clarification may be ordered not just where the matter in question is contained or referred to in a statement of case; rather, the question is whether the matter is "in dispute in the proceedings". For instance, [CPR 18.1](#) has been relied upon to obtain further information about the attributes of documents in disclosure.⁹¹ At the same time, however, [CPR 18](#) is more restrictive than the [RSC](#) procedure in that further information will only be ordered where it is proportionate and necessary to enable a party to understand the case it has to meet and to prepare its own case.⁹² The court will not order disclosure of information in order to enable a party to establish whether they have other claims against their opponent.⁹³
- 7.35** In *Al Saud v Gibbs*, the court held that there are two conditions which must be met in order to enliven the court's discretion to order that further information be provided by another party:⁹⁴ first, the request must relate to a matter "in dispute", and the dispute must be "in the proceedings" ([CPR 18.1\(1\)](#)); and secondly, the request must be confined to matters reasonably necessary and proportionate to assist the requesting party to prepare and understand the case (PD 18, para.1.1).⁹⁵ If either of those conditions are not satisfied, the court lacks jurisdiction to make an order pursuant to [CPR 18](#).⁹⁶ If both conditions are satisfied, the question "becomes a matter for the court's discretion", having regard to the "overall case management of the action".⁹⁷ In *Loreley Financial*, Males LJ held that the second requirement was necessary to keep litigation within reasonable bounds, and applied not just to commercial litigation, but civil litigation generally.⁹⁸ In that case, the court refused a request that the counterparty provide information identifying the persons who instructed solicitors in the proceedings due to failing to satisfy the second criterion.⁹⁹
- 7.36** Before making an application for further information a party should first make a direct approach to the party from whom the information is sought (PD 18 para.1.1). The party making such a request must indicate a reasonable time by which a response is required. If no response has been forthcoming, the requesting party may apply for an order. In such a situation, the applicant need not serve an application notice on the opponent and the court may deal with the application without a hearing provided that at least 14 days have passed since the time indicated for a response has expired (PD 18 para.5.5). A response, whether to a direct approach or as a result of a court order, must be verified by a statement of truth ([CPR 22.1](#)).
- 7.37** The power to order a party to provide further information may be used by the court as a case management tool.¹⁰⁰ As noted above, after the defence has been filed, the court normally examines the statements of case in order to allocate the case to the appropriate track. If the court considers that a statement of case is insufficiently clear, it may of its own initiative require a party to provide further information. The court may direct that information provided by a party must not be used for any purpose except for that of the proceedings in which it is given, whether the information was given voluntarily or following an order

made under CPR 18.1 (CPR 18.2).¹⁰¹ The court making an order under CPR 18 may use its power under CPR 3.1(3) to make the order subject to conditions or to lay down the consequences of non-compliance with the order. Thus, for example, the court may order that the party's statement of case would be struck out in the event of non-compliance.

- 7.38 The purpose of the jurisdiction is to ensure that the parties and the court have all the information needed for dealing justly and efficiently with the matter in dispute. For example, where an admission in a defence is equivocal or inconsistent with other allegations, the claimant should seek further information under CPR 18, or the court may itself make an order for clarification.¹⁰² The overriding objective and, in particular, the need for proportionality in the conduct of disputes require the court to have regard to the following considerations when dealing with an application for further information: the likely benefit that the information would have for the just determination of the issues; the cost that is likely to be involved in supplying it; whether the request places an unreasonable burden on the respondent; and the respondent's conduct in the litigation.¹⁰³ In assessing the need for such an order the court will want to be persuaded that it is necessary and proportionate and does not involve excessive expense.¹⁰⁴
- 7.39 One of the most important facts that a claimant would want to know at the outset is whether the defendant would be able to satisfy an eventual judgment. For it is plainly a waste of resources and of energy to sue a defendant for money they cannot pay. As a rule, English law provides no means of discovering whether the defendant is judgment-worthy. A claimant cannot oblige the defendant to provide information about their assets and their values, nor normally about the defendant's insurance arrangements. Yet, whether the defendant is insured in respect of the loss claimed is of crucial importance to the claimant's decision whether to proceed with the claim. There are conflicting High Court authorities on whether the court may order disclosure of insurance cover in such situations.¹⁰⁵
- 7.40 In *Harcourt v FEF Griffin*,¹⁰⁶ the claimant brought a claim arising from severe injuries he suffered at a gymnasium run by an unincorporated association. He applied for an order under CPR 18 to find out whether the defendants had insurance cover to meet an award potentially running into millions of pounds, which they could not afford to meet themselves. CPR 18.1(a) provides that the court may "order a party to...clarify any matter which is in dispute in the proceedings". Irwin J held that the purpose of CPR 18.1(1)(a) was to ensure that the parties had all the information they needed to deal efficiently and justly with the matters in dispute, which included establishing whether it would be worthwhile investing the claimant's meagre resources in pursuing the claim or whether to use them instead for his care needs. Irwin J stressed that such disclosure should only be ordered where a party could demonstrate that there was some real basis for concern that a realistic award in the case might not be satisfied and the exercise of any jurisdiction to order disclosure of such information would be approached with caution.
- 7.41 In *West London Pipeline & Storage Ltd v Total UK Ltd*,¹⁰⁷ Steel J declined to follow *Harcourt*. In that case, *Total UK* was sued in a multimillion-pound claim following an explosion in its fuel installation. It sought a contribution from a third party, TAV, which had ceased to trade but was thought to have some liability insurance. Total UK applied for information about TAV's insurance on the grounds that it was necessary in order to determine whether the continuance of the litigation would serve a useful purpose from the perspective of Total UK and the court. Steel J, after referring to a number of authorities which Irwin J had not considered,¹⁰⁸ held that the court had no jurisdiction under CPR 18 to order such disclosure, since it was not information needed to "clarify any matter which is in dispute in the proceedings". As Lewison LJ held in *Dowling v Griffin*, following a consideration of the different approaches in *Harcourt* and *Total UK*, as a matter of precedent, where a "judge has considered and refused to follow a previous decision of a judge of coordinate jurisdiction a third judge must follow the second judge unless clearly convinced that he was wrong".¹⁰⁹
- 7.42 Nonetheless, the decision in *West London Pipeline & Storage Ltd v Total UK Ltd* was distinguished in *Barr v Biffa Waste Services Ltd*.¹¹⁰ The claimants applied for a group litigation order (GLO) under CPR 19, the defendants did not object but requested disclosure of the terms of the claimants' after-the-event (ATE) policy, the existence of which the claimants had already revealed as part of their application. The claimants objected, relying on the *Total UK* decision. Coulson J distinguished that decision on the basis that it did not apply to ATE policies, and granted the order sought. ATE insurance is taken for the sole

purpose of allowing a claimant to pursue litigation that would otherwise not be possible, and at the time of Coulson J's decision it was required to be disclosed in certain circumstances by several rules.¹¹¹ However, it is doubtful whether the basis on which Coulson J distinguished *Total UK* is maintainable. While ATE policies had acquired special importance in litigation on account of the recoverability of ATE insurance premiums until April 2013,¹¹² the reasons for wishing to discover their precise terms were (and are) essentially the same as the reasons for learning about any other insurance cover: to ascertain whether the opponent would be able to meet their liabilities following judgment, be they costs, damages or the recovery of debt. In *Henry v BBC*, Grey J said that "both the amount of cover and the existence of material exclusions in the policy are of obvious relevance to the opposite party, who must be in a position to make informed choices as to the conduct of the litigation".¹¹³ Although this remark was made in relation to ATE insurance, the same must apply to any insurance cover that has a bearing on a party's ability to meet their liabilities arising from the proceedings, as Irwin J observed in *Harcourt*.¹¹⁴

- 7.43 Similarly, in *Avalon Capital Markets Ltd v Duigou*, the court distinguished *Total UK*, where the applicant sought disclosure of documents which provided the defendant with certain indemnities. While such documents may have incidentally provided the applicant with information as to the defendant's capacity to pay a prospective judgment sum or costs award, the existence of the indemnity was a live issue in the case. In turn, the court held that the indemnity should not be treated in the same manner as in *Total UK* "simply because its practical effect may be to 'insure' the Defendants against litigation risk".¹¹⁵
- 7.44 In *XYZ v Various Companies*, Thirwall J engaged in what has been described as a "very limited extension" of the principle established in *Total UK*.¹¹⁶ A group of claimants sought disclosure to determine whether a defendant had sufficient insurance cover to: (1) continue litigation until the end of trial; (2) to satisfy potential damages orders; and (3) satisfy potential costs orders. Thirwall J made the order sought in respect of (1), because it related to case management. However, orders (2) and (3) were rejected as they did not relate to case management.¹¹⁷ Thirlwall J held that the court's broad case management power to make any order for the purpose of managing the case and furthering the overriding objective (CPR 3.1(2)(p)) gave the court jurisdiction to order that the defendant provide a witness statement setting out the details of its insurance in respect of (1). Whether the claimants would be able to enforce a judgment was not a case management matter, but whether the defendant could fund the litigation to trial was. It has subsequently been said that the application for disclosure in *XYZ* was only successful because the "defendant's financial position had a significant impact upon the management of the case up to trial".¹¹⁸
- 7.45 In *Re RBS Rights Issue Litigation*,¹¹⁹ meanwhile, the defendants applied for an order that the claimants provide a copy of any ATE insurance policy which they held, in order to determine whether they should make an application for security for costs against the third party funder. As in *XYZ v Various Companies*, Hildyard J held that the court's jurisdiction to make such an order did not derive from CPR 18.1 but rather CPR 3.1(2)(m), provided that the order was necessary to enable the court to exercise its case management function proportionately and efficiently.¹²⁰ On the facts, however, he refused to grant the order sought, because in reality the defendant was seeking the disclosure with a view to enforcement rather than for a genuine case management purpose. Further, such an order was likely to lead to satellite disputes, which was inconsistent with the overriding objective.¹²¹ Recourse to CPR 3.1(2)(m) is not, however, a panacea to the conflicting decisions applying CPR 18.1, as there is still no clear or coherent approach to the question of whether the words "any matter which is in dispute in the proceedings" are capable of including the depth of an opposing party's pockets or its funding arrangements. In *Al Saud v Gibbs*,¹²² the High Court rejected Irwin J's "liberal and pragmatic approach" in *Harcourt* as impermissibly stretching CPR 18 beyond its terms.
- 7.46 The *Harcourt* line of authority could have far-reaching implications if taken to its logical conclusion. For if insurance cover is disclosable to help claimants decide whether a defendant is worth suing, there would be no reason to stop there. Claimants with a well-founded claim generally have a strong interest in finding out whether the defendants' financial position justifies investing resources in pursuing litigation against them. And if it were permissible to order disclosure of information concerning the defendant's creditworthiness in the course of litigation, there would be no reason in principle why disclosure could not be obtained pre-action for the same purpose. Such a practice would run counter to a long-established principle that in the absence of a proven risk of dissipation of assets for the purpose of defeating a future judgment, the court will not order a defendant to

disclose information about its assets when this is not directly relevant to an issue in the case.¹²³ The subject calls for careful consideration and authoritative guidance from the Court of Appeal.

Footnotes

- 88 *Al Saud v Gibbs [2022] EWHC 706 (Comm); [2022] 1 W.L.R. 3082* [41].
- 89 2025 WB 18.1.2.
- 90 RSC O.18 r.12.
- 91 See, eg, *Crypto Open Patent Alliance v Wright [2023] EWHC 2408 (Ch)*.
- 92 *Lexi Holdings (In Administration) v Pannone & Partners [2010] EWHC 1416 (Ch)*.
- 93 *Trader Publishing Ltd v Autotrader.com Inc [2010] EWHC 142 (Ch)*. Similarly, CPR 18 cannot be used to help a claimant plead a more detailed case where a particulars of claim has already been drafted: *Barness v Formation Group Plc [2018] EWHC 1228 (Ch)*.
- 94 *Al Saud v Gibbs [2022] EWHC 706 (Comm); [2022] 1 W.L.R. 3082* [35].
- 95 See, eg, *Raja v McMillan [2023] EWHC 1110 (Ch)*; *Brown v JMW Solicitors LLP [2022] EWHC 2848 (SCCO)*.
- 96 *Al Saud v Gibbs [2022] EWHC 706 (Comm); [2022] 1 W.L.R. 3082* [35].
- 97 *Al Saud v Gibbs [2022] EWHC 706 (Comm); [2022] 1 W.L.R. 3082* [36].
- 98 *Loreley Financial (Jersey) No 30 Ltd v Credit Suisse Securities (Europe) Ltd [2022] EWCA Civ 1484; [2023] 1 W.L.R. 1425* [59].
- 99 *Loreley Financial (Jersey) No 30 Ltd v Credit Suisse Securities (Europe) Ltd [2022] EWCA Civ 1484; [2023] 1 W.L.R. 1425* [61]–[62].
- 100 *Pacific Biosciences of California, Inc v Oxford Nanopore Technologies Ltd [2018] EWHC 806 (Ch)* [20].
- 101 For the limitation imposed on the use of documents obtained in disclosure see CPR 31.22 and the section on subsequent use of disclosed documents in Ch.15 Disclosure paras 15.239 ff.
- 102 *Akhtar v Boland [2014] EWCA Civ 872* [19]. The order may take the form of permission to amend the pleadings or by way of providing further information: *Philips Pension Trustees Ltd and another v Aon Hewitt Ltd [2015] EWHC 1768 (Ch)* [101].
- 103 *Rowland v Al Fayed [2000] C.P. Rep. 35, Ch*. See also *Al Saud v Gibbs [2022] EWHC 706 (Comm); [2022] 1 W.L.R. 3082* [38].
- 104 *King v Telegraph Group Ltd [2004] EWCA Civ 613; [2005] 1 W.L.R. 2282*; and *Lexi Holdings (In Administration) v Pannone & Partners [2010] EWHC 1416 (Ch)*.
- 105 See also, on the separate question of whether a party can apply for pre-action disclosure of insurance policies, pursuant to CPR 31.16(3), in *Peel Port Shareholder Finance Co Ltd v Dornoch Ltd [2017] EWHC 876 (TCC)*.
- 106 *Harcourt v FEF Griffin [2007] EWHC 1500 (QB)*.
- 107 *West London Pipeline & Storage Ltd v Total UK Ltd [2008] EWHC 1296 (Comm); Arroyo v BP Exploration Co (Colombia) Ltd QBD, 6 May 2010 unreported*.
- 108 See the discussion of *Harcourt and Total UK in Dowling v Bennett Griffin [2014] EWCA Civ 1545* [56] ff.
- 109 *Dowling v Bennett Griffin [2014] EWCA Civ 1545* [58].
- 110 *Barr v Biffa Waste Services Ltd [2009] EWHC 1033 (TCC)*.
- 111 See the summary at *Barr v Biffa Waste Services Ltd [2009] EWHC 1033 (TCC)* [43].
- 112 This was particularly true prior to the introduction of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 s.46, which prevents courts from awarding ATE premiums as part of costs orders, following recommendations made by Jackson LJ in Review of Civil Litigation Costs: Final Report (London: HMSO, 2010). Despite this reform, certain limited exceptions remained: see Ch.28 Costs paras 28.188 ff.
- 113 *Henry v BBC [2005] EWHC 2503 (QB); [2006] 1 All ER 154* [23].
- 114 See the decision in *J Senior v Rock UK Adventure Centres [2015] EWHC 1447 (QB)*, applying *Harcourt v FEF Griffin [2007] EWHC 1500 (QB)* in the context of an employer's liability insurance policy.
- 115 *Avalon Capital Markets Ltd v Duigou [2023] EWHC 1890 (KB)* [28].
- 116 See discussion of XYZ in *Dowling v Bennett Griffin [2014] EWCA Civ 1545* [59].
- 117 See discussion in *Dowling v Bennett Griffin [2014] EWCA Civ 1545* [59].

- 118 *QX v Secretary of State for the Home Department* [2022] EWCA Civ 1541; [2023] KB 472 [139].
119 *Re RBS Rights Issue Litigation* [2017] EWHC 463 (Ch).
120 *Re RBS Rights Issue Litigation* [2017] EWHC 463 (Ch) [104] and [107].
121 *Re RBS Rights Issue Litigation* [2017] EWHC 463 (Ch) [122] and [123], respectively.
122 *Al Saud v Gibbs* [2022] EWHC 706 (Comm); [2022] 1 W.L.R. 3082 [32].
123 Moreover, it is doubtful whether such a practice could be sufficiently effective to be justifiable, since orders for disclosure of assets are notoriously difficult to police and tend to lead to expensive satellite litigation, as experience of freezing orders shows: see Ch.11 Freezing Injunctions paras 11.68 ff, esp. paras 10.262 ff.

Amendments—General Principles

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Mainwork

Chapter 7 - Statements of Case

Amendments—General Principles

- 7.47** It is no exaggeration to say that a party does not fully understand their own case until they see their opponent's response to it. Upon receipt of the defence, the claimant may realise that they have failed to state a material fact, or upon receiving the claimant's reply the defendant may realise that their defence is flawed. In some cases, the inadequacy of the particulars of claim or of the defence may emerge only when a particular document is disclosed, or when the party in question sees the opponent's witness statements or expert report. In some cases, the defect may only become apparent during the trial. Given the importance that English law attaches to deciding the case in accordance with the true facts and the correct application of the law, it is only to be expected that the law should allow for amendments to statements of case. As we shall presently see, some amendments may be made without court permission, but whether or not such permission is required the court exercises control over amendments with a view to promoting the overriding objective of dealing with cases justly, and in particular in order to ensure that amendments do not undermine the court's ability to decide the dispute in a proportionate and expeditious manner and with proper use of court resources.¹²⁴ Amendments to a statement of case do not just include correcting mistakes or changing the grounds of a party's case, but also adding or removing causes of action, or adding, removing or substituting parties. Special considerations apply to amendments which would have the effect of raising a new cause of action after expiry of the relevant limitation period, and amendments which add, remove or substitute parties. These are discussed below.¹²⁵
- 7.48** CPR 17 distinguishes between amendments that do not require the consent of the parties or court permission and amendments that are conditional on such consent or permission. A party may amend their statement of case at any time before it has been served on any other party (CPR 17.1(1)).¹²⁶ Such amendments, pursuant to CPR 17.1, extend to "removing, adding or substituting a party".¹²⁷ The reason is obvious: before a statement of case has been communicated, the opponent has not had a chance to rely on it and therefore an amendment would in no way affect their position. Accordingly, a claimant may unilaterally amend the claim form and particulars of claim between the time of issue and the time that these documents have been served on the defendant. Similarly, a defendant may amend their defence between the time it was filed and the time that it was served on the claimant. It follows that there is only a narrow window for unilateral amendment of statements of case, which closes once the statement of case has been served on the relevant party.
- 7.49** However, the freedom to amend a statement of case prior to service is not absolute, since CPR 17.2 empowers the court to disallow such amendments. It is difficult to imagine situations in which this power might be exercised, other than those involving scurrilous or fraudulent allegations. Given that the discretion would only be exercised in an extreme case, one wonders whether CPR 17.2 is necessary seeing that the court has a general power under CPR 3.4(2)(b) to strike out a statement of case that "is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings".¹²⁸ An application under the latter provision has the added advantage that it is free of a time limit, whereas an application under CPR 17.2 has to be made within 14 days (CPR 17.2(2)). The 14-day period under CPR 17.2 applies even where an application challenging jurisdiction is yet to be resolved.¹²⁹ In theory the wording of CPR 17.2 is wide enough to capture amendments made with the agreement of the parties, although again it is difficult to envisage circumstances in which the court would disallow such an amendment.¹³⁰
- 7.50** Once a statement of case has been served, it may be amended only with the written consent of all other parties or, alternatively, with court permission (CPR 17.1(2)).¹³¹ Thus, if the parties do not agree, the party wishing to amend must apply to court for permission. The permissibility of consensual amendment is obvious, seeing that it is for the parties to define their controversy, not the court. Indeed, parties are expected to consent to amendments which are limited and can comfortably be addressed at

trial.¹³² In *GASL Ireland Leasing A-I Ltd v SpiceJet Ltd*, the court criticised a party for delaying proceedings by refusing to consent to minor amendments to the particulars of claim.¹³³ Where the court gives permission to amend, it will also give directions about consequential amendments to other statements of case and service (CPR 17.3(1)).¹³⁴ Unless the court directs otherwise, the amended statement of case must be filed within 14 days and a copy of the order and of the amended statement of case must be served on every party to the proceedings.¹³⁵

The pre-CPR approach to applications to amend

- 7.51 In general, prior to the CPR the court was tolerant of amendments to statements of case, even very late amendments. The old approach was expressed by Brett MR in the nineteenth century:

“However negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs.”¹³⁶

This principle was echoed by Millett LJ in *Gale v Superdrug Stores Plc*:

“Litigation is slow, cumbersome, beset by technicalities, and expensive. From time to time laudable attempts are made to simplify it, speed it up and make it less expensive. Such endeavours are once again in fashion. But the process is a difficult one which is often frustrated by the overriding need to ensure that justice is not sacrificed. It is easy to dispense injustice quickly and cheaply, but it is better to do justice even if it takes a little longer and costs a little more.”¹³⁷

General approach to applications to amend under the CPR

- 7.52 The view that justice invariably dictates permission to amend, however late, as long as no prejudice is caused and the other parties can be compensated in costs, is untenable. Late amendments could undermine the just resolution of a dispute rather than advance it by causing confusion, wasting litigant and court resources or delaying a final resolution—which cannot be maintained in a system governed by the overriding objective.¹³⁸ Under the overriding objective, an important consideration continues to be whether the proposed amendment is necessary in order to determine the real issues in dispute between the parties. But this is not the only consideration, as Peter Gibson LJ has stated:

“Amendments in general ought to be allowed so that the real dispute between the parties can be adjudicated upon provided that any prejudice to the other party or parties caused by the amendment can be compensated for in costs, and the public interest in the efficient administration of justice is not significantly harmed.”¹³⁹

Thus, the court must have regard not only to the need to decide the case on its real merits, but also to the need to avoid prejudice to the other party and to the need for the efficient administration of justice.

- 7.53 A significant factor in determining whether the court should permit an application to amend is the *lateness* of the proposed amendment.¹⁴⁰ An amendment is late if it could have been advanced earlier,¹⁴¹ accepting that “lateness is not an absolute but relative concept”.¹⁴² Therefore, as Birss LJ held in *ABP Technology Ltd v Voyetra Turtle Beach Inc*, “an amendment made early

in the absolute frame of reference of the proceedings may nevertheless be a ‘late’ one when its timing is considered relative to the date on which the amendment could have been raised, and taking into account the consequences of the difference”. Furthermore, in *Hague Plant Ltd v Hague*, Briggs LJ delineated broadly between ‘late’ amendments, which risked undermining work completed on a matter; and ‘very late’ amendments, which could put the trial date at risk.¹⁴³ Regardless, in looking to whether the lateness should be excused, the court will look to whether there was a “good reason for the delay”.¹⁴⁴ Additionally, generally, the later the amendment, the greater need for particularity – given that further requests for particulars will further delay proceedings.¹⁴⁵

- 7.54** Given the importance of promoting efficient proceedings,¹⁴⁶ the court will allow an amendment only if it has a real prospect of success.¹⁴⁷ There remains some ambiguity as to whether the “real prospect of success” test applies only to amendments which introduce a “new claim”, or also amendments which provide further particulars, based on factual material in support of existing pleadings.¹⁴⁸ In assessing prospects of success, Males LJ held in *CNM Estates (Tolworth Tower) Ltd v Carvill-Biggs* that the “principal focus must be on the pleading in question and no attempt should be made to resolve disputed matters of evidence (conducting a mini-trial)¹⁴⁹. Nonetheless, it is appropriate to consider whether a “proposed pleading is coherent and contains properly particularised elements of the cause of action relied upon”.¹⁵⁰
- 7.55** Where a claim satisfies the real prospect of success hurdle, the court retains a discretion whether to allow the amendment.¹⁵¹ However, as noted in *CNM*, it is generally “not appropriate to consider the strength or weakness of the claim as a factor relevant to that exercise of discretion”.¹⁵² Finally, in *ABP*, Birss LJ observed that the “fact an amendment advances a case permissible under the relevant law is obviously relevant, but it is not determinative. Such an amendment may well be refused if its unjustified lateness is prejudicial to the other party”.¹⁵³
- 7.56** If the claim has no legal foundation in the law as it stands, the possibility that the Supreme Court may change the law is not sufficient justification for an amendment.¹⁵⁴ In an action for fraudulent misrepresentation a claimant could seek an amendment to plead an alternative case based on the defendant’s version of events while continuing to deny that version and being unable to support it by their own statement of truth; but the claimant would have to provide proper evidential foundation for the alternative allegation.¹⁵⁵ However, the court should be astute not to conduct a mini-trial in order to reach a conclusion on whether the proposed amendment has a real prospect of success.¹⁵⁶
- 7.57** Provided a proposed amendment satisfies the threshold test of having a reasonable prospect of success, applications to allow the amendment must necessarily turn on the particular facts and no hard and fast rules are possible. The range of considerations that need to be taken into account is illustrated by the Court of Appeal’s decision in *SX Holdings Ltd v Synchronet*,¹⁵⁷ where the court took into account the following matters: the opportunity that the claimant had to formulate his statements of case adequately at an earlier stage; the expense to which the defendant would be put as a result of an amendment; the waste of court time; the consequences of refusing an amendment to the continuation of the claim; the seriousness of the matters proposed to be added; and the possibility of making an order that would compensate the defendant for any costs or prejudice caused by the amendment so that the parties are treated on an equal footing. Similarly, in *Niprose Investments Ltd v Vincents Solicitors Ltd*, the court permitted the claimant to make “comprehensive amendments” on the basis that their existing statement of claim was “fundamentally defective”, and the strike out and summary judgment application would have succeeded but for the amendments.¹⁵⁸ Permission to amend was granted subject to the claimant paying 71% of the respondent’s costs of the strike out application. The outcome of an application to amend will depend on a fact-based assessment of these considerations.¹⁵⁹ Decided cases can only illustrate the way in which discretion is exercised.
- 7.58** It is apparent from the foregoing that prejudice is still an important consideration. Where the amendment advances an issue which relies on already pleaded facts, the court would be inclined to permit it.¹⁶⁰ But an amendment would not be allowed if it is no longer possible for the respondent to defend themselves against the fresh allegation. Thus, for example, it would be unfair

to allow an amendment alleging that a person who died in a road accident did not wear a seatbelt, if it is proposed after the car wreck has been disposed of.¹⁶¹ Nor was a defendant plumber who had admitted the existence of a contract in his defence allowed to amend it so as to withdraw that admission, at a time when it was no longer possible for the claimant to seek a remedy from the architect or builder involved instead.¹⁶² If permission to amend is sought close to the trial date, the court would refuse permission if it would add an excessive burden on the opponent or risk losing the trial date and delaying the final resolution.¹⁶³

Late applications to amend

- 7.59** While traces of the old approach to allowing late amendments can still be found here and there,¹⁶⁴ the jurisdiction is now governed by the overriding objective and the courts have stressed the distinction between the pre-CPR approach and the current approach.¹⁶⁵ This point was emphasised by Lloyd LJ in *Swain-Mason v Mills & Reeve*, who said that “the court is and should be less ready to allow a very late amendment than it used to be in former times, and that a heavy onus lies on a party seeking to make a very late amendment to justify it, as regards his own position, that of the other parties to the litigation, and that of other litigants in other cases before the court”.¹⁶⁶ This approach is now taken seriously and the court has not hesitated in dismissing late applications for amendments.¹⁶⁷ It was reiterated by Carr J in *Quah v Goldman Sachs International*,¹⁶⁸ and was summarised by Vos LJ in *Nesbit Law Group LLP v Acasta European Insurance Company Ltd* as follows:

“In essence, the court must, taking account of the overriding objective, balance the injustice to the party seeking to amend if it is refused permission, against the need for finality in litigation and the injustice to the other parties and other litigants, if the amendment is permitted. There is a heavy burden on the party seeking a late amendment to justify the lateness of the application and to show the strength of the new case and why justice requires him to be able to pursue it. These principles apply with even greater rigour to an amendment made after the trial and in the course of an appeal.”¹⁶⁹

- 7.60** Even if an application to amend is made sufficiently in advance of trial that the hearing itself is not jeopardised, it still ought to be regarded as late if it could have been made earlier.¹⁷⁰ In either case, the court’s approach to late amendments cannot therefore be radically different from the approach to enforcing compliance with any other process requirements and to case management generally.¹⁷¹ Tolerance of late amendments may undermine the court’s ability to manage the litigation process effectively so as to deliver expeditious resolution by the use of proportionate party and court resources. For this reason the court is unlikely to give permission for late amendments that would raise a fundamentally new case,¹⁷² or where no good explanation is given for the late amendment.¹⁷³ In determining whether to allow an amendment that may necessitate putting off the trial date the court will have regard to whether the party seeking to amend could and should have raised the point earlier and the effect that the proposed amendment would have on the other parties and on court resources.¹⁷⁴ An application for an amendment close to the end of the trial would be unlikely to succeed where no explanation is provided for the delay in raising the point.¹⁷⁵

- 7.61** Conversely, in the case of late amendments which neither prejudice a hearing date, nor cause additional cost or stress to those involved, “the requirements of fairness and justice do not need to be valued any the less or to be compromised merely for the sake of discipline or the marking of disapproval.”¹⁷⁶ Thus, where a late amendment raises a point which has been discussed by the parties before the trial, no prejudice is suffered in allowing the amendment.¹⁷⁷ Similarly, in a claim for assault, battery and false imprisonment, the claimant was allowed, late in the trial, to amend the statement of case so as to allege assault at an earlier stage during the same arrest.¹⁷⁸ Where at the trial both sides dealt with an unpleaded allegation of negligence, the claimant was allowed to amend in order to add that allegation to the statement of case.¹⁷⁹ In exceptional circumstances an amendment may even be allowed after the trial, but before the judge has drawn up and sealed the judgment.¹⁸⁰ However, permission was refused where the party seeking to amend had chosen not to advance the point for several years and had sought to amend only once the

original claim was struck out by the Court of Appeal.¹⁸¹ Similarly, permission was refused where the claimant had delayed revealing the details of their amended claim to the defendants until after receiving the defendants' witness statements.¹⁸²

- 7.62 Lastly, it is worth remembering that it is not always sensible to take points of pleadings, even when they may be technically correct, as Lord Phillips MR observed:

“Where one party advances a case that is inconsistent with his pleadings, it often happens that the other party takes no point on this. Where the departure from the pleadings causes no prejudice, or where for some other reason it is obvious that the court, if asked, will give permission to amend the pleading, the other party may be sensible to take no pleading point. Where, however, departure from a pleading will cause prejudice, it is in the interests of justice that the other party should be entitled to insist that this is not permitted unless the pleading is appropriately amended. That then introduces, in its proper context, the issue of whether or not the party in question should be permitted to advance a case which has not hitherto been pleaded.”¹⁸³

But it must also be remembered that points of pleading cannot be left to appeal. Complaints that a party was permitted to rely upon an unpleaded point at trial cannot be raised on appeal unless, at the trial, the complaining party raised the point and insisted upon a ruling.¹⁸⁴

Amendments after the expiry of the limitation period

- 7.63 Amending a statement of claim by adding a new cause of action or by substituting or adding a party does not, on the whole, give rise to special difficulty because it is always possible in principle for a party to start fresh proceedings and advance a new cause of action against a party to existing proceedings or indeed against a new party. Problems do arise, however, where the substitution or addition of a claim or of a party is sought after the expiry of the limitation period, when the option of starting fresh independent proceedings no longer exists and when such amendment may deny another party an accrued limitation defence.

- 7.64 The [Limitation Act 1980 \(the 1980 Act\)](#) identifies a number of situations where justice may allow a claim to be brought notwithstanding the expiry of the limitation period, such as fraud ([s.32](#))¹⁸⁵ and personal injury ([s.33](#)).¹⁸⁶ But the [1980 Act](#) also provides that, if a claim or a party is added by way of amendment to existing proceedings, the amendment is related back and deemed to have started on the same date as the original action ([s.35\(1\)–\(2\)](#)).¹⁸⁷ This is known as “relation back”.¹⁸⁸ It follows that by amending a statement of case in order to add a claim in respect of which the limitation period has expired, the claimant is effectively depriving the defendant (whether they are a new or existing defendant) of an accrued limitation defence.¹⁸⁹ This is a serious matter because rules of limitation are meant to provide closure to the possibility of suit. They are meant, in other words, to free persons from the risk of litigation after a period provided by statute has elapsed, which normally begins to run when the cause of action arises. Persons have a legitimate expectation to freedom from suit after the expiry of the limitation period, which it would normally be unjust to disappoint.

- 7.65 In this regard, however, Newey LJ held in *Viegas v Cutrale* that “an amendment should be disallowed or, as the case may be, refused where there is a prospect of relation back prejudicing a defendant. The mere fact that there may be an arguable limitation defence will not preclude an amendment. The defendant's position for limitation purposes must be made worse as a result of relation back”.¹⁹⁰ Newey LJ continued, observing that “in determining whether there is a prospect of relation back prejudicing a limitation defence, the court should have regard not only to the defence, but to the claimants' pleadings and to such other materials as are before the court and may cast light on the issue”.¹⁹¹

- 7.66

It is easy to see why the period of limitation should not prevent aggrieved claimants from suing persons who defrauded them or otherwise concealed their wrongdoing. It is also understandable why special provision should be made to allow late claims in personal injury cases where claimants seek redress for harm which may have long-term debilitating consequences for their health and welfare. But it is not immediately clear why special provision should be made in respect of amendments. It is therefore essential to work out the thinking, or the rationale, behind the provisions concerning amendments in order to be able to give the [1980 Act s.35](#) its proper scope.

7. 67 We can start with the assumption that, like other exceptions to or derogations from limitation periods, the statutory scheme of [s.35](#) seeks to balance the competing demands of justice. Thus, there may be circumstances where it would be even more unjust to deny a claimant the possibility of amending their claim to advance a new cause of action or proceed against a new party. At the same time, it is clear that [s.35](#) is not intended to allow limitation-free amendments. On the contrary, the section reiterates the commitment to limitation even where amendments are concerned. [Section 35\(3\)](#) states:

Arrangement of Act

Except as provided by section 33 of this Act or by rules of court, neither the High Court nor any County Court shall allow a new claim within subsection (1)(b) above, other than an original set-off or counterclaim, to be made in the course of any action after the expiry of any time limit under this Act which would affect a new action to enforce that claim.”

For this purpose, an amendment is “made” when it is filed or served, whichever is earlier.¹⁹² The “evil” to which [s.35\(3\)](#) is directed is the “prejudice to defendants losing protection from the [Limitation Act](#) by the reference back to the date of the original writ of any new claim which might otherwise be added”.¹⁹³ [Section 35\(1\)](#) provides that “any new claim made in the course of any action shall be deemed to be a separate action and to have been commenced - (a) in the case of a new claim made in or by way of third party proceedings, on the date on which those proceedings were commenced; and (b) in the case of any other new claim, on the same date as the original action”.¹⁹⁴ “New claim” is defined by [s.35\(2\)](#) as meaning “any claim by way of set-off or counterclaim, and any claim involving either – (a) the addition or substitution of a new cause of action; or (b) the addition or substitution of a new party”.

7. 68 The upshot is that the court has no jurisdiction to allow a party to raise a new cause of action (including a claim by way of set-off or counterclaim), or the addition or substitution of a new party, except as provided by rules of court (or by the [1980 Act s.33](#), which empowers the court to disapply the period of limitation in personal injury actions and with which we need not be concerned here).¹⁹⁵ There is a narrow qualification to this, namely that the defendant will not be prevented from pleading set-off or bringing a counterclaim even though such a claim would be time-barred if brought by way of separate proceedings, provided that the claimant’s claim was brought within the limitation period applicable to the defendant’s set-off or counterclaim. This emerges from the drafting of [s.35\(1\)–\(3\)](#), and is intended to protect the defendant’s position where the claimant commences proceedings very close to the end of the limitation period.¹⁹⁶

7. 69 The [Limitation Act 1980 s.35\(4\)–\(7\)](#) sets out the exceptions to [s.35\(3\)](#) that rules of court may create:

Arrangement of Act

“(4) Rules of court may provide for allowing a new claim to which subsection (3) above applies to be made as there mentioned, but only if the conditions specified in subsection (5) below are satisfied, and subject to any further restrictions the rules may impose.

(5) The conditions referred to in subsection (4) above are the following—

(a) in the case of a claim involving a new cause of action, if the new cause of action arises out of the same facts or substantially the same facts as are already in issue on any claim previously made in the original action; and

(b) in the case of a claim involving a new party, if the addition or substitution of the new party is necessary for the determination of the original action.

(6) The addition or substitution of a new party shall not be regarded for the purposes of subsection (5)(b) above as necessary for the determination of the original action unless either—

(a) the new party is substituted for a party whose name was given in any claim made in the original action in mistake for the new party's name; or

(b) any claim already made in the original action cannot be maintained by or against an existing party unless the new party is joined or substituted as plaintiff or defendant in that action.

(7) Subject to subsection (4) above, rules of court may provide for allowing a party to any action to claim relief in a new capacity in respect of a new cause of action notwithstanding that he had no title to make that claim at the date of the commencement of the action.

This subsection shall not be taken as prejudicing the power of rules of court to provide for allowing a party to claim relief in a new capacity without adding or substituting a new cause of action."

7.70

A clue to the rationale of [s.35](#) is to be found in subsection (5)(a), which makes the addition of a new cause of action conditional on it arising out of the facts already pleaded. The reason for this condition is not difficult to fathom: in such circumstances the defendant is already on notice that the pleaded facts are alleged to give rise to liability on their part. Adding a new cause of action does not disturb the defendant's reasonable expectation of closure and does not therefore inflict an injustice on the defendant. By contrast, refusing an amendment purely because the limitation period has expired in respect of the new cause of action would cause injustice to the claimant as it would be disproportionate to the aim of the limitation period, which is to protect legitimate expectations of closure. It is not the aim of the limitation regime to trip up claimants who have brought proceedings within the limitation period but who misdescribed their cause of action, or failed to mention a cause of action which arose out of the pleaded facts.

7.71

This rationale, which emerges plainly from the wording of [s.35\(5\)\(a\)](#), can be said to be shared by [s.35\(5\)\(b\)](#) and [s.35\(7\)](#), which are concerned with amendments that add a new party and amendments that allow a party to claim relief in a new capacity. [Section 35\(5\)\(b\)](#) requires that the addition or substitution of a new party should be necessary for the determination of the action. [Section 35\(6\)](#) goes on to state that such addition or substitution will be deemed "necessary" only if "(a) the new party is substituted for a party whose name was given in any claim made in the original action in mistake for the new party's name; or (b) any claim already made in the original action cannot be maintained by or against an existing party unless the new party is joined or substituted as plaintiff or defendant in that action".¹⁹⁷ There is no express requirement here limiting the addition or substitution to circumstances where the other parties were on notice of the likely challenge by the new party. But in many of the situations envisaged this will be so. For example, where the original party died or became bankrupt and their interest or liability has passed to another person, as indicated by [CPR 19.6\(3\)\(c\)](#), the existing parties cannot reasonably complain that their expectation of peace from litigation would be disturbed by the substitution of that person for the deceased or bankrupt party. Likewise with [s.35\(7\)](#): a defendant sued by a claimant in a representative capacity, for example, cannot credibly say that an amendment which allows the claimant to sue in their personal capacity disturbs their expectation of closure. Such a defendant was already on notice that they were being sued in connection with a particular transaction or underlying factual situation.

7.72

In the absence of notice on the part of the affected parties, [s.35\(5\)\(b\)](#) lacks sound justification. For why else should the mere fact that a new party needs to be added or substituted justify depriving another of an accrued limitation defence? In this regard it must be remembered that the entitlement to closure after the expiry of the limitation period is wholly independent of the reason

why the claimant did not bring the correct causes or action, or sue the right parties. At the heart of the limitation philosophy is the idea that once a certain time has elapsed citizens should be free of the risk of litigation. Other than fraud, concealment and similar situations, it does not matter why the claim was not brought in time. It matters not whether the claimant made a conscious decision not to sue or whether they forgot, were ill or suffered an accident which prevented them from commencing proceedings. The fact that the claimant made a mistake and sued the wrong defendant first does not justify disturbing the defendant's peace of mind post-limitation, any more than the fact that the claimant only got around to suing after the expiry of the limitation period.

- 7.73 The notion that [s.35\(5\)\(b\)](#) requires the affected parties to have had prior notice, in order for rules of court to allow new parties to be added or substituted, is reinforced by the legislative history of the provision. Before 1965, the courts simply did not permit amendments that introduced a new cause of action or a new party after the relevant time limit under the [Limitation Act 1939](#) had expired. In 1964, [RSC Ord.20 r.5](#) was added:

- (1) The court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.
- (2) Where such an application to the court for leave to make the amendment mentioned in paragraph (3), (4) or (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so.
- (3) An amendment to correct the name of a party may be allowed under paragraph (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party *if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or, as the case may be, intended to be sued.*
- (4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under paragraph (2) if the capacity in which, if the amendment is made, the party will sue is one in which at the date of the issue of the writ or the making of the counterclaim, as the case may be, he might have sued.
- (5) An amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment.

As the italicised words of [r.5\(3\)](#) make clear, an amendment to the parties could be allowed only if there was no reasonable doubt from the start about the identity of the person intending to sue or intended to be sued. In other words, an amendment may be made only where there was prior notice and therefore no reasonable expectation of closure.

- 7.74 Since the [1980 Act](#) was enacted some 15 years after [RSC Ord.20 r.5](#) came into effect, the question is whether [s.35\(5\)\(b\)](#)'s failure to expressly require prior notice signifies an intention to relax the approach found in [r.5\(3\)](#), which plainly did require prior notice in order for the parties' names to be changed. Only if the [1980 Act](#) was intended to widen the circumstances in which permission could be given under [r.5\(3\)](#) to correct a party's name post-limitation, would we be justified in concluding that [s.35\(5\)\(b\)](#) does not require prior notice in such situations. However, the opposite is the case. As the Court of Appeal pointed out in [Adelson](#),¹⁹⁸ the [1980 Act](#) implemented most of the recommendations of the Law Reform Committee's 21st Report on Limitation of Actions. The committee commended the wording of [RSC Ord.20 r.5](#) and the result that it achieved.¹⁹⁹ It is therefore reasonable to suppose that the [1980 Act s.35](#) was not intended to relax the conditions of [RSC Ord.20 r.5](#).

- 7.75 Given that the [1980 Act](#) was not meant to relax the test for allowing amendments after the limitation period, the next question is whether the rule-maker decided to do so. The rules of court which implement the statutory scheme of the [1980 Act s.35](#) are to be found in [CPR 17.4](#) and [CPR 19.6](#).²⁰⁰ They establish two separate regimes for amendments after the expiry of the

limitation period: one for the addition of a new claim or correcting the name of a party; and the other for adding a new party. **CPR 17.4** governs: (1) adding or substituting a new claim arising out of the same facts or substantially the same facts as an existing claim; (2) correcting a mistake as to the name of a party; and (3) altering the capacity in which a party claims. Where the amendment seeks to add or substitute a new party, however, the matter falls to be considered under **CPR 19.6**, which makes special provisions for adding or substituting parties after the end of a relevant limitation period. Broadly speaking, **CPR 17.4** governs amendments that affect only the parties to the existing proceedings, whereas **CPR 19.6** deals with situations where the proposed amendment seeks to bring fresh parties into the proceedings.

- 7.76 As we have seen, parliament did not intend to relax the prior notice requirement as far as correcting a mistake as to the name of a party was concerned, as envisaged by the **1980 Act s.35(5)(b)**. Nor did the rule-maker do so when transposing this condition into **CPR 17.4(3)**, which mimics the wording of **RSC Ord.20 r.5(3)** when it says “The court may allow an amendment to correct a mistake as to the name of a party, but only where the mistake was genuine and not one which would cause reasonable doubt as to the identity of the party in question”. This gives rise to the third and decisive question: is there any reason why the rule-maker might have decided to omit the prior notice requirement in **CPR 19.6**, which deals with adding and substituting parties, when **s.35(5)** appears to be predicated on the requirement of prior notice, and when the rule maker insisted on that condition in **CPR 17.4(3)**?
- 7.77 It has indeed been held that both **CPR 17.4(3)** and **CPR 19.6** only permit the correction of errors of nomenclature, and not of errors of identity. An error of nomenclature occurs where the claimant identifies the correct person as having caused them the injury, but describes them in the pleadings by the wrong name. “An error of identification will occur”, Lord Phillips CJ said in *Adelson*, “where a claimant identifies an individual as the person who has caused him an injury, intends to sue that person, describes him in the pleadings by the correct name, but then discovers that he has identified the wrong person as the person who has injured him”.²⁰¹ For example, a pedestrian who was run over on a pedestrian crossing sues driver A believing him to be responsible, but later discovers that it was driver B who ran him over, makes an error of identity. **RSC Ord.20 r.5(3)** was held not to apply to such situations and nor do **CPR 17.4(3)** and **CPR 19.6**.²⁰² If it were otherwise, every time a claimant discovered that they sued the wrong person they could simply apply for an amendment adding a second and new defendant.²⁰³ And if it emerged that the second defendant was not liable either, the claimant could apply for yet a further amendment to seek to join a third defendant.
- 7.78 The sort of case covered by **CPR 19.6** includes situations where, for example, the claimant is a company and through some confusion the name given in the claim form is that of an associated company, which is therefore served instead of the intended company. Or, to take another example, where the claimant is in dispute with their employers, who are aware of the complaints, but the employer is wrongly named in the claim form and the claim form is served on someone else.²⁰⁴ Such errors tend to be more serious than the errors covered by **CPR 17.4(3)**, which involve typographical errors in the names of existing parties. There is no apparent reason why the rule-maker would insist that the lesser error, that of giving an existing party the wrong name, must have been such as not to cause reasonable doubt as to the identity of the party in question, and yet would permit amendments to correct the more serious error of suing the wrong party regardless of any confusion about the identity of intended party. Since there is no rational reason why the rule-maker should insist on due notice for the lesser error and waive it for the more serious error, we must assume that there was no such intention and that both provisions permit amendment only where the original pleading did not give rise to reasonable doubt about the identity of the party in question. We may therefore conclude that neither the **1980 Act** nor the rules permit a party to be brought into an existing action unless there is some clear connection between the original action and the new party, such that the addition of the new party does not come as a total surprise either to the new party or to other parties.
- 7.79 The rationale of ensuring that reasonable expectation of closure should not be defeated must be kept in mind when dealing with the interpretation of the statute or the rules and the court must therefore be careful not to deprive a party of an accrued limitation defence unjustly. The need to consider the interests of both parties was stressed by Dyson LJ in *Parsons v George*, where he said that on “the one hand, it may be unjust to add a person as a party to proceedings if this would deny him an accrued limitation defence”, but on “the other hand, there are circumstances in which it would be manifestly unjust to a claimant to refuse an amendment to add or substitute a defendant even after the expiry of the relevant limitation period”.²⁰⁵ He went on

to illustrate this by saying that a refusal to permit an amendment would be unjust to a claimant where the defendant is already on notice of the substance of the amendment. “A common example of such a case”, Dyson LJ said, “is where the claimant has made a genuine mistake and named the wrong defendant, and where the correct defendants have not been misled, and they have suffered no prejudice in relation to the proceedings (except for the loss of their limitation defence)”.²⁰⁶ Although the Court of Appeal in *Lockheed Martin Corp v Willis*,²⁰⁷ held, obiter, that in cases falling under CPR 19.6 there is no jurisdictional requirement that the mistake should not have caused reasonable doubt as to the identity of the party in question (though such doubts will be relevant to the exercise of the court’s discretion as to whether to allow such an amendment),²⁰⁸ the correctness of this view may be doubted for the reasons set out above.

7.80 CPR 17.4 and CPR 19.6 are expressed to apply where a period of limitation has expired under the 1980 Act; the Foreign Limitation Periods Act 1984; or any other enactment which allows such an amendment or change, or under which such an amendment or change is allowed (CPR 17.4(1), CPR 19.6(1)).²⁰⁹ However, it has been held that CPR 19.6(1)(c) applies not only to enactments which expressly allow a change of parties after the end of the relevant limitation period, but also to those which impose a limitation period and do not prohibit such a change. Thus it was applied where the relevant limitation period was imposed by the Landlord and Tenant Act 1954 concerning applications for new tenancies under s.29(3).²¹⁰ But CPR 19.6 does not apply in public law proceedings, where the addition or substitution of a party is governed by the court’s inherent jurisdiction.²¹¹

7.81 It is important to bear in mind that the 1980 Act s.35, together with CPR 17.4 and 19.6, only establish jurisdictional conditions to permitting amendments after the expiry of the limitation period. Once a party seeking to add or substitute a new claim or a new party has established the jurisdictional conditions, the court may allow the amendment but is not obliged to do so. The court has discretion, which it must exercise in accordance with the overriding objective, to permit or refuse the proposed amendment.²¹²

Footnotes

124 For what is involved in practice see 2025 WB 17.1.2.

125 See below, paras 7.55 ff and 7.73 ff, respectively.

126 See, eg, *Viegas v Cutrale [2024] EWCA Civ 1122; [2025] 1 W.L.R. 1467*. Since April 2023, CPR 17.1(1) provides that amendments before service can include removing, adding or substituting a party, following the decision in *Rawet v Daimler AG [2022] EWHC 235 (QB)*: see 2025 WB 17.1.2. See also *Beckett v Graham [2025] EWHC 993 (KB)* [65]–[66] in relation to the service of a claim form which had been amended prior to service under CPR 17.1, in the context of what is now PD 5C (electronic filing).

127 See *Civil Procedure (Amendment) Rules 2023 (SI 2023/105) r.11(1)(a)(ii)*.

128 In *Viegas v Cutrale [2024] EWCA Civ 1122; [2025] 1 W.L.R. 1467*, the defendant relied on both provisions.

129 See *Viegas v Cutrale [2024] EWCA Civ 1122; [2025] 1 W.L.R. 1467* [44]–[50].

130 *Cape Distribution Ltd v Cape Intermediate Holdings Plc [2016] EWHC 1786 (QB)*.

131 See, eg, *Qatar Investment and Projects Development Holding Co v Phoenix Ancient Art SA [2023] EWHC 1916 (KB)*.

132 See *GASL Ireland Leasing A-1 Ltd v SpiceJet Ltd [2023] EWHC 1107 (Comm)* [11].

133 *GASL Ireland Leasing A-1 Ltd v SpiceJet Ltd [2023] EWHC 1107 (Comm)* [7(b)], [11].

134 *Gregson v Channel Four Television Corp [2000] C.P. Rep. 60, The Times, 11 August 2000, CA*.

135 PD 17 paras 1.3 and 1.5.

136 *Clarapede & Co v Commercial Union Association* (1883) 32 W.R. 262, 263. See also *Cropper v Smith* (1884) 26 Ch D 700 at 710–711; *Denton v TH White Ltd [2014] EWCA Civ 906; [2014] W.L.R. 3926* [19], discussed in at Blackstone’s Civil Practice 2023 (OUP), para.[31.5] ff.

137 *Gale v Superdrug Stores Plc [1996] 3 All ER 468 at 477; [1996] 1 W.L.R. 1089* at 1098, CA.

138 *Savings & Investment Bank Ltd v Fincken [2003] EWCA Civ 1630*. See also Rix LJ’s view in *Jones v Environcom Ltd [2011] EWCA Civ 1152*; *Worldwide Corp Ltd v GPT Ltd [1998] CA Transcript 1835*; and see *Sowerby v Charlton [2005]*

- EWCA Civ 1610* [42]. Indeed, the Court should have regard to the factors in CPR 1.1(2) when determining amendment applications: *Scipion Active Trading Fund v Vallis Group Ltd* [2020] EWHC 795 (Comm) [63]; *Quah v Goldman Sachs International* [2015] EWHC 759 (Comm) [38(a)]. See discussion by Neuberger J in *Charlesworth v Relay Roads Ltd (In Liquidation)* [1999] 4 All ER 397, Ch; and Ch.1 The Overriding Objective paras 1.5 ff.
- 139 *Cobbold v London Borough of Greenwich* (9 August 1999, unreported, CA). This approach has since been followed in a number of cases: see for example *Law Debenture Trust Corp (Channel Islands) Ltd v Lexington Insurance Co* [2002] EWCA Civ 1673; *Cluley v RL Dix Heating* [2003] EWCA Civ 1595; *Daniels v Thompson* [2004] EWCA Civ 307; [2004] PNLR 33; *Roberts v Williams* [2005] EWCA Civ 1086; [2005] C.P. Rep. 44; and *Hewson v Times Newspaper Ltd* [2019] EWHC 1000 (QB).
- 140 *ABP Technology Ltd v Voyetra Turtle Beach Inc* [2022] EWCA Civ 594 [23]. See also *Finastra International Ltd v The CRDB Bank Plc* [2025] EWHC 509 (Comm) [45(v)–(viii)].
- 141 *ABP Technology Ltd v Voyetra Turtle Beach Inc* [2022] EWCA Civ 594 [23], quoting *CIP Properties v Galliford Fry* [2015] EWHC 1345 (TCC) [19(a)]. See also *Trafigura Pte Ltd v Gupta* [2025] EWHC 1609 (Comm) [11(5)].
- 142 *Hague Plant Ltd v Hague* [2014] EWCA Civ 1609 [33]. See also *ABP Technology Ltd v Voyetra Turtle Beach Inc* [2022] EWCA Civ 594 [30].
- 143 *Hague Plant Ltd v Hague* [2014] EWCA Civ 1609 [32]. See also *Jacobs v Chalcot Crescent (Management) Co Ltd* [2024] EWHC 259 (Ch) [60].
- 144 *ABP Technology Ltd v Voyetra Turtle Beach Inc* [2022] EWCA Civ 594 [23], quoting *CIP Properties v Galliford Fry* [2015] EWHC 1345 (TCC) [19(c)].
- 145 *Rijckaert v El-Khoury* [2023] EWHC 409 (KB) [20].
- 146 See *Gerko v Seal* [2023] EWHC 63 (KB) [190(ii)].
- 147 *CNM Estates (Tolworth Tower) Ltd v Carvill-Biggs* [2023] EWCA Civ 480; [2023] 1 W.L.R. 4335 [48], [69]; *Kawasaki Kisen Kaisha Ltd v James Kemball Ltd* [2021] EWCA Civ 33 [18]. See also 2025 WB 17.3.6.
- 148 *Gerko v Seal* [2023] EWHC 63 (KB) [190]; *Scott v Singh* [2020] EWHC 1714 (Comm) [19]. See 2025 WB 17.3.6.
- 149 *CNM Estates (Tolworth Tower) Ltd v Carvill-Biggs* [2023] EWCA Civ 480; [2023] 1 W.L.R. 4335 [48], citing *Okpabi v Royal Dutch Shell Plc* [2021] UKSC 3; [2021] 1 W.L.R. 1294 [103]–[107].
- 150 *Elite Property Holdings Ltd v Barclays Bank plc* [2019] EWCA Civ 204 [42], cited in *CNM Estates (Tolworth Tower) Ltd v Carvill-Biggs* [2023] EWCA Civ 480; [2023] 1 W.L.R. 4335 [48].
- 151 *CNM Estates (Tolworth Tower) Ltd v Carvill-Biggs* [2023] EWCA Civ 480; [2023] 1 W.L.R. 4335 [49]. See also *ABP Technology Ltd v Voyetra Turtle Beach Inc* [2022] EWCA Civ 594.
- 152 *CNM Estates (Tolworth Tower) Ltd v Carvill-Biggs* [2023] EWCA Civ 480; [2023] 1 W.L.R. 4335 [49].
- 153 *ABP Technology Ltd v Voyetra Turtle Beach Inc* [2022] EWCA Civ 594 [28].
- 154 *Mandrake Holdings Ltd v Countrywide Assured Group Plc* [2005] EWCA Civ 840. See also *Aarons v Brocket Hall (Jersey) Ltd* [2018] EWHC 222 (QB). On the other hand, where the law is unclear, such that the court cannot be sure that the amended claim is bound to fail, and is likely to be considered by the Supreme Court, the claim should not be struck out: *Warner-Lambert Company, LLC v Actavis Group PTC EHF* [2015] EWHC 223 (Pat).
- 155 *Bleasdale v Forster* [2011] EWHC 596 (Ch).
- 156 *Patel v National Westminster Bank Plc* [2015] EWCA Civ 332.
- 157 *SX Holdings Ltd v Synchronet Ltd* [2001] C.P. Rep. 43, CA.
- 158 *Niprose Investments Ltd v Vincents Solicitors Ltd* [2025] EWHC 2084 (Ch) [32]. See also *Bellhouse v Zurich Insurance Plc* [2025] EWHC 1551 (Comm).
- 159 The mere fact that an issue has arisen from witness statements or documents served by one party does not lead to a general presumption in favour of permission to amend: *EDO Technology Ltd v Campaign to Smash EDO* [2006] EWHC 598 (QB).
- 160 *P&O Nedlloyd BV v Arab Metals Co (The UB Tiger)* [2006] EWCA Civ 1300; [2007] 1 W.L.R. 2483. See also *Goode v Martin* [2001] EWCA Civ 1899; [2001] 3 All ER 562; *Binks v Securicor Omega Express Ltd* [2003] EWCA Civ 993; [2003] 1 W.L.R. 2557; and *Nolan and others v Tui UK Ltd* [2013] EWHC 3099 (QB).
- 161 *Lenton v Abrahams* [2003] EWHC 1104 (QB).
- 162 *Cluley v R.L. Dix Heating (a firm)* [2003] EWCA Civ 1595. Where an amendment would be tantamount to withdrawing an admission the principles relevant to granting permission to withdraw admissions come into play: see discussion in Ch.6 Defendant's Response paras 6.24 ff.
- 163 *Swain-Mason v Mills & Reeve* [2011] EWCA Civ 14; and see below discussion on late applications, paras 7.59 ff.
- 164 See for example *Law Debenture Trust Corp (Channel Islands) Ltd v Lexington Insurance Co* [2002] EWCA Civ 1673 (11 November 2002); *Roberts v Williams* [2005] EWCA Civ 1086; [2005] C.P. Rep. 44; *Davies Attbrook (Chemists) Ltd v Benchmark Group Plc* [2005] EWHC 3413 (Ch); [2006] 1 W.L.R. 2493; and see the approach of the judge at first

instance in *Ali v Siddique*, which was overturned by the Court of Appeal: [2015] EWCA Civ 1258. The Court of Appeal's sometimes lax attitude to late amendments, particularly in the early days of the CPR, led Professor Ian Scott to observe that some "practitioners believe that cases in which parties are 'mucked around' by parties making late applications to amend statements of case are far too common and far too readily granted": I.R. Scott, "Amendments to statements of case" (2003) 22 C.J.Q. 101, 104.

165 See for example *Henderson v Dorset Healthcare University Foundation NHS Trust* [2016] EWHC 3032 (QB); *Jacobs v Chalcot Crescent (Management) Co Ltd* [2024] EWHC 259 (Ch) [63].

166 *Swain-Mason v Mills & Reeve* [2011] EWCA Civ 14, [72]; reiterated in *Brown v Innovatorone Plc* [2011] EWHC 3221 (Comm). See also 2025 WB 17.3.8 and the cases cited therein.

167 In *Lombard North Central Plc v Automobile World (UK) Ltd* [2010] EWCA Civ 20, the Court of Appeal upheld the trial judge's decision not to allow an unpleaded point which was clearly raised only in the closing moments of the trial, after all the evidence had been taken and the parties had closed their respective cases. See also *Bleasdale v Forster* [2011] EWHC 596 (Ch); *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd* [2015] EWHC 1345 (TCC); *Ali v Siddique* [2015] EWCA Civ 1258; and *Ahmed v Ahmed* [2016] EWCA Civ 686.

168 *Quah v Goldman Sachs International* [2015] EWHC 759 (Comm) [38]. This decision has been followed in *Jacobs v Chalcot Crescent (Management) Co Ltd* [2024] EWHC 259 (Ch) [60]; *Gregor Fisken Ltd v Carl* [2019] EWHC 3360 (Comm); and *Vilca v Xstrata Ltd* [2017] EWHC 2096 (QB).

169 *Nesbit Law Group LLP v Acasta European Insurance Company Ltd* [2018] EWCA Civ 268 [41].

170 *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd* [2015] EWHC 1345 (TCC) [19].

171 For the general approach to enforcing compliance, see Ch.12 Case Management Pt II.

172 *Law Society v Shah* [2008] EWHC 2515 (Ch); [2009] 1 All ER 752; and *Swain-Mason v Mills & Reeve* [2011] EWCA Civ 14; *Jones v Environcom Ltd* [2011] EWCA Civ 1152.

173 *Bourke v Favre* [2015] EWHC 277 (Ch).

174 *Woods v Chaleff* [1999] CLY 5000, CA; *EDO Technology Ltd v Campaign to Smash EDO* [2006] EWHC 598 (QB); *Hayer v Hayer* [2012] EWCA Civ 257; and *Apache Beryl Ltd v Marathon Oil UK LLC* [2017] EWHC 2462 (Comm). But this factor was given little weight in *Roberts v Williams* [2005] EWCA Civ 1086; [2005] C.P. Rep. 44.

175 *Hayer v Hayer* [2012] EWCA Civ 257; *Lombard North Central Plc v Automobile World (UK) Ltd* [2010] EWCA Civ 20; and *Ali v Siddique* [2015] EWCA Civ 1258.

176 *Groarke v Fontaine* [2014] EWHC 1676 (QB) [31]. See also *Hewson v Times Newspaper Ltd* [2019] EWHC 1000 (QB), where a late amendment was allowed, partly because the matter was to be determined on the papers so there was no loss of a hearing date and limited additional delay and cost occasioned by the amendment.

177 *Ahmed v Ahmed* [2016] EWCA Civ 686.

178 *Kelly v Chief Constable of South Yorkshire Police* [2001] L.T.L. 25 October 2001, CA.

179 *Hall v Bolton Metropolitan Borough Council* [2001] L.T.L., CA.

180 *Stewart v Engel* [2000] 3 All ER 518; [2000] 1 W.L.R. 2268, CA.

181 *Christofi v Barclays Bank Plc* [1999] 4 All ER 437; [2000] 1 W.L.R. 937, CA.

182 *Bourke v Favre* [2015] EWHC 277 (Ch).

183 *Loveridge v Healey* [2004] EWCA Civ 173, (2004) 148 S.J.L.B. 264 [23].

184 *Hawkesworth v Chief Constable of Staffordshire* [2012] EWCA Civ 293.

185 As to which, see *AXA Sun Life Plc v HMRC* [2024] EWCA Civ 1430; [2025] 1 W.L.R. 2179 [90], where the court held that the claimant should indicate in their pleadings whether they are relying upon fraud, concealment or mistake, and when they discovered the fraud, concealment or mistake. See also *Media Trust SPA v BGB Weston Ltd* [2024] EWHC 3277 (KB) [20] ff, on the meaning of "could with reasonable diligence" for the purposes of s.32 of the Limitation Act.

186 For discussion of limitation generally see Ch.26 Finality of Litigation paras 26.4 ff.

187 *Roberts v Gill* [2010] UKSC 22; [2011] 1 AC 240; *Ballinger v Mercer* [2014] EWCA Civ 996; [2014] 1 W.L.R. 3597 [25]. See discussion of the history of the 1980 Act s.35 in *Parsons v George* [2004] EWCA Civ 912; [2004] 1 W.L.R. 3264; and in *Roberts v Gill* [2010] UKSC 22; [2011] 1 AC 240[24]–[37]. Note that outside the context of s.35, the rule of relation back is only a rule of thumb and the court can order that an amendment adding a new claim takes effect on a different date, if appropriate: *Football Association Premier League Ltd v O'Donovan* [2017] EWHC 152 (Ch).

188 *Viegas v Cutrale* [2024] EWCA Civ 1122; [2025] 1 W.L.R. 1467 [17].

189 *Goode v Martin* [2002] EWCA Civ 1899; [2002] 1 All ER 620.

190 *Viegas v Cutrale* [2024] EWCA Civ 1122; [2025] 1 W.L.R. 1467 [31].

- 191 *Viegas v Cutrale* [2024] EWCA Civ 1122; [2025] 1 W.L.R. 1467 [41]. See also Newey LJ's reasoning at [42]–[43], applying these principles and finding that there was a sufficient prospect of relation back prejudicing the defendants for the amendments to be rejected.
- 192 *Hayes v Butters* [2021] EWCA Civ 252; [2021] 1 W.L.R. 2886 [9].
- 193 *Viegas v Cutrale* [2024] EWCA Civ 1122; [2025] 1 W.L.R. 1467 [21], quoting *Grimsby Cold Stores Ltd v Jenkins & Potter* (1985) 1 Const LJ 362.
- 194 Note that a claim is considered to be made not when the application for the amendment is made but on the date of the order allowing the amendment: *Welsh Development Agency v Redpath Dorman Long Ltd* [1994] 4 All ER 10; [1994] 1 W.L.R. 10, CA; and *Diamandis v Willis* [2015] EWHC 312 (Ch). In *Bajwa v Furini* [2004] EWCA Civ 412; [2004] 1 W.L.R. 1971, the court adjourned a hearing on the basis that the specific amendments sought would be revised later. It was held that the amendments had not been properly made until the revised amendments had been approved after the adjournment.
- 195 *SmithKline Beecham Plc v Horne-Roberts* [2001] EWCA Civ 2006; [2002] 1 W.L.R. 1662. 2025 WB 19.6.1.
- 196 *Al-Rawas v Hassan Khan (A Firm)* [2017] EWCA Civ 42. In that case, the claimant solicitors sought to recover unpaid fees from the defendant in debt, and the defendant alleged that the claimant solicitors had been negligent. The six-year limitation period for the defendant's professional negligence claim had started running earlier than the six-year period for the claimant solicitors' action in debt. Consequently, while the claimant solicitors' action in debt was brought (just) within its limitation period, the defendant's claim for professional negligence action was already time-barred at the point of issue. The defendant could not, therefore, pray in aid s.35(1)–(3) so as to argue that he could bring the counterclaim as of right notwithstanding that the limitation period had already expired by the time the claimant's claim was brought. See *Office Properties PL Ltd (In Liquidation) v Adcamp LLP* [2025] EWHC 170 (Ch); [2025] 1 W.L.R. 2287 [43], commenting that, while the Limitation Act 1980 s.35(6)(b) and CPR 19.6(3)(b) employ different language, "the sense is substantially the same".
- 197 *Adelson v Associated Newspapers Ltd* [2007] EWCA Civ 701; [2007] 4 All ER 330 [23]. See also *Yorkshire Regional Health Authority v Fairclough Building Ltd* [1996] 1 All ER 519, 527.
- 198 Law Reform Committee, Final Report on Limitation of Actions (London: HMSO, 1977) Cmnd 6923.
- 199 Brooke LJ explained the origin of the statutory power to make the rule and its limitations in *Martin v Kaisary (No.1)* [2005] EWCA Civ 594; [2005] C.P. Rep. 35.
- 200 *Adelson v Associated Newspapers Ltd* [2007] EWCA Civ 701; [2007] 4 All ER 330 [29].
- 201 *Adelson v Associated Newspapers Ltd* [2007] EWCA Civ 701; [2007] 4 All ER 330.
- 202 In a similar vein, see *Armes v Godfrey Morgan Solicitors (a firm)* [2017] EWCA Civ 323, in which a claimant was not permitted to add a partnership defendant alongside a corporate defendant where the claim against the former had expired at the time of amendment; such an action was not a substitution for the purpose of CPR 19.6.
- 203 See the examples discussed in *Adelson v Associated Newspapers Ltd* [2007] EWCA Civ 701; [2007] 4 All ER 330.
- 204 *Parsons v George* [2004] EWCA Civ 912; [2004] 3 All ER 633; [2004] 1 W.L.R. 3264 [8]–[9].
- 205 *Parsons v George* [2004] EWCA Civ 912; [2004] 3 All ER 633; [2004] 1 W.L.R. 3264 [8]–[9].
- 206 *Lockheed Martin Corp v Willis Group Ltd* [2010] EWCA Civ 927.
- 207 2025 WB 19.6.2.
- 208 The limitation period to which the rule refers is, obviously, the limitation period applicable to the cause of action brought against the new party. *San Vicente v Secretary of State for Communities and Local Government* [2013] EWCA Civ 817; [2014] 1 W.L.R. 966 held that CPR 17.4 does not apply to the time limit for challenging planning decisions under the Town and Country Planning Act 1990 s.288(3).
- 209 *Parsons v George* [2004] EWCA Civ 912; [2004] 1 W.L.R. 3264; although the 1954 Act did not regulate the manner in which such applications should or could be made, save to say that claims had to be brought within the limitation period prescribed by s.29 (3), the substitution or addition of a party was held to be governed by CPR 19.
- 210 *River Thames Society v First Secretary of State* [2006] EWHC 2829 (Admin).
- 211 *Weston v Gribben* [2006] EWCA Civ 1425; [2007] C.P. Rep. 10; *Lockheed Martin Corp v Willis Group Ltd* [2010] EWCA Civ 927; *Lokhova v Longmuir* [2016] EWHC 2579 (QB); [2017] EMLR 7 (the proposed amendments fell within the scope of CPR 17.4(2) so the court had discretion to permit them, but refused to do so on grounds of delay and proportionality); and *American Leisure Group Ltd v Olswang LLP* [2015] EWHC 629 (Ch) (the court had discretion to permit amendments under CPR 19.6(3)(a), but refused to exercise it on grounds of delay).

CPR 17.4—Adding or substituting a new claim, correcting a mistake as to the name of a party, or altering capacity, after expiry of the limitation period

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 7 - Statements of Case

Amendments—General Principles

CPR 17.4—Adding or substituting a new claim, correcting a mistake as to the name of a party, or altering capacity, after expiry of the limitation period

Introduction—questions of fact and of law

7.82

CPR 17.4(2) provides that the “court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as are already in issue on a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings”. Following *Mullaley & Co Ltd v Martlet Homes Ltd*, CPR 17.4 has been accepted to involve a four-stage test, being:

- “(i)Is it reasonably arguable that the opposed amendments are outside the applicable limitation period?
- (ii)Did the proposed amendments seek to add or substitute a new cause of action?
- (iii)Does the new cause of action arise out of the same or substantially the same facts as are already in issue in the existing claim?
- (iv)Should the court exercise its discretion to allow the amendment?”²¹³

Applying the above four-stage test, the court in *Trump v Orbis Business Intelligence Ltd* held that:

“If the answer to the first question is ‘yes’, the court proceeds to consider the next question, and so on, until the final question is reached. If the answer to question (i) or (ii) is ‘no’, the amendments fall to be considered under the usual provision for amendment (CPR 17.1(2)(b)). If the answer to question (iii) is ‘no’ the court has no discretion to allow the amendment.”²¹⁴

Nonetheless, the two central concepts are: “new claim”, and “same or substantially the same facts”.²¹⁵ The onus is on the applicant to show that the amendment is permissible under these provisions and that the court should exercise its discretion to allow it.²¹⁶

7.83

Before considering the two central concepts, it is important to note that CPR 17.4(2) is a rule of court made in the exercise of power conferred by s 35(4) of the Limitation Act.²¹⁷ In turn, the scope of CPR 17.4(2) is limited by s 35(5) of the Limitation Act, which requires a comparison with the facts that “are already in issue”.²¹⁸ In turn, in *Libyan Investment Authority v King*, the claimant could not make an amendment pursuant to CPR 17.4(2) based upon facts which were initially pleaded, but struck out (or abandoned) at the time of the proposed amendment – as such facts were not “in issue”.²¹⁹

7.84 On the face of it, the two concepts (“new claim” and “same facts”) are different in principle: the first is a legal concept and the second a factual concept. A “claim” consists, as the 1980 Act s.35(2)(a) makes clear, of a cause of action, which is inherently a legal construct. By contrast, the second concept is essentially one of fact because it calls for a comparison of two states of fact. However, attempting to draw a hard and fast line between the two concepts on the basis that one is legal and the other is factual is unhelpful and misleading. To begin with, although a “cause of action” is undoubtedly a legal concept, the cause of action consists, as Diplock LJ put it, of “a factual situation the existence of which entitles one party to obtain from the court a remedy against another person”.²²⁰ It follows therefore that whether a claim or cause of action is new turns on questions of fact not law. Similarly, whether a factual situation is the same or substantially the same is not so much a factual or empirical question, but a conceptual question involving an evaluation of sameness.

7.85 This last point was brought out by David Richards J when he said that a “change in the essential features of the factual basis (rather than, say, giving further particulars of existing allegations) will introduce a new cause of action, but it may be permitted under s.35(5)(a) and CPR 17.4(2) if the facts are the same or substantially the same as those already in issue”.²²¹ It follows therefore that the legal concepts of “claim” and “cause of action” are closely interwoven with the factual concepts of “same facts” or “substantially the same facts” etc. Both involve consideration of law, fact and evaluation. In some situations the discussion of one cannot be separated from the discussion of the other, and in some circumstances the conclusion will be essentially a matter of impression.²²² Analysis is important but it must be stated from the outset that in borderline cases the analysis may not produce a clear-cut answer because newness and sameness are matters of degree, and call for value judgments upon which opinions might differ. But the conceptual difficulties involved in the application of tests of newness and sameness should not be allowed to deflect attention from the much more important question of justice. In the final resort, justice depends on whether the defendant had notice of the matters in advance of the proposed amendment. If they are taken by surprise, they would reasonably feel aggrieved about being denied an opportunity to rely on a limitation defence in respect of the new claim.

Newness and sameness

7.86 When deciding whether there is a “new claim” for the purposes of the 1980 Act s.35(2) and the associated CPR 17.4(2), the court has to compare the essential allegations which are in issue in the existing cause of action with those proposed by way of amendment.²²³ It should compare the original particulars of claim with the proposed new particulars.²²⁴ “So in identifying a new cause of action the bare minimum of essential facts abstracted from the original pleading is to be compared with the minimum as it would be constituted under the amended pleading”, Robert Walker LJ explained.²²⁵ If the essential facts are the same, there is no new cause of action and, therefore, no new claim.²²⁶

The concept of newness in this context is different from the common sense concept of newness applied to physical objects. If I buy a shirt that turns out to be defective, the shop will replace it with a new one. This is not what is meant by “new” in the present context, as Longmore LJ made clear in *Berezovsky v Abramovich*:

“A cause of action in tort has, as its essential ingredients, a plea of duty, breach of duty and consequent damage to the Claimant. If it happens to be the case that an element of one of those essential ingredients is misstated, misdescribed or omitted, it does not mean that a correct statement, description or inclusion is a new cause of action; even if the formal result of such a statement, misdescription or omission might technically be that an unaltered claim would have to be dismissed, that still does not mean that a corrective alteration involves or constitutes a new cause of action.”²²⁷

The point of this observation is that, in a sense, any added cause of action is bound to be new, for if it were the same as an existing one it would be objectionable on grounds of redundancy or duplication. The real question is whether the cause of action was already embedded in the original pleading albeit in some way that was defective. This is not so much a matter of technical analysis but of whether the original pleading gave sufficient notice of what the amendment seeks to achieve.

- 7.87 This approach is to be preferred to a formal typological approach which seeks to create categories of sameness. In *Paragon Finance*,²²⁸ a breach of fiduciary duty was pleaded without an allegation of conscious impropriety. Millett LJ regarded the addition of the allegation of intentional wrongdoing as transforming the claim into a new claim. This view was followed in *Bank of Scotland Plc v Watson*.²²⁹ It is not immediately evident why adding intentional wrongdoing should automatically fall foul of the rule if it is already embedded in the pleaded facts. Put differently, there is no reason to turn intentional wrongdoing into a special category for the purpose of the CPR 17.4(2) jurisdiction. The decision in *Bank of Scotland Plc* is better explained on the grounds that the amendment was based on a different factual foundation. The approach adopted by Longmore LJ in *Berezovsky* is to be preferred because it stresses not so much newness as the notice element; that is, whether the original pleading gave the defendant sufficient notice of the substance of the allegations made against them.
- 7.88 Sameness too is not always straightforward. Colman J explained that “substantially the same” implied “something going no further than minor differences likely to be the subject of enquiry but not involving any major investigation and/or differences merely collateral to the main substance of the new claim, proof of which would not necessarily be essential to its success”.²³⁰ It does not mean the same thing as “similar”.²³¹ The key, again, is notice to the defendant. What lies behind Colman J’s dictum is that adding a new claim in such circumstances inflicts no injustice on the defendant because they have been made aware of the challenge in respect of the transaction or events in question. This policy also explains the Court of Appeal’s decision in *Akers v Samba Financial Group*,²³² where the claimant was not permitted to amend in order to raise a constructive trust claim, because the new claim would have required the defendant to undertake investigations well beyond those that it could reasonably be assumed to have undertaken in defending the claim as originally pleaded.
- 7.89 Similar considerations lie behind the power to allow an amendment to correct a mistake as to the name of the party “where the mistake was genuine and not one which would cause reasonable doubt as to the identity of the party in question” (CPR 17.4(3)).²³³ Further, the court may allow an amendment to alter the capacity in which a party claims, if they had that capacity when the proceedings started or have since acquired it (CPR 17.4(4)). Capacity in this context denotes the characteristics which a person has and which give them an ability to sue or be sued on the claim, or which restrict that ability. Put differently, capacity is competence or status to bring or defend a claim. Thus, a claimant who seeks to amend their statement of claim so that they switch from suing in their personal capacity to suing in a representative capacity will come under the rule.²³⁴ Common to these situations is, again, the consideration that the amendment does not advance a challenge of which the defendant did not have some notice within the limitation period in respect of the claim in question.
- 7.90 A distinction has developed between situations where a party seeks to add a new claim which was not advanced before, and situations where a party made a mistake in the description of the claim and now wishes to correct it so that the statement of case advances the claim that was intended in the first place. It is said that the former situation is governed by CPR 17.4(2), while the latter is subject to the court’s general discretion under CPR 3.10 to correct procedural errors. *Evans v Cig Mon Cymru Ltd*²³⁵ illustrates the distinction. The claimant considered bringing a claim for personal injury and for workplace bullying against the defendants. In the event it was decided to pursue only the personal injury claim. However, although the claim form and particulars of claim specified his injuries and were accompanied by a schedule of losses and a medical report, an error occurred and the claim was described as one for “loss and damage arising out of abuse at work”. The Court of Appeal held that an amendment that is merely designed to correct an obvious mismatch between the claim form and the accompanying documents is outside the scope of CPR 17.4(2). In deciding whether the amendment involved a new claim or was merely clarifying the true basis of the claim, it was proper to look not just at the claim form but at the pleaded case as a whole. When looked at that way, it was clear that the claimant was not seeking to raise a new claim but to correct an obvious error.
- 7.91 To the extent that *Evans*²³⁶ draws a distinction between the jurisdiction under CPR 3.10 and CPR 17.4(2), it is liable to bring more confusion to an area of procedure which is already difficult. CPR 3.10 confers on the court a general power to make an order to remedy any error of procedure which has occurred. CPR 17 makes specific provision for dealing with amendments of statements of case generally, and CPR 17.4 makes special provision for amendments to statements of case after the expiry

of the limitation period. The special rules for amendments in [CPR 17](#) therefore displace the general power to cure errors of procedure under [CPR 3.10](#). The result in *Evans* was correct because the amendment was correcting the description of the cause of action which had already been set out in the pleadings. It was squarely within the approach of Longmore LJ in *Berezovsky*, discussed above.²³⁷ Much was made in *Evans* of the fact that the claimant made an error in describing his claim as one of abuse rather than personal injury. However, the fact that the claimant made an error cannot of itself defeat a defendant's legitimate expectation of being free of the risk of litigation after the expiry of the limitation period. What is essential is that the defendant should have had fair notice of the claim omitted in error, as indeed was the position in *Evans*.

“New claim”

7.92

Adding a new claim means adding a new cause of action. A cause of action consists of “every fact which is material to be proved to entitle the plaintiff to succeed, every fact which the defendant would have a right to traverse”.²³⁸ Peter Gibson LJ explained that “the exercise which is required is the comparison of the pleading in its state before the proposed amendment and the pleading in its amended state. What must be examined is the pleading of the essential facts which need to be proved. To define the cause of action the non-essential facts must be left out of account as mere instances or particulars of essential facts”.²³⁹ Where, by an amendment, a duty or obligation is pleaded which differs from the duty or obligation pleaded in the original pleading, there is likely to be a new cause of action. In a claim for damages for negligent professional advice, new allegations relating to periods earlier than those already pleaded amounted to a new cause of action, but the Court of Appeal held that they arose out of substantially the same facts already pleaded and, therefore, permission to amend was given.²⁴⁰

7.93

As we have seen, it was held in *Paragon Finance Plc v D B Thakerar & Co (a firm)*²⁴¹ that an amendment which sought to make an allegation of intentional wrongdoing where previously no intentional wrongdoing had been alleged constituted the introduction of a new cause of action, since intentional and unintentional wrongdoing gave rise to distinct causes of action. The reasoning in this case was followed by the Court of Appeal in *D&G Cars Ltd v Essex Police Authority*,²⁴² where the claimant sued the police for being wrongfully excluded from a tendering process. By way of defence the police alleged that the claimant's misconduct in the performance of an earlier contract justified the exclusion. Following disclosure, the claimant sought to amend its claim to allege that the tender was intentionally rigged by the police to ensure that the claimant lost. By majority the Court of Appeal upheld the refusal to permit the amendments because they asserted for the first time intentional wrongdoing and bad faith, which would give rise to a new cause of action.

7.94

The decision is not free of doubt for two reasons. First, as Patten LJ (dissenting) pointed out, the issue raised by the claim was whether the police were justified in excluding the claimant from the tender process. An allegation of intentional wrongdoing in the tender process can be said to do no more than assert lack of justification for the exclusion of the claimant rather than raise a fresh cause of action. This reasoning is close to that of Longmore LJ in *Berezovsky*, considered above.²⁴³ The second difficulty concerned the claimant's reply to the defence. A question arose whether, in its reply to the defence allegation that the claimant was excluded from the tender for improper conduct, the claimant could advance the allegations that were not permitted by way of amendment. Briggs LJ acknowledged that “it would be a denial of justice if material obtained on disclosure (after close of pleadings) which could be sufficient to destroy a pleaded defence had to be excluded, merely because it was sought to be introduced after the expiry, or arguably after the expiry, of a relevant limitation period, where the claimant had no wish to rely upon it as part of its claim”.²⁴⁴ The majority therefore concluded that the claimant “ought in principle to be at liberty to introduce, by way of reply, and as particulars of the denial of the Police Authority's Reg.23(4) defence [i.e. the justification for exclusion from tender], all those parts of the proposed new case as are properly relevant for that purpose, excluding only allegations of misconduct which are irrelevant, and therefore an abuse”.²⁴⁵ This solution is problematic because if the disclosed material does suggest misconduct on the part of the police, it would be neither practical nor just to expect the claimant to refrain from drawing attention to them. If the disclosed material did provide some basis for allegations of intentional misconduct, the amendment should have been allowed by analogy with *Goode v Martin*,²⁴⁶ discussed below, on the grounds that the new cause of action did not come out of the blue but was founded on facts that emerged from the defendant's disclosure.

7.95 The addition of a new instance of the same breach of duty does not amount to a new cause of action, as distinguished from adding a new breach of duty which would be disallowed.²⁴⁷ Thus it has been said that “when an amendment merely seeks to add a new case of loss and damage, for instance in breach of duty, the amendment will not generally constitute a new claim within the meaning of s.35(2) of the 1980 Act]”.²⁴⁸ For example, in an action claiming breach of a contractual duty to disclose assets, the addition of a further undisclosed asset does not amount to a new cause of action.²⁴⁹ In a claim based on breach of warranty that a car is of merchantable quality, the subsequent addition of a further defect does not amount to a new claim. Similarly, where a personal injuries action is brought in respect of minor injuries an amendment alleging more serious injuries attributable to the same harm inflicted on the claimant does not give rise to a new cause of action. “The fact that a serious illness, as compared with the not very serious injuries pleaded earlier, is pleaded by amendment cannot transform what is otherwise plainly not a new cause of action into a new cause of action”, Peter Gibson LJ has explained.²⁵⁰ The court will therefore allow the introduction of a new head of loss or damage arising out of the original breach of duty.²⁵¹

7.96 Suing in a different capacity from that used in bringing the action may entail advancing a new cause of action, as where a person who has sued as a beneficiary under a will wishes to be added as a representative (or derivative) claimant on behalf of the estate. Such a representative claim will amount to a new cause of action.²⁵²

“The same or substantially the same facts”

7.97 As already noted, the court may allow an amendment which will add or substitute a new claim “only if the new claim arises out of the same facts or substantially the same facts as are already in issue on a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings” (CPR 17.4(2)).²⁵³ In a claim against an architect for negligent supervision of building works, the claimant was allowed to add an allegation of negligent design.²⁵⁴ If a beneficiary under a will wishes to be added as claimant in the capacity of representative of the estate, the representative’s claim is a new claim arising out of the same facts.²⁵⁵ A claim based on allegations of fraud and dishonesty did not involve substantially the same facts as a claim based on allegations of negligence.²⁵⁶ A claimant who brought an action for compensation for being deprived of a beneficial interest in certain assets could amend to make a claim for compensation in respect of a legal interest in the same assets since the new claim was in respect of the same loss as before and stemmed from an already pleaded breach of duty.²⁵⁷ A defamation claim against a defendant on the basis of a statement sent to a newspaper involved similar but not substantially the same facts as a claim based on an interview between the defendant and the same newspaper.²⁵⁸

7.98 In *Goode v Martin*,²⁵⁹ the claimant suffered serious head injuries in an accident on board the defendant’s yacht, which also caused amnesia. She commenced proceedings alleging a certain version of the events. But later she sought to amend her claim to put forward a new version of the facts, which was based on what the defendant himself alleged. By this time the limitation period had expired and the defendant opposed the claimant’s application to amend. Brooke LJ noted that the claimant was not putting forward facts that had not already figured in the litigation, but wished to argue that if the defendant succeeded in establishing his version of the facts, she should still recover because those facts proved negligence. The Court of Appeal held that it would be contrary to the claimant’s right to access to justice under the European Convention on Human Rights (ECHR) art.6 to prevent her from putting her new case before the court. Accordingly, it exercised its power under the 1998 Act s.3(1) to interpret the rule as it then stood by reading in the words “as are already in issue” into CPR 17.4(2).²⁶⁰ Giving effect to *Martin v Goode*, these words are now included in the rule.

7.99 In *Martlet*, Coulson LJ held that *Goode* established that “if a defendant advanced a new case in its defence, and the claimant wanted to say that, even on that basis, the claim was still good, then the claimant should be permitted to do so”.²⁶¹ However, his Lordship observed that it “would be contrary to principle and overly-restrictive to suggest that the *Goode v Martin*

approach can only arise where the amended claim seeks to add nothing at all to that which is pleaded in the defence. The proper approach is, as I have said, more flexible than that”.²⁶² Following *Goode*, Jackson J held that where there are several defendants the claimant may plead a new cause of action against all the defendants that is founded on the facts which have been put in issue by only one defendant.²⁶³

Correcting the name of a party

- 7.100 CPR 17.4(3) empowers the court to “allow an amendment to correct a mistake as to the name of a party, but only where the mistake was genuine and not one which would cause reasonable doubt as to the identity of the party in question”. This power is intended enable the court to permit the corrections of mistakes such as where the claimant described the defendant by an incorrect name, provided that the identity of the intended party was clear from the outset.²⁶⁴ If the intended defendant could not have reasonably known that they were the subject of the claim, the court has no power to correct the error since an amendment adding them as defendant would rob them of the legitimate expectation of being free of the risk of being sued after the expiry of the limitation period.²⁶⁵ As the rule plainly states, the court may permit the correction of a mistake in the naming of a party where there is no reasonable doubt about the identity of the party in question. Whether the mistake would cause reasonable doubt as to the intended party had to be determined objectively having regard to what was said in the claim form in the light of what was known by the parties and the context in which the claim came to be made.²⁶⁶

- 7.101 Say, for instance, a claimant injured in a road accident correctly identifies the offending driver as the person who drove a car bearing a particular registration number, but they give this driver the wrong name in the claim form. After expiry of the limitation period, this error will come within CPR 17.4(3) and the claimant may be given permission to amend. But if the claimant sues the driver of the car, and after the limitation period discovers that the offending driver was someone else altogether who drove a lorry, the claimant would be outside CPR 17.4(3) (and for that matter outside CPR 19.6, discussed below) and the court has no power to allow an amendment that would name the lorry driver instead. In *The Sardinia Sulcis* Lloyd LJ said:

“In all these cases it was possible to identify the intending plaintiff or intended defendant by reference to a description which was more or less specific to the particular case. Thus if, in the case of an intended defendant, the plaintiff gets the right description but the wrong name, there is unlikely to be any doubt as to the identity of the person intended to be sued. But if he gets the wrong description, it will be otherwise.”²⁶⁷

- 7.102 The crucial distinction seems to be between an error of nomenclature, which may be corrected under CPR 17.4(3) (and CPR 19.6, considered further below), and an error as to identity, which cannot be corrected after the limitation period has expired. The point was explained by Lord Phillips CJ in *Adelson v Associated Newspapers Ltd* as:

“An error of identification will occur where a claimant identifies an individual as the person who has caused him an injury, intends to sue that person, describes him in the pleadings by the correct name, but then discovers that he has identified the wrong person as the person who has injured him. An error of nomenclature occurs where the claimant identifies the correct person as having caused him the injury, but describes him in the pleadings by the wrong name.”²⁶⁸

This distinction justifies the decision in *Maman (t/a Fine Watches and Jewellery) v Certain Lloyd's Underwriters subscribing to Policy Number DCAL/08230*,²⁶⁹ in which it was held that CPR 17.4(3) can be used to correct the description of a party in the same way that it can be used to correct a party’s name.

- 7.103

The Court of Appeal in *Best Friends Group v Barclays Bank Plc* outlined a three-stage test for applications made under CPR 17.4(3). A court faced with such an application must ask: (1) was the mistake genuine; (2) was it a mistake which would not have caused reasonable doubt as to the identity of the claimant; and (3) if those questions were answered in favour of the applicant, should the court exercise its discretion in favour of the applicant?²⁷⁰ On the facts, the claimant was not permitted to amend his claim where he had used the trade name of his veterinarian practice instead of his personal name, as this was such as to cause reasonable doubt as to the claimant's identity.

Altering the capacity of a party

7. 104 The court may allow an amendment to alter the capacity in which a party claims, if the new capacity is one which that party had when the proceedings started or has since acquired (CPR 17.4(4)). Thus a court may allow a party who has sued in a personal capacity to amend their claim so as to sue in a representative capacity, or vice versa so as to sue in a personal capacity (or a different representative capacity),²⁷¹ notwithstanding the expiry of the limitation period.²⁷²

Footnotes

- 213 *Mullaley & Co Ltd v Martlet Homes Ltd* [2022] EWCA Civ 32 [38], applied in *Trump v Orbis Business Intelligence Ltd* [2024] EWHC 173 (KB) [58] ff.
- 214 *Trump v Orbis Business Intelligence Ltd* [2024] EWHC 173 (KB) [59].
- 215 *Hoechst UK Ltd v Inland Revenue Commissioners* [2003] EWHC 1002 (Ch) [22].
- 216 See 2025 WB 17.4.1. As an example, see *Lokhova v Longmuir* [2016] EWHC 2579 (QB); [2017] EMLR 7.
- 217 *Libyan Investment Authority v King* [2020] EWCA Civ 1690; [2021] 1 W.L.R. 2659 [36].
- 218 *Libyan Investment Authority v King* [2020] EWCA Civ 1690; [2021] 1 W.L.R. 2659 [36].
- 219 See discussion in *Libyan Investment Authority v King* [2020] EWCA Civ 1690; [2021] 1 W.L.R. 2659 [39]–[54].
- 220 *Letang v Cooper* [1965] 1 QB 232, 242–243. There is a suggestion in that case that a claim and a cause of action are not the same in that a claim may disclose more than one cause of action, however, nothing turns on this distinction in the present context (see also *Lloyds Bank v Rogers* [1999] 3 EGLR 83; and *Bank of Scotland Plc v Watson* [2013] EWCA Civ 6 [75]).
- 221 *Revenue and Customs Commissioners v Begum* [2010] EWHC 1799 (Ch).
- 222 *Paragon Finance Plc v D B Thakerar & Co (a firm)* [1999] 1 All ER 400, 418, CA.
- 223 *Martlet Homes Ltd v Mulalley & Co Ltd* [2022] EWCA Civ 32 [40].
- 224 *Chandra v Brooke North* [2013] EWCA Civ 1559.
- 225 *Smith v Henniker-Major* [2003] Ch 182, 210.
- 226 *Aldi Stores Ltd v Holmes Buildings Plc* [2003] EWCA Civ 1882.
- 227 *Berezovsky v Abramovich* [2011] EWCA Civ 153 [59].
- 228 *Paragon Finance Plc v D B Thakerar & Co (a firm)* [1999] 1 All ER 400, CA.
- 229 *Bank of Scotland Plc v Watson* [2013] EWCA Civ 6.
- 230 *P & O Nedlloyd BV v Arab Metals Co (The UB Tiger)* [2005] EWHC 1276, (Comm); [2005] 1 W.L.R. 3733 [42].
- 231 *Chandra v Brooke North* [2013] EWCA Civ 1559; *Economou v de Freitas* [2016] EWHC 1218 (QB).
- 232 *Akers v Samba Financial Group* [2019] EWCA Civ 416; [2019] 4 W.L.R. 54, discussed in *Martlet Homes Ltd v Mulalley & Co Ltd* [2022] EWCA Civ 32 [52]–[54].
- 233 In *Gregson v Channel Four Television Corp* [2000] C.P. Rep. 60, *The Times*, 11 August 2000, CA, the claimant who had mistakenly issued defamation proceedings against “Channel Four Television Co Ltd”, a dormant company, was allowed to change the party to “Channel Four Television Corporation”.
- 234 *Haq v Singh* [2001] EWCA Civ 957; [2001] 1 W.L.R. 1594. But see: *Millburn-Snell v Evans* [2011] EWCA Civ 577.
- 235 *Evans v Cig Mon Cymru Ltd* [2008] EWCA Civ 390; [2008] 1 W.L.R. 2675.

- 236 *Evans v Cig Mon Cymru Ltd* [2008] EWCA Civ 390; [2008] 1 W.L.R. 2675; see also *Trump v Orbis Business Intelligence Ltd* [2024] EWHC 173 (KB) [44]–[46].
 237 See above, para.7.86.
- 238 *Cooke v Gill* (1873) L.R. 8 C.P. 107 at 116 per Brett J. See also *Paragon Finance Plc v D B Thakerar & Co (a firm)* [1999] 1 All ER 400, CA.
- 239 *Savings & Investment Bank Ltd (In Liquidation) v Fincken* [2001] EWCA Civ 1639; [2002] 48 L.S. Gaz. R. 29 [30]. See also *Chandra v Brooke North* [2013] EWCA Civ 1559; and *Blue Tropic Ltd v Chkhartishvili* [2016] EWCA Civ 1259 [45]–[48].
- 240 *Chantrey Vellacott v Convergence Group Plc* [2005] EWCA Civ 290.
- 241 *Paragon Finance Plc v D B Thakerar & Co (a firm)* [1999] 1 All ER 400; *Blue Tropic Ltd v Chkhartishvili* [2016] EWCA Civ 1259.
- 242 *D&G Cars Ltd v Essex Police Authority* [2013] EWCA Civ 514. See also *Bank of Scotland Plc v Watson* [2013] EWCA Civ 6, in which Lloyd LJ noted a degree of inconsistency between *Paragon Finance and Berezovsky v Abramovich* [2011] EWCA Civ 153, but held that the facts were closer to those of *Paragon Finance*.
 243 See above, para.7.86.
- 244 *D&G Cars Ltd v Essex Police Authority* [2013] EWCA Civ 514 [68].
- 245 *D&G Cars Ltd v Essex Police Authority* [2013] EWCA Civ 514 [71].
- 246 *Goode v Martin* [2001] EWCA Civ 1899; [2002] 1 All ER 620. See also *Nolan and others v Tui UK Ltd* [2013] EWHC 3099 (QB). See Ch.3 Fair Trial para.3.6.
- 247 *Harland & Wolff Pension Trustees Ltd v Aon Consulting Financial Services Ltd* [2009] EWHC 1557 (Ch).
- 248 *Re One Blackfriars Ltd* [2019] EWHC 2493 (Ch) [10].
- 249 *Savings & Investment Bank Ltd (In Liquidation) v Fincken* [2001] EWCA Civ 1639; [2002] 48 L.S. Gaz. R. 29 [32].
- 250 *Savings & Investment Bank Ltd (In Liquidation) v Fincken* [2001] EWCA Civ 1639; [2002] 48 L.S. Gaz. R. 29 [38].
- 251 *Aldi Stores Ltd v Holmes Buildings Plc* [2003] EWCA Civ 1882; and *Harland & Wolff Pension Trustees Ltd v Aon Consulting Financial Services Ltd* [2009] EWHC 1557 (Ch), where the court allowed such amendment on the condition that the claimant would not seek to further amend the particulars of claim to rely on a new breach of duty to recover under the new head of loss. See also *Berezovsky v Abramovich* [2011] EWCA Civ 153, discussed above at para.7.86; and see *Re One Blackfriars Ltd* [2019] EWHC 2493 (Ch).
 252 *Roberts v Gill* [2010] UKSC 22; [2011] 1 AC 240 [41].
 253 See 2025 WB 17.4.4.3; *Trump v Orbis Business Intelligence Ltd* [2024] EWHC 173 (KB) [74]–[87].
- 254 *Brickfield Properties Ltd v Newton* [1971] 3 All ER 328; [1971] 1 W.L.R. 862, CA, discussed in *Martlet Homes Ltd v Mulalley & Co Ltd* [2022] EWCA Civ 32 [47].
 255 *Roberts v Gill* [2010] UKSC 22; [2011] 1 AC 240.
- 256 *Paragon Finance Plc v D B Thakerar & Co (a firm)* [1999] 1 All ER 400, CA.
- 257 *Berezovsky v Abramovich* [2011] EWCA Civ 153; see above, para.7.86.
- 258 *Economou v de Freitas* [2016] EWHC 1218 (QB).
- 259 *Goode v Martin* [2001] EWCA Civ 1899; [2002] 1 All ER 620, discussed in *Martlet Homes Ltd v Mulalley & Co Ltd* [2022] EWCA Civ 32 [55] ff. See also *Nolan and others v Tui UK Ltd* [2013] EWHC 3099 (QB); Ch.3 Fair Trial para.3.6.
- 260 *Goode v Martin* [2001] EWCA Civ 1899; [2002] 1 All ER 620 [46]–[47]. This ruling does not help a claimant who wishes to add a new claim in refutation of the defendant's allegations: *Compagnie Noga D'Importation Et D'Exportation SA v Australia and New Zealand Banking Group Ltd and others (No.5)* [2005] EWHC 225, Comm; and see *Bleasdale v Forster* [2011] EWHC 596 (Ch). See also *Martlet Homes Ltd v Mulalley & Co Ltd* [2022] EWCA Civ 32.
 261 *Martlet Homes Ltd v Mulalley & Co Ltd* [2022] EWCA Civ 32 [73].
 262 *Martlet Homes Ltd v Mulalley & Co Ltd* [2022] EWCA Civ 32 [80].
 263 *Charles Church Developments Ltd v Stent Foundations Ltd* [2006] EWHC 3158 (TCC). See also *Secretary of State for Transport v Pell Frischmann Consultants Ltd* [2006] EWHC 2909 (TCC).
 264 See discussion above at paras 7.74–7.76.
- 265 See for example *Morgan Est (Scotland) Ltd v Hanson Concrete Products Ltd* [2005] EWCA Civ 134; [2005] 1 W.L.R. 2557.
- 266 *ABB Asea Brown Boveri Ltd v Hiscox Dedicated Corporate Member Ltd* [2007] EWHC 1150 (Comm).
 267 *The Sardinia Sulcis v The Al Tawwab* [1991] 1 Lloyd's L.R. 201, CA.
 268 *Adelson v Associated Newspapers Ltd* [2007] EWCA Civ 701; [2007] 4 All ER 330 [29].

- 269 *Maman (t/a Fine Watches and Jewellery) v Certain Lloyd's Underwriters subscribing to Policy Number DCAL/08230 [2016] EWHC 1327 (QB)*.
- 270 *Best Friends Group v Barclays Bank Plc* [2018] EWCA Civ 601 [3]. See 2025 WB 17.4.5.
- 271 *Haq v Singh* [2001] 1 W.L.R. 1594 (CA).
- 272 *Jogie v Sealy* [2022] UKPC 32, especially at [46].

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CPR 19.6—Adding or Substituting a Party after the Expiry of the Limitation Period

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 7 - Statements of Case

CPR 19.6—Adding or Substituting a Party after the Expiry of the Limitation Period

The basic conditions

- 7. 105** The power under [CPR 17.4\(3\)](#) to allow an amendment correcting the name of a party must be distinguished from the power to allow an amendment that involves the addition of a new party, under [CPR 19.6](#). In the former there is no change in the parties to the proceedings, while in the latter a person who has not been a party is joined to the proceedings. [CPR 19.6\(2\)](#) permits the addition or substitution of a party, but only if: (a) the relevant limitation period was current when the proceedings were started; and (b) the addition or substitution is necessary. In terms of the first requirement, it appears to be enough for the claimant to show a reasonable argument that the relevant limitation period was current when proceedings were started.²⁷³ As to the second requirement, [CPR 19.6\(3\)](#) defines necessity as follows:

The addition or substitution of a party is necessary only if the court is satisfied that—

- (a) the new party is to be substituted for a party who was named in the claim form in mistake for the new party;
- (b) the claim cannot properly be carried on by or against the original party unless the new party is added or substituted as claimant or defendant; or
- (c) the original party has died or had a bankruptcy order made against them and their interest or liability has passed to the new party.

- 7. 106** The court has a discretion as to whether to make an order for substitution pursuant to [CPR 19.6](#), and considers factors including the extent of delay and the overriding objective.²⁷⁴ Comparing this rule with [CPR 17.4\(3\)](#), one is struck by the omission of the jurisdictional condition in [CPR 17.4\(3\)](#) that “the mistake was not one which would cause reasonable doubt as to the identity of the party in question”. The omission is surprising because, as discussed above, the rationale of the [1980 Act s.35](#) is to allow amendments after the expiry of the limitation period only where the affected party has had some prior notice or warning that its rights may be challenged. In the absence of such notice there is no justification for disturbing an accrued limitation defence. Further, as explained above, the legislative history suggests that prior notice is a jurisdictional condition.²⁷⁵

- 7. 107** Given the centrality of prior notice to the jurisdiction to permit amendments after the limitation period has expired and the legislative history, it had long been assumed that prior notice is a jurisdictional precondition to permitting amendments under [CPR 19.6](#), just as it is to permitting amendments under [CPR 17.4\(3\)](#). Beatson J was therefore correct to refuse to add a new party in *Lockheed Martin Corp v Willis*,²⁷⁶ on the basis that at the time the claim form was issued, the mistake in naming the original defendant had caused reasonable doubt as to the identity of the party intended to be sued. It was surprising that the Court of Appeal overruled his decision on this point and held that a claimant did not have to show that the mistake had not misled the other party, or had not caused reasonable doubt as to the identity of the party it intended to sue.²⁷⁷ The Court of

Appeal's decision on this point was obiter, as the court itself was careful to stress,²⁷⁸ and it is therefore suggested that we have not heard the last word on the subject.

7. 108 The Court of Appeal set considerable store by the fact that neither the *1980 Act* s.35 nor *CPR 19.6* make it a condition that the mistake should not have been misleading. However, there is no discussion of the rationale of s.35 nor any explanation of why the requirement of prior notice should have been incorporated into *CPR 17.4(3)* but not into *CPR 19.6*. As is suggested above, there is no proper basis upon which the requirement would be imported into the former provision but not the latter.²⁷⁹ It is tolerably clear from *Adelson* that Lord Phillips CJ assumed, as indeed have other courts before and since, that *CPR 19.6* must be construed as if it contained the conditions formerly contained in *RSC Ord.20 r.5* (including the prior notice condition in r.5(3)), and latterly in *CPR 17.4(3)*.²⁸⁰ While no such premise was expressly set out, *Adelson* contains no hint of a reason why prior notice should be required under *CPR 17.4(3)* but not under *CPR 19.6*, which Lord Phillips CJ would no doubt have articulated had he considered it possible that such a distinction existed. But in *Lockheed*, Rix LJ did not agree that such an assumption had been made by the courts or was justified.²⁸¹

7. 109 The Court of Appeal in *Lockheed* drew attention to a number of decisions which it thought provided examples where the addition of a new defendant was allowed notwithstanding that the defendant had no prior knowledge that its rights were being challenged. It is suggested that in each case cited, the defendant in fact knew or ought to have known that its rights were likely to be challenged. One such case was *SmithKline Beecham Plc v Horne-Roberts*,²⁸² which Rix LJ discussed as follows:

“It may well be that, in many cases, the justice of the matter will militate against a successful application under [CPR 19.6] unless the correct defendant has known about the complaint at some time before the limitation period has passed. However, even that cannot be laid down too firmly as a principle, as the *SmithKline* case itself demonstrates. For in that case, which this court in *Adelson* referred to and relied on without any note of disapproval, the claimant was allowed to substitute SmithKline for Merck, even though SmithKline is of course an entirely different organisation from Merck, it must be entirely irrelevant what Merck may have thought about the matter, and SmithKline could not have known anything about the litigation until service or shortly before service, and in any event after the expiry of the limitation period.”²⁸³

7. 110 The choice of *SmithKline* in support of the Court of Appeal's view on prior notice is strange. In the 1990s, an alarming rumour spread throughout the country (subsequently shown to be false) that the MMR vaccine caused developmental defects in children. The claimants brought proceedings against Merck, believing that to be the manufacturer of the vaccine used on their child. When it turned out that the particular batch of vaccine administered to the child was manufactured by SmithKline, they obtained permission to substitute them for Merck. Given the massive publicity and the public panic that ensued (the deleterious consequences of which are still felt today), and the talk of worldwide class actions, there could not have been a vaccine manufacturer in the entire world who had not been aware that they might be sued. True, SmithKline had not heard of the particular claimants prior to the limitation period expiring, but equally they cannot possibly have been surprised to have been sued in respect of the product in question.

7. 111 Although the prior notice was not as clear in the other cases relied on by the Court of Appeal as illustration of the absence of the prior notice requirement, the circumstances of each indicated some connection between the defendant sued and the new defendant.²⁸⁴ As Lord Phillips CJ pointed out in *Adelson*, almost “all the cases involve circumstances in which (i) there was a connection between the party whose name was used in the claim form and the party intending to sue, or intended to be sued, and (ii) where the party intended to be sued, or his agent, was aware of the proceedings and of the mistake so that no injustice was caused by the amendment.”²⁸⁵ This, it is suggested, is a threshold requirement for the addition of a new party after the expiry of the limitation period. It is this requirement which guarantees that the new party had warning of proceedings prior to the expiry of limitation, which in turn justifies troubling the party after the expiry of limitation. Where there is no such prior warning no amount of mistake on the part of the claimant can justify disturbing the defendant's peace (other than where the defendant contributed to the mistake or engaged in fraud, concealment and the like).²⁸⁶

Party named in mistake—CPR 19.6(3)(a)

7. 112

The meaning of [CPR 19.6\(3\)\(a\)](#) was explained by Lord Phillips CJ in *Adelson v Associated Newspapers Ltd*:

(i) The mistake must be as to the name of the party in question and not as to the identity of that party. Such a mistake can be demonstrated where the pleading gives a description of the party that identifies the party, but gives the party the wrong name. In such circumstances a ‘mistake as to name’ is given a generous interpretation.

(ii) The mistake will be made by the person who issues the process bearing the wrong name. The person intending to sue will be the person who, or whose agent, has authorised the person issuing the process to start proceedings on his behalf.

(iii) The true identity of the person intending to sue and the person intended to be sued must be apparent to the latter although the wrong name has been used.

(iv) Most if not all the cases seem to have proceeded on the basis that the effect of the amendment was to substitute a new party for the party named.

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An error of identification, Lord Phillips CJ explained, will occur where a claimant identifies an individual as the person who has caused them an injury, intends to sue that person, describes them in the pleadings by the correct name, but then discovers that they have identified the wrong person as the person who has injured them. An error of nomenclature occurs where the claimant identifies the correct person as having caused them the injury, but describes them in the pleadings by the wrong name.²⁸⁸ The identification of a party by reference to a description means identification by reference to the aspect of the description that is material from a legal point of view to the claim made.²⁸⁹

7. 113

Two factors are critical in applications under [CPR 19.6\(3\)\(a\)](#). First, the “mistake must be as to the name of the party rather than as to the identity of the party, applying the generous test of this type of mistake laid down in *Sardinia Sulcis*".²⁹⁰ Second, whether the party who is sought to be joined had reason to believe that they were free from litigation. If they did not know that their actions or rights were challenged it would normally be unjust to deprive them of a limitation defence.²⁹¹ This last proposition was doubted in *Lockheed Martin Corp v Willis Group Ltd*,²⁹² where as we have seen the Court of Appeal said that it was not a necessary jurisdictional condition in an application under [CPR 19.6\(3\)\(a\)](#) to show the mistake had not misled the other party or had not caused reasonable doubt as to the identity of the party intended to be sued. Even if this view were correct, which may be doubted, the question of whether the party to be joined knew of the challenge to their rights must at the very least remain an important consideration in the exercise of discretion, as the court in *Lockheed* accepted.²⁹³

7. 114

In many situations coming under the exceptions, such as the example just mentioned, the party to be added would know that their rights are being challenged and could not therefore have assumed that they had acquired peace from litigation. Where X, instead of Y, is named as claimant in an action for breach of contract, it will inflict no hardship on the defendant if Y were substituted for X. The defendant knew that they were being challenged in respect of the alleged breach. Nor can there be an injustice where an original party has died and their successor in title becomes claimant or defendant. But difficulties may arise where A is named as defendant, but the claimant later realises that they should have sued B instead. If B knew all along that the claimant had made a mistake and that they, B, were the intended defendant, B would suffer no injustice if they were substituted for A.²⁹⁴ It would, however, be different where B was ignorant of the mistake and had no reason to assume that they were the intended defendant in the proceedings.

7. 115

CPR 19.6(3)(a) states that “the new party is to be substituted for a party who was named in the claim form in mistake for the new party”. The meaning of these words has caused some difficulty. One thing is, however, clear: this clause cannot encompass just any mistake made in suing a particular defendant. Claimants always intend to sue the person who they believe is liable, otherwise there is no point in bringing an action. If CPR 19.6(3)(a) applied whenever a claimant discovered that they had not sued the right person, there would be no limit whatever on the claimants’ freedom to pull in new defendants whenever they discovered that they had been barking up the wrong tree. Under such an interpretation CPR 19.6(3)(a) and the 1980 Act s.35(6) would present no restriction on suing new defendants after the limitation period. Since s.35(6) was intended to limit the possibility of suing new parties after the expiry of the limitation period, the mistake must be more limited in scope. At the same time, it is clear that the mistake is wider than a mistake made when a claimant intends to sue a particular defendant but gives the defendant the wrong name (e.g. naming the defendant as John Smith instead of John Roberts), to which CPR 17.4(3) would apply.

7. 116

For the reasons given earlier, it is unlikely that the legislature or rule-maker intended to ignore the interests of a party who had reasonable grounds for believing that their rights were no longer challengeable. It is suggested that CPR 19.6(3) cannot be used to allow the addition of a person as a defendant after the limitation period if that person did not know, and had no reasonable grounds for suspecting, that they were sued or that there was a reasonable likelihood that they would be. At the very least, this consideration should be relevant to the exercise of discretion. This view is supported by *Adelson v Associated Newspapers Ltd*, where Lord Phillips CJ said:

“Almost all the cases involve circumstances in which (i) there was a connection between the party whose name was used in the claim form and the party intending to sue, or intended to be sued and (ii) where the party intended to be sued, or his agent, was aware of the proceedings and of the mistake so that no injustice was caused by the amendment. In *SmithKline*, however, Keene LJ accepted that the *Sardinia Sulcis* test could be satisfied where the correct defendant was unaware of the claim until the limitation period had expired. We agree with Keene LJ’s comment that, in such a case, the Court will be likely to exercise its discretion against giving permission to make the amendment.”²⁹⁵

7. 117

Thus, in *SmithKline Beecham Plc v Horne-Roberts*,²⁹⁶ discussed above, Keene LJ explained that “one is reluctant to accept an interpretation of [the 1980 Act] section 35(6) which might allow the substitution of a new defendant unconnected with the original defendant and unaware of the claim until after the expiry of the limitation period. But on further consideration it seems to me that any potential injustice can be successfully avoided by the exercise of the court’s discretion under section 35”.²⁹⁷ He went on to clarify that the 1980 Act s.35 and CPR 19.6 are not limited to merely correcting a typographical error in a party’s name. Section 35 must go further than that, since it “expressly allows the substitution of a new party for the original named party. Almost by definition such substitution could be said to involve a change in the identity of the party”.²⁹⁸ The correct test, the Court of Appeal held, was that explained in *The Sardinia Sulcis*: can the intended party be identified by reference to a description found in the particular case as denoting the person intended to be sued—for example, landlord, employer, owners or ship-owners?²⁹⁹ On the facts, Keene LJ concluded “that the claimant always intended to sue the manufacturer of the identified vaccine and that that is sufficient to give the court the power to substitute the true manufacturer under [the 1980 Act s.35 and CPR 19.6]”.³⁰⁰ Crucially, as emphasised above, the grant of permission in *SmithKline* did not disturb the new party’s expectation of peace. Given the controversy surrounding the use of the MMR vaccine, SmithKline must have been aware that some complaints would be directed against them. Thus, while they were not aware of the particular claimants before expiry of the limitation period, they could not have had any reasonable expectation of peace in respect of the product in question.

7. 118

The approach in *The Sardinia Sulcis* was also followed in *Parsons v George*,³⁰¹ where Dyson LJ stated:

“the power to change a party after the expiry of a limitation period can be exercised where a party has been wrongly identified, but ‘it was possible to identify the intending claimant or intended defendant by reference

to a description which was more or less specific to the particular case'. Thus, for example, if it is clear that the claimant intended to sue his employer or the competent landlord, but by mistake named the wrong person, an application to substitute the person who in fact answers the description of employer or competent landlord would come within CPR 19.6(3)(a)."³⁰²

Since, on the facts of that case, the claimants always intended to sue the persons who answered the description of competent landlord, and named the defendants because they mistakenly believed that they answered that description, they were allowed to amend to name the landlord correctly. Dyson LJ observed that the solicitors who had been served were also acting for the landlord, and must have understood that the claimants were intending to apply for a new tenancy from the competent landlord.

7. 119 An interesting case of this kind is *Kesslar v Moore & Tibbits (a firm)*.³⁰³ The claimant wished to sue her solicitor for professional negligence in connection with a conveyance. The normal practice is to sue the firm in which the solicitor was a partner. But the firm in which the solicitor was a partner at the time, Kundert & Co, had amalgamated with Moore & Tibbits. She therefore sent a letter before claim to Moore & Tibbits. However, unknown to the claimant, the solicitor had never become a partner of Moore & Tibbits and consequently this firm was not liable. In the pre-action correspondence between the claimant and Moore & Tibbits, the firm gave no indication that there was a different firm that the claimant should be suing, even though they were aware that the claimant wished to sue her former solicitor and that solicitor's firm. After commencement of the proceedings and after expiry of the limitation period, Moore & Tibbits raised the objection that they were the wrong target for the claim. The claimant applied to substitute in the solicitor and Kundert & Co; Moore & Tibbits objected to this on the grounds that CPR 19.6(3)(a) did not apply because there was no mistake about identity, as the claimant always intended to sue Moore & Tibbits. The Court of Appeal rejected this argument. Buxton LJ reviewed the authorities and said:

"Those authorities, in my judgment, give a simple answer to the present case. Miss Kesslar and her advisers always intended to sue in respect of Miss Roughley's mistake. The error that they made was to think that that alleged negligence on Miss Roughley's part was effectively impleaded by instituting the action against Moore & Tibbits (incorporating Kundert & Co). In my judgment it is simple and straightforward that the latter party was named in the claim in mistake for the new party, Mr Kundert and Miss Roughley, which is now sought to be substituted for it. That really is the end of the matter."³⁰⁴

It must be assumed that the solicitor was aware throughout of the intended claim, not least because Moore & Tibbits informed their insurers of the claimant's intentions, who were also the insurers of Kundert & Co.

7. 120 The court will be astute to detect improper practices designed to keep an intended party in the dark. In *Kesslar*, the Court of Appeal was critical of the defendant's failure to point out to the claimant her mistake. Sedley LJ said that the "withholding by one party, until it is believed to be too late to do anything about it, of the fact that it is not the person whom the claimant manifestly intends to sue in my judgment runs counter to the overriding objective". He went on to say that "the effect of the defendant's silence about the status of [Kundert & Co] until the limitation period had expired was to let the claimant walk into a trap. It would only be if in this situation the law made the substitution of the correct defendant impossible that I would be prepared to dismiss this appeal. But the Act and Rules contain no such barrier".³⁰⁵

New party necessary for the claim to be carried on—CPR 19.6(3)(b)

7. 121 The second ground on which permission to add or substitute a party may be granted is CPR 19.6(3)(b), where "the claim cannot properly be carried on by or against the original party unless the new party is added or substituted as claimant or defendant".³⁰⁶ In *Martin v Kaisary (No.1)*,³⁰⁷ the claimant sued for professional negligence the surgeon who treated him privately in an NHS hospital. He later came to the view that the hospital staff contributed to his conditions and sought to add the NHS as defendants. The Court of Appeal upheld the decision not to allow the joinder. It held that, although the court would have to examine the actions of the NHS staff in order to determine the surgeon's liability, it would not be necessary to

determine their responsibility. Put differently, it is not enough that the actions of a person who is not party to the proceedings are found to be relevant to the proceedings. To pass the test of necessity, it has to be shown that without determining the liability of the non-party, the court cannot adequately determine the defendant's liability.³⁰⁸

- 7.122 A paradoxical illustration of the operation of CPR 19.6(3)(b) is provided by *Parkinson Engineering Services Plc (In Liquidation) v Swan*.³⁰⁹ A company sued its previous administrators for negligence, and when it became apparent that the claim was statute-barred under the Insolvency Act 1986 s.20, the company liquidator sought to be substituted as claimant for the company because a liquidator's claim under s.212 was not statute-barred. The Court of Appeal approved of the substitution because the original action could not be determined without the substitution of the liquidator, whereas if brought by the liquidator under s.212 it could be. The liquidator's claim was the same in all respects as that of the company, so no injustice could be asserted by the defendants. The paradox in this situation is that what made the original action impossible to pursue was limitation, whereas it is normally the new claim that raises limitation issues.

- 7.123 The interaction between CPR 19.6 and CPR 17.4 is illustrated by *Roberts v Gill*.³¹⁰ The claimant sued as beneficiary under a will the solicitors who advised the testator in respect of professional negligence. After the expiry of the limitation period he sought to be added in a representative capacity suing on behalf of the estate. Although the case did not strictly come under CPR 17.4(4), since the claimant did not seek to alter the capacity in which he already claimed but to bring a claim in an additional capacity, the amendment was in principle possible since a claim in the new capacity was a new claim capable of being brought under CPR 17.4(2) as arising from the same facts.³¹¹ As a representative of the estate, the claimant could not proceed without adding the administrator of the estate as a party, which could be done only in accordance with CPR 19.6, which in turn required the claimant to show that the original claim could not be carried on without the administrator. However, the original claim in a personal capacity did not require the addition of the administrator. The administrator could become a necessary party in accordance with CPR 19.6 only if the new representative claim were permitted, which would then automatically be deemed to have been brought when the original claim was brought. However, the Supreme Court held that it would be an abuse of process to make amendments in stages; that is, to first permit the adding of a representative claim and then permit the adding of a new party, who could not have been added but for the first amendment. The application to amend therefore failed.

The original party has died or become bankrupt—CPR 19.6(3)(c)

- 7.124 CPR 19.6(3)(c) is self-explanatory. It allows for the addition or substitution of a party if the original party has died or had a bankruptcy order made against them and their interest or liability has passed to the new party (reflecting the 1980 Act s.35(6)).

Footnotes

273 *Brownlee v Four Seasons Holdings Incorporated* [2019] EWHC 2533 (QB).

274 *Goldkorn v MPA (Construction Consultants) Ltd* [2025] EWHC 660 (TCC) [18]. See also *Allianz Funds Multi-Strategy Trust v Barclays Bank Plc* [2023] EWHC 2015 (Ch).

275 See above, paras 7.69–7.75.

276 *Lockheed Martin Corp v Willis Group Ltd* [2009] EWHC 1436 (QB).

277 *Lockheed Martin Corp v Willis Group Ltd* [2010] EWCA Civ 927.

278 *Lockheed Martin Corp v Willis Group Ltd* [2010] EWCA Civ 927 [26].

279 See above, paras 7.69–7.75.

280 *Adelson v Associated Newspapers Ltd* [2007] EWCA Civ 701; [2007] 4 All ER 330.

281 *Lockheed Martin Corp v Willis Group Ltd* [2010] EWCA Civ 927 [31].

282 *SmithKline Beecham Plc v Horne-Roberts* [2001] EWCA Civ 2006; [2002] 1 WLR. 1662.

- 283 *Lockheed Martin Corp v Willis Group Ltd* [2010] EWCA Civ 927 [37].
- 284 In *Parsons v George* [2004] EWCA Civ 912; [2004] 1 W.L.R. 3264, the landlord originally sued by a tenant and the correct landlord had the same solicitor.
- 285 *Adelson v Associated Newspapers Ltd* [2007] EWCA Civ 701; [2007] 4 All ER 330 [57]. Lord Phillips CJ drew attention to Keene LJ's view that an amendment might be justified in the absence of prior notice, but also pointed out that if that were so, the court's discretion would generally be exercised so as to refuse permission to amend. See 2025 WB 19.6.2 for further support for this approach.
- 286 *Parkin v Alba Proteins Ltd* [2013] EWHC 2036 (QB): a claimant who had repeatedly sought confirmation as to the identity of the correct defendant from a company in the same group, but had received no reply on that issue from the defendant's solicitors during a period of almost three years, was entitled to amend its claim to add the correct defendant and a declaration that the limitation period did not begin to run until the date of receipt of the defence.
- 287 *Adelson v Associated Newspapers Ltd* [2007] EWCA Civ 701; [2007] 4 All ER 330 [43].
- 288 *Adelson v Associated Newspapers Ltd* [2007] EWCA Civ 701; [2007] 4 All ER 330 [29].
- 289 The *Insight Group Ltd v Kingston Smith* [2012] EWHC 3644 [52].
- 290 *Adelson v Associated Newspapers Ltd* [2007] EWCA Civ 701; [2007] 4 All ER 33, [56].
- 291 *Adelson v Associated Newspapers Ltd* [2007] EWCA Civ 701; [2007] 4 All ER 330 [57].
- 292 *Lockheed Martin Corp v Willis Group Ltd* [2010] EWCA Civ 927.
- 293 *Lockheed Martin Corp v Willis Group Ltd* [2010] EWCA Civ 927. See also 2025 WB 19.6.2 for further support for this approach.
- 294 See *International Distillers and Vinters Ltd v J.F Hillebrand (UK) Ltd*, *The Times*, 25 January 2000, QB.
- 295 *Adelson v Associated Newspapers Ltd* [2007] EWCA Civ 701; [2007] 4 All ER 330 [57]. But see *Lockheed Martin Corp v Willis Group Ltd* [2010] EWCA Civ 927, where it was said that the question of whether the intended party was misled did not go to jurisdiction but to the exercise of discretion; and see 2025 WB 19.6.2.
- 296 *SmithKline Beecham Plc v Horne-Roberts* [2001] EWCA Civ 2006; [2002] 1 W.L.R. 1662.
- 297 *SmithKline Beecham Plc v Horne-Roberts* [2001] EWCA Civ 2006; [2002] 1 W.L.R. 1662 [44].
- 298 *SmithKline Beecham Plc v Horne-Roberts* [2001] EWCA Civ 2006; [2002] 1 W.L.R. 1662 [39].
- 299 *The Sardinia Sulcis v The Al Tawwab* [1991] 1 Lloyd's Rep. 201, CA.
- 300 *SmithKline Beecham Plc v Horne-Roberts* [2001] EWCA Civ 2006; [2002] 1 W.L.R. 1662 [45].
- 301 *Parsons v George* [2004] EWCA Civ 912; [2004] 1 W.L.R. 3264.
- 302 *Parsons v George* [2004] EWCA Civ 912; [2004] 1 W.L.R. 3264 [41]. See also *The Insight Group Ltd v Kingston Smith* [2012] EWHC 3644 (QB); and *Rosgosstrakh Ltd v Yapi Kredi Finansal Kiralama AO* [2017] EWHC 3377 (Comm).
- 303 *Kessler v Moore & Tibbits (a firm)* [2004] EWCA Civ 1551; [2005] P.N.L.R. 17.
- 304 *Kessler v Moore & Tibbits (a firm)* [2004] EWCA Civ 1551; [2005] P.N.L.R. 17 [18].
- 305 *Kessler v Moore & Tibbits (a firm)* [2004] EWCA Civ 1551; [2005] P.N.L.R. 17 [27], [29].
- 306 For circumstances under which CPR 19.6(3)(b), and not CPR 19.6(3)(a) is applied see *Parkin v Alba Proteins Ltd* [2013] EWHC 2036 (QB) [106], [108].
- 307 *Martin v Kaisary (No.1)* [2005] EWCA Civ 594; [2005] C.P. Rep. 35. See also *Parkin v Alba Proteins Ltd* [2013] EWHC 2036 (QB).
- 308 See for example *Slough BC v SSE Plc* [2019] EWHC 3148 (Comm).
- 309 *Parkinson Engineering Services Plc (In Liquidation) v Swan* [2009] EWCA Civ 1366.
- 310 *Roberts v Gill* [2010] UKSC 22; [2011] 1 AC 240.
- 311 For a discussion of CPR 17.4(2) see above, paras 7.76 ff.

Power to Dispense with Statements of Case

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 7 - Statements of Case

Power to Dispense with Statements of Case

7. 125 Where a claim form has been issued and served, the court has the power to order that the claim will continue without any other statement of case ([CPR 16.8](#)). In effect, [CPR 16.8](#) enables the court to give directions that a claim which was commenced as an ordinary claim under [CPR 7](#) should continue as a [CPR 8](#) claim, which proceeds on the basis of the claim form and court directions.

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Verification of Statements of Case by Statement of Truth

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Mainwork

Chapter 7 - Statements of Case

Verification of Statements of Case by Statement of Truth

Documents that need to be verified

7. 126 CPR 22 and PD 22 govern the process for verifying statements of case and other documents. CPR 22.1 lists the documents that must be verified by a statement of truth, including statements of case (including amendments), witness statements, acknowledgment of service using the CPR 8 procedure, certificates of service, contempt applications under CPR 81 and any other document where a rule or PD requires it. Closely related to statements of case are application notices. An application notice is a document in which the applicant states their intention to seek a court order (CPR 23.1), such as an interim injunction. An application notice must state what order the applicant is seeking, and the reasons for seeking the order (CPR 23.6). If the applicant wishes to rely on matters set out in their application notice as evidence, they must verify it by a statement of truth (CPR 22.1(3) and CPR 32.6(2)(b)). Other documents must be similarly verified, such as witness statements and expert reports.³¹²

Nature of statement of truth

7. 127 A statement of truth is an affirmation by the person making the statement that they believe that the facts stated in a document are true (CPR 22.1(4)). Although in some situations documents supported by a statement of truth may be used as evidence (for example, in an application for summary judgment), the main purpose of this requirement is not so much to establish a platform of proof but to ensure that parties do not take up positions that they know to be untrue, or which are unsupported by evidence, in the hope that something may turn up in the course of proceedings. An additional aim, it has been suggested, is to enable parties to rely on facts asserted in statements of case during settlement negotiations.³¹³ It should be noted that the requirement for statements of truth is not the only measure taken to discourage unfounded allegations. The practice of requiring counsel to sign any pleading settled by them operates as some confirmation that the professional rules of conduct have been observed when deciding whether to advance a particular claim.³¹⁴
7. 128 A party cannot assert in a statement of case contradictory factual versions because they would not be able to support both of them by a statement of truth. However, a party is permitted to advance alternative claims and assert their honest belief that one or other of the pleaded claims substantiates their case.³¹⁵ This includes pleading alternative claims in different jurisdictions.³¹⁶ A party who wishes to plead, by way of amendment or otherwise, a factual situation that is at odds with their own pleaded position but which is derived from their opponent's case may do so, though they may need the court's permission not to provide a statement of truth.³¹⁷ In other words, the requirement of a statement of truth should not interfere with a party's ability to develop a position concerning the disputed issues that is justified in the circumstance of the particular case.

Persons required to sign the statement of truth

- 7.129 The rules specify who is to sign a statement of truth ([CPR 22.1\(5\)–\(6\)](#)). In the case of a statement of case, a response in accordance with [CPR 18.1](#) or an application, the statement must be signed by the party, or the party's legal representative on the party's behalf.³¹⁸ An insurer with a financial interest in the result may also sign a statement of truth (PD 22 para.3.4-3.5). Where a party is conducting proceedings with a litigation friend (as where a child or a protected party sues in accordance with [CPR 21](#)), the statement must be signed by the litigation friend or their legal representative ([CPR 22.1\(5\)](#)). Witness statements and expert reports must be signed by the author of the statement or report ([CPR 22.1\(6\)\(b\)](#)).³¹⁹
- 7.130 A legal representative who signs on behalf of a client affirms the client's belief, not their own, and must state the capacity in which they sign (PD 22 para.3.6). By their signature the legal representative confirms that the client has authorised them to sign on the client's behalf, that they have explained to the client that in signing the statement of truth they are confirming the client's belief that the facts stated in the document are true and that they have informed the client of the possible consequences to the client if it should subsequently appear that the client did not have an honest belief in the truth of those facts (PD 22 para.3.7).

Verified statements of case as evidence

- 7.131 At a hearing other than a trial a party may support their case by reference to statements of case verified by a statement of truth, whether it is their own statement of case or that of any other party ([CPR 32.6\(2\)\(a\)](#)). Additionally, a claimant may advance as evidence matters set out in a [CPR 8](#) claim form, provided the claim form has been verified ([CPR 8.5\(7\)](#)).

Failure to verify a statement of case

- 7.132 A statement of case that has not been verified remains effective, unless it is struck out, but its contents will not be admissible in evidence ([CPR 22.2\(1\)](#)). The court may order any party who has failed to do so to verify a document in accordance with CPR 22.1, and any party may apply for such an order ([CPR 22.4\(1\)–\(2\)](#)). Where a statement of case remains unverified, the court may strike out the statement of case and any party may apply for such an order ([CPR 22.2\(2\)–\(3\)](#)). It is difficult to imagine circumstances where a party would be justified in refusing to verify their statement of case, except of course where the party has good reason for pleading inconsistent facts. However, an order to strike out a statement of case would be made only if the failure is substantial in the sense that it is indicative of a reluctance on the part of a litigant to stand behind their allegations. Purely technical failures would not justify a striking out application, as where a claimant has failed to verify the claim form but has verified the particulars of claim, or where the statement of truth on behalf of a company was signed by the wrong company officer.³²⁰ In *Prince Abdulaziz v Apex Global Management Ltd*,³²¹ Vos J made a case management order in which it was directed that all parties should file and serve statements, verified by a statement of truth, confirming that they had given full disclosure of certain matters. Prince Abdulaziz refused to sign the statement, on the basis that Saudi Arabian royal protocol dictated that, as a member of the Saudi royal family, he should not sign court documents. His defence was then struck out. A majority of the Supreme Court held that it would be inappropriate to interfere with Vos J's case management decision, which was to be given a generous margin in any event; his approach reflected normal practice and was in accordance with the terms of the [CPR](#).

False statements of truth—proceedings for contempt of court

- 7.133 A person who makes a false statement in a document verified by a statement of truth without an honest belief in its truth may be liable for contempt of court.³²² CPR 32.14 states:

Proceedings for contempt of court may be brought against a person who makes or causes to be made a false statement in a document, prepared in anticipation of or during proceedings and verified by a statement of truth, without an honest belief in its truth.

CPR 31.23 makes similar provision with respect to false disclosure statements.

- 7.134 The standard form statement of truth is designed to focus the mind of the person signing on the possibility of being prosecuted for contempt of court:³²³

‘[I believe] [The (claimant or as may be) believes] that the facts stated in this [name of document being verified] are true. [I understand] [The (claimant or as may be) understands] that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.’

Given the fact that statements of case, and many witness statements in particular, tend to be drafted by lawyers, and given the risk of the party or witness giving the document only a cursory read before signing a statement of truth,³²⁴ this approach is welcomed. Committal for contempt is discussed in Ch.24.

Footnotes

312 2025 WB 22.1.1 ff.

313 *Zurich Insurance Co Plc v Hayward* [2011] EWCA Civ 641.

314 *Clarke v Marlborough Fine Art (London) Ltd (Amendments)* [2002] 1 W.L.R. 1731. See the BSB Handbook r.C9.

315 *Clarke v Marlborough Fine Art (London) Ltd (Amendments)* [2002] 1 W.L.R. 1731.

316 *Dellal v Dellal* [2015] EWHC 907 (Fam).

317 *Clarke v Marlborough Fine Art (London) Ltd (Amendments)* [2002] 1 W.L.R. 1731; *Goode v Martin* [2001] EWCA Civ 1899; [2002] 1 All ER 620; *Binks v Securicor Omega Express Ltd* [2003] EWCA Civ 993; [2003] 1 W.L.R. 2557; and *Kimathi v Foreign and Commonwealth Office* [2017] EWHC 2145 (QB).

318 For statements of truth signed on behalf of companies and partnerships see PD 22 para.3.1–3.3. In the Intellectual Property Enterprise Court (IPEC), statements of truth verifying statements of case “must be signed by a person with knowledge of the facts alleged”, and if no one person has such knowledge a number of different people can attest to the part of the statement of case of which they have knowledge: CPR 63.21.

319 PD 35 para.3.3 concerning expert reports.

320 *Protea Leasing Ltd v Royal Air Cambridge Co Ltd* (7 March 2000, unreported).

321 *Prince Abdulaziz v Apex Global Management Ltd (Rev 2)* [2014] UKSC 64; [2014] 1 W.L.R. 4495.

322 See, eg, *Clarkson v Future Resources FZE* [2022] EWCA Civ 230 [47]. In *Liverpool Victoria Insurance Co Ltd v Yavuz* [2017] EWHC 3088 (QB), Warby J queried (obiter) whether this extended to Claim Notification Forms sent in accordance with the Pre-Action Protocols for Low Value Personal Injury Claims. This question now seems to have been

answered in the affirmative, in that the Court of Appeal in *Jet 2 Holidays Ltd v Hughes [2019] EWCA Civ 1858* held that witness statements verified by false statements of truth sent in purported compliance with a pre-action protocol (even where this was not mandated by the terms of the protocol) could found contempt proceedings. The court's reasoning in *Jet 2* applies a fortiori to Claim Notification Forms sent in accordance with the Pre-Action Protocols for Low Value Personal Injury Claims.

323 PD 22 para.2.1, which applies to statements of case. Adjusted wording applies to witness statements: para.2.2.

324 For an example of the parties being criticised for not appreciating the seriousness of signing a statement of truth, see *Recovery Partners GP Ltd v Rukhadze [2018] EWHC 2918 (Comm)*.

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Introduction

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Mainwork

Chapter 8 - Interim Applications

Introduction

8. 1 The term “application” does not have a fixed or defined meaning. It broadly describes any approach or request made by a party or other person to the court, in connection with litigation. Applications may be made before commencement of proceedings—for example an application for an interim injunction, a freezing order or a search order. Once litigation has commenced, parties may require a court decision on a variety of matters relating to the conduct of the case. A claimant may require an extension of time for serving the claim form, a party may seek summary judgment, a defendant may seek security for costs or to strike out the claimant’s statement of case or the parties may seek case management directions. Requests for court decisions on such matters are known as interim (formerly interlocutory) applications. The term “interim” reflects the fact that the application is not meant to provide a final resolution of the issues in dispute, but merely to regulate the process for arriving at a determination on the merits or ensure that such a determination is reached without undue risk of harm to the rights in dispute. However, not all applications fall into this category.
8. 2 Although [CPR 23](#) (general rules about applications for court orders)¹ is the main provision dealing with applications, it is not the only source of law dealing with applications.² The [CPR 23](#) procedure is sometimes supplemented by additional requirements applicable to particular types of applications, such as applications for summary judgment under [CPR 24](#) or default judgment under [CPR 12](#). Further, court guides supplement [CPR 23](#) and PD 23A by adding requirements applicable in particular courts.
8. 3 Although it is not the function of interim applications to achieve a final decision on the merits, their outcome may nonetheless influence the outcome of an action. For instance, a refusal to extend the time for serving a claim form could effectively extinguish the claim and leave the claimant with no further recourse. The grant of an interim injunction could impose serious constraints on a party’s ability to exercise their rights pending litigation. Given the potential importance of interim decisions, the application procedure must conform with the requirements of a fair trial,³ reflected by [CPR 23](#)’s provision for notice of the application to be given to all the parties and the establishment of safeguards where giving notice would be impractical or undesirable.
8. 4 Broadly speaking, the procedure for making an application under [CPR 23](#) is as follows. The applicant must file an application notice,⁴ setting out the order sought and the reasons for seeking the order ([CPR 23.3\(1\)](#), [CPR 23.6](#)). The court will issue the application notice and notify the applicant of the time and date for the hearing, whereupon the applicant must serve a copy of the application notice on each respondent ([CPR 23.4\(1\)](#)). The “respondent” is the person against whom the order is sought and any other person the court may direct ([CPR 23.1](#)). A “hearing” is defined as “the occasion on which any interim or final decision is or may be made by a judge, at which a person is, or has a right to be, heard in person, by telephone, by video or by any other means which permits simultaneous communication” ([CPR 23.1](#)). With the application notice the applicant must serve any written evidence in support of the application (if it has not already been served), and any draft order attached to the notice ([CPR 23.7\(3\)](#) and [\(5\)](#)).

Footnotes

1 Amendments have been made to [CPR 23](#) pursuant to the [Civil Procedure \(Amendment No. 3\) Rules 2023 \(SI 2023/788\)](#) and [Civil Procedure \(Amendment\) Rules 2025 \(SI 2025/106\)](#).

- 2 See 2025 WB 23.0.2–4. For example, applications under [CPR 76](#) for derogating control orders under the [Prevention of Terrorism Act 2005 s.4\(1\)](#). There are also special rules which apply to applications made in the course of insolvency proceedings: see [Insolvency Rules 2016 r.1.35](#).
- 3 See for instance [Frey v Labrouche \[2012\] EWCA Civ 881](#); [Church v MGN Ltd \[2012\] EWHC 693 \(QB\)](#). This principle also holds true for applications made outside the [CPR 23](#) procedure: [Richards v Vivendi SA \[2017\] EWHC 1581 \(Ch\)](#); [Read v Panzone \[2019\] EWCA Civ 1662](#). For discussion of the application of the European Convention on Human Rights (ECHR) art.6 to interim applications, see [Ch.3 Fair Trial para.3.16 ff.](#)
- 4 [CPR 23.1](#) states that *application notice* means a document in which the applicant states their intention to seek a court order.

The Procedure for Making an Application

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Chapter 8 - Interim Applications

The Procedure for Making an Application

Time and place for making an application

- 8.5 Applications can be made whenever the need arises for court assistance; whether before proceedings, during proceedings or after judgment.⁵ For example, applications for freezing, search or third party disclosure orders are often made before the start of the proceedings.⁶ Most commonly, however, applications are made during proceedings. Some applications, meanwhile, will be made after judgment, as with an application to correct a mistake in a judgment under the slip rule. Consistent with the overriding objective, parties are encouraged to advance their applications at a hearing which has already been fixed by the court (PD 23A para.2.6). Whenever the court hears an application or gives directions, it must seize the opportunity to deal with as many aspects of the case as possible ([CPR 1.4\(2\)\(i\)](#)).
- 8.6 [CPR 23.2](#) specifies where to make an application.⁷ Generally, applications must be made to the court where the claim was started or, if the claim has been transferred to another court, to the court to which it has been transferred ([CPR 23.2\(1\)–\(2\)](#)). Once the parties have been notified of a fixed date for the trial, an application must be made to the court where the trial is to take place ([CPR 23.2\(3\)](#)). If an application is made before a claim has been started, it must be made to the court that is “most likely” to deal with the claim to which the application relates, unless there is good reason to do otherwise ([CPR 23.2\(4\)](#)).⁸ If an application is made after proceedings to enforce judgment, it must be made to any court that is dealing with the enforcement of the judgment, unless any rule or practice direction provides otherwise ([CPR 23.2\(6\)](#)).

The application notice

- 8.7 Generally, applicants must file an application notice, except where the rules or practice directions permit an application without filing an application notice or the court dispenses with the requirement for an application notice ([CPR 23.3](#); PD 23A para.3).⁹ An application notice is a document in which the applicant states what order is sought and the reasons why the order should be made ([CPR 23.6](#)). It can be amended once it has been issued and before the application has been decided, pursuant to the court’s case management powers under [CPR 3.1\(2\)\(m\)](#).¹⁰
- 8.8 However, there are situations where an application may be made without filing an application notice. An application notice is not normally required to be filed where an application is made orally in the course of a hearing. For instance, a judge may permit a party to make an oral application to amend their statement of case during the trial.¹¹ During the hearing of a summary judgment application the claimant may apply, without filing an application notice, for a conditional order requiring the defendant to pay money into court as a condition for defending the claim.¹² Similarly, permission for a defendant to take part in judicial review proceedings could be given by the judge in response to an informal application.¹³ In one case, the Court of Appeal treated an email sent to the court by the appellant’s counsel after the hearing of the appeal but before judgment was delivered as an application for the court to accept an undertaking offered by the appellant.¹⁴ In *Park v Hadi*, the Court of Appeal held that it

was not always necessary to issue an application notice where the applicant seeks relief from sanctions.¹⁵ However, where an application is to be made orally during a hearing, it must be clearly raised and articulated so that the judge can reach a formal decision on it; moreover, the court will not necessarily tolerate oral applications where a formal application could and should have been made in advance of the hearing, especially where this has led to the application fee being avoided.¹⁶

- 8.9 Even where no application notice is required to be filed, the court must take care to ensure that respondents are not disadvantaged by the lack of prior notice and are not deprived of a reasonable opportunity to respond. If the application raises difficult points of law, with which the respondent's advocate cannot be expected to deal without preparation, an adjournment may be required. If the respondent needs to call evidence in order to resist the application, they must be given an opportunity to do so. In *Anglo-Eastern Trust v Kermanshahchi*,¹⁷ the claimant applied for summary judgment. In the course of the summary judgment hearing the claimant applied for a conditional order directing the defendant to pay £1 million as a condition of defending the claim. Brooke LJ stated that in such circumstances a court should not, as a general rule, make a conditional order in the absence of evidence about the defendant's means, unless it is satisfied that the defendant has been given appropriate prior notice. Such notice may be given informally by a letter stating that, if the summary judgment application fails, the claimant will be seeking a conditional order along the lines set out in the letter. The defendant could then prepare a witness statement concerning their means, so that it will be available to the court when it comes to consider whether to make the conditional order. Alternatively, the court may indicate at the end of the hearing that it is minded to make a conditional order and give the respondent an opportunity to put forward evidence of their means.

Evidence in support of an application

- 8.10 The application notice must be served with a copy of any "supporting written evidence" of the application as well as the applicant's draft order (CPR 23.7(3)). Further evidence need not be filed and served where the applicant wishes only to rely on facts which have already been included in statements of case or witness statements and which are supported by statements of truth (CPR 23.7(5)). But where the applicant wishes to rely on facts that are not stated in a statement of case, they must support them with evidence, as where the applicant advances some excuse for a failure to comply with a rule or court order and seeks an extension of time for performance. A respondent who wishes to meet the applicant's case with evidence of their own must serve their evidence as soon as possible (PD 23A para.7.2). The general rule is that evidence at hearings other than the trial is to be given by way of witness statements (or statements of case or application notices, provided they are supported by a statement of truth), unless the court, a practice direction or any other enactment requires otherwise (CPR 32.6(1)).

Footnotes

5 2025 WB 23.2.4.

6 See Ch.10 Interim Remedies. See para.15.203 ff on pre-action third party disclosure orders, known as *Norwich Pharmacal* orders, named after the decision in *Norwich Pharmacal Co v Customs and Excise Commissioners [1974] AC 133; [1973] 2 All ER 943*.

7 The Chancery and King's Bench divisions of the High Court each run a dedicated Interim Applications Court on at least one day a week, which specialise in hearing interim applications (both on notice and urgent). There is also an Insolvency and Companies Court Interim Applications Court, which hears specialist applications brought under the *Insolvency Act 1986* and the *Companies Act 2006*.

8 The test under CPR 23.2(4) has changed from "likely" to "most likely".

9 Caution is required when dispensing with procedural requirements where one party is a litigant in person: see, eg, *Djurberg v Thames Properties (Hampton) Ltd [2024] EWCA Civ 549*; 2025 WB 23.3.2.

10 *Agents Mutual Ltd v Moginnie James Ltd [2016] EWHC 3384 (Ch)*.

11 *Groarke v Fontaine [2014] EWHC 1676 (QB); [2014] 4 Costs L.R. 670*.

12 *Anglo-Eastern Trust Ltd v Kermanshahchi [2002] EWCA Civ 198; [2002] C.P. Rep. 36*.

- 13 *Riniker v Employment Tribunals and Regional Chairmen* [2009] EWCA Civ 1450.
- 14 *Sharab v Prince Al-Waleed Bin Tala Bin Abdal-Aziz-Al-Saud* [2009] EWCA Civ 353.
- 15 See *Park v Hadi* [2022] EWCA Civ 581; [2022] 4 W.L.R. 61 [49]: “An application for relief from sanctions should be made (and usually is made) by a Part 23 application notice supported by a statement. It is, however, clear that the court has a discretion to grant relief from sanctions in two situations: where (as in the present case) no formal application notice has been issued, but an application is made informally at a hearing; or where no application is made, even informally, but the court acts of its own initiative. The discretion must of course be exercised consistently with the overriding objective”.
- 16 *Magdeev v Tsvetkov* [2019] EWCA Civ 1802 [26]–[27]. See, in this regard, PD 23A para.2.5–2.7.
- 17 *Anglo-Eastern Trust Ltd v Kermanshahchi* [2002] EWCA Civ 198 [68]; [2002] C.P. Rep. 36 [68].

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Applications Made with Notice

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Chapter 8 - Interim Applications

Applications Made with Notice

- 8.11** The right to be heard is a fundamental element of procedural fairness and natural justice,¹⁸ and is no less important in interim hearings than at the trial.¹⁹ Accordingly, CPR 23.4 provides that a “copy of the application notice must be served on each respondent unless a rule, practice direction or court order permits otherwise”. The respondent is the person against whom the order is sought or any other person that the court may direct to be joined to the application (CPR 23.1). It will generally be for the applicant to serve a copy of the application notice upon the respondent, rather than the court (CPR 6.21(1)).
- 8.12** The requirement set out in CPR 23.4 that “a copy of the application notice must be served on each respondent” means that it may not always be necessary to serve it on every party. Where an order is sought against one defendant of several, for example, it need not be served on the other defendants unless the court directs otherwise. It is, however, good practice to send the application notice to all other parties for their information. For example, although CPR 19.2(2) does not expressly require that applications to join a party be served on the existing parties, and CPR 23.4 does not require this either since existing parties would not be respondents to such an application, it has been held that the existing parties should be provided with the application notice and evidence in support, especially where the proposed joinder is likely to increase the cost or length of the proceedings.²⁰
- 8.13** CPR 23.7(1) provides that service is to take place as soon as practicable after the application notice is filed and in any event at least three days before the court is to deal with the application (unless a different time limit is stated in a rule, practice direction or court order).²¹ Where an application notice is served, but the period of notice is shorter than that dictated by the rules, the court may decide that sufficient notice has nevertheless been given and proceed with a hearing (CPR 23.7(4)).²² If due to some constraint there is no time to serve the application notice at all, informal notice should be given as soon as possible unless secrecy is required (PD 23A para.4). It should be stressed that while urgency may justify a hearing being held in short order, the respondent must still be afforded an adequate opportunity to contest the case. Consequently, where a hearing has had to be held urgently such that the application was to all intents and purposes without notice, the respondent should be afforded a later reconsideration of the decision, when they have had adequate opportunity to prepare (sometimes referred to as a “return date”).²³
- 8.14** While most applications must be made with notice, there are exceptions. Notably, that the questions of whether an application notice is required to be filed, and whether it must be served (and, if so, upon whom), are discrete questions.²⁴ Thus, as noted above, sometimes an application notice need not be filed at all (as where an application is made informally in the course of an oral hearing).²⁵ In other situations, an application notice may be filed with the court, but not served upon the respondent because the matter is urgent²⁶ or because a date for a hearing has been fixed and the applicant does not have sufficient time to effect service.²⁷ In such circumstances the applicant must take steps to inform the other party and the court of the application (PD 23A paras 3(6) and 2.8). In other cases still, rules may permit an application notice and evidence in support to be filed but not served upon the respondent if there are good reasons, for example because there is an exceptional need for secrecy in relation to the application.²⁸
- 8.15** The answers to these questions are not to be found in CPR 23 but in other provisions. CPR 23 merely states the default position that notice will normally be required, and as such does not limit or expand the range of situations where an application may

be made without filing and/or serving an application notice.²⁹ Special considerations attaching to without-notice applications, including the circumstances in which they may be made, the procedure for making them and applications to set aside orders made without notice, are dealt with below.³⁰ First, we consider the mode of disposal of interim applications, including applications to set aside determinations reached on the papers as opposed to at a hearing.

Footnotes

18 *Al-Rawi v Security Service [2011] UKSC 34; [2012] 1 AC 531* [12].

19 See Ch.3 Fair Trial para.3.16 ff.

20 *Molavi v Hibbert [2020] EWHC 121 (Ch); [2020] 4 W.L.R. 46* [44].

21 See Civil Procedure (Amendment No. 3) Rules 2023 (SI 2023/788) r.14(7)(a).

22 See for example *Phillips v Avena [2005] EWHC 3333 (Ch)*; for a decision going the other way, see *Napp Pharmaceutical Holdings Ltd v Dr Reddy's Laboratories (UK) Ltd [2016] EWHC 493 (Pat)*.

23 See further below, para.8.35.

24 See 2025 WB 23.3.1 and 23.4.1.

25 See above, paras 8.8–8.9; and see for example *Groarke v Fontaine [2014] EWHC 1676 (QB); [2014] 4 Costs L.R. 670*.

26 See above, para.8.13, and below, para.8.35.

27 See PD 23A para.2.8; but note PD 23A para.2.5–2.7.

28 CPR 25.3(2); as to which, see Ch.10 Interim Remedies para.10.216 ff. For other provisions permitting applications to be made without notice to the respondent see: PD 23A para.3; CPR 34.17(b) (application for order for evidence to be obtained for proceedings in another jurisdiction); CPR 65.43 (injunction to prevent gang-related violence); CPR 74.3(2) (application for registration of foreign judgment). In addition, it should be remembered that as with service of the claim form, the court has a general discretion to dispense with service of an application notice, not just in cases of exceptional urgency or secrecy: CPR 6.28; and see for example *Execuzen Ltd v De Ferranti [2013] EWCA Civ 592*.

29 *Mackay v Ashwood Enterprises Ltd [2013] EWCA Civ 959*.

30 See paras 8.30 ff.

Disposing of Applications with or without a Hearing

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Disposing of Applications with or without a Hearing

The decision whether to hold a hearing

- 8.16 Where an application notice has been filed, the court may, and commonly would, hold a hearing to decide the application. However, the court has jurisdiction to dispose of an application without a hearing, sometimes referred to as a hearing on the papers. It may do so if (i) the parties agree to the terms of the order sought ([CPR 23.8\(1\)\(a\)](#)); or (ii) alternatively, the parties agree among themselves that the court should dispose of the application without a hearing, on the basis of written materials ([CPR 23.8\(1\)\(b\)](#)); or (iii) where the court does not consider that a hearing would be appropriate ([CPR 23.8\(1\)\(c\)](#)).³¹ If the parties agree to dispense with a hearing, a party may not without the court's permission apply to have the order set aside, varied or stayed ([CPR 23.8\(2\)](#)). Further, if the court accepts the parties' request for disposal of the application without a hearing, it will inform them and give directions about the filing of written evidence (PD 23A para.2.4).
- 8.17 However, the court is not bound to accede to the parties' request under [CPR 23.8\(1\)\(b\)](#) for disposal of the application without a hearing and may nonetheless order a hearing if it considers that it would be in the public interest.³² In such circumstances, the court will notify the parties of the date of the hearing and will give directions about the filing of evidence (PD 23A para.2.4). The court may be content to hold a remote hearing (PD 23A paras 6.1–6.3).
- 8.18 Furthermore, even where the parties have not agreed that the application should be determined without a hearing, the court may nevertheless dispose of the application on paper if "the court does not consider that a hearing would be appropriate" [CPR 23.8\(1\)\(c\)](#).³³ This is essentially a case management power to be exercised in light of the overriding objective,³⁴ though the court should be astute not to press ahead with disposal of important applications on the papers, or applications where one party is at a serious disadvantage.³⁵ For example, in *Armstrong Watson LLP v Persons Unknown*, it was held that a hearing was not required where one of the parties was "disengaged" with the proceedings, and requiring an oral hearing would unnecessarily increase costs and delay.³⁶ Similarly, in *Clarkson Plc v Person(s) Unknown*, the court held that:

"It is unlikely that the Court could or would deal on the papers with an application for a final order that determines civil rights, if that way of proceeding was opposed by one of the parties. But there are cases like the present, where one party has failed to engage with the proceedings and has therefore expressed no view about the matter. It is not necessary to decide whether that involves a waiver of the party's rights. I did not consider a hearing to be 'appropriate' in this case, because it would have added to the expense of this claim without serving any sufficiently useful purpose."³⁷

For instance, a claimant who applies without notice for an extension of time to serve the claim form and obtains it without a hearing runs the risk that the court may later set aside the extension of time at the defendant's request after the expiry of the limitation period.³⁸ Nor was it desirable to refuse without a hearing relief from the sanction of striking out for non-compliance suffered by a self-represented litigant.³⁹ Where the court decides an application without a hearing pursuant to [CPR 23.8\(1\)\(c\)](#), and does so in circumstances where the parties have not had an opportunity to make representations, a party affected can apply to have the order set aside, varied or stayed—within such period as the court may specify ([CPR 23.8\(3\)](#)). Such applications are

generally considered at an oral hearing ([CPR 23.8\(4\)](#)), unless the application is considered to be “totally without merit” ([CPR 23.8\(5\)](#)).

- 8.19 On the other hand, in *Hewson v Times Newspapers Ltd*,⁴⁰ Nicklin J held that it was appropriate to determine without a hearing the preliminary issue regarding the ordinary meaning of a publication alleged to be defamatory as it did not necessitate the hearing of evidence. Determining the issue on paper with the aid of the parties’ written submissions, he explained, furthered the overriding objective by saving expense while ensuring that the case was dealt with expeditiously and fairly. To ensure that the process accorded with the principle of open justice, the court adopted a procedure by which:

- it considered the written submissions of the parties and prepared a judgment to be handed down;
- the draft judgment was circulated to the parties in the normal way;
- the case was listed, in open court, for judgment to be handed down; and
- at the hand-down, together with copies of the judgment, the Court made available all written submissions that were considered by the Court before making the determination.

Although this was a case of a substantive issue being determined on the merits without a hearing, it is illustrative of the flexible and pragmatic approach the court can adopt in deciding whether to hold a hearing under [CPR 23.8\(1\)\(c\)](#). It also highlights some of the techniques the court could employ when determining an application on the papers so as to balance costs and delay, ensuring fairness and open justice.

- 8.20 [CPR 23.8\(1\)\(c\)](#) does not empower a judge to grant or dismiss an application to strike out a statement of case on the papers where the applicant has requested an oral hearing.⁴¹ While the judge may not deny the applicant the right to make oral argument,⁴² if they have come to a provisional view they may seek to shorten the hearing by adopting the course outlined by the Court of Appeal in *Frey v Labrouche*.⁴³ That is to say, the judge could: (a) give their provisional view that the application should be rejected on one of the grounds raised by the respondent; (b) give the applicant a fair opportunity to disabuse them of that view through oral argument; and (c) if unpersuaded, end the hearing by dismissing the application on the ground in question.⁴⁴ But the Court of Appeal stressed that a judge could not dismiss the application without giving the applicant a fair opportunity to make out their case.

Disposing of an application at a hearing

- 8.21 As noted above, evidence at an application hearing is usually given in the form of witness statements (or statements of case or the application notice itself, provided they are supported by a statement of truth) ([CPR 32.6\(1\)](#)). In some cases, a rule, practice direction or order may make different provision; for example, [CPR 25.13](#) and [25.17\(1\)](#) require applications for search orders and freezing injunctions to be supported by affidavit evidence. Exceptionally, oral evidence may be permitted at an application hearing. After an application hearing, the court will give its decision on the application. Normally it will also make an order for costs. If the court decides that the costs of the application should be paid by one of the parties in any event (that is, irrespective of the eventual outcome) on the multi-track it will normally make a summary assessment (PD 44 para.9.2(b)), or award the appropriate fixed recoverable costs and court fee for cases on the fast and intermediate tracks ([CPR 45.8](#)). Unless the court directs otherwise, such costs are payable within 14 days ([CPR 44.7](#)).

Challenging an order made without a hearing

- 8.22

In *Collier v Williams*,⁴⁵ the Court of Appeal clarified the powers of the court to set aside or vary a decision on an application that has been made without a hearing under CPR 23.8(1)(c). Since CPR 23.8(1)(c) covers any situation where the court considers it is appropriate to deal with the application without a hearing irrespective of the parties' wishes, any party affected by an order made in this way has the right to apply to have it set aside, varied or stayed.⁴⁶ This includes parties other than the parties who requested a hearing; and it includes applicants who made a without-notice application and requested that it be dealt with on the papers.⁴⁷

- 8.23 The Court of Appeal recognised that if any party had the right to seek reconsideration of a decision disposing of an application without a hearing under CPR 23.8(1)(c), it was conceivable that a party could repeatedly seek reconsideration, if the application under CPR 3.3(5) was itself decided on the papers. In order to obviate this risk, Dyson LJ considered that "it is good practice to require any application under CPR 3.3(5) to be made at a hearing rather than on paper", so as to extinguish any further right to apply for reconsideration under that provision. Further:

"If a judge dismisses an application under CPR 3.3(5), whether on paper or at a hearing, any further application under CPR 3.3(5) should usually be struck out as an abuse of process, unless it is based on substantially different material from the earlier application (in which case different considerations will arise)".⁴⁸

- 8.24 The position is otherwise where the parties agreed that the matter should be dealt with without a hearing under CPR 23.8(1)(b). In those circumstances, a party who is dissatisfied with the court's decision cannot simply seek oral reconsideration under CPR 3.3(5), but rather must challenge the order by way of an appeal.⁴⁹

- 8.25 It is worth noting that in either case (though more commonly in situations falling within CPR 23.8(1)(b), where it is not open to the parties to seek reconsideration under CPR 3.3(5)), a dissatisfied party might instead seek to invoke the general power to vary or revoke orders under CPR 3.1(7).⁵⁰ However, this is unlikely to assist. A restrictive approach is taken to applications to vary or revoke orders under CPR 3.1(7),⁵¹ as set out by Patten J in *Lloyds Investment (Scandinavia) Ltd v Christen Ager-Hanssen*:

"the Applicant must either show some material change of circumstances or that the judge who made the earlier order was misled in some way, whether innocently or otherwise, as to the correct factual position before him. The latter type of case would include, for example, a case of material non-disclosure on an application for an injunction. If all that is sought is a reconsideration of the order on the basis of the same material, then that can only be done, in my judgment, in the context of an appeal. Similarly it is not open to a party to the earlier application to seek in effect to re-argue that application by relying on submissions and evidence which were available to him at the time of the earlier hearing, but which, for whatever reason, he or his legal representatives chose not to employ."⁵²

This approach was explicitly endorsed by Dyson LJ in the context of CPR 3.1(7) applications to revoke or vary a decision reached on the papers in relation to interim applications.⁵³ Thus, unless a party can bring themselves within the narrow grounds envisaged by Patten LJ, they should not attempt to use CPR 3.1(7), but instead should appeal against the underlying orders. Further, a "minimum level of reasoning" is required for the disposal of applications so that it is "understandable not just to the parties but to an appeal court".⁵⁴

Disposing of an application where a party fails to attend

- 8.26 Where one of the parties to an application fails to attend an on-notice application hearing, the court may proceed in the absence of that party and decide the application (CPR 23.11(1)).⁵⁵ The court needs to be careful before proceeding in the absence of

a party and satisfy itself that the absent party actually received notice of the application and that the parties present are not aware of any reason why the absent party would have been prevented from attending. Generally, the power to proceed in the absence of a party should be exercised sparingly, with the overriding objective in mind, and having considered the merits of the application.⁵⁶ The court needs to be particularly careful with self-represented litigants who might not appreciate, for example, that writing to the court and seeking an adjournment does not mean that an adjournment has been granted.⁵⁷ However, the court may proceed in the absence of a litigant in person if the application is hopeless, because adjourning the matter would lead to a waste of court time and costs.⁵⁸

8.27 Where the court has proceeded with an application in the absence of a party, it may, on application or of its own initiative, relist the application ([CPR 23.11\(2\)](#)). This is also sometimes referred to as giving a “return date”. When the court relists an application under this rule it effectively sets aside the decision given and rehearses the application afresh, and so it is not a power that is exercised unreservedly.⁵⁹ An application to vary or set aside the judgment reached in the absence of a party (in absentia) must be made promptly, must show a good reason for the failure to attend and must demonstrate reasonable prospects of success on the merits ([CPR 39.3\(5\)](#)).⁶⁰ The discretion to relist an application is to be granted “sparingly”, and the court can look to the overriding objective and merits of the application.⁶¹ However, while the approach taken to applications under [CPR 39.3\(5\)](#) is a useful guide when considering an application under [CPR 23.11](#), [CPR 39.3\(5\)](#) does not strictly apply and the court is not bound by it.⁶²

8.28 It is important that these requirements are satisfied in order to justify relisting under [CPR 23.11](#), first because the judge will already have considered that it was appropriate and proportionate to proceed in absentia and second because the application will have been decided on its merits (albeit argued only by one party). In these circumstances, there need to be good reasons why the court should devote more of its valuable resources to hearing the matter again; that the absent party has reasonable prospects of succeeding on the application should not of itself suffice.⁶³ The reasons for the failure to attend the hearing should therefore be of considerable relevance, as should the promptness with which the absent party applied for relisting. It might make a difference whether it was the applicant or the respondent who failed to attend the hearing. All else being equal, an applicant who is responsible for the hearing which they fail to attend for no good reason should expect less sympathy than a respondent who fails to attend.⁶⁴ Lastly, even where there were good reasons for the failure to attend and there is a real prospect of a different outcome, it may not be fair to unwind the order if it has been acted upon.⁶⁵

Dismissing an application as totally without merit

8.29 It should be noted that the court has the power to dismiss an application and certify it as being totally without merit (including an application for permission to appeal or for permission to apply for judicial review) ([CPR 23.12](#)).⁶⁶ This can apply to an “application which is hopeless or bound to fail”.⁶⁷ When it has decided to do so, the court must record that fact ([CPR 23.12\(a\)](#)), and must consider whether it is appropriate to make a civil restraint order ([CPR 23.12\(b\)](#)).⁶⁸

Footnotes

- 31 *Collier v Williams [2006] EWCA Civ 20* [32]. Such an agreement must be clear and binding: *R (Compton) v Wiltshire Primary Care Trust [2008] EWCA Civ 749*.
- 32 *Church v MGN Ltd (Practice Note) [2012] EWHC 693 (QB)*.
- 33 See, eg, *Wintermute Trading Ltd v Terraform Labs Pte Ltd [2024] EWHC 141 (KB)* [25]–[35]; *Collier v Williams [2006] EWCA Civ 20* [33]. See also *Bristol City Council v Hassan [2006] EWCA Civ 656*.

34 CPR 1.4(2)(j); *Vernon v Spoudeas [2010] EWCA Civ 666* [25]. Where the court decides under CPR 23.8(1)(c) to determine an application without a hearing despite a party's request for one, the party may apply for a hearing. However, it would be a rare case in which the court changed its mind and acceded to the request for a hearing, given that CPR 23.8(1)(c) enshrines a case management power: *R (Jones) v Nottingham City Council [2009] EWHC 271 (Admin). Collier v Williams [2006] EWCA Civ 20* [38].

35 *Armstrong Watson LLP v Persons Unknown [2023] EWHC 1761 (KB)* [8]–[10].

36 *Clarkson Plc v Person(s) Unknown [2018] EWHC 417 (QB)* [7], quoted in *Armstrong Watson LLP v Persons Unknown [2023] EWHC 1761 (KB)* [9].

37 *Collier v Williams [2006] EWCA Civ 20.*

38 *Vernon v Spoudeas [2010] EWCA Civ 666.*

39 *Hewson v Times Newspapers Ltd [2019] EWHC 650 (QB).*

40 *Frey v Labrouche [2012] EWCA Civ 881.* The court is under a duty to list a hearing in such circumstances: *R (on the application of Godson) v Central London County Court [2019] EWHC 2655 (Admin).* For the position in judicial review proceedings see: *BP v Secretary of State for the Home Department [2011] EWCA Civ 276.*

41 The same is of course true in reverse, namely that a judge should not accede to an application for strike out where the respondent has requested an oral hearing, though this point is more obvious.

42 *Frey v Labrouche [2012] EWCA Civ 881.*

43 The same applies mutatis mutandis where it is the respondent's case that is weak.

44 *Collier v Williams [2006] EWCA Civ 20.* See also *Hills Contractors and Construction Ltd v Struth [2013] EWHC 1693 (TCC).*

45 *Collier v Williams [2006] EWCA Civ 20* [34].

46 *Collier v Williams [2006] EWCA Civ 20* [32].

47 *Collier v Williams [2006] EWCA Civ 20* [37]. As to finality of litigation, and the attendant doctrines of res judicata, and issue and cause of action estoppel, see Ch.26.

48 *R (V) v Secretary of State for the Home Department [2012] EWHC 1499 (Admin)* [14].

49 See for example *R (Compton) v Wiltshire Primary Care Trust [2008] EWCA Civ 749.*

50 See generally Ch.12 Case Management Pt I paras 12.68 ff.

51 *Lloyds Investment (Scandinavia) Ltd v Christen Ager-Hanssen [2003] EWHC 1740 (Ch).*

52 *Collier v Williams [2006] EWCA Civ 20* at [39]–[40]. See also *R (Jones) v Nottingham City Council [2009] EWHC 271 (Admin),* which explained that where the decision finally disposes of the issue, the challenge must be by appeal.

53 *GLAS SAS (London Branch) v European Topsoho Sarl [2025] EWCA Civ 933* [29].

54 See, eg, *KKK v Tsirilna (t/a Blokh Solicitors) [2025] EWHC 1017 (KB)* [25], [84].

55 *Yeganeh v Freese [2015] EWHC 2032 (Ch).*

56 *Fox v Graham Group Ltd, The Times, 3 August 2001.*

57 *Wilmot v Financial Conduct Authority [2015] EWHC 2230 (Ch).*

58 *R (Idubo) v Secretary of State for Home Department [2003] EWCA Civ 1203* [7].

59 *De Ferranti v Execuzen Ltd [2013] EWCA Civ 592;* see Ch.22 Trial and Evidence paras 22.151 ff for discussion of the CPR 39.3(5) test.

60 *Deng v Zhang [2024] EWHC 2392 (KB)* [33]; *Whittaker v Bertha UK Ltd [2023] EWHC 2554 (Ch)* [52].

61 *Tubelike Ltd (in Liquidation) v Visitjourneys.com Ltd [2016] EWHC 43 (Ch); Phonographic Performance Ltd v Balgun (t/a Mama Africa) [2018] EWHC 1327 (Ch); Morgan v Dooner [2019] EWHC 679 (Comm)* [24].

62 In a similar vein, see Ch.12 Case Management Pt II paras 12.206 ff.

63 More latitude may have to be given in application for judicial review where the freedom of the individual is involved: *R (Idubo) v Secretary of State for Home Department [2003] EWCA Civ 1203.*

64 *Riverpath Properties Ltd v Brammall, The Times 16 February 2000.*

65 See, eg, *Kazley v Disclosure and Barring Service [2025] EWHC 1057 (KB)* [22].

66 At *Kazley v Disclosure and Barring Service [2025] EWHC 1057 (KB)* [22].

67 In *Kazley v Disclosure and Barring Service [2025] EWHC 1057 (KB)* [23], the court refused to make a civil restraint order, despite dismissing the application as being “totally without merit” because the application “had been the applicant’s first application to date, had been made in good faith and had not been vexatious or unreasonable”; *Yovonie v East Sussex Healthcare NHS Trust [2023] EWHC 2618 (KB)* [50]–[58]. For discussion of civil restraint orders see Ch.3 Fair Trial paras 3.40 ff.

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Applications Made without Notice

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 8 - Interim Applications

Applications Made without Notice

8.30 As noted above, the right to timely notice is a fundamental principle of procedural justice.⁶⁹ However, an inflexible adherence to this principle could itself become a source of injustice. There are situations where court intervention is needed before due notice can be given, such as where a defendant is about to leave the country with a child whose custody is contested. If the court were powerless to interfere until the defendant had received three days' notice of the application, the child could be put beyond the court's protection. If the court had to wait until proper notice had been given before issuing an order restraining a defendant from pulling down a building to which the claimant asserted ownership, the defendant would be free in the meantime to destroy the building and irrevocably harm the claimant's right. As these examples suggest, there are situations where depriving a party of the opportunity to be heard before a court order is made against them is the lesser evil.

8.31 CPR 23 does not specify when applications without notice (formerly known as ex parte applications) may be made. CPR 23.9 and 23.10 merely deal with the procedural consequences of such applications. Thus CPR 23.9 applies "where the court has disposed of an application which it permitted to be made without service of a copy of the application notice" (CPR 23.9(1)). The situations where an application may be made without serving an application notice are listed in PD 23A para.3:

- (1)where there is exceptional urgency;
- (2)where the overriding objective is best furthered by doing so;
- (3)by consent of all parties;
- (4)with the permission of the court;
- (5)where the applicant is seeking a direction that their address not be provided to a party;
- (6)where paragraph 2.8 applies [i.e. where a date for a hearing has been fixed and a party wishes to make an application at the hearing and there is not time for notice]; or
- (7)where a court order, rule or practice direction permits.

The most important rule authorising applications without notice is CPR 25.3(2), which provides that an application for an interim remedy may be made without notice "if it appears to the court that there are good reasons for not giving notice". An interim application made pursuant to CPR 25.3(2) must be supported by evidence unless the court directs otherwise (CPR 25.3(1)), and must state reasons for why notice is not being provided (CPR 25.3(3)). Given the extensive, non-exhaustive, list of interim remedies in CPR 25.1(1), this rule has very wide application. Therefore, the principles governing applications without notice will be discussed in detail in Ch.10.⁷⁰ For present purposes it is sufficient to draw attention to some general matters concerning applications without notice.

Types of without-notice applications

8.32 There are, broadly speaking, three types of situation in which an application without notice may be appropriate: where there is not yet a respondent to be served; where urgency leaves no time for notice; and, lastly, where there is a risk that notice would

cause the respondent to take precipitate action to defeat the object of the application. As noted earlier, a number of rules permit applications without notice: prominent among them are [CPR 25.3\(2\)](#) and PD 23A para.3.⁷¹

Unilateral process applications

8.33 An application without notice may be made where there is not as yet a party to be served. This is the case, for example, where a claimant applies for an extension of time for serving the claim form under [CPR 7.6\(4\)](#), where a defendant wishes to advance an additional claim under [CPR 20](#) seeking contribution or indemnity from a third party, or where the applicant seeks an order to restrain publication against parties unknown. Although there may not be a practical impediment to giving notice in some such cases, there is equally no need to involve the respondent in a process that by its very nature is unilateral. For instance, since a claimant does not require the defendant's permission to serve a claim form, the latter's presence can hardly be indispensable when the claimant seeks an extension of time for service (though a defendant will be able to apply to set aside a permission to serve out of time). Similarly, a claimant's application for anonymity does not need to involve the defendant.⁷² We may refer to such applications as "unilateral process applications". The examples given above concern applications that are made before proceedings have been commenced, but there is also scope for unilateral process even where proceedings are already under way.

8.34 Where the process is by its very nature unilateral, it is unnecessary to give prior notice to the affected parties, rather than an exception to the general requirement to give notice. However, the absence of a requirement to give prior notice does not render the decision obtained by the applicant unchallengeable by the affected parties. Where a decision has been given following a unilateral process application, other parties would normally be able to seek to set it aside. Thus, a defendant who is served with a claim pursuant to an extension of time for service may seek to have the service set aside. Similarly, a defendant served pursuant to a permission to serve outside the jurisdiction may challenge the jurisdiction of the court. If, in such situations, the claimant believes that the defendant would apply for service to be set aside, it would be advisable to join them as respondent to the application to extend the time for service, in order to save the cost of an additional hearing.

Urgent applications

8.35 An exception to the principle of notice exists in situations of urgency where, due to pressure of time, there is no practical opportunity of giving the respondent sufficient advance notice of the hearing. In such situations the respondent must be given as much notice as is practicable in the circumstances, as PD 23A para.4 states:

"Where an application notice should be served but there is not enough time to do so, informal notification of the application should be given unless the circumstances of the application require secrecy."

Similarly, PD 23A para.2.8 states that where:

"Where a date for a hearing has been fixed and a party wishes to make an application at that hearing but does not have enough time to file or serve an application notice they should inform the other party and the court (if possible in writing) as soon as possible and make the application orally at the hearing."

A respondent who is handicapped by the fact that insufficient notice has been given could always seek later reconsideration of the decision, to take place after they have had sufficient time to prepare (as to which, see below).⁷³

Secret applications

- 8.36 Neither unilateral applications nor urgent applications are secret. Such application hearings are in principle public hearings in accordance with CPR 39.2, even if the hearing is in chambers, where there is no facility for public attendance.⁷⁴ However, secrecy is of the essence in the third type of without-notice applications, where notice to the respondent risks defeating the very purpose of the application. This would be the case where there is a risk that upon receiving notice of the application the respondent would take precipitate action to frustrate an eventual court order. For this reason a claimant may, for instance, obtain an asset freezing order restraining the defendant from dissipating their assets if there is a danger that, upon hearing of the claim, the defendant would put their assets beyond the court's reach.⁷⁵ Asset freezing orders are therefore issued without notice and before the defendant has been served with the claim form, because a lack of forewarning is essential to the success of the process. The same is true for search orders, designed to preserve evidence from destruction.⁷⁶

Safeguarding the respondent's rights

- 8.37 A unilateral process application does not impinge on the respondent's procedural rights, for the reasons already explained. The position is, however, different in the case of urgent applications and secret applications because the respondent is denied the opportunity of timely notice, and possibly of participation, in a process that may affect their substantive or procedural rights. An urgent application for an interim injunction to prevent the export of a work of art, or to prohibit publication of newsworthy information, seeks to interfere with the respondent's freedom. A secret application for a search order can result in a court order requiring immediate acquiescence from the respondent to an invasion of their privacy and seizure of their property.
- 8.38 ECHR art.6 applies to applications for interim injunctions. As noted above, although an interim injunction is not a final decision on the merits, it may affect the respondent's freedom pending litigation and may even have permanent consequences for the respondent's rights. The normal procedural safeguards cannot, therefore, be ignored simply because decisions reached in applications for such measures are not finally determinative of the parties' rights.⁷⁷
- 8.39 English law puts in place special measures to safeguard the interests of respondents who have been deprived of notice. The details of these arrangements are best discussed in the context of interim remedies.⁷⁸ For the present purposes, it is sufficient to note the following matters. A court will entertain a without-notice application only where it is satisfied that it is just to do so. For instance, the court has stressed that where there is no need for secrecy, without-notice applications should be avoided, especially where the consequences could be very considerable in financial terms and where there is no real prospect of the enforcement of any cross-indemnity.⁷⁹ A key reason for this is because, as Lord Kerr explained in *Al Rawi v Security Service*⁸⁰ more generally, evidence insulated from challenge is likely to positively mislead.
- 8.40 Where the court does entertain a without-notice application, the applicant must make full and frank disclosure of all relevant matters, including those that are favourable to the absent respondent's case. Full and frank disclosure involves a "very high duty"⁸¹ to disclose all material facts.⁸² Material facts are defined (somewhat circularly) as those which are material to determining the application, and do not extend to every possible point or fact which could arise.⁸³ Rather, sensible boundaries must be drawn—the limits of which are determined by asking whether the court has been misled in a material respect.⁸⁴ Full disclosure requires "fair presentation" of the facts.⁸⁵ Proper enquiries must be made before the application by the applicant to investigate any likely applicable defences—regardless of the urgency of the application.⁸⁶

- 8.41 Failure to make full disclosure would justify the court to exercise its discretion in discharging a without-notice order. Where the failure to disclose is substantial or deliberate, the likely starting point is immediate discharge, without renewal, of the interim order.⁸⁷ The order can still be discharged where the court would have made the order had it been aware of the non-disclosed information, as the court adopts a penal approach to deter non-disclosure.⁸⁸ Whether the non-disclosure was innocent is an important, yet non-decisive factor in determining whether to discharge the interim order.⁸⁹ For example, in *J & J Snack Foods Corporation v Ralph Peters & Sons Ltd*, the court discharged a £20 million without-notice worldwide freezing injunction due to the applicant's non-deliberate, yet serious failure to make full and frank disclosure.⁹⁰ Ultimately, the court's discretion to discharge the without-notice order will be exercised according to the overriding consideration of the interests of justice.⁹¹
- 8.42 Furthermore, the applicant must give an undertaking in damages to compensate the respondent should the latter suffer harm from an order that should not have been made. The duty to make full and frank disclosure applies not only in secret applications, but also where the application is heard in the presence of both parties but with insufficient notice.⁹² Orders made in without-notice proceedings are normally of short duration and remain valid only until with-notice proceedings can be held to consider the application. Further, the making of a without-notice order which affects substantive rights can only be justified if the respondent has a right to apply to the court to set aside the order, once they have received notice of it; failure to provide the respondent with the grounds on which the court relied and the evidence filed in support of the application will entitle the respondent to have the order set aside.⁹³

Procedure

- 8.43 Like applications with notice, applications without notice must set out the order sought and be supported by evidence but, additionally, must state the reasons why notice is not given (CPR 25.3(3)).⁹⁴ An order made as a result of an application without notice must be served on the respondent, whether or not the application was granted or dismissed, together with the application notice filed by the applicant and any evidence advanced in support (CPR 23.9(2)). The purpose of CPR 23.9 is to give "protection to a party where a court order is made which impacts that party and where such an order has been made without it having an opportunity to understand the basis for the order or present any arguments to the court".⁹⁵ To enable respondents to challenge any decision made without notice, it is the duty of the applicant's counsel and solicitors to make a full note of the hearing either at the time or soon after, and to provide a copy of that note with all expedition to any party affected by the grant of relief.⁹⁶ Failure to discharge this duty may result in the award of indemnity costs against the applicant. The applicant's legal representatives must comply with their professional obligations by satisfying themselves, through careful scrutiny, that the without-notice application is properly arguable.⁹⁷

Application to set aside or vary a without-notice order

- 8.44 A person who has been made subject to a court order following a process of which they had no notice and therefore no opportunity to defend their position must have the right to seek to set aside the order. A number of provisions make arrangements for such situations. CPR 23.9 deals with situations where the court has disposed of an application which it permitted to be made without service of a copy of the application notice (CPR 23.9(1)). It goes on to state:

Rule 23.9:(1)

“(2) Where the court makes an order, whether granting or dismissing the application, a copy of the application notice and any supporting evidence must, unless the court orders otherwise, be served with the order on any party or other person—

- (a) against whom the order was made; and
- (b) against whom the order was sought.

(3) The order must contain a statement of the right to make an application to set aside or vary the order under rule 23.10.”

CPR 23.10 states:

Rule 23_10

“(1) A person who was not served with a copy of the application notice before an order was made under rule 23.9, may apply to have the order set aside or varied.

(2) An application under this rule must, unless the court directs otherwise, be made within 7 days after the date on which the order was served on the person making the application.”

8. 45 Notably, CPR 23.9(2) applies only to situations where the without-notice order was made pursuant to an application notice. Yet, there will be rare occasions where the court may make a without-notice order even though the applicant did not even file an application notice. It has been held that the power under CPR 23.10 to set aside an order made without notice applies equally to orders made pursuant to an application notice and orders made without such notice, provided the application to set aside was made within seven days after the date on which the order was served on the party making the application.⁹⁸ An application pursuant to CPR r.23.10 involves a rehearing rather than a mere review.⁹⁹ That period may, of course, be extended by the court, especially where the applicant has failed to comply with their obligation under CPR 23.9(2) to serve the respondent with a copy of the application notice together with any evidence presented in support of the application.¹⁰⁰

8. 46 Justice dictates that a person who had no opportunity to defend themselves against the making of an order should not be placed in a worse position than they would have been in had they been able to fully participate in the proceedings leading to the order. The rules therefore ensure that such opportunity is not permanently denied to that party by conferring a right to apply to have the without-notice order varied or set aside. Indeed, as we have observed, where the court has permitted an application to be made without notice, the ensuing order must contain a statement of the right to make an application to set aside or vary the order (CPR 23.9(3)). The right to apply to have a without-notice order set aside or varied is not a right to have it set aside ipso facto. Were it otherwise, there would be no point in a rule permitting an application to be made without notice. The very fact that a without-notice application is permissible renders the resulting order valid notwithstanding the absence of notice.¹⁰¹

8. 47 Yet the lack of notice is also the source of the jurisdiction that a court possesses to set aside or vary an order that it made without notice. As noted above, the court cannot normally set aside or vary an order made following an application made with notice, save in limited circumstances where it was made without a hearing, or perhaps where there has been a change of circumstances requiring the order to be revisited. Consequently, a with-notice order must generally be appealed.¹⁰² As would be expected, the jurisdiction to set aside a without-notice order may be exercised only for good reason. There is no good reason for setting aside a without-notice order where the party seeking to set it aside would have no prospect of resisting such an order at a hearing in which they could participate.¹⁰³ This follows from the point made earlier, that since a without-notice order is in principle valid, it cannot be set aside for the sole reason that there was no notice.

8. 48

It might be suggested that a distinction should be drawn between two different types of without-notice orders. The first consists of orders made in situations where the rules permit an application to be made without notice. Such orders are clearly valid and may not be set aside or varied without good reason (other than the lack of notice); it would be absurd to claim that a freezing order made without notice should be set aside for that reason alone. But the position is less clear where the rules require notice to be given. On the one hand it may be said that an applicant should not be allowed to benefit from an order that they obtained by infringing the rule requiring them to give notice to their opponent. On the other hand, it would make no sense to set aside an order that the applicant would be entitled to obtain with notice.

- 8.49** The matter was considered in *De Ferranti v Execuzen Ltd*,¹⁰⁴ where the claimants applied for a default judgment in a situation which required notice. The claimants failed to serve the defendants with an application notice. The claimants obtained an order retrospectively dispensing with service of the application notice for the default judgment, and the defendants' application to have the default judgment set aside was dismissed. On the defendants' appeal against this decision (at which they also failed to appear), the Court of Appeal explained that when the order dispensing with service was made, CPR 23.10 (which sets a seven-day time limit for applying to set aside the without notice order) ceased to apply. Consequently, the issue for the court dealing with the set-aside application was whether the default judgment should be set aside as a matter of discretion under CPR 13.3.
- 8.50** A further decision of note is *Mackay v Ashwood Enterprises Ltd*.¹⁰⁵ The claimant bank applied without notice for an order appointing it as a receiver. The order stated that any party could apply to set aside or vary the order in accordance with CPR 23.10. The Court of Appeal held that the court had jurisdiction to make an order for costs on the without-notice application under the Senior Courts Act 1981 s.51, and CPR 44.10(2)(c). Any objection by the defendant was therefore to apply to have the order set aside under CPR 23.10. The court stressed it was exceptional for the court to make a without-notice order granting substantive relief, especially a costs order requiring immediate payment. Where such an order has been made, the party affected should have had the right to a first instance hearing at which it could have presented arguments that would have been relevant had the original hearing been on notice. In the event, the Court of Appeal refused to set aside the without-notice order because of unexplained delays in making the application and failing to support it with evidence. However, the court left it open as to whether the right to apply for reconsideration of a without-notice order was a free-standing right or was confined to a right under CPR 23.10.¹⁰⁶ It is suggested that where the situation falls under the terms of CPR 23.10, the rule applies, including the time limit. In any other situation, the absent party should have a right to apply to have the order reconsidered as a matter of elementary justice—that is to say, as part and parcel of a right to be heard.

Footnotes

- 69 See above, para.8.11.
- 70 Ch.10 Interim Remedies para.10.214 ff.
- 71 See above, para.8.14.
- 72 *CVB v MGN Ltd [2012] EWHC 1148 (QB)*.
- 73 See below, paras 8.43 ff.
- 74 See Ch.3 Fair Trial paras 3.113 ff.
- 75 See Ch.11 Freezing Injunctions.
- 76 Formerly known as *Anton Piller* orders, after *Anton Piller KG v Manufacturing Processes* [1976] Ch 55; [1976] 1 All ER 779, CA; see the section on search orders in Ch.15 Disclosure paras 15.221 ff for detailed discussion.
- 77 Proceedings held in the absence of the affected party are inherently biased against the absent party: *Siporex Trade SA v Comdel Commodities Ltd* [1986] 2 Lloyd's Rep. 428; [1986] N.L.J. Rep. 538; *Columbia Picture Industries v Robinson* [1987] Ch 38 at 81–82; [1986] 3 All ER 338 at 375.
- 78 See Ch.10 Interim Remedies paras 10.216 ff.
- 79 *R (Graham) v Northamptonshire CC [2006] EWHC 2495 (Admin)*.
- 80 *Al Rawi v Security Service* [2011] UKSC 34; [2012] 1 AC 531 [93]. See also J Lidbetter, “Rationalising National Security, Closed Hearings and Procedural Fairness: SDCV v Director-General of Security [2022] HCA 32” (2023) 42 C.J.Q. 213, 222–223.

- 81 *J & J Snack Foods Corporation v Ralph Peters & Sons Ltd [2025] EWHC 436 (Ch) [119]*.
- 82 See *Tugushev v Orlov [2019] EWHC 2031 (Comm) [7]*, the entire summary of which was quoted with approval in *Derma Med Ltd v Ally [2024] EWCA Civ 175 [29]* and *J & J Snack Foods Corporation v Ralph Peters & Sons Ltd [2025] EWHC 436 (Ch) [17]*.
- 83 *Tugushev v Orlov [2019] EWHC 2031 (Comm) [7(v)]*.
- 84 *Tugushev v Orlov [2019] EWHC 2031 (Comm) [7(vi)]*.
- 85 *Tugushev v Orlov [2019] EWHC 2031 (Comm) [7(iii)]*.
- 86 *Tugushev v Orlov [2019] EWHC 2031 (Comm) [7(iii)-(iv)]*.
- 87 *Tugushev v Orlov [2019] EWHC 2031 (Comm) [7(x)]*, quoted with approval in *Derma Med Ltd v Ally [2024] EWCA Civ 175 [29]* and *J & J Snack Foods Corporation v Ralph Peters & Sons Ltd [2025] EWHC 436 (Ch) [17]*.
- 88 *Tugushev v Orlov [2019] EWHC 2031 (Comm) [7(xi)]*.
- 89 *Tugushev v Orlov [2019] EWHC 2031 (Comm) [7(x)]*.
- 90 *J & J Snack Foods Corporation v Ralph Peters & Sons Ltd [2025] EWHC 436 (Ch) [120]*.
- 91 *Tugushev v Orlov [2019] EWHC 2031 (Comm) [7(xii)]*.
- 92 *CEF Holdings Ltd v Mundey [2012] EWHC 1524 (QB)*.
- 93 *Evans v Royal Wolverhampton Hospitals NHS Foundation Trust [2014] EWHC 3185 (QB)*.
- 94 *J & J Snack Foods Corporation v Ralph Peters & Sons Ltd [2025] EWHC 436 (Ch) [19] ff.*
- 95 *Cook UK Ltd v Boston Scientific Ltd [2023] EWHC 2163 (Pat) [17]*.
- 96 *Interoute Telecommunications (UK) Ltd v Fashion Gossip Ltd, The Times, 10 November 1999*. Alongside the duty to make a note of the hearing, it is also often prudent to request a transcript of the hearing, if one is available.
- 97 *Awuku v Secretary of State for the Home Department [2012] EWHC 3690 (Admin)*. On the other hand, where a legal representative was instructed on a matter which required an urgent application to be made in response to removal directions, they should have done so immediately, and certainly in time for an inter partes hearing to have taken place: *Rehman v Secretary of State for the Home Department [2013] EWHC 2658 (Admin)*.
- 98 *Tombstone Ltd v Raja (also known as Raja v Van Hoogstraten) [2008] EWCA Civ 1444*.
- 99 *Al-Zahra (Pvt) Hospital v DDM [2019] EWCA Civ 1103 [67]; Hashtroodi v Hancock [2004] EWCA Civ 652; [2004] 1 W.L.R. 3206 [33]*.
- 100 *Sarayiah v Suren [2004] EWHC 1981 (QB)*.
- 101 *Mackay v Ashwood Enterprises Ltd [2013] EWCA Civ 959*.
- 102 See above, paras 8.21 ff.
- 103 *De Ferranti v Execuzen Ltd [2013] EWCA Civ 592; Mackay v Ashwood Enterprises Ltd [2013] EWCA Civ 959*.
- 104 *De Ferranti v Execuzen Ltd [2013] EWCA Civ 592*. See also *Riley v Reddish LLP (Ch, unreported, 7 June 2019)*.
- 105 *Mackay v Ashwood Enterprises Ltd [2013] EWCA Civ 959*.
- 106 But see *Tombstone Ltd v Raja (also known as Raja v Van Hoogstraten) [2008] EWCA Civ 1444*, where the Court of Appeal was of the view that it did not matter whether the application to set aside was made in response to an application supported by an application notice or one not supported by an application notice (e.g. an oral application).

Introduction

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Mainwork

Chapter 9 - Disposal without Trial

Introduction

- 9.1 The culmination of the litigation process is an enforceable judgment. One route to judgment is the full trial process, usually involving documentary disclosure, witness evidence, the exchange of written skeleton arguments, and a hearing to determine the case on the merits. This full process aims to provide the optimal means for securing the correct judgment on the merits, but involves considerable investment of time and costs from the parties and from the public justice system. However, many claims may be satisfactorily disposed of by a much simpler means – and indeed the vast majority of judgments are entered without a full trial process.¹
- 9.2 There are, broadly speaking, three situations in which a full trial is not required. The first is where the defendant fails to respond to the claim; the claimant may then obtain default judgment under CPR 12, subject to the rules on set-aside in CPR 13. The second is where a party's statement of case discloses no reasonable grounds for its position, or the party has no real prospect of success. For such cases the rules provide simple processes consisting of striking out the statement of case under CPR 3.4(2)(a), or awarding summary judgment under CPR 24. The third is where a party has abused the litigation process, obstructed the just disposal of proceedings, or failed to comply with process obligations. In such cases the court may strike out the offending party's statement of case under CPR 3.4(2)(b) or (c). The present chapter is only concerned with the first two situations. The third is considered in Ch.12 Pt II, which deals with party compliance.²

Footnotes

- 1 For example, in January to March 2024, 93% of judgments entered were default judgments. See Ministry of Justice, Civil Justice Statistics Quarterly: January to March 2024, <https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-january-to-march-2024/civil-justice-statistics-quarterly-january-to-march-2024>.
- 2 Abuse of process is discussed in Ch.12 Case Management Pt II paras 12.250 ff, and striking out attempts to litigate issues already decided as abusive is discussed in Ch.26 Finality of Litigation paras 26.112 ff. Strike-out for non-compliance, including pursuant to unless orders, is discussed in Ch.12; see for example para.12.193. Where a statement of case has been struck out automatically pursuant to an unless order CPR 3.5 enables the other party to apply for default judgment to be entered: see Ch.12 Case Management Pt II paras 12.191 ff.

Default Judgment

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 9 - Disposal without Trial

Default Judgment

General principles

- 9.3 As a matter of basic principle, no person is obliged to litigate. A potential claimant is free to choose not to file a claim, and a defendant is free to choose not to respond to the claim once filed (although not responding may sometimes have extremely undesirable consequences, which make responding the only practical option).³
- 9.4 Where the defendant does not respond to a claim, a legal system could adopt one of three possible approaches. First, it may provide that the process is suspended until the defendant responds to the claim (the “suspension option”). This is the option chosen by some systems of criminal law, which prohibit trials in the defendant’s absence.⁴ A second option is to provide that, notwithstanding the defendant’s absence, the *normal process* must be followed requiring the claimant to prove its claim to the court’s satisfaction (the “process option”). A third option is to hold that the defendant has waived its right to contest the claim, such that the claimant becomes automatically entitled to judgment in accordance with the claim (the “waiver option”).
- 9.5 The suspension option is easily rejected: if a defendant were able to unilaterally prevent court adjudication, the defendant would effectively have a veto over the claimant’s access to justice. Choosing between the remaining two options is less straightforward. In favour of the process option, it may be said that a judgment is an official court pronouncement, enforceable by coercive measures, which should not be given except where the court is satisfied that the claim is well founded in law and in fact. Against this it may be said that English litigation is an adversarial process, designed to resolve conflicting claims between parties who are willing to engage with the litigation. If the defendant does not respond to the claim, there is simply no controversy that calls for adjudication.⁵ Indeed, it would be strange if a defendant who declines to invest its private resources into contesting the claim were able to require the state to devote public resources to investigating it.
- 9.6 English law has therefore generally preferred the waiver option, but makes some concessions to the process option. The general rule is that where a defendant has failed to respond to the claim, the claimant is entitled to default judgment without any consideration of the underlying merits of the claim. However, the process option finds expression in that some claims require limited judicial examination before proceeding to default judgment. Moreover, in certain circumstances the default judgment may be limited to liability, with the appropriate relief to be assessed by the court subsequently. Further, default judgment is vulnerable to being set aside in certain circumstances, which may involve some assessment of the merits.
- 9.7 English law’s adoption of the waiver option is wholly consistent with the ECHR art.6.⁶ The right of access to court under art.6 is not absolute but may be subject to limitations. Such a limitation will be compatible with the right if it is imposed in pursuit of a legitimate aim and there is a reasonable relationship of proportionality between the restriction and the aim that it seeks to achieve. In *Trade Agency v Seramico Investments*, the CJEU recognised that the aim of the default judgment procedure in English law was to provide a “swift, effective and cost-effective handling of proceedings brought for the recovery of uncontested claims” in interests of the “sound administration of justice”.⁷ A system that enables a judgment to be swiftly and inexpensively entered against the defaulting defendant prevents unresponsive defendants from stymieing the claimant’s access to justice, and enables

the court to properly manage its scarce resources. At the same time, as just noted, the procedure is not without safeguards: the claimant's right to default judgment is not unfettered, and the defendant can seek to set aside a default judgment and contest the claim on its merits in certain circumstances.

- 9.8 This chapter uses the term “default judgment” in the sense given to it by [CPR 12.1](#)—“judgment without trial where a defendant — (a) has failed to file an acknowledgment of service; or (b) has failed to file a defence or any document intended to be a defence”. However, there are other situations, apart from the defendant’s failure to respond to the claim, where judgment may be given in the absence of a statement of case — for instance, following the striking out of the other party’s statement of case as a result of a failure to comply with process requirements.⁸
- 9.9 In some ways, the terminology of “default” judgment confuses the issue. To “default” usually means to breach an obligation. In an adversarial system, the defendant is not obliged to contest their liability: indeed, a defendant who declines to contest an overwhelming case against it acts entirely appropriately, saving themselves, the claimant and the public justice system considerable time and expense. However, part of the purpose of the default judgment procedure is clearly to encourage filing defences within time, and applications to set aside default judgment are subject to the principles for relief from sanctions in [CPR 3.9](#).⁹ If there is an obligation that has been breached, it cannot be an obligation to file a defence, but an obligation (having decided to file a defence) to file it in time.

Obtaining a default judgment

- 9.10 Default judgment is available in all but a few types of proceedings. It is not available ([CPR 12.2](#)):
- (1)in claims for delivery of goods subject to an agreement regulated by the [Consumer Credit Act 1974](#);
 - (2)where the alternative procedure under [CPR 8](#) is used; or
 - (3)in any case where a practice direction provides that a claimant may not obtain a default judgment (for example, [CPR 55](#) possession claims ([CPR 55.7\(4\)](#)) or probate claims ([CPR 57.10\(1\)](#))).
- 9.11 The right to apply for default judgment is time-limited. [CPR 15.11\(1\)](#) provides that where six months have expired since the end of the period for filing a defence and “no defendant”¹⁰ has filed or served an admission, defence or counterclaim, and the claimant has not entered or applied for default judgment, the claim shall be stayed. [CPR 15.11\(2\)](#) states that the court has the power to lift the stay, but the jurisdiction is discretionary and the court may refuse to exercise it if it considers that there were no good reasons for the delay.¹¹ However, it seems that where at least one of several defendants has filed or served an admission, defence or counterclaim (even if the others have not), no time limit applies and the claimant can seek default judgment against the other defendants.¹²
- 9.12 A claimant who has served its particulars of claim may generally obtain default judgment if the defendant has not served its acknowledgment of service or defence (or any document intended to be a defence, ie, a defective defence), and the relevant time for doing so has expired ([CPR 12.3\(1\)–\(2\)](#)). The time for assessing these matters is “at the date on which judgment is entered”. A defendant may therefore prevent default judgment simply by filing a (late) defence before default judgment is drawn up and sealed (even if the default judgment application has been made, or heard by the court before then).¹³ Further, the claimant may not obtain default judgment if, “at the time the court is considering the issue”, the defendant has applied to have the claimant’s claim struck out or for summary judgment and the application is pending ([CPR 12.3\(3\)\(a\)](#)), or the defendant has satisfied the claim ([CPR 12.3\(3\)\(b\)](#)), or the defendant has admitted liability but requested time to pay ([CPR 12.3\(3\)\(c\)](#)).

9.13

It has sometimes been suggested that the claimant should refrain from requesting or applying for default judgment when it knows that the defendant could be entitled to set the default judgment aside (for example, because the defendant has a real prospect of defending the claim). ¹⁴ This cannot be correct. If the defendant does not wish to contest the claim, the claimant is not obliged to construct a defence for the defendant. Where a claimant has obtained default judgment in circumstances where the defendant clearly has a good defence, and the defendant decides it wishes to contest the claim after all, the proper approach would be for the defendant to seek the claimant's consent to have the default judgment set aside. Should the claimant unreasonably refuse, this may well sound in costs. ¹⁵

9. 14 The rules distinguish between two types of default judgment: *default judgment by request* and *default judgment by application*.

Default judgment by request

9. 15 Default judgment by request has been described as a “mechanistic, administrative, non-judicial function”. ¹⁶ It is obtained without any judicial involvement, let alone examination of the merits (although it has been suggested that the court does have residual power to list a hearing on such a request). ¹⁷ There is no requirement to notify the defendant of the application for default judgment. All the claimant need do is to file a request in the relevant form and judgment will be entered by a simple administrative act ([CPR 12.4\(1\)](#)). However, [CPR 12.4\(1\)](#) limits the availability of the request procedure to money claims, which include claims for:

- (1) a specified amount of money;
- (2) an amount of money to be decided by the court;
- (3) the delivery of goods, where the claim form gives the defendant an alternative of paying their value; and
- (4) any combination of these remedies.

9. 16 There is a difference of opinion as to whether claims for a “specified amount of money” can include not just liquidated claims, but claims for damages on which the claimant is prepared to put a money value. ¹⁸ The better view is that it can – the language of a “specified amount of money” is broad enough to include a claim for a specific sum in damages. If the respondent disagrees with the sum of money claimed, it is always open to them to apply to set aside a default judgment.

9. 17 A request for judgment can include fixed costs. ¹⁹ It may also include interest up to the date of judgment ([CPR 12.7\(1\)](#)), provided that the particulars of claim include the details required by [CPR 16.4](#), the rate of interest claimed is no higher than the rate payable on judgment debts (8%) if it is claimed under the [Senior Courts Act 1981 s.35A](#) or the [County Courts Act 1984 s.69](#), and the request for judgment includes a calculation of interest up to the date of the request. Otherwise, judgment will be for an amount of interest to be decided by the court ([CPR 12.7\(2\)](#)) (likely reflecting a rate much lower than 8%). If in addition to a money claim the claimant also makes a non-money claim (for example, for an injunction or declaration), it may still obtain default judgment by request if it is prepared to abandon all the non-money claims ([CPR 12.4\(4\)](#)); there is no particular form for doing so, and so filing a request for default judgment may be treated as implied abandonment. ²⁰ If the default judgment is later set aside, such a claimant is free to restore the abandoned non-money claim ([CPR 13.6](#)).

9. 18 If, in its request for judgment for a specified amount of money, the claimant has specified the date by which the sum claimed is to be paid in full, or the times and rates of payment, judgment will be given accordingly. If the claimant has not specified a payment date, judgment would be for immediate payment ([CPR 12.5\(1\)–\(2\)](#)). Where the claim is for an unspecified amount of money, judgment by request will be given on liability, leaving quantum (and interest and costs) to be decided by the court later ([CPR 12.5\(3\)](#)). Where the claim is for delivery of goods or alternatively payment of their value, the default judgment will be for delivery and, if the defendant fails to comply, for payment of the value to be decided by the court and for costs ([CPR 12.5\(4\)](#)).

9.19 Whenever the default judgment is for an amount to be determined by the court, the judgment is final as far as liability is concerned, leaving only quantum to be determined at a later hearing. The court giving a default judgment for an amount to be determined will also give directions for the quantum hearing ([CPR 12.8](#)).²¹ The defendant may contest the assessment at the quantum hearing, but it may not dispute liability unless it has the default judgment set aside.²² Whether or not the defendant plays any part in such a hearing, the court's decision at the assessment is not a default judgment since the claimant has to prove its loss or damage by evidence.²³

9.20 Where the claimant has sued numerous defendants, but only some of them have opted to defend, the rules distinguish between situations where the claim against the defaulting defendants can be dealt with separately from the claim against the other defendants, and situations where it cannot be dealt with separately ([CPR 12.9](#)). In the former, a request for judgment may be entered against the defaulting defendants, and proceedings will continue against the other defendants. Where, however, the claims against the defendants cannot be properly separated, the court will not deal with the request for default judgment until such time as it has disposed of the claim against the non-defaulting defendants.²⁴

Default judgment by application

9.21 Default judgment by application involves a very limited judicial examination of the claim, still falling short of a full trial. The application procedure must be followed in all claims other than those falling under [CPR 12.4\(1\)](#) (that is, other than claims for money and/or delivery of goods where payment of money is offered as an alternative). The application procedure must therefore be employed in cases where any other relief is sought, such as injunctions, accounts, delivery up of goods with no alternative of paying their value, or declarations (although declarations will not usually be granted by way of default judgment, except in the clearest cases).²⁵ In addition, the rules specify various other exceptions, including claims for costs only ([CPR 12.10\(1\)](#)), claims against a child or protected party ([CPR 12.11\(a\)\(i\)](#));²⁶ tort claims by one spouse or civil partner against the other ([CPR 12.11\(a\)\(ii\)](#)); or claims where the defendant has failed to file an acknowledgment of service, and the claim is against a defendant who (i) has been served out of the jurisdiction pursuant to [CPR 6.32\(1\)](#) or [6.33\(2B\)](#), (ii) is domiciled in Scotland or Northern Ireland, (iii) is a State, (iv) is a diplomatic agent enjoying immunity under the [Diplomatic Privileges Act 1964](#), or (v) is a person enjoying immunity under the [International Organisations Acts 1968 and 1981](#) ([CPR 12.11\(b\)](#)).

9.22 Applications for default judgment are governed by the general rules for applications in [CPR 23](#) ([CPR 12.4\(3\)](#)).²⁷ The claimant must therefore generally file and serve an application notice ([CPR 23.3–23.4](#)). Exceptions include where the defendant failed to file an acknowledgment of service in response to claims under the [Civil Jurisdiction and Judgments Act 1982](#) or the 2005 Hague Convention served in accordance with [CPR 6.32\(1\)](#) or [6.33\(2B\)](#) ([CPR 12.12\(5\)](#)). Where the defendant in such cases has filed an acknowledgment of service but not a defence, an application notice must be served on the defendant.²⁸ Special rules apply in applications against a state ([CPR 12.12\(8\)–\(9\)](#)).

9.23 The court hearing an application for a default judgment shall give “such judgment as the claimant is entitled to on the statement of case” ([CPR 12.12\(1\)](#)) – that is, taking the allegations in the statement of case as proved. The claimant may support its application by further evidence, who generally need not be served on a defaulting party which has not served an acknowledgment of service ([CPR 12.12\(2\)](#)). However, evidential support is compulsory in certain claims, such as where an acknowledgment of service has been filed, claims against a child or a protected party and in claims between spouses or civil partners ([CPR 12.12\(3\)](#)).

9.24 The mandatory language of [CPR 12.12\(1\)](#) (“...the court shall give such judgment”) could be read to indicate that the court has no discretion in this respect. However, the Privy Council has interpreted [CPR 12.12\(1\)](#) by reference to the more flexible

language of the RSC rule “as affording the court a discretion to decline to grant any default judgment if the court considers that it would be unjust to do so”,²⁹ in particular, holding that “the court should not grant a default judgment if there is material before the court at the hearing of the application which would justify setting such a judgment aside”.³⁰ That reasoning is difficult to reconcile with the language of CPR 12.12(1) or the status of the CPR as a new procedural code. If the respondent to an application indicates its intention to apply to have the judgment set aside, there is something to be said for this approach as a matter of procedural economy. But if no such intention has been indicated, the mere fact that the respondent’s position would have a real prospect of success if pursued should not prevent default judgment being entered.

Setting aside a default judgment

- 9.25** A default judgment cannot be challenged by way of appeal: a defendant who chooses not to contest the claim at first instance cannot turn around and demand an opportunity to contest it before an appellate court. Similarly, a claim cannot be retrospectively “struck out” after default judgment has been obtained (even if, for example, the bringing of the claim amounted to an abuse of process).³¹
- 9.26** This does not mean that a default judgment is unchallengeable. On the contrary, a defendant may apply to the court that entered the judgment to set it aside under CPR 13. The CPR Glossary defines “set aside” as “cancelling a judgment or order or a step taken by a party in the proceedings”. Such an application is concerned with whether the default judgment was properly entered and, if it was, whether the defendant deserves a second chance to contest the claim because it has a real prospect of success or there is some other good reason for allowing it to do so.
- 9.27** An application to set aside may be made not only by the defendant but also by the claimant³² or any non-party “directly affected” by the outcome (CPR 40.9).³³ Being *directly affected* means that the person has some interest capable of recognition by law, which is materially and adversely affected by the default judgment or its enforcement³⁴—for example, where the non-party is the defendant’s insurer.³⁵
- 9.28** The court has a number of options when deciding an application to set aside. It may dismiss the application and thus allow the judgment to stand; grant the application and set aside the default judgment; vary the default judgment; or make any of these orders on conditions, such as a payment into court by the defendant.

Setting aside as of right under CPR 13.2

- 9.29** A defendant has a right to have a default judgment set aside if it was “wrongly entered” (CPR 13.2). In these circumstances, the court must set aside default judgment, even if the claim is hopeless—although the court could in theory set aside default judgment under CPR 13.2, but then enter summary judgment under CPR 24.3.
- 9.30** A judgment is wrongly entered where the conditions for obtaining a default judgment in CPR 12 were not met. Thus, for example, a default judgment must be set aside if it was obtained even though an acknowledgment of service or defence was entered before default judgment is drawn up and sealed.³⁶ A default judgment must be similarly set aside where service was not validly effected in accordance with the rules,³⁷ unless the court dispensed with service. Further, a default judgment must be set aside if service was purportedly effected under the CPR 6.15 alternative service provisions, but the order failed to comply with the requirements of those provisions—for example, by failing to specify a deadline for filing a defence or

acknowledgment of service.³⁸ However, it has also been held that failure to file a valid certificate of service will not lead to a mandatory order setting aside the default judgment.³⁹ In other words, other modes of proof of valid service may be acceptable.

9.31 But what if the defendant receives no actual notice of the proceedings despite being validly served by the claimant? Where service is effected personally, by physically touching the defendant with the document or dramatically throwing it at their feet, this is unlikely. However, the CPR allows service by first-class post or other next-day delivery service (CPR 6.3(1)(b)), which occasionally goes astray. The claimant might be unaware of this and obtain a default judgment. Such judgment does not fall within CPR 13.2, just discussed, because it was not “wrongly entered”. Rather, a defendant who has been served in accordance with the rules, but who has not received actual notice of the proceedings, should seek to set the default judgment aside as a matter of discretion under CPR 13.3.⁴⁰

9.32 A default judgment obtained under CPR 12 can be set aside as of right only in cases falling squarely within CPR 13.2. The CPR has ousted the previous position at common law, which in effect required any irregularly obtained judgment to be set aside as of right.⁴¹ Any other application will be determined in accordance with CPR 13.3.

Setting aside as a matter of discretion under CPR 13.3

9.33 A judgment which was not wrongly entered as defined by CPR 13.2 may be set aside as a matter of discretion in accordance with CPR 13.3, which states:

Rule 13_3

- “(1) … the court may set aside or vary a judgment entered under Part 12 if—
 - (a) the defendant has a real prospect of successfully defending the claim; or
 - (b) it appears to the court that there is some other good reason why—
 - (i) the judgment should be set aside or varied; or
 - (ii) the defendant should be allowed to defend the claim.
- (2) In considering whether to set aside or vary a judgment entered under Part 12, the matters to which the court must have regard include whether the person seeking to set aside the judgment made an application to do so promptly.”

The burden is on the applicant to satisfy the court that there is good reason why judgment regularly obtained ought to be set aside.⁴²

9.34 When the application is made under CPR 13.3(1)(a), the starting point is to consider whether the defendant has a “real prospect” of successfully defending the claim. This means more than a merely arguable case,⁴³ but one which carries a real conviction.⁴⁴ The standard is the same as for obtaining a summary judgment,⁴⁵ discussed below, except that in set-aside applications the burden is on the applicant to show there is a real prospect of success, while in summary judgment applications the burden is to show there is no such prospect.⁴⁶

9.35

It is important to appreciate the limitations on the court's ability to investigate issues of fact on set aside applications. As explained below in relation to summary judgment the application process is simply unsuited to "mini-trials" to probe genuinely conflicting witness or expert evidence, since it takes place without full disclosure or cross-examination.⁴⁷ Consequently, unless it is clear that the defendant's evidence cannot be believed, the court would tend to conclude that there is a real prospect of successfully defending the claim,⁴⁸ unless the defendant's evidence has no real substance or is plainly contradicted by contemporaneous documents.⁴⁹

- 9.36** When the application is made under [CPR 13.3\(1\)\(b\)](#), the court may set aside a default judgment if there is "some other good reason" why (i) the judgment should be set aside or varied, or (ii) the defence should be allowed to proceed. Category (i) includes cases where a clear mistake was made in entering a default judgment. For instance, if default judgment was entered for £100,000 when only £10,000 was claimed, a variation of the judgment should be ordered and the corrected judgment entered.
- 9.37** Category (ii) is less straightforward, for it assumes the possibility of there being a good reason for setting aside a default judgment even though the defendant has no real prospect of success (otherwise the case would fall under [CPR 13.3\(1\)\(a\)](#)). Normally it would be wasteful to force the claimant to proceed to trial where the defence is hopeless.
- 9.38** Cases where there is another "good reason" may include where the defendant did not in fact receive the claim form or particulars of claim⁵⁰ or the documents required pursuant to [CPR 7.8](#) to be served with the claim form such as the response pack.⁵¹ Similarly, "other good reason" might be found where the claimant has acted unreasonably or in bad faith—for example, by applying for default judgment as soon as a stay for mediation has expired, even though the mediation is still ongoing and the defendant has a reasonable expectation that the stay will extend,⁵² or lulling the defendant into the false belief that the claim is not being pursued.⁵³
- 9.39** There may also be situations where the claim raises an issue of general public interest which the court considers deserves a hearing. Thus in one case the court held that a default judgment should be set aside because a serious allegation of threatening and drugging witnesses had been made which should be investigated at trial.⁵⁴ Further, in a defamation claim, the court was of the view that if the claimant was left with a default judgment, it would be easy for those ill-disposed towards him to undermine the effectiveness of the vindication provided by that judgment, so that it was in the interests of both sides that a proposed plea of justification should be determined at a full trial.⁵⁵ It should be stressed, however, that setting aside the default judgment would still leave the claimant free to apply for summary judgment on the grounds that the defendant has no real prospect of success (although summary judgment will only be granted where there is also no compelling reason why the case should not be disposed of at trial, see [CPR 24.3\(b\)](#)).
- 9.40** Satisfying the conditions in [CPR 13.3\(1\)\(a\)](#) or [CPR 13.3\(1\)\(b\)](#) gives the court a discretion to set aside default judgment. Previously, it was thought that if a defendant could meet those conditions, the discretion would normally be exercised in favour of setting aside. However, the courts' attitude has shifted and now a claimant will not be deprived of a default judgment lightly.⁵⁶
- 9.41** [CPR 13.3\(2\)](#) provides that, in particular, the court must have regard to whether the defendant made the application promptly, and delay may of itself lead the court to refuse the defendant's application.⁵⁷ The word "promptly", Simon Brown LJ explained, implies "not that an applicant has been guilty of no needless delay whatever, but rather that it has acted with all reasonable celerity in the circumstances".⁵⁸ Thus, despite occasional suggestions by judges that particular periods of time are at the "outer limit" of what is acceptable,⁵⁹ there is no fixed or arbitrary time limit; rather, each case will turn on its own facts.⁶⁰ Indeed, an application to set aside a default judgment on liability could be made even after the court has

assessed the damages at a subsequent hearing,⁶¹ although such circumstances would weigh heavily against setting aside default judgment.⁶²

9.42 Failure to provide a good reason for any delay in applying is not *necessarily* fatal to an application to set aside, but is an important factor,⁶³ and in some cases may itself be sufficient to deny relief.⁶⁴ There should be little sympathy for a defendant who delays because they prefer to take a vacation, or because they wait until the creditor seeks to enforce judgment.⁶⁵ The courts have also held that delaying in order to seek the claimant's consent to have the default judgment set aside may not constitute a "good reason"⁶⁶ —a somewhat puzzling attitude, since setting aside the order by agreement can save considerable time and expense that would otherwise be spent on a contested hearing. Given the importance of factual considerations of this kind, a defendant applying under **CPR 13.3** needs to support its application with formal written evidence,⁶⁷ which may even include waiving privilege to allow its lawyers to provide a full explanation.⁶⁸ A failure to provide such evidence may lead to adverse inferences about the real reason for the delay.⁶⁹

9.43 After some first-instance confusion,⁷⁰ it is now well settled⁷¹ that the courts will analyse applications under **CPR 13.3** through the prism of **CPR 3.9** and the criteria set out in *Denton v TH White Ltd*.⁷² In other words, the court will consider the seriousness and significance of the failure to file an acknowledgment of service or defence, the reason for it, and all the circumstances of the case, with particular (but not paramount) importance attached to the need for litigation to be conducted efficiently and at proportionate cost, and for the court to enforce compliance with rules, practice directions and orders.

9.44 Factors that will be relevant to the evaluation of "all the circumstances" include the nature and merits of the defence;⁷³ whether the defendant deliberately chose to default;⁷⁴ the period of time prior to the entry of default judgment⁷⁵ as well as the length of and reason for any delay in applying to set aside,⁷⁶ the injustice that the claimant would suffer if judgment were set aside;⁷⁷ especially if the claimant has changed its position in reliance upon it; and the overriding objective. If an application to set aside under **CPR 13.3** is refused, the court has no jurisdiction to consider a second application, even if there has been a material change of circumstances since the first application was refused. Rather, the applicant should appeal the first refusal, and adduce evidence of any material change in circumstances on appeal.⁷⁸

Setting aside default judgment under CPR 23.10

9.45 Where (i) default judgment was obtained by the claimant by way of application under **CPR 23**, (ii) notice of the application for default judgment was required but not given and (iii) default judgment was granted in the defendant's absence, the defendant may alternatively apply for the default judgment to be set aside under the general set-aside provision in **CPR 23.10**. **CPR 23.10** operates a strict time limit of seven days from the date on which the order was served. This is obviously more exacting than the requirement under **CPR 13.3(2)** that any application to set aside default judgment be made "promptly". But even where the application is made under **CPR 23.10** rather than **CPR 13**, it seems that the courts exercise the discretion to set aside with **CPR 13.3** firmly in mind, and as such the person applying to have the default judgment set aside will normally be required to show a reasonable prospect of success⁷⁹ and grounds for relief from sanctions. It is therefore difficult to see what advantage applying under **CPR 23.10** rather than **CPR 13.3** would bring.

Footnotes

³ *Newland Shipping and Forwarding Ltd v Toba Trading FzC [2014] EWHC 1986 (Comm)* [27]. For this aspect of party autonomy, see further Ch.7 Statements of Case para.7.7; and Ch.12 Case Management Pt I paras 12.8 ff.

- 4 See, for example, the Rome Statute of the International Criminal Court art.63(1). In English criminal law there is a limited discretion to allow trials in absentia: *R v Jones [2003] 1 AC 1* [13].
- 5 See Ch.7 Statements of Case para.7.7.
- 6 See the discussion in Ch.3 Fair Trial paras 3.28 ff; and Ch.12 Case Management Pt II paras 12.206 ff.
- 7 *Trade Agency v Seramico Investments [2012] EUECJ C-619/10 (6 September 2012)* [57]–[58].
- 8 CPR 3.5. For the power to enter judgment in these circumstances, see Ch.12 Case Management Pt II paras 12.186 ff.
- 9 See below, paras 9.43 ff.
- 10 Emphasis added.
- 11 See, for example, *King v Commissioner of Police of the Metropolis (Permission to Appeal) [2005] EWCA Civ 706* [3].
- 12 Subject to the rules set out in CPR 12.9, which govern the circumstances in which default judgment can be selectively entered against some defendants but not all, in a claim against multiple defendants.
- 13 *Galliani v Sartori [2023] EWHC 3306 (Comm)* [35].
- 14 *Roundstone Nurseries Ltd v Stephenson Holdings Ltd [2009] EWHC 1431 (TCC)* [36].
- 15 *Roundstone Nurseries Ltd v Stephenson Holdings Ltd [2009] EWHC 1431 (TCC)* [36].
- 16 *Thevarajah v Riordan [2015] EWCA Civ 41* [33].
- 17 *Edward v Okeke [2023] EWHC 2932 (KB)* [57].
- 18 In favour, see *Merito Financial Services Limited v David Yelloly [2016] EWHC 2067 (Ch)* [36]; against, see Master Dagnall in *Edward v Okeke [2023] EWHC 2932 (KB)* [39], Johnston J not expressing a final view on appeal at [55].
- 19 Fixed costs will apply in accordance with CPR 45. Judgment by request may be obtained for costs only, provided they are fixed costs: CPR 12.10(1).
- 20 2025 WB 12.4.7.
- 21 Such directions would deal with disclosure and production of documents, the calling of witnesses (including experts) and any other matter relevant to determining the amount payable by the defendant.
- 22 Although liability is established by a default judgment, a defendant may contend that particular heads of loss do not flow from the act or omission on which the judgment is based: *Sykes v St George's Healthcare NHS Trust [2014] EWHC 2505 (QB)*.
- 23 *Strachan v Gleaner Co Ltd [2005] UKPC 33; [2005] 1 W.L.R. 3204* [16].
- 24 Pursuant to CPR 12.9(3) a default judgment for possession of land or delivery of goods under CPR 12 cannot be enforced against one of several defendants unless the claimant has obtained judgment against all the defendants or was given permission to do so by the court.
- 25 *Goldcrest Distribution Ltd v McCole [2016] EWHC 1571 (Ch)* [43].
- 26 CPR 21.3(2) forbids any step to be taken in the proceedings after the service of a claim form on a child or protected party until a litigation friend has been appointed for the defendant. A claimant seeking a default judgment must therefore apply for the appointment of a litigation friend under CPR 21.6: CPR 12.12(4).
- 27 See generally Ch.8 Interim Applications.
- 28 *Intense Investments Ltd v Development Ventures Ltd [2005] EWHC 1726 (TCC)* [16]–[17].
- 29 *Lux Locations Ltd v Yida [2023] UKPC 3 [53]–[56]*.
- 30 *Lux Locations Ltd v Yida [2023] UKPC 3 [72]*; followed in *Ras Al Khaimar Investment Authority v Azima [2023] EWHC 2108 (Ch)*.
- 31 *Terry v BCS Corporate Acceptances [2018] EWCA Civ 2422*.
- 32 *Messer Griesheim GmbH v Goyal MG Gases PVT Ltd [2006] EWHC 79 (Comm)* [1].
- 33 *Abdelmamoud v The Egyptian Association in Great Britain Ltd [2015] EWHC 1013 (Ch)* [49]–[50].
- 34 *Abdelmamoud v The Egyptian Association in Great Britain Ltd [2015] EWHC 1013 (Ch)* [58].
- 35 *Ageas Insurance Ltd v Stoodley [2019] Lloyd's Rep IR 1* [40]–[43].
- 36 *Galliani v Sartori [2023] EWHC 3306 (Comm)* [35].
- 37 *Credit Agricole Indosuez v Unicof Ltd (No.1) [2003] EWHC 77 (Comm)* [18] (Langley J).
- 38 *Dubai Financial Group Llc v National Private Air Transport Services Company (National Air Services) Ltd [2016] EWCA Civ 71* [27]–[32], [38]–[39], contra [13] per Longmore LJ.
- 39 *Henriksen v Pires [2011] EWCA Civ 1720* [28].
- 40 *Akram v Adam [2004] EWCA Civ 1601; [2005] 1 All ER 741 [34]; Godwin v Swindon Borough Council [2001] EWCA Civ 1478* [49].
- 41 *De Ferranti v Execuzen Ltd [2013] EWCA Civ 592* [49]; *Nelson v Clearsprings (Management) Ltd [2006] EWCA Civ 1252* [48].

- 42 *E D & F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472; [2003] (D) All ER 75 (Apr) [9].
 43 *Nemetona Tradiing Ltd v Goldington Corporation Ltd* [2015] EWHC 739 (QB) [11].
 44 *International Finance Corp v Utexafrica Sprl* [2001] CLC 1361, p.1363. See also *E D & F Man Liquid Products v Patel* [2003] EWCA Civ 472; [2003] (D) All ER 75 (Apr) [8].
 45 *Newland Shipping And Forwarding Ltd v Toba Trading Fzc* [2014] EWHC 1986 (Comm) [3].
 46 *E D & F Man Liquid Products v Patel* [2003] EWCA Civ 472; [2003] (D) All ER 75 (Apr) [9]; *Roundstone Nurseries Ltd v Stephenson Holdings Ltd* [2009] EWHC 1431 (TCC) [29]. For discussion of the test in applications for summary judgment see below, para.9.54 ff.
 47 *Redbourn Group Ltd v Fairgate Development Ltd* [2017] EWHC 1223 (TCC) [24].
 48 *Manolakaki v Constantinides* [2003] EWHC 401 (Ch).
 49 *Redbourn Group Ltd v Fairgate Development Ltd* [2017] EWHC 1223 (TCC) [24].
 50 *Godwin v Swindon Borough Council* [2001] EWCA Civ 1478 [49].
 51 *Rajval Construction Ltd v Bestville Properties Ltd* [2010] EWCA Civ 1621 [22]; see also *Henriksen v Pires* [2011] EWCA Civ 1720 [28]–[29].
 52 *Roundstone Nurseries Ltd v Stephenson Holdings Ltd* [2009] EWHC 1431 (TCC) [33]–[35].
 53 *S.T. Shipping & Transport Inc v Vyzantio Shipping Ltd (The Byzantio)* [2004] EWHC 3067 (Comm) [32].
 54 *Berezovsky v Russian Television and Radio Broadcasting Co* [2009] EWHC 1733 (QB) [16].
 55 *Berezovsky v Russian Television and Radio Broadcasting Co* [2009] EWHC 1733 (QB) [18].
 56 *Regione Piemonte v Dexia Credio SpA* [2014] EWCA Civ 1298 [33]–[34].
 57 *Standard Bank Plc v Agrinvest International Inc* [2010] EWCA Civ 1400 [21]–[23]. For a discussion of delay see *Evans v Bartlam* [1937] AC 473; [1937] 2 All ER 646, HL.
 58 *Regency Rolls Ltd, David Eric Kemp v Murat Anthony Carnall* [2000] EWCA Civ 379 [45]. But see *Page v Champion Financial Management Ltd* [2014] EWHC 1778 (QB) [69], which suggests that a very lengthy delay may of itself prevent the defendant from seeking relief, even when the delay has arisen through no fault of the defendant.
 59 Some examples are given, and disapproved, in *Intesa Sanpaolo SPA v Regione Piemonte* [2013] EWHC 1994 (Comm) [31].
 60 *Regione Piemonte v Dexia Credio SpA* [2014] EWCA Civ 1298 [35].
 61 *Strachan v Gleaner Co Ltd* [2005] UKPC 33; [2005] 1 W.L.R. 3204 [16]–[18]; see also *Gentry v Miller* [2016] EWCA Civ 141.
 62 *Hawley v Luminar Leisure Plc* [2006] EWCA Civ 18 [93].
 63 *Goldcrest Distribution Ltd v McCole* [2016] EWHC 1571 (Ch) [59].
 64 *Redbourn Group Ltd v Fairgate Development Ltd* [2017] EWHC 1223 (TCC) [80].
 65 *Nolan v Devonport* [2006] EWHC 2025 (QB) [15]–[16].
 66 *Samara v MBI & Partners UK Ltd* [2014] EWHC 563 (QB) [52].
 67 2025 WB 13.4.1.
 68 *Goldcrest Distribution Ltd v McCole* [2016] EWHC 1571 (Ch) [63].
 69 *Redbourn Group Ltd v Fairgate Development Ltd* [2017] EWHC 1223 (TCC) [80].
 70 See eg *Cunico Resources NV v Daskalakis* [2018] EWHC 3382 (Comm) [38]–[41].
 71 *Regione Piemonte v Dexia Credio SpA* [2014] EWCA Civ 1298 [38]–[41]; *Gentry v Miller* [2016] EWCA Civ 141 [23]–[24]; *FXF v English Karate Federation Ltd* [2023] EWHC 891 [63].
 72 *Denton v TH White Ltd* [2014] EWCA Civ 906, discussed in Ch.12 Case Management Pt II paras 12.225 ff.
 73 *Regione Piemonte v Dexia Credio SpA* [2014] EWCA Civ 1298 [36].
 74 *Newland Shipping And Forwarding Limited v Toba Trading Fzc* [2014] EWHC 1986 (Comm) [28].
 75 *Samara v MBI & Partners UK Ltd* [2014] EWHC 563 (QB), [43]; *Newland Shipping And Forwarding Limited v Toba Trading Fzc* [2014] EWHC 1986 (Comm) [30].
 76 *Gentry v Miller* [2016] EWCA Civ 141 [24].
 77 *Newland Shipping And Forwarding Limited v Toba Trading Fzc* [2014] EWHC 1986 (Comm) [34].
 78 *Samara v MBI & Partners UK Ltd* [2016] EWHC 441 (QB) [61].
 79 *De Ferranti v Execuzen Ltd* [2013] EWCA Civ 592 [49].

Striking Out a Statement of Case Which Discloses No Reasonable Claim or Defence

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 9 - Disposal without Trial

Striking Out a Statement of Case Which Discloses No Reasonable Claim or Defence

9. 46

There is no justification for investing court and litigant resources in following the pre-trial and trial process where the outcome is a foregone conclusion. Nor is it appropriate to do so where a litigant seeks to abuse the court's processes. In such cases, the court has the power to strike out the offending claim or defence and thereby avoid unnecessary expense and delay. "Strike out" is defined in the CPR Glossary as "the court ordering written material to be deleted so that it may no longer be relied upon". The power is set out in [CPR 3.4](#):

[Rule 3.4](#)

- “(2) The court may strike out a statement of case if it appears to the court—
 - (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;
 - (b) 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; or
 - (c) that there has been a failure to comply with a rule, practice direction or court order.”

[80](#)

9. 47

Applications to strike out a statement of case in the exercise of the court's powers under [CPR 3.4\(2\)\(a\)](#) must be made in accordance with the [CPR 23](#) application procedure. An application to strike out a statement of case on the merits should normally be made as soon as possible, well before the trial⁸¹—ideally, before or when filing the directions questionnaire (PD 26 para.11(1)), so that if the application is successful and the statement of case is struck out at this stage, there is no need to allocate the case and give directions. However, an application may be made much later—even after the trial has commenced, although striking out at that stage will be very rare.⁸²

9. 48

The applicant must satisfy the court that the respondent's statement of case discloses no reasonable grounds for bringing or defending the claim. There is no onus on the respondent to show the claim or defence to be well founded.⁸³ On the face of it, [CPR 3.4\(2\)\(a\)](#) only permits the court to strike out proceedings where the terms of the pleading itself justify this course. Indeed, in *Ministry of Defence v AB* the Court of Appeal considered it neither necessary nor appropriate for any material beyond the pleadings to be adduced in such applications.⁸⁴ However, as Lord Phillips pointed out on the appeal to the Supreme Court, [CPR 3.1\(1\)](#) and [3.4\(5\)](#) preserve the inherent jurisdiction of the court to strike out proceedings on the ground of abuse of process even where the hopelessness of the claim is not visible on the face of the pleadings, as where the facts alleged are wholly implausible.⁸⁵ For this reason, PD 3A para.5.2 provides that "While many applications under [rule 3.4\(2\)](#) can be made without evidence in support, the applicant should consider whether facts need to be proved and, if so, whether evidence in support should be filed and served".⁸⁶ Applicants would be well advised to do so, especially where the grounds of the application cannot be sustained by merely pointing to the statements of case in question.⁸⁷

9. 49

PD 3A provides examples of where striking out under CPR 3.4(2)(a) would be appropriate. Particulars of claim may be struck out if they include no facts indicating what the claim is about, if they are incoherent and make no sense, or if the facts relied upon disclose no legally recognisable claim against the defendant (PD 3A para.1.2). Similarly, a defence may be struck out if it consists of a bare denial and sets out no coherent statement of facts, or if the facts it sets out could not amount in law to a defence to the claim (PD 3A para.1.4). The most straightforward case for striking out is a claim that on its face fails to establish a recognisable cause of action or no defence in law.⁸⁸ A statement of case may also be hopeless where it advances factual allegations which cannot possibly be true, or relies on an unsustainable point of law such as a groundless argument concerning the interpretation of a document (PD 3A para.1.5). However, where the court is minded to strike out a statement of case, it will normally allow a party the opportunity to amend it to put the defect right, if there is reason to believe the party will be able to do so.⁸⁹

- 9. 50** It is important to stress that the justification of dismissal under this rule rests on the idea that the claim or defence is “unwinnable” or “bound to fail”⁹⁰. It would be wrong to strike out a statement of case simply because it is unlikely to succeed, or because the case raises complex issues of fact or law.⁹¹ The applicant for strike-out is bound to accept the accuracy of the facts as pleaded, unless they are contradictory or obviously wrong.⁹² For instance, even though the court considers an allegation of sexual abuse to be unlikely, it may be desirable to allow the allegation to be tested at trial.⁹³ Similarly, a statement of case should not be struck out if it raises an issue in an area of the law that is in a state of uncertainty or development,⁹⁴ or requires evaluations of public policy or the public interest.⁹⁵

- 9. 51** At one point the European Court of Human Rights held that dismissal of a claim on the grounds that it disclosed no reasonable cause of action could amount to a denial of the right of access to court under ECHR art.6.⁹⁶ But it is plainly wrong to suggest that a party who has had the benefit of an (albeit abbreviated) hearing on the merits in a court of competent jurisdiction has been denied access to court adjudication.⁹⁷ Every modern system has a variety of procedures for disposing of different types of cases depending on their value, complexity, importance and so on. Provided that the procedural arrangements are not otherwise unfair, there cannot be a complaint of a denial of access simply because a claim or defence is decided summarily.⁹⁸

- 9. 52** This conclusion is supported by the subsequent ECtHR judgment in *Z v United Kingdom*.⁹⁹ There the ECtHR dismissed the argument that striking out a case that disclosed no cause of action could, of itself, amount to a violation of the ECHR art.6:

“That [striking out] decision did end the case, without the factual matters being determined on the evidence. However, if as a matter of law, there was no basis for the claim, the hearing of evidence would have been an expensive and time-consuming process which would not have provided the applicants with any remedy at its conclusion. There is no reason to consider the striking out procedure which rules on the existence of sustainable causes of action as per se offending the principle of access to court. In such a procedure, the plaintiff is generally able to submit to the court the arguments supporting his or her claims on the law and the court will rule on those issues at the conclusion of an adversarial procedure.”

¹⁰⁰

Indeed, the right to adjudication within a reasonable time demands that a litigant with an indisputable claim or defence should not be kept out of its entitlement by being put through a lengthy process.¹⁰¹

- 9. 53** Following strike-out, the court has a broad discretion to make consequential orders. It may choose to enter judgment immediately (PD 3A para.4.2) or permit the respondent to file an amended statement of case, if there is reason to believe the party will be able to correct the defect.¹⁰² Where strike-out concerns only part of the statement of case, the court may give directions for the case management of the remainder of the claim.

Footnotes

- 80 Statement of case means “a claim form, particulars of claim where these are not included in a claim form, defence, counterclaim or other additional claim, or reply to defence” and also “includes any further information given in relation to them voluntarily or by court order under rule 18.1”: CPR 2.3(1).
- 81 *National Westminster Bank Plc v Rabobank Nederland (Application to Strike Out) [2006] EWHC 2959 (Comm)* [28].
- 82 *Devon and Cornwall Autistic Community Trust v The Cornwall Council [2015] EWHC 403 (QB)* [16]–[17].
- 83 *Green v Hancocks [2000] Lloyd's Rep. P.N. 813.*
- 84 *Ministry of Defence v AB [2010] EWCA Civ 1317* [71].
- 85 *Ministry of Defence v AB [2012] UKSC 9* [149].
- 86 *S v Gloucestershire County Council [2001] Fam. 313, 341; [2000] 3 All ER 346, 372.*
- 87 See eg *Korea National Insurance Corp v Allianz Global Corporate & Speciality AG [2008] EWCA Civ 1355* [28]–[30].
- 88 For example, a statement of case that alleges facts giving rise to a duty of care may be struck out if, assuming those facts to be true, there would in law be no duty of care: *Rowley v Secretary of State for Work and Pensions [2007] EWCA Civ 598* [22]; or a statement of case alleging negligence but no actionable damage: *Harris v Bolt Burdon [2000] C.P. Rep. 70 [24] CA*. Similarly, it would not be reasonable to take matters further where the defendant’s sole reply to a claim for the recovery of debt is that it has no money—the defendant’s remedy lies not in resisting the substantive claim, but seeking the protection of bankruptcy.
- 89 *Soo Kim v Youg [2011] EWHC 1781 (QB)* [40].
- 90 *Hughes v Richards (t/a Colin Richards & Co) [2004] EWCA Civ 266; [2004] P.N.L.R. 35.*
- 91 *Three Rivers District Council v Governors and Company of the Bank of England (No.3) [2001] UKHL 16; [2001] 2 All ER 513* [95]; *Barrett v Universal-Island Records Ltd [2003] EWHC 625 (Ch)* [44].
- 92 *MF Tel Sarl v Visa Europe Ltd [2023] EWHC 1336 (Ch)* [34(1)].
- 93 In *S v Gloucestershire County Council [2000] 3 All ER 346, 373.*
- 94 *Bridgeman v McAlpine-Brown [2000] EWCA Civ 524; Farah v British Airways Plc [1999] EWCA Civ 3052; Hughes v Richards (t/a Colin Richards & Co) [2004] EWCA Civ 266; [2004] P.N.L.R. 35 [30].*
- 95 *Saeed v Ibrahim [2018] EWHC 3 (Ch)* [48].
- 96 *Osman v United Kingdom (1998) 29 E.H.R.R. 245* [119]. For criticism see *Barrett v Enfield London Borough Council [2001] 2 AC 550, 558*; L. Hoffmann, “Human Rights and the House of Lords” (1999) 62 M.L.R. 159; and Buxton, “The Human Rights Act and Private Law” (2000) 116 L.Q.R. 48, 63. See also *Palmer v Tees Health Authority [1999] Lloyd's Rep. Med. 351, CA*.
- 97 *S v Gloucestershire County Council [2000] 3 All ER 346, 370–371; Kent v Griffiths (No.3) [2000] 2 W.L.R. 1158, [37]–[38].* See also *Jones v Kaney [2010] EWHC 61 (QB); [2010] 2 All ER 649, [10].*
- 98 *Kent v Griffiths [2001] QB 36; [2000] 2 All ER 474, CA*. See also *Palmer v Tees Health Authority [1999] Lloyd's Rep. Med. 351.*
- 99 *Z v UK (2001) 10 B.H.R.C. 384 [87], [98].*
- 100 *Z v UK (2001) 10 B.H.R.C. 384 [97], see also [95]–[96], [100]–[101].* To the same effect see *TP and KM v United Kingdom (2002) 34 E.H.R.R. 69, 70.*
- 101 For discussion of the right to timely adjudication, see Ch.1 The Overriding Objective paras 1.50 ff.
- 102 *Soo Kim v Youg [2011] EWHC 1781 (QB)* [40].

Summary Judgment

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Mainwork

Chapter 9 - Disposal without Trial

Summary Judgment

General principles

9. 54 The strike-out procedure just discussed deals with situations where the statements of case reveal that one of the parties has failed to advance a reasonable case worthy of further consideration. There will also be situations where, although a statement of case cannot be so easily brushed aside, the issues it presents can be easily decided without need for the normal pre-trial and trial processes. To insist that such disputes should nevertheless follow the full procedural course would waste valuable resources and, worse still, enable unscrupulous litigants to cause their opponents and the court to waste unnecessary time and resources. [CPR 24](#) therefore enables summary judgment to be given without a full trial in such circumstances.
9. 55 Summary judgment may be given against a defendant or a claimant, if the court considers that the party in question has no real prospect of success and there is no other compelling reason why the matter should be disposed of at a trial ([CPR 24.3](#)). Summary judgment may therefore be seen as an example of the proportionality principle, in that the full trial procedure could be avoided because in the circumstances its use would be disproportionate to what it could achieve.

Scope of the summary judgment procedure

9. 56 Summary judgment against a claimant (sometimes referred to as “reverse summary judgment) is available in any type of proceedings ([CPR 24.2\(a\)](#)). The availability of summary judgment against defendants is somewhat more limited ([CPR 24.2\(b\)](#)). It is not available in certain residential possession proceedings against a mortgagor, or a protected tenant or contract-holder under the [Rent Act 1977](#) or [Housing Act 1988](#). Summary judgment was previously unavailable against the Crown¹⁰³; now, [CPR 24.4\(2\)](#) defers the earliest date at which summary judgment against the Crown may be sought, until after the expiry of time for filing a defence. However, if a defendant’s defence is patently groundless, it may be struck out under [CPR 3.4\(2\)\(a\)](#) notwithstanding that summary judgment is unavailable.
9. 57 Summary judgment may dispose of the case as a whole or be confined to a particular issue ([CPR 24.3](#)). For example, the court may decide to give summary judgment on liability alone, and defer the issue of quantum to trial. However, the fact that the summary judgment will not dispose of the whole of the case may in certain situations lead the court to conclude that it would be better for the whole case to go forward to trial.¹⁰⁴ As stated in *Anan Kasei Co., Ltd v Neo Chemicals & Oxides (Europe) Ltd*, “If the determination of an issue before trial has no consequences except that there is one fewer issue for trial then the court has not given summary judgment and the application was not for summary judgment. If it were otherwise, parties would be able to pick and choose the issues on which they thought their cases were strong and seek to have them determined in isolation, in an attempt to achieve a tactical victory and cause the respondent to incur heavy costs liability at an early stage.”¹⁰⁵ Rather, the appropriateness of summary judgment will depend on the extent to which it is likely to contribute to the expeditious and economical disposal of the remaining issues.

- 9.58 The summary judgment process may be initiated by the parties, or by the court of its own initiative under [CPR 3.3\(1\)](#). Part of the court's duty of active case management includes "deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others" ([CPR 1.4\(2\)\(c\)](#)). However, the court would be justified in proceeding to summary judgment of its own initiative only if all the necessary materials are before the court and the parties have had adequate notice of how the court proposes to proceed (or are given the opportunity to set aside an order made without notice). ¹⁰⁶
- 9.59 Summary judgment may be awarded against a respondent who fails to appear at the hearing of the application. However, the respondent may apply for the summary judgment to be set aside. In such circumstances [CPR 23.11](#) applies, and the court will consider as relevant the approach taken to applications under [CPR 39.3\(5\)](#), so that it would grant the application only if the respondent acted promptly when it found out about the summary judgment, had good reason for not attending and has a reasonable prospect of success at trial. ¹⁰⁷

Grounds for summary judgment

- 9.60 [CPR 24.3](#) sets out the conditions for obtaining a summary judgment:

Rule 24.2

"The court may give summary judgment against a claimant or defendant on the whole of a claim or on an issue if—

- (a) it considers that the party has no real prospect of succeeding on the claim, defence or issue; and
- (b) there is no other compelling reason why the case or issue should be disposed of at a trial."

- 9.61 An applicant for summary judgment bears the burden of establishing each limb.

No real prospect of success

- 9.62 In [Swain v Hillman](#), Lord Woolf MR said that the "words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success or they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success". ¹⁰⁸ It has been said that "real" means that the respondent has to have a case which is better than merely arguable ¹⁰⁹ or has some degree of conviction, ¹¹⁰ even if it is difficult to make out. ¹¹¹ But even these elaborations fail to convey a clear measure of what has to be established in order to obtain summary judgment and different judges may well have different conceptions of what counts as "real" and what counts as "fanciful" or what is better than "merely arguable". It is of course not possible to obtain precision in a test of this kind, but adequate consistency can be achieved only if the test is better articulated so that judges can apply it in the context of a shared understanding of its nature and purpose.

- 9.63 To appreciate the full implications of the test one must first articulate its rationale. The pre-CPR position was that only claimants could apply for summary judgment, and they had to demonstrate that the defendant had "no defence" to the

claim.¹¹² It was not enough for the court to conclude that the defendant was unlikely to succeed in its defence; it had to be convinced beyond reasonable doubt that the defendant could not succeed. As a result, leave to defend had to be given even where the defence was very weak, or “shadowy”,¹¹³ though the court had the power to impose conditions on the leave to defend if it considered the defence to be doubtful.¹¹⁴

9. 64 In his Access to Justice reports Lord Woolf found the old rule unsatisfactory because it allowed unmeritorious cases to go to trial when they should have been disposed of summarily.¹¹⁵ The test of “a real prospect of succeeding” must therefore be understood in the context of the reports’ policy to promote proportionate use of resources. The purpose of the CPR test is to avoid the use of the full trial procedures for resolving disputes that cannot benefit from them. For example, where the full trial processes are unlikely to make a difference to the outcome.

9. 65 The leading statement of the summary judgment test is set out in *Easyair Ltd v Opal Telecom Ltd*.¹¹⁶ Lewison J said (citations omitted):

- “i)The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success ...
- ii)A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable ...
- iii)In reaching its conclusion the court must not conduct a "mini-trial" ...
- iv)This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents ...
- v)However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial ...
- vi)Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case ...
- vii)On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction ...”.

9. 66

Whether a party has a real prospect of success therefore depends on an assessment of two distinct matters. The first is whether the party has a real prospect of success on the basis of the facts that are known at the time. The second is whether there is a clear prospect that further material supporting the party's case would emerge if the case proceeded to a full trial (with disclosure and cross-examination of witnesses),¹¹⁷ which would give the respondent a real prospect of success.¹¹⁸ The respondent who seeks to rely on that further support must identify, at least in general terms, the nature of the evidence, its source, and its relevance to the issues;¹¹⁹ it is not enough for a party to assert that "something will turn up"¹²⁰ (sometimes referred to as "Micawberism", after the character in the Dickens novel David Copperfield).¹²¹ It is only when the court is convinced that the party has no real prospect in light of both these matters that the full trial process would be wasteful. The size of the claim or amount at stake is not itself relevant in determining whether summary judgment should be awarded.¹²²

9. 67

In *S v Gloucestershire County Council*¹²³ the Court of Appeal explained that before giving summary judgment the court must be satisfied:

- (1)that it had before it all substantial relevant facts that were reasonably capable of being before it;
- (2)that those facts were undisputed or there was no real prospect of successfully disputing them; and
- (3)that there was no real prospect of oral evidence affecting the court's assessment of the facts.

The Court of Appeal stressed that even where there were gaps in the evidence, the court could proceed to summary judgment if there was no real prospect that the gaps would be filled.

9. 68

In deciding whether the test is satisfied, the court should bear in mind what material is and is not available to it at the pre-trial stage,¹²⁴ and hesitate before making a final decision without trial where reasonable grounds exist for believing that a fuller investigation into the facts would add to or alter the evidence available, thereby affecting the outcome of the case.¹²⁵ Thus, where a case turns on expert issues, in most cases it will be inappropriate to grant summary judgment until the experts have produced a joint statement; and only in very few cases will summary judgment be granted before the expert reports have been exchanged.¹²⁶

9. 69

Decisions on summary judgment applications are generally fact-specific, such that it is difficult to apply previous decisions directly to others. However, the following principles can be distilled. First, there are certain types of allegation which by nature will not usually be appropriate for summary judgment. For example, because findings of dishonesty depend heavily on a witness' credibility under cross-examination, establishing fraud or dishonesty without a full trial is difficult,¹²⁷ and summary judgment will be inappropriate¹²⁸ except where a finding is virtually inevitable.¹²⁹ Second, questions of pure law which do not depend upon the resolution of disputes of fact should be decided by summary judgment, if postponement of the decision to trial would unnecessarily waste time and add to the expense of the proceedings.¹³⁰ This can be the case even where the question of law involves evaluative judgments or issues of public policy, such as the application of the doctrine of illegality,¹³¹ or the exercise of a discretion, such as whether to award declaratory relief.¹³² In such cases, it is the facts which must be established to the summary judgment standard; the applicant does not need to show that the discretion could not be arguably exercised the other way.¹³³ Where, however, the issue involves a controversial question of law in a developing area, the full process should be employed;¹³⁴ such questions are better decided against actual rather than assumed facts.¹³⁵ Third, summary judgment may be awarded where, although the claimant and defendant have different versions of events, the claimant is entitled to the relief sought whichever version of events is true.¹³⁶ The purpose of court proceedings is to vindicate the claimant's rights by awarding a remedy, rather than fact-finding for its own sake.

No "mini-trials" on an application for summary judgment

9. 70

The court has often said that the summary judgment procedure must not be turned into a mini-trial.¹³⁷ All that is meant by this is that if at the hearing of a summary judgment application, the court concludes that issues should be disposed of by a trial process, it should not then continue the hearing of the application as if it were a trial process. For example, if the court concludes that the resolution of factual issues requires witness testimony that needs to be tested by cross-examination,¹³⁸ or if it considers that the dispute raises complex issues of fact, then it must not proceed with the summary judgment hearing as if it were a trial but dismiss the application.¹³⁹ But the principle does not preclude summary judgment wherever the respondent adduces witness evidence;¹⁴⁰ it may be clear that there is no real substance to the witness' assertions, especially if they are contradicted by contemporaneous documents.¹⁴¹ However, it has been said that where witness testimony has been offered in opposition to an application for summary judgment the court must be convinced that it is so obviously untrue that it is fanciful to suggest that it might be accepted before granting the application.¹⁴² A respondent to a summary judgment application is therefore well-advised to adduce witness evidence in support of its factual contentions.

“Other compelling reason”

9.71

The court may refuse a summary judgment application, even though the respondent has been shown to have no real prospect of succeeding at the trial, if there is an “other compelling reason why the case or issue should be disposed of at a trial” ([CPR 24.3\(b\)](#)). The requirement for a “compelling” reason significantly narrows the broad discretion previously available under the RSC. Given the importance attached to the proper use of court resources, it would be only in exceptional cases that the court would refuse to give summary judgment after the applicant has shown that the respondent has no real prospect of success.¹⁴³ This may include where summary judgment would effectively deprive a party of the right to trial by jury,¹⁴⁴ or wider points of public interest—for example, if the court considers that the case should be determined in the full glare of a public trial,¹⁴⁵ or raises a point of construction of a standard form contract widely used in the market.¹⁴⁶

Time for application

9.72

A claimant may not apply for summary judgment before the defendant has served an acknowledgment of service or a defence, unless the court gives permission or a practice direction provides otherwise ([CPR 24.4\(1\)](#)). However, [CPR 24.4\(3\)](#) provides that in claims for specific performance or rescission of certain property transactions, or for forfeiture or return of deposits made under such agreements, the claimant may generally apply for summary judgment after the claim form has been served. The defendant may apply for summary judgment at any time after proceedings have started, even before it has served an acknowledgment or defence. If the court dismisses an application for summary judgment at this stage, it will give directions for the service of a defence ([CPR 24.6](#)).

9.73

Given that the purpose of the procedure is to achieve a quick and efficient disposal of the dispute, the application for summary judgment should be made as early as possible; ideally, before the filing of the directions questionnaire or at the same time (PD 26 para.11(1)). Where the court exercises its power to order summary adjudication of its own initiative, this will normally occur at the allocation stage, when it has examined the parties' statements of case. If the court decides to proceed with summary adjudication, it will not allocate the case but instead give the parties 14 days' notice of the hearing and inform them of the issues it proposes to decide summarily ([CPR 24.4\(5\)](#); PD 26 para.12).

9.74

That said, there is no prohibition on later applications, since it should be possible to summarily determine a dispute whenever it becomes clear that one party has no hope of succeeding. Indeed, parties may theoretically apply for summary judgment at any stage. However, summary judgment will only rarely be awarded once the trial has actually begun.¹⁴⁷ In particular, a defendant who applies for summary judgment at the end of the claimant's case effectively asks the judge to express a view about the strength of the claimant's case before the end of the trial. Such an application would raise difficulties similar to those involved in

raising a plea of no case to answer, which is firmly discouraged by the court.¹⁴⁸ It is suggested, therefore, that such applications should only be granted in those unusual circumstances where the trial has for some reason or other been subject to a radical disruption (for example, by the unexpected emergence of critical new evidence).

Summary judgment procedure

- 9.75** An application for summary judgment must be made in accordance with the [CPR 23](#) application procedure. Further, [CPR 24.5\(1\)](#) requires that the application notice expressly identify any point of law or document relied on, set out or attach any written evidence relied on, state that the applicant believes the respondent has no real prospect of succeeding, state that the applicant knows of no reason why disposal should await trial, and draw the respondent's attention to their right to rely on evidence opposing the application. The Court of Appeal has emphasised the "critical importance" of these safeguards: "It prevents a claimant making an application and claiming the case to be straightforward when, in truth, he knows otherwise".¹⁴⁹
- 9.76** Oral evidence cannot be adduced, unless the court permits it ([CPR 32.6\(1\)](#)). The applicant may rely on any written evidence contained in its statement of case or application notice, or witness statement, provided these are verified by a statement of truth. If the respondent wishes to rely on written evidence, it must file and serve copies on every other party at least seven days before the hearing ([CPR 24.5\(3\)\(a\)](#)). The applicant may reply with witness statements of its own, which have to be filed and served at least three days before the hearing ([CPR 24.5\(3\)\(b\)](#)). Where the hearing takes place at the initiative of the court, a party who wishes to rely on written evidence must similarly file and serve it at least seven days before the hearing ([CPR 24.5\(3\)\(a\)](#)). An application may proceed even if the applicant or respondent does not attend the hearing ([CPR 23.11\(1\)](#)).

The court's powers at the summary judgment hearing

- 9.77** At the conclusion of a summary judgment hearing the court may grant summary judgment on the claim or issue; dismiss the application; or make a conditional order. The court will also consider the issue of costs.

Summary judgment on the claim or an issue

- 9.78** The court may enter summary judgment for the claimant on the whole of the claim or on a specific issue, or strike out the whole of the defence or part thereof. Where the summary judgment is on the whole of the claim, the court will award the remedy sought. If the summary judgment relates to only part of the claim, such as liability, the remaining issues are left to be determined by the normal procedure. Where the court has awarded a remedy in summary judgment, such as the repayment of debt or the payment of damages, the court may stay enforcement of the summary judgment, if the respondent has a plausible counterclaim against the applicant.¹⁵⁰
- 9.79** Similarly, the court may give summary judgment for the defendant and dismiss the claim in whole or in part, or order that the claimant's statement of case should be struck out in part or in full. A summary judgment dismissing the claim creates res judicata, but striking out the claimant's statement of case does not, though this may sometimes be followed by a default judgment under [CPR 3.5](#).
- 9.80**

A summary judgment is a final judgment on the merits for all intents and purposes. It can be attacked only by way of appeal, not by an application to set it aside, except where the respondent did not appear at the hearing. An appeal against a decision given in a summary judgment application will be concerned with the correctness of the summary judgment decision on the basis of the materials available to the court below. As with other appeals, the appellant will not normally be allowed to call fresh evidence ([CPR 52.21\(2\)\(b\)](#)).

Dismissal of the application

- 9.81** If the court is not satisfied that the respondent has no real prospect of succeeding, or if it considers that there is some other compelling reason to allow the case to go to trial, it will simply dismiss the summary judgment application. Upon the dismissal of an application, or indeed where the court makes an order that disposes of only part of the case (for example, summary judgment on a discrete issue), the court will give directions about the future conduct of the case ([CPR 24.6\(b\)](#)).

Conditional order

- 9.82** The court is not limited to either giving or denying summary judgment. It may instead make a conditional order so that the route to trial would be subject to a special provision ([CPR 24.6\(c\), 3.1\(3\)](#)),¹⁵¹ especially where it seems possible but unlikely that the claim or defence may succeed.¹⁵² The court may, for example, make an order which requires a party to pay a sum of money into court, or to take a specified step in relation to its claim or defence, and provide that the party's claim will be dismissed or its statement of case struck out if it does not comply. An order to make payment into court has a dual advantage. It deters the respondent from using the trial as a device for putting off the need to pay and it provides the applicant with security for judgment.

- 9.83** Such an order must not impose a condition with which the party cannot comply, as this would amount to an outright summary judgment against a party who has been found to have a real chance of succeeding.¹⁵³ The court must not direct payment in when the respondent cannot afford it,¹⁵⁴ but it may do so if it considers that the respondent will be able to raise the necessary funds.¹⁵⁵ Where the court is minded to make a conditional order against a defendant of payment into court, it is for the defendant to show that it cannot afford payment. To discharge this onus, the defendant must make full and frank disclosure of its means.¹⁵⁶

Costs orders

- 9.84** Upon disposal of a summary judgment application, the court will normally make an order for costs.¹⁵⁷ The court's power to order costs on an indemnity basis is limited in summary judgment,¹⁵⁸ although the court may take [CPR 36](#) offers into account, and it may award indemnity costs against an applicant where it was clear that it was never going to succeed in knocking out its opponent's pleaded case by way of summary judgment.¹⁵⁹ The rules make no provision regarding costs in situations where the summary judgment process was initiated by the court and not one of the parties. It has been suggested that where the court initiates the summary judgment procedure but decides to allow the case to go to trial, it will normally order that the costs be paid by the party against whom final judgment is given.¹⁶⁰ It is, however, far from clear whether it is just to burden a party with the costs of a hearing initiated by the court.

The relationship between striking out under CPR 3.4(2)(a) and summary judgment under CPR 24

- 9.85 Although the wording is different, the [CPR 24.3\(a\)](#) test of “no real prospect of succeeding” is fundamentally the same as the [CPR 3.4\(2\)\(a\)](#) test of “no reasonable grounds for bringing or defending the claim”. ¹⁶¹ It has been suggested that the focus is different under the two rules. In an application under [CPR 3.4\(2\)\(a\)](#) the court looks mainly at the adequacy of the parties’ statements of case, ¹⁶² whereas in an application under [CPR 24.3](#) the court considers the evidence and the inferences that can be drawn from it. ¹⁶³ It is said that for the purpose of striking out a statement of case, the court is obliged to treat the facts averred as true, even if it thinks that they may be very difficult to prove. ¹⁶⁴ By contrast, in an application for summary judgment the court may look beyond the statements of case and consider the evidence in deciding whether a party has a real prospect of success. ¹⁶⁵
- 9.86 Notwithstanding the difference of emphasis, the two tests converge, as Chadwick LJ explained:
- “If the particulars of claim disclose no reasonable grounds for bringing the claim, the court has ample power to strike out the pleading and to enter judgment for the defendant... No recourse to [[CPR 24.3](#)] is required. But if the pleading does disclose reasonable grounds for bringing the claim, then—on the hypothesis that the claimant will be able to establish the facts pleaded and in the absence of other facts to rebut the claim—it is impossible to hold that the claimant has no real prospect of succeeding. In those circumstances the existence of reasonable grounds for bringing the claim leads, necessarily, to the conclusion that there is a real prospect of success. There is no scope for recourse to [[CPR 24.3](#)].” ¹⁶⁶
- 9.87 Although an application for strike-out would not normally require evidence, whereas a summary judgment application may call for some evidential consideration, ¹⁶⁷ the court is not confined to considering a strike-out application only on the basis of the statements of case. It would be absurd if a court had to deal with an application to strike out on the basis that the alleged facts are true even though they cannot possibly be proved. Chadwick LJ has observed in connection with applications for summary judgment under [CPR 24.3](#) that “in the 21st century a claimant is not entitled to trial because he asserts, as a necessary element of his claim, that the earth is flat”. ¹⁶⁸ Nor, one may add, should such assertions be tolerated in an application for a statement of case to be struck out.
- 9.88 Since both procedures give expression to the need for proportionate use of resources and avoiding unnecessary trials and pre-trial procedures, the two distinct powers may be used to achieve the same goal, as PD 3A para.1.5 suggests. A party may apply for a strike-out and in the alternative for summary judgment. ¹⁶⁹ If, for instance, the court dismisses the defendant’s strike-out application because it finds that the particulars of claim do reveal a cause of action, it may proceed to find that the claimant has no real prospect of success and give summary judgment against them. In appropriate cases, the court may treat an application to strike out under [CPR 3.4\(2\)\(a\)](#) ¹⁷⁰ or an appeal against a refusal to strike out ¹⁷¹ as an application for summary judgment under [CPR 24.3](#). However, in all cases it should ensure the respondent is able to prepare for the hearing with forewarning of the basis upon which it is said the court should summarily dispose of the claim. ¹⁷²
- 9.89 The High Court has referred to the distinction between the two powers being “deliberately drawn”. ¹⁷³ That is, with respect, significantly overstating the position. The differences are due to the fact that when the [CPR](#) were enacted, the strike-out procedure under [CPR 3.4](#) was added to the already existing procedure of summary judgment without much consideration of their overlap or indeed of the necessity of having two separate processes. It is a pity that the opportunity was not taken to devise one composite procedure and iron out redundant historical creases.

Summary adjudication in defamation proceedings under the Defamation Act 1996: essentially defunct

- 9.90** Prior to the [CPR](#), when defamation trials were usually heard by a jury,¹⁷⁴ defamation proceedings were expressly excluded from the summary judgment procedure in [RSC Ord.14](#). Today, we have two regimes for summary proceedings in defamation cases: summary judgment under [CPR 24](#), and summary disposal under the provisions of the [Defamation Act 1996](#), as regulated by [CPR 53](#). The latter is essentially defunct.
- 9.91** Under the [Defamation Act 1996 s.8](#), the court may dismiss the claim or award summary relief, as the case may be, if it appears to the court that the claim or defence has no “realistic prospect of success” and there is no reason why the case should be tried ([s.8\(2\)](#)), which includes consideration of a number of factors identified in [s.8\(4\)](#) (including the seriousness of the alleged wrong and whether all the persons who are or might be defendants in respect of the publication complained of are before the court). However, unless the claimant has sought summary relief, the court shall refrain from giving it unless it is satisfied that it will adequately compensate the claimant for the wrong it has suffered ([s.8\(3\)](#)). Under [s.9\(1\)](#), summary relief may include the following remedies: a declaration that the statement was false and defamatory of the claimant; an order that the defendant publish a suitable correction and apology; damages not exceeding £10,000; and an order restraining the defendant from publishing the offending matter.¹⁷⁵
- 9.92** Applications for summary disposal under the [1996 Act](#) are governed by [CPR 53.5](#) and PD 53B paras. 7.1–7.3. The provisions of [CPR 24](#) concerning procedure, evidence and directions apply to applications for summary disposal under the [Defamation Act 1996 s.8](#) ([CPR 53.5\(2\)](#)). Thus, an application notice for summary disposal under [s.8](#) must state the matters set out in [CPR 24.5](#). It must also state whether the defendant has made an offer to make amends under the [Defamation Act 1996 s.2](#). Beyond this, PD 53B sets out detailed arrangements that must be followed in defamation claims.
- 9.93** The [Defamation Act 1996](#) mechanism has not proved popular. Although only implemented in 1996, in 2017 it was described as an “antique procedural weapon” that has been “largely left to gather dust”,¹⁷⁶ the White Book now describes it as “almost defunct”.¹⁷⁷ The reasons for this are not difficult to see. The £10,000 cap on damages means the procedure is unsuitable for all but relatively low value claims, but [s.1\(1\) of the Defamation Act 2013](#) imposes a serious harm threshold which has all but eliminated such claims; by contrast, there is no limit to the monetary damages awardable under [CPR 24](#). The thresholds of “no real prospect” and “no realistic prospect” appear to be synonymous, but the [Defamation Act 1996](#) threshold of “no reason” for trial as opposed to no compelling reason appears more onerous, especially in light of the particular factors identified in [s.8\(4\)](#) such as “the seriousness of the alleged wrong”. The White Book says that “under Pt 24 there is no mechanism for obtaining an order for an apology”,¹⁷⁸ but in principle this remedy is available in the court’s broad power to order injunctive relief. It is therefore difficult to see circumstances in which a party would prefer the [Defamation Act 1996](#) mechanism to summary judgment under [CPR 24.3](#).

Footnotes

103 Under previous [RSC Ord.77 r.7](#); CCR O 42.

104 *Green v Hancocks [2000] Lloyd's Rep. P.N. 813*. For the possibility of summary judgment on some, rather than all, of the damages claimed, see *Sinclair Investment Holdings SA v Cushnie [2006] EWHC 219 (Ch)* [55]–[56].

105 *Anan Kasei Co., Ltd v Neo Chemicals & Oxides (Europe) Ltd [2021] EWHC 1035 (Ch)* [82].

- 106 *Orford v Rasmi Electronics Ltd* [2002] EWCA Civ 167, [28].
- 107 *Tubelike Ltd (in Liquidation) v Visitjourneys.com Ltd* [2016] EWHC 43 (Ch); *Phonographic Performance Ltd v Balgun (t/a Mama Africa)* [2018] EWHC 1327 (Ch); *Morgan v Dooner* [2019] EWHC 679 (Comm) [24]. See Ch.8 Interim Applications paras 8.27–8.28; and Ch.22 Trial and Evidence paras 22.133 ff and 22.142 ff.
- 108 *Swain v Hillman* [2001] 1 All ER 91, 92.
- 109 *International Finance Corp v Utexafrica Sprl* [2001] C.L.C. 1361, 1363; and *E D & F Man Liquid Products v Patel* [2003] EWCA Civ 472; [2003] (D) All ER 75 (Apr) [8].
- 110 *Easyair Ltd (t/a Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch) [15].
- 111 *BPC Hotels Ltd v Brooke North (A Firm)* [2014] EWHC 2367 (TCC) [34].
- 112 RSC Ord. 14 r.1(1).
- 113 *Van Lynn Developments Ltd v Pelias Construction Co* [1969] 1 QB 607, 614; [1968] 3 All ER 824, 827.
- 114 RSC Ord.14 r.4(3): see *MV Yorke Motors Ltd v Edwards* [1982] 1 All ER 1024, 1027; [1982] 1 W.L.R. 444, 449.
- 115 Lord Woolf, Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales (London: HMSO, 1996) Ch.6 paras 17–21; and Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales (London: HMSO, 1996) Ch.12 para.31.
- 116 *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) [15], approved in *AC Ward & Sons Ltd v Catlin (Five) Ltd* [2009] EWCA Civ 1098 [24].
- 117 Oral evidence is not heard on a summary judgment application unless the Court gives permission: **CPR 32.6**. Rather, the decision is made based on the statements of case and any witness statement.
- 118 *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725 [12]–[14]; and *Easyair Ltd (t/a Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch) [15].
- 119 *Korea National Insurance Corp v Allianz Global Corporate & Specialty AG* [2007] EWCA Civ 1066 [14].
- 120 See eg *King v Stiefel* [2021] EWHC 1045 (Comm) [22].
- 121 *The Lady Anne Tennant v Associated Newspapers Ltd* [1979] FSR 298, 303.
- 122 *Arcadia Group Brands Ltd v Visa Inc* [2014] EWHC 3561 (Comm) [20].
- 123 *S v Gloucestershire County Council* [2000] 3 All ER 346, 373. See also the comments of Buckley J in *Gordon v J.B. Wheatley & Co (unreported, 13 January 2000)*; and *Royal Brompton Hospital National Health Service Trust v Hammond* [2001] EWCA Civ 550; [2001] All ER (D) 130 [10]–[11], [108].
- 124 *Tchenguiz v Grant Thornton UK LLP* [2015] EWHC 3926 (Comm) [2].
- 125 *Bolton Pharmaceuticals v Doncaster Pharmaceuticals* [2006] EWCA Civ 661 [18]; and *TFL Management Services Ltd v Lloyds Bank plc* [2013] EWCA Civ 1415 [26]–[27].
- 126 *Hewes v West Hertfordshire Hospitals NHS Trust* [2018] EWHC 2715 (QB) [45].
- 127 *Alpha Rocks Solicitors v Alade* [2015] EWCA Civ 685 [21], [25].
- 128 *Gujra v Roath* [2018] EWHC 854 (QB) [10] (Spencer J).
- 129 *Gujra v Roath* [2018] EWHC 854 (QB) [20] (Spencer J).
- 130 *Hallisey v Petmoor Developments Ltd* [2000] All ER (D) 1632; *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725 [12]–[14]; *Easyair Ltd (t/a Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch) [15].
- 131 *Gujra v Roath* [2018] EWHC 854 (QB) [33]–[35].
- 132 *Abaidildinov v Amin* [2020] EWHC 2192 (Ch) [43].
- 133 *Abaidildinov v Amin* [2020] EWHC 2192 (Ch) [43].
- 134 *Gordon v J.B. Wheatley & Co (unreported, 13 January 2000)*; and *Hammonds (A Firm) v Danilunas* [2009] EWHC 216 (Ch) [180].
- 135 *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7 [84]; and *TFL Management Services Ltd v Lloyds Bank Plc* [2013] EWCA Civ 1415 [27].
- 136 *Sagicor Bank Jamaica Ltd v Taylor-Wright* [2018] UKPC 12 [17], [21].
- 137 *Three Rivers District Council v Governors and Company of the Bank of England (No.3)* [2001] UKHL 16; [2001] 2 All ER 513 [95]; *Smith v Peter North & Partners* [2001] EWCA Civ 1553 [46]; and *Bolton Pharmaceutical Co 100 Ltd v Doncaster Pharmaceuticals Group Ltd* [2006] EWCA Civ 661 [17].
- 138 *Alpha Rocks Solicitors v Alade* [2015] EWCA Civ 685 [25] (Vos LJ).
- 139 *Apvodedo NV v Collins* [2008] EWHC 775 (Ch) [32], [42] (Henderson J).
- 140 *Miller v Garton Shires (formerly Gartons)* [2006] EWCA Civ 1386 [20] (Lindsay LJ).
- 141 *ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472 [10] (Potter LJ).
- 142 *Director of the Assets Recovery Agency v Woodstock* [2006] EWCA Civ 741 [14] (Hughes LJ).

- 143 See Ch.1 The Overriding Objective paras 1.67 ff.
- 144 *Safeway Stores Plc v Tate* [2001] QB 1120, 1132–1133; [2001] 4 All ER 193, 203. For the right to trial by jury see: Senior Courts Act 1981 s.69; County Courts Act 1984 s.66.
- 145 *Bank für Gemeinwirtschaft Aktiengesellschaft v City of London Garages* [1971] 1 All ER 541, 548.
- 146 *A C Ward & Sons Ltd v Catlin (Five) Ltd* [2009] EWCA Civ 1098 [35].
- 147 *National Westminster Bank Plc v Rabobank Nederland* [2006] EWHC 2959 (Comm) [28]; and *Devon and Cornwall Autistic Community Trust v The Cornwall Council* [2015] EWHC 403 (QB) [16]–[17].
- 148 *Graham v Chorley BC* [2006] EWCA Civ 92 [25]–[30]. For discussion see Ch.22 Trial and Evidence paras 22.74 ff.
- 149 *Price v Flitcraft Ltd* [2020] EWCA Civ 850 [86].
- 150 2025 WB 24.3.5.
- 151 *Deutsche Bank AG v Unitech Global Ltd* [2016] EWCA Civ 119 [78]–[81]. Conditional orders are discussed in Ch.12 Case Management Pt I paras 12.73 ff.
- 152 *Kazeminy v Siddiqi* [2009] EWHC 3207 (Comm) [8].
- 153 *Olatawura v Abiloye* [2002] EWCA Civ 998; [2002] 4 All ER 903, [27]; *Kazeminy v Siddiqi* [2009] EWHC 3207 (Comm) [71].
- 154 *Chapple v Williams* [1999] CPLR 731.
- 155 *Foot & Bowden v Anglo Europe Corp Ltd* (CA, unreported, 17 February 2000).
- 156 *Kazeminy v Siddiqi* [2009] EWHC 3207 (Comm) [68]; and *Trademark Licensing Co Ltd v Leofelis SA* [2010] EWHC 969 (Ch).
- 157 The court's exercise of its discretion as to costs is discussed in Ch.28 Costs.
- 158 *Petrotrade Inc v Texaco Ltd* [2001] 4 All ER 853; [2002] 1 W.L.R. 947 [58], [72].
- 159 *Libyan Investment Authority v Goldman Sachs International* [2014] EWHC 3364 (Ch) [49].
- 160 See *Namusoke v Northwick Park and St Mary's NHS Trust* (QBD, unreported, 26 November 1999).
- 161 *Taylor v Midland Bank Trust Co Ltd* (No.2) [1999] All ER (D) 831.
- 162 *Swain v Hillman* [2001] 1 All ER 91, CA; *Green v Hancocks* [2000] Lloyd's Rep. P.N. 813; *Kasongo v CRBE Ltd* [2023] EWHC 1464 (KB) [36]–[37].
- 163 *Saeed v Ibrahim* [2018] EWHC 3 (Ch) [44].
- 164 *Swinney v Chief Constable of the Northumbria Police* [1997] QB 464, 473; *Marsh v Chief Constable of Lancashire Constabulary* [2003] EWCA Civ 284; [2003] All ER (D) 73 (Mar) [2]; *Farah v British Airways Plc* [1999] EWCA Civ 3052.
- 165 *Marsh v Chief Constable of Lancashire Constabulary* [2003] EWCA Civ 284; [2003] All ER (D) 73 (Mar) [2], [22].
- 166 *Independents Advantage Insurance Co v Personal Representatives of Cook* [2003] EWCA Civ 1103; [2004] P.N.L.R. 3 [8].
- 167 *Chief Constable of Kent v Rixon* [2000] All ER (D) 476, CA.
- 168 *Marsh v Chief Constable of Lancashire Constabulary* [2003] EWCA Civ 284; [2003] All ER (D) 73 (Mar) [55].
- 169 *Green v Hancocks* [2000] Lloyd's Rep. P.N. 813 and PD 3A para.1.5.
- 170 *Taylor v Midland Bank Trust Co Ltd* (No.2) [1999] All ER (D) 831, CA; *S v Gloucestershire County Council* [2000] 3 All ER 346, 372; and *Moroney v Anglo-European College of Chiropractice* [2009] EWCA Civ 1560 [25].
- 171 *Taylor v Midland Bank Trust Co Ltd* (No.2) [1999] All ER (D) 831, CA; and *S v Gloucestershire County Council* [2000] 3 All ER 346, 372.
- 172 *Saeed v Ibrahim* [2018] EWHC 3 (Ch) [9], [44]. For example, in *Moroney v Anglo-European College of Chiropractice* [2009] EWCA Civ 1560 [16]–[18], the court examined each side's oral and written submissions in order to decide whether the applicant had expressed sufficiently clearly that summary judgment was sought in the alternative to strike-out.
- 173 *Kasongo v CRBE Ltd* [2023] EWHC 1464 (KB) [43].
- 174 Unlike the position under the Defamation Act 2013 s.11, which provides that defamation trials will be heard without a jury unless the court orders otherwise.
- 175 Defamation Act 1996 s.9(1).
- 176 *Alsaifi v Amunwa* [2017] EWHC 1443 (QB) [56].
- 177 2025 WB 53.5.1.
- 178 2025 WB 53.5.1.

Introduction

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Mainwork

Chapter 12 - Case Management & Enforcing Party Compliance

Part I—Techniques for Case Management

Introduction

- 12. 1** The [Civil Procedure Rules 1998](#), practice directions and pre-action protocols provide an integrated framework for the effective management of disputes both before and after proceedings are issued. Their aim is to promote the resolution of disputes, whether that be by settlement or adjudication. They confer extensive responsibilities on parties to promote early and if possible pre-action settlement, and otherwise to assist the court in managing proceedings efficiently to further the overriding objective.¹ As Vos C explained in *OMV Petrom SA v Glencore International AG*, parties are under an obligation to “conduct litigation collaboratively and to engage constructively in the settlement process”.² The rules also confer extensive powers on the court to control its own procedure. These powers are essentially of two kinds: techniques for case management and powers to enforce compliance. The former are used to control the conduct of proceedings, and include means such as allocating claims to procedural tracks, setting timetables, directing pre-trial preparations and regulating the manner of the trial or of any other hearing. Compliance powers enable the court to deal with parties’ failure to comply with both their pre-action responsibilities and post-issue process requirements imposed by pre-action protocols, the [CPR](#), practice directions or court orders.³
- 12. 2** Part I of this chapter gives a general account of pre-action and post-issue dispute management techniques, including the [CPR](#)’s approach of establishing template procedures or ‘tracks’ for cases of different levels of value and complexity. The main aim here is to explain how the architecture of the [CPR](#) is designed to promote the efficient and expeditious resolution of cases, and to consider the court’s approach to the exercise of its case management powers in order to achieve these aims. Detailed discussion of specific procedures is left to the chapters devoted to service, disclosure, witness statements, expert evidence, trial, appeal, and so on. The exercise of the court’s powers to enforce compliance and restrain abuse of its process is considered in Part II of this chapter.
- 12. 3** The overriding objective is the organising principle for both the exercise of case management powers and party conduct during litigation. Parties must assist the court to further the overriding objective, which generally means striving to conduct litigation efficiently and proportionately, and cooperating with each other ([CPR 1.3](#)).⁴ Likewise, the court itself must further the overriding objective when it exercises its powers under the rules ([CPR 1.2](#)). This includes, in particular, managing cases proactively rather than acting as a passive supervisor or umpire ([CPR 1.4\(1\)](#)). [CPR 1.4\(2\)](#) spells out what this means by identifying a list of the court’s active case management tasks, such as encouraging (and if necessary compelling) the parties to engage in [ADR](#); identifying the issues early and narrowing the issues needing to be tried (including disposing of issues summarily where appropriate); deciding the order in which to resolve issues; controlling the progress of the case; and undertaking a cost–benefit analysis when deciding whether to order a particular procedural step.
- 12. 4** Implicit within this set of overarching principles and powers is the recognition that the effective management of cases is necessarily fact-sensitive. Flexibility in the deployment of the court’s case management tools is important since it enables the court and the parties to design a process which will lead to a satisfactory resolution of the dispute within a reasonable time and at proportionate cost.⁵ Further, the use of the court’s case management powers must be broadly predictable to enable the parties to know in advance what will be expected of them and, indeed, to enable them to estimate the likely costs of litigation. Moreover, as we shall see when we consider the [CPR](#)’s system of tracks, it would often be unnecessary to expend scarce judicial time on developing bespoke procedures for each case when courts are capable of following (in broad terms) a blueprint that has been tried and tested in other similar cases. In this way, cases can be shaped to fit procedure in the interests of proportionality

and preserving court resources, just as procedure can be moulded to the case. Fundamental to striking the balance between these two techniques in a way that is predictable and transparent is a set of well-articulated principles to guide the court's discretion in deciding what process is to be followed.

Footnotes

- 1 CPR 1.3; see discussion in Ch.1 Overriding Objective paras 1.92 ff; and *Jet2Holidays Ltd v Hughes [2019] EWCA Civ 1858; [2020] 1 W.L.R. 844* [36]–[40].
- 2 *OMV Petrom SA v Glencore International AG [2017] EWCA Civ 195; [2017] 1 W.L.R. 3465* [39].
- 3 The term “rules” will henceforth generally be used to include the rules contained in pre-action protocols, the **CPR**, the practice directions and any other rules of practice pertaining to the pre-action and post-issue conduct of disputes.
- 4 *Gotch v Enelco Ltd [2015] EWHC 1802 (TCC); [2015] TCLR 8* [42]–[49].
- 5 *Re L (a child) [2013] EWCA Civ 1778* [12].

Case Management, Party Autonomy and the Adversarial System

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 12 - Case Management & Enforcing Party Compliance

Part I—Techniques for Case Management

Case Management, Party Autonomy and the Adversarial System

The civil court provides a public service which requires management

- 12.5 By its very nature, law enforcement is a monopoly of the state. This is as true of civil litigation as it is of its criminal counterpart. Civil litigation is the process which provides citizens with the remedies to which they are entitled for wrongs that they have suffered. Even ostensibly “private” processes of extra-judicial dispute resolution still depend on the state for their efficacy. An arbitral award is worthless if it cannot be recognised and enforced, and the most amicably reached settlement agreement means nothing if breach of its terms cannot be complained of in court. In this way, the court underwrites the rights that people possess and thereby upholds the rule of law, both as between individual litigants and in society as a whole. In so doing, it provides a public service which must be adequately managed, knowing that demand for its services will always outstrip supply.⁶ Like any other public service, its operation cannot be left to the whim of its users—in this context, litigants. All public services are directed and controlled by the public body charged with delivering the particular service, in order to ensure that it operates fairly for the benefit of all users. It follows, therefore, that there is no such thing as a management-free service. There are only well-managed and poorly managed services and many intermediate degrees in between.

- 12.6 Once it is accepted that adjudication of civil disputes is a public service maintained for the benefit of the community as a whole, a point emphasised by Lord Reed in *R (Unison) v Lord Chancellor*,⁷ it follows that its provision must be managed for the general good. In the context of the civil justice system, effective management for the benefit of all litigants is achieved in large part by the court’s exercise of its case management and compliance powers in individual cases.⁸ They do so by both promoting settlement and ensuring the efficient conduct of those disputes that require adjudication on their merits. However, court management of litigation means not just management of individual cases, but also the continual review of the performance of the system as a whole and periodic adjustment of responses to emerging problems. The responsibility for supervising the administration of civil procedure lies with the Court of Appeal.⁹ It is its responsibility to oversee, develop and control principles for the exercise of discretion under the CPR. Court management of litigation is inevitably case-based, but if it is to achieve satisfactory results it must be guided by general principles and must be committed to achieving certain standards of efficiency and system-wide justice.¹⁰ The pre-CPR system, discussed in Ch.1, presents a cautionary tale in this regard. It had developed principles for the exercise of discretion but with no regard to overall efficiency.¹¹

The impact of active case management on the adversarial system

- 12.7 The English adversarial system was traditionally regarded as having three principal features: party autonomy, limited judicial responsibility for outcomes, and party control of the pre-action and post-issue litigation process.¹² As we shall presently see, the introduction of the pre-action protocols and the transfer of control of litigation post-issue to the court has not affected the first two features, though it has significantly altered the third.¹³ However, in reality the third feature is not an indispensable part of the adversarial system, and in any event the advent of the CPR has not truly “transferred control” of litigation to the

court (since the court has always had a measure of control over its processes), but rather has modified the court's approach to the exercise of powers it always possessed.

Party autonomy

12. 8

It is first necessary to outline the limitations that party autonomy places on the court's powers to control the litigation process. As a matter of general principle, parties to a dispute are autonomous in procedure. They are free to choose whether to litigate, what to litigate and what evidence to call in support of their respective allegations. This is, as Jolowicz noted, an aspect of the "dispositive principle"; that parties "have the power of disposition of their rights, procedural as well as substantive".¹⁴ The court thus has no power to insist that the parties litigate issues they do not wish to raise, even if the court might think it in their interests or in the interests of "pure" justice to do so. If, for example, the parties wish to proceed on the assumption that there has been a breach of contract and are disputing only the loss caused by it, the court cannot insist on trying the question of breach.¹⁵ Dyson LJ elaborated this point when he said:

"A claimant may have various reasons for not including in his claim heads of damages to which he would arguably be entitled, if he established liability. He may decide that the cost of proving a head of loss is disproportionate to the sum that he thinks he is likely to recover. Or he may decide that the evidence that would have to be adduced in order to prove a head of loss would cause him embarrassment which he wishes to avoid. Or he may decide not to seek to recover a head of loss because he is confident that it will be made good to him by a third party. A claimant is fully entitled to decide what to include in his claim. There is nothing in the general law which positively obliges a claimant to include in his pleaded case all the claims which he could arguably advance against a defendant."¹⁶

12. 9

Even where it emerges in the course of the trial that the contract in dispute was infected by illegality, the court should not take up the point of its own initiative in the absence of a pleaded allegation or the appearance of illegality on the face of the contract, unless to overlook the matter would undermine the legitimacy of the legal process.¹⁷ If a defendant has admitted receipt of notice, it is not for the court to question the fact of notice on the grounds that notice goes to jurisdiction and that the parties cannot by agreement confer on the court a jurisdiction that it does not possess; rather, the court must proceed on the basis that notice had been given.¹⁸ The court may not decide the case on a factual basis that none of the parties has advanced.¹⁹

12. 10

Once an issue has been raised, the court has no power to prevent the parties from settling it among themselves and withdrawing it from adjudication. If, having denied liability in a claim for personal injuries, the defendant changes its mind and is prepared to admit liability, it may do so at any time before judgment. Once they have done so, the court is powerless to continue considering the issue of liability and force a determination according to the evidence. The court does, however, control its judgment, and will not necessarily allow the parties' withdrawal from adjudication to prevent it from publishing a judgment it has prepared.²⁰ Similarly, an appeal court will not accede to a joint request by the parties to allow an appeal unless it is satisfied that the decision of the lower court was wrong, although it may set aside or vary the order of the lower court by consent and without determining the merits of the appeal (PD 52A para.6.4). This is because reasoned judgments of the court have an important public-facing function which goes beyond the interests of the immediate parties to the litigation, unlike orders which merely set out the consequences of the court's decision for the respective rights and obligations of the parties.²¹

12. 11

A further aspect of party autonomy is reflected in the context of evidence. Parties bear the responsibility for gathering evidence and presenting it to the court. They are free to choose which evidence to leave out, regardless of its relevance. If the parties would rather not call a certain witness, or would rather not rely on a certain document, the court cannot interfere with their choice even if it regards the evidence as significant.²² As the Supreme Court emphasized in *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC*, "the task of the courts is to do justice between the parties in relation to the way in which they have framed and prosecuted their respective cases, rather than to carry out some wider inquisitorial function as a searcher after

truth".²³ Although a court has some vestigial powers to call evidence of its own initiative, these are hardly ever exercised. The court may, however, refuse to admit evidence which should not be adduced. As we will see in other chapters, it has extensive powers to limit the evidence to be adduced in the exercise of its case management powers,²⁴ and it may, for example, exclude witness statements adduced by a party when they conflict with the party's own case.²⁵ But even then the parties bear the task of objecting to or probing the opponent's evidence at trial,²⁶ and are therefore free to refrain from objecting to or questioning evidence that another party introduces.

Party autonomy renders most process requirements electable

12. 12

The fact that parties are free to engage in, or disengage from, litigation has an important implication for the nature of process requirements, such as the requirement to serve the claim form or a defence, give disclosure or serve witness statements. It is common to describe such requirements as "duties" or "obligations". Thus, it is usual to speak of a party's "duty" to serve a claim form or a defence, or a witness statement, within a certain period of time. However, these are not duties or obligations in the sense that these terms are used in other branches of the law. The duty to serve a witness statement is not the same kind of duty as the duty to pay income tax, or damages for breach of contract, because most procedural obligations are not enforceable in the same way that substantive rights are enforceable. When CPR 7.5 provides that a claim form must be served within four months of its issue, it does not impose any obligation on the claimant actually to effect service; rather, the claimant may elect not to effect service, in which case the claim form will simply cease to be valid after the four-month period has expired. By the same token, a defendant is not obliged to serve a defence, but is free to allow the claim to take its course without their response or participation. Claimants are said to have a "duty" to pay court fees, but if they fail to do so, they are merely notified that unless payment is made (or exemption obtained) the claim will be struck out (CPR 3.7(2)). They remain free to choose whether to pay.²⁷ The effect of these consequences of party election (and indolence or apathy is in truth as much an election as a conscious decision not to take a procedural step) may be severe, as we shall see. But as all choices have consequences, so does the choice not to meet a procedural condition in litigation.

12. 13

These simple observations have important implications, in particular for the court's response to party default (discussed further below in Part II of this chapter). If claimants are under no obligation to perform most process requirements, the consequences of their defaults cannot be regarded as "sanctions" in the usual sense of the word. The term sanction normally implies punishment for failure to perform a duty. In this sense, a sanction is designed to inflict a disadvantage for breach of duty in order to deter further breaches and to encourage future compliance. But this is hardly true of most consequences of procedural defaults. Where a defendant fails to serve a defence, the claimant may obtain a default judgment, but this is not a punishment intended to encourage defendants to defend claims brought against them. On the contrary, defendants with no real prospect of success should be discouraged from doing so, otherwise the court would be burdened with unmeritorious litigation. Equally significant is the fact that a default judgment is not meant to reflect the gravity of the default. The same is true of other process requirements, not just those concerned with the initial process of engaging in litigation. Claimants who do not pay court fees will have their claims struck out, but this is not a mark of disapproval, nor is it calibrated to the perceived seriousness of the default. It simply represents the consequence of failure to fulfil the conditions for continuing to trial.

12. 14

While it is plain that such consequences of procedural default cannot be characterised as sanctions in the punitive sense, it might be thought that the consequences of failure to meet deadlines are of a different nature. It might be said that denying permission for late compliance with a process requirement (such as service of a claim form or of a witness statement) is in the nature of a punishment or a sanction. This is not, however, a sustainable proposition. Deadlines are not external to, or independent of, process requirements, but rather are an integral part of any process. Failure to comply with a time limit is just as harmful to the process in question as failure to comply with any other aspect of the process requirement. For example, failure to meet the deadline for service of a claim form is no different in principle from a failure to issue the claim form properly. The consequences of failure to meet deadlines are therefore no more punitive than the consequences of any other kind of procedural default. There is no reason to suppose that, for example, refusing permission for late service of an expert report is a sanction. As with other procedural defaults, such consequences amount to no more than the consequences of failure to meet the conditions for a particular entitlement.

12. 15 This is equally true of defaults which produce consequences as a matter of substantive law. For example, the unenforceability of an oral contract for the sale of land is not a sanction for failing to reduce the contract into writing; it is simply the necessary consequence of the lack of formality. Withholding a driving licence or university degree is not a sanction for missing the driving test or final examination; it too is simply the consequence of failing to satisfy a requisite condition for the grant of a licence or degree. Few would argue that a limitation defence represents a sanction or punishment for failure to bring proceedings within the limitation period; rather, it is a consequence designed to let a prospective defendant draw a line and get on with their life and business, and to prevent the courts being burdened with stale disputes for which important evidence may no longer be available. In sum, as long as a litigant is free to choose whether to perform a procedural step, the consequence of failure to do so cannot be regarded as a punishment.
12. 16 This is not to say that the consequences of procedural defects cannot be remedied. A well-governed procedural system must have some flexibility for dealing in an effective manner with non-compliance with rules and court orders. Thus, the court has the power to set aside a default judgment even if the judgment was regularly entered ([CPR 3.6](#), [CPR 13](#)). The court has a general power to remedy procedural defects and grant extensions of time for performing process requirements ([CPR 3.10\(b\)](#) and [CPR 3.1\(2\)\(a\)](#)). Most significantly, it has the power to relieve a party of the consequences which have attached to its breach of a rule or court order ([CPR 3.9](#), in which context such consequences are unhelpfully and confusingly termed “sanctions”). The court is therefore able to make allowances in appropriate circumstances for obstacles to performance, such as accidents and illness. However, making an allowance in procedure must be seen for what it is: a concession to human frailty or imperfection, not the mitigation of punishment.
12. 17 The distinction between punishment and consequences is not merely a matter of semantics. Rather, it illustrates a distinction between different approaches to the enforcement of procedural rules and orders. A court that regards the consequence of a default as punitive will seek to ensure that the punishment is just. It will therefore approach an application for relief by asking itself whether the applicant deserves the imposition or lifting of the punishment. By contrast, a court that regards the results of default as non-penal will not examine the justness of such a consequence, any more than it would question the justice of the refusal of a driving licence where the driving test was missed or failed. Provided that the procedural requirement was fair in the first place, and the litigant had a fair opportunity to comply, the consequence of default will also be fair. This does not mean that the consequences of default are immutable. Rather, it suggests that the court’s approach should be to ask itself whether the defaulting party had an adequate opportunity to comply, and whether there was a good explanation for the default such that the defaulter deserves another opportunity to comply. As in any other context, de minimis considerations may be in play too, as where a litigant narrowly missed a deadline but made good the delay within a short time.
12. 18 Unfortunately, the terminology of “duty”, “obligation” and “sanction” is far too entrenched in the [CPR](#) to try to reverse it. [CPR 3.7](#), for instance, speaks of sanctions for non-payment of fees, [CPR 3.8](#) refers to the consequences of non-compliance with process requirements as sanctions and, as noted above, [CPR 3.9](#) confers on the court the power to grant relief from sanctions. But such terminology should not be allowed to obscure the nature of procedural requirements and of their consequences. This usage should present no difficulty, provided it is always borne in mind that most process obligations are merely conditions of participation in the litigation process (such as serving a defence), or preconditions to taking advantage of certain procedural facilities (such as calling a witness), and that “sanctions” are in truth consequences, not punishments.

Judicial responsibility for outcomes is limited by the evidence and arguments presented by the parties

12. 19 The second feature of the English adversarial system mentioned above consists of limited judicial responsibility for outcomes. To an extent, this feature is influenced by the notion of party autonomy, considered above. Since the court is confined to arriving at a decision according to the evidence and arguments presented by the parties,²⁸ it is hardly in a position to guarantee the factual correctness of the final judgment.²⁹ Lord Devlin stated the position thus:

“Where the judge sits as an arbiter between two parties, he need consider only what they put before him. If one or other omits something material and suffers from the omission, he must blame himself and not the judge. Where the judge sits purely as an arbiter and relies on the parties for his information, the parties have a correlative right that he should act only on information which they have had the opportunity of testing.”³⁰

12. 20 In another case Lord Wilberforce said:

“In a contest purely between one litigant and another, such as the present, the task of the court is to do, and to be seen to be doing, justice between the parties. There is no higher additional duty to ascertain some independent truth. It often happens, from the imperfection of evidence, or the withholding of it, sometimes by the party in whose favour it would tell if presented, that an adjudication has to be made which is not, and is known not to be, the whole truth of the matter; yet, if the decision has been in accordance with the available evidence and with the law, justice will have been fairly done.”³¹

12. 21 This feature of English adjudication is to a large extent the product of the jury system.³² Since juries had neither the expertise to direct the process nor the power to do so, their role was limited to adjudicating according to the evidence presented before them.³³ In this model, the arbiter of fact can no more take a hand in the contest than an umpire in a cricket match.³⁴ Although trial by jury virtually disappeared from civil cases long ago,³⁵ its legacy has remained. To this day, the process of adjudication takes place as a debate or contest conducted by the parties before an impartial and detached judge, whose responsibility is limited to deciding the case on the issues raised by the parties and according to the evidence presented by them. In *Schmidt v Wong* Buxton LJ stated:

“While the Woolf reforms have in procedural matters brought a very welcome change from the former position when the judge was more or less a spectator of an agenda set by the parties, and have given the judge much more latitude to intervene, at the same time they have not so altered the English view of a judge’s role as to place on him responsibility for identifying the appropriate or possible form of relief when the claimant has not done so. Such an obligation may arise in a very limited category of cases, a possible example being where one party is unrepresented.”³⁶

12. 22 It should be noted, however, that non-adversarial proceedings are not unknown in English law. In cases involving the welfare of children, for example, it is incumbent on the court to investigate matters pertaining to the child’s welfare, and to arrive at a decision that is most likely to protect and promote the interests of the child.³⁷ The non-adversarial nature of such proceedings has been relied upon as a reason for side-stepping certain principles embedded in the adversarial process, such as legal professional privilege.³⁸ Given the “paramount duty” of the court to protect the interests of vulnerable persons in such proceedings, it is sometimes justifiable for the court to see a document which is not seen by certain parties to the proceedings or to withhold disclosure in some circumstances.³⁹

12. 23 A further point worth bearing in mind is that the fact that judicial responsibility for outcomes is limited does not mean that the English system is indifferent to whether court judgments reflect the true facts. A system may demonstrate a high level of commitment to the truth in ways other than imposing on its judges the responsibility for unearthing it. English procedure’s commitment to the ascertainment of truth is underscored by the extensive facilities that the CPR place at the disposal of litigants to obtain documents and other information from parties and non-parties alike, including compulsory measures to protect evidence from being destroyed or otherwise tampered with. The fact that English judge’s duty is confined to deciding the issues according to the evidence presented to them has not misled them into thinking that the English process is unconcerned with the determination of truth. On the contrary, as Lord Donaldson MR observed, “litigation is not a war

or even a game. It is designed to do real justice between opposing parties and if the court does not have *all* the relevant information, it cannot achieve this object".⁴⁰

Managerial judges and the adversary system

12. 24

The **CPR** have not fundamentally altered the principles of party autonomy and of limited judicial responsibility for outcome. But the **CPR** have encroached on the third feature of the adversarial system mentioned above, namely party control of the pre-trial litigation process. Today, the court, rather than litigants, controls the process. Case management decisions may be made at any stage in the proceedings by any judicial officer of the court, except where a rule provides otherwise (**CPR 2.4**); though in practice the pre-trial process is largely managed by procedural judges.⁴¹ The court has extensive powers to influence the nature and pace of proceedings. It no longer has to wait for parties to make applications in order to progress the litigation or determine the means by which the case is to be resolved. It may give directions of its own motion (**CPR 3.3**),⁴² such as ordering a summary judgment hearing. Although the court cannot dictate to the parties what evidence to call, it may disallow relevant evidence if it considers it to be wasteful or otherwise unhelpful or unnecessary (**CPR 32.1**).

12. 25

It has been suggested that the idea of judges taking a hand in shaping the litigation process is inimical to the adversarial nature of the English procedure.⁴³ Some believe that in an adversarial system parties should have the freedom to manage their own litigation as they see fit. The reasoning behind this view is that since the courts do not take it upon themselves to investigate the issues but confine themselves to the role of impartial umpires, litigants must have a free hand in the preparation and presentation of their case. Thus, it is thought that if the parties have a right to disclosure of relevant documents, it is not for the court to circumscribe their access to such documents. Nor should a court tell the parties that the importance of their case or the nature of its issues does not justify the extensive and expensive procedural steps they propose to take. In an adversarial system, the argument concludes, litigants should be free within the parameters of the permissible to exploit to their own advantage the procedural devices that the law provides because they know best what is in their best interest.

12. 26

Two points must be stressed in response to this. First, case management under the **CPR** remains limited to managing the process and not the substance of claims,⁴⁴ unlike in some civilian jurisdictions where the court is responsible both for the management of the procedural aspects of litigation and the substantive presentation of claims.⁴⁵ Second, complete litigant freedom did not exist even before the **CPR**. Procedural freedom needs to be circumscribed just as any other freedom does, because unlimited freedom for one party can mean injustice or the denial of procedural justice for the opponent, as well as injustice to other users of the court system. The court has always been ultimately in control of its own procedures, both at the rule-making level, by means of making practice directions and such like, and at the level of the individual case. Rules of procedure have always defined the means that parties may employ in litigation; and most modern procedures impose time limits, because without time limits the system could not guarantee the resolution of disputes or the effective protection of rights. Moreover, the court has always enjoyed considerable discretion in enforcing compliance with rules and court orders. It was for the court to allow an amendment, to grant an extension of time for compliance or to permit a party to call fresh evidence on appeal. Although its powers were not referred to as "case management powers", in practice the court carried out a managerial function whenever it was asked by a party to extend a deadline, to forgive a default or authorise a particular step to be taken. In sum, the English adversarial system has always allowed for judicial discretion in matters of procedure, the exercise of which could influence the outcome of litigation. What was different prior to the **CPR** was the fact that the court practised a policy of lax enforcement, allowing parties considerable freedom to determine the intensity and pace of the litigation process without due regard for the importance of efficiency for the operation of the system as a whole.

12. 27

The **CPR** depart from the old system in three important respects.⁴⁶ First, the court has a more prominent role in dictating the nature of the process and timetables to be followed, and as a result there is less tolerance of party failure to comply with process requirements and time limits. For the reasons just mentioned, this is not as radical a change as might be thought. The second innovation does, however, represent a more substantial change. It consists in the overriding objective, which, roughly speaking, subjects party freedom to a general standard of proportionality. The idea at the root of the **CPR** is that parties

cannot be allowed to obstruct the expeditious and cost-effective resolution of litigation. In order to ensure expedition and curb excessive expenditure, the court must also limit other freedoms, such as the freedom to decide the extent of documentary disclosure or to choose how many expert witnesses to call. It should be stressed, however, that although the court now has extensive powers to control evidence ([CPR 32.1](#)), this is confined to discouraging evidential waste, not to excluding necessary evidence.

12.28

The third innovation is the increased emphasis on managing disputes to resolution rather than just to adjudication at trial. The promotion of settlement has long been acknowledged to be in the parties' interests and the public interest.⁴⁷ Prior to the [CPR](#), settlement was promoted in a limited and haphazard way—for instance, through the use of [Calderbank](#) offers.⁴⁸ Under the [CPR](#), there has been a particular emphasis on settlement as a means to further the overriding objective. As Sharp LJ explained in *Mionis v Democratic Press SA*:

“... settlement does not only serve the private interests of the litigants, but the administration of justice and the public interest more generally, by freeing court resources for other cases. The law therefore encourages and facilitates the mutual resolution of disputes by various means, for very sound reasons of public policy; and there is obviously an important public interest in the finality of settlement.”⁴⁹

The imperative to promote settlement is given voice by the pre-action protocols,⁵⁰ [CPR 1.1\(2\)\(f\)](#), [CPR 1.4\(2\)\(e\)–\(f\)](#), and the parties' duty to help the court to further the overriding objective ([CPR 1.3](#)), which underscores the fact that the duty of co-operation is intended to support not only the parties' private interest in settlement, but also the public interest. Indeed, the court now has power, recognised by the Court of Appeal in *Churchill v Merthyr Tydfil County Borough Council*⁵¹ and expressly codified in [CPR 3.1\(2\)\(o\)](#) not merely to encourage the parties to engage in ADR, but positively to order them to do so. This development is discussed further in Ch.1;⁵² for present purposes, suffice it to note that it underlines the premium the justice system now places on achieving the larger aim of resolving disputes with the minimum demand possible being made of scarce public resources.

Footnotes

⁶ See Lord Dyson MR, “The Application of the Amendments to the Civil Procedure Rules: 18th Lecture in the Implementation Programme”, speech delivered at the District Judges’ Annual Seminar, Judicial College, 22 March 2013, [29]; Lord Dyson, “The Jackson Reforms and Civil Justice” in *Justice: Continuity and Change* (Oxford: Hart, 2018); and see [Ch.1 Overriding Objective paras 1.29 ff](#). See also the decision of the High Court of Australia in *AON v Australian National University* [2009] HCA 27, (2009) 239 CLR 175 [23]–[24] (discussed below in Part II at para. [12.223](#)); and *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537; [2014] 1 W.L.R. 795 [38]–[39].

⁷ *R (Unison) v Lord Chancellor* [2017] UKSC 51; [2020] AC 869 [66]–[73].

⁸ See [Ch.1 Overriding Objective paras 1.29 ff](#). For discussion of the court’s compliance powers, see Part II below.

⁹ *Callery v Gray (Nos 1 and 2)* [2002] UKHL 28; [2002] 1 W.L.R. 2000 [6], [8], [17].

¹⁰ Comments redolent of the pre-CPR approach to case management made by the House of Lords in *Moy v Pettman Smith (a firm)* [2005] UKHL 7; [2005] 1 W.L.R. 581 [42], [61] could have been taken to undermine this approach. Fortunately, those remarks cannot be regarded as good law, particularly in light of the Supreme Court’s endorsement of *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537; [2014] 1 W.L.R. 795 and *Denton v TH White Ltd* [2014] EWCA Civ 906; [2014] 1 W.L.R. 3926, in *Global Torch Ltd v Apex Global Management Ltd (No 2)* [2014] UKSC 64; [2014] 1 W.L.R. 4495 [79], and *Thevarajah v Riordan* [2015] UKSC 78; [2016] 1 W.L.R. 76 [13].

¹¹ See Ch.1 Overriding Objective paras 1.5 ff.

¹² For a classical discussion of the value of party autonomy see *Fuller, “Forms and Limits of Adjudication”* (1978) 92 Harv. L. Rev. 353. See also: *J. Resnik, “Managerial Judges”* (1982) 96 Harv. L. Rev. 374; D. Luban “The Adversary System Excuse” in D. Luban (ed.), *The Good Lawyer* (Totowa N.J.: Rowman and Allenheld, 1983); S. Landsman, *The Adversary System* (Washington D.C.: American Enterprise Institute for Public Policy Research, 1984); M. Damaska, *The Faces of Justice and State Authority* (London: Yale University Press, 1986); D. Luban, *Lawyers and Justice, an Ethical Study*

(Princeton N.J.: Princeton University Press, 1988); *P. Smallmann*, “*Observations on Judicial Participation in Caseload Management*” (1989) 8 C.J.Q. 129; J. McEwan, Evidence and the Adversarial Process (Oxford: Blackwell, 1992); *W. Schwarzer*, “*Case management in the Federal Courts*” (1996) 15 C.J.Q. 141; M. Zander, “*The Woolf Report: Forwards or Backwards for the New Lord Chancellor?*” (1997) 16 C.J.Q. 208, 214; M. Zander, *The State of Justice* (London: Sweet and Maxwell, 2000), 43–44; and *R. Finkelstein*, “*The Adversarial System and the Search for Truth*” (2011) 37(1) *Monash University Law Review* 135.

13 Cf. *N. Andrews*, “*A New Civil Procedural Code for England: Party-Control Going, Going, Gone*” (2000) 19 C.J.Q. 19.

14 J.A. Jolowicz, *On Civil Procedure* (Cambridge: Cambridge University Press, 2000), 78.

15 *Balchin v Chief Constable of Hampshire Constabulary* [2001] EWCA Civ 538, where it was held that it was not the function of the judge to investigate facts where there is an agreed statement of facts.

16 *Khiaban v Beard* [2003] EWCA Civ 358 [13]. For a general discussion see: J.A. Jolowicz, “*Adversarial and Inquisitorial Models of Civil Procedure*” (2003) 52 I.C.L.Q. 281.

17 *Lipton v Powell* [1921] 2 KB 51, *Div Ct*; *Pickering v Deacon* [2003] EWCA Civ 554; *Ali v Al-Basri* [2004] EWHC 2608 (QB).

18 *Loveridge v Healey* [2004] EWCA Civ 173.

19 *Al-Medenni v Mars UK Ltd* [2005] EWCA Civ 1041.

20 See Ch.23 Judgment and Orders paras 23.68 ff.

21 See Ch.23 Judgment and Orders para.23.6.

22 *Air Canada v Secretary of State for Trade* [1983] 2 AC 394 at 488, HL; and *Society of Lloyd's v Jaffray, The Times*, 3 August 2000, QBD. See also *McPhilemy v Times Newspapers Ltd (No.2)* [2000] 1 W.L.R. 1732, CA, holding that it was the court’s duty to make a decision in accordance with the admissible evidence even if it was known that further evidence existed which had not been adduced.

23 *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC* [2020] UKSC 24 [242].

24 See for example Ch.20 Witness Statements; Ch.21 Experts; and Ch.22 Trial and Evidence.

25 *McPhilemy v Times Newspapers Ltd (No.2)* [2000] 1 W.L.R. 1732, CA.

26 *Hawksworth v Chief Constable of Staffordshire* [2012] EWCA Civ 293: if counsel for one of the parties believes that the court is admitting evidence in a departure from a pleaded case, it is incumbent on them to raise an objection and insist the judge is to make a ruling; they cannot raise the point for the first time on appeal.

27 For support for the proposition that process requirements are electable see the High Court of Australia’s decision in *Berowra Holdings Pty Ltd v Gordon* [2006] HCA 32; (2006) 225 CLR 364 [14]–[15]; and see J.A. Jolowicz, *On Civil Procedure* (Cambridge: Cambridge University Press, 2000) pp.68 and 78.

28 *Macdonald Estates Plc v National Car Park Ltd* [2010] S.L.T. 36; [2009] C.S.I.H. 79: the Court of Session explained that whereas a judge must decide matters on the basis of submissions and evidence put before them, an expert witness is entitled to carry out their own investigations and come to their own conclusions regardless of any material provided to them by the parties.

29 *Chilton v Saga Holidays Plc* [1984] EWCA Civ 1; [1986] 1 All ER 841.

30 *Official Solicitor v K* [1965] AC 201 at 240–241; [1963] 3 All ER 191 at 210, HL. Though see the discussion of the closed material procedure, which enables the court to act on evidence which some parties have not had the opportunity of testing (save in a limited way through a special advocate) in Ch.19 Public Interest Immunity and Closed Material Procedure paras 19.59 ff.

31 *Air Canada v Secretary of State for Trade (No.2)* [1983] 2 AC 394 at 438, HL.

32 J. Jacob, “The Hamlyn Lectures 1986”, *The Fabric of English Civil Justice* (London: Stevens & Sons, 1987) pp.5 and 156 ff.

33 The form of the juror’s oath or affirmation is: “... I will faithfully try the defendant and give a true verdict according to the evidence”: D. Ormerod and D. Perry, *Blackstone’s Criminal Practice* 2025 (Oxford University Press, 2025) para.D13-18; see also *Crown Court Compendium* 2025, appx VI and VII, requiring the judge to warn the jury that they must decide the case only on the basis of the evidence presented.

34 F. Pollock and F. Maitland, *The History of English Law*, 2nd edn (Cambridge: Cambridge University Press, 1898) Vol.2, p.667; J. Jacob, “The Reform of Civil Procedural Law”, in *The Reform of Civil Procedural Law and Other Essays in Civil Procedure* (London: Sweet & Maxwell, 1982), p.24. Also see *Thomson v Corporation of Glasgow* (1961) S.L.T. 237, 246.

35 Until 1854, trial by jury was the only form of trial used in any court of common law. During the second half of the century it became possible to opt by consent for a trial by judge alone. By 1883 trial by jury was obtainable as a matter of course only in six causes of action, while in all other cases it had to be specially asked for. In 1918 another cause of action was added to the list of causes for which there remained a right to trial by jury, while in all other cases it

was made discretionary, and this legislation was substantially re-enacted in 1933. Jury trial declined not because judges refused to order it when it was sought, but because litigants sought it less and less, according to Sir Patrick Devlin (as he then was): P. Devlin, “The Hamlyn Lectures 1956”, Trial by Jury (London: Stevens & Sons, 1956), pp.130–133. The current position is governed by the [Senior Courts Act 1981 s.69](#) (as amended by the [Defamation Act 2013](#) and the [Justice and Security Act 2013](#)). There is a qualified right to trial by jury only in cases concerning malicious prosecution, false imprisonment and certain allegations of fraud. This is subject to the proviso that the court may refuse jury trial if it is of the opinion that “the trial requires any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury” ([s.69\(1\)](#)). In appropriate circumstances the court may order certain issues to be tried by jury and others by the judge: [Phillips v Commissioner of Police of the Metropolis \[2003\] EWCA Civ 382](#). But it would rarely be appropriate to do so: [Armstrong v Times Newspapers Ltd \[2005\] EWHC 2816 \(QB\)](#).

36 [Schmidt v Wong \[2005\] EWCA Civ 1506; \[2006\] 1 W.L.R. 561](#) [8]. On litigants in person see Ch.3 Fair Trial, paras 3.165 ff.

37 [Re C \(A Minor: Irregularity of Practice\) \[1991\] 2 F.L.R. 438](#); and [Re B \(A Minor\) \(Disclosure of Evidence\) \[1993\] Fam. 142; \[1993\] 1 All ER 931](#). In [Re R \(A Minor\) \(Disclosure of Privileged Material\) \[1993\] 4 All ER 702](#), it was held that in proceedings under the [Children Act 1989](#) the judge is duty-bound to investigate any material relevant to the determination of the child’s welfare, whether put before them by the parties in the normal adversarial manner or not. See also [Oxfordshire County Council v M \[1994\] Fam. 151; \[1994\] 2 All ER 269, CA](#); [Re L \(A Minor\) \(Police Investigation: Privilege\) \[1997\] AC 16; \[1996\] 2 All ER 78, HL](#). In [Al Maktoum v Al Hussein \[2021\] EWCA Civ 1216](#) [115]–[116], the Court of Appeal rejected a submission that [Oxfordshire County Council](#) and [Re L](#) no longer represented the law: “whilst [Oxfordshire](#) and [Re L](#) were each decided some time ago (1993 and 1997 respectively) they cannot be placed in a silo marked ‘outdated’”.

38 See the discussion in Ch.16 Legal Professional Privilege of exceptions to the LPP rule; see also the discussion of the extent to which litigation privilege covers communications with non-parties.

39 See [\(Re\) C's Application for Judicial Review \[2012\] NICA 47](#), and [A County Council v SB \[2010\] EWHC 2528 \(Fam\)](#). See further Ch.3 Fair Trial paras 3.196 ff.

40 [Davies v Eli Lilly & Co \[1987\] 1 W.L.R. 428](#) at 431, CA. In [Riddick v Thames Board Mills \[1977\] QB 881 at 895; \[1977\] 3 All ER 677](#) at 687, CA, Lord Denning said: “Discovery of documents is a most valuable aid in the doing of justice. The reason for compelling discovery of documents in this way lies in the public interest in discovering the truth so that justice may be done between the parties.” See further Ch.3 Fair Trial paras 3.203 ff.

41 That is, masters in the Royal Courts of Justice, district judges in the High Court district registries and district judges in county court proceedings (though see PD 2B for reservations of certain pre-trial business, such as interim applications relating to the liberty of the subject, to particular levels of the judiciary). Authorised legal advisers employed by the courts increasingly have a hand in aspects of the pre-trial process: see the [Courts and Tribunals \(Judiciary and Functions of Staff\) Act 2018 s.3](#); and see [CPR 2.4\(2\)](#); PD 2E; and [CPR 73](#).

42 The court may even make an order without hearing the parties, although the affected parties can apply within seven days for such orders to be set aside, varied or stayed: [CPR 3.3\(4\)–\(5\)](#).

43 N. Andrews, “The Adversarial Principle: Fairness and Efficiency: Reflections on the Recommendations of the Woolf Report” in A.A.S. Zuckerman and R. Cranston (eds), Reform of Civil Procedure—Essays on Access to Justice (Oxford: Oxford University Press, 1995) p.69. See also N. Brooks, “The Judge and the Adversary System” in A. Linden (ed.), The Canadian Judiciary (Toronto: Osgoode Hall Law School, 1976) p.90; L. Fuller, “Forms and Limits of Adjudication” (1978) 92 Harv. L.R. 353; J. Langbein, “German Advantage in Civil Procedure” (1985) 52 U. Chic. L.R. 823; R. Allen et al “The German Advantage in Civil Procedure: A Plea for More Details and Fewer Generalities in Comparative Scholarship” (1988) 82 Nw. U. L. Rev. 705. For the argument that judicial involvement in the pre-trial process could undermine judicial impartiality, see J. Resnik, “Managerial Judges” (1982) 96 Harv. L.R. 374; M. Zander, “The Woolf Report: Forwards or Backwards for the New Lord Chancellor?” (1997) 16 C.J.Q. 208, 214.

44 It could be said, however, that the management of claims allocated to the small-claims track or which involve litigants in person entails a degree of substantive case management: see [Schmidt v Wong \[2005\] EWCA Civ 1506; \[2006\] 1 W.L.R. 561](#) [8]; and Ch.3 Fair Trial paras 3.165 ff.

45 See for instance the approach in Germany, which is often described wrongly as an inquisitorial system, where the court is responsible for both procedural case management (formelle Prozessleitungs pflicht) and substantive case management (materielle Prozessleitungs pflicht). On the former see, for instance, the power to direct the course of proceedings under the German Civil Procedure Code (Zivilprozessordnung) s.136. On the latter see, for instance, the power to discuss with the parties what facts and evidence may be necessary and what the legal issues are under the Zivilprozessordnung s.139.

46 See Ch.1 The Overriding Objective paras 1.5 ff.

47 [D v NSPCC \[1978\] AC 171, 232](#).

48 See Ch.27 Offers to Settle paras 27.3–27.4 and 27.13 ff.

49 *Mionis v Democratic Press SA* [2017] EWCA Civ 1194; [2018] QB 662 [88].

50 See for example PD PAC paras 1 and 3(c)–(d).

51 *Churchill v Merthyr Tydfil County Borough Council* [2023] EWCA Civ 1416; [2024] 1 W.L.R. 3827.

52 See Ch.1 Overriding Objective paras 1.112 ff.

Use of Technology in Case Management

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 12 - Case Management & Enforcing Party Compliance

Part I—Techniques for Case Management

Use of Technology in Case Management

12. 29 Before turning to the case management powers the court possesses under the [CPR](#), it is useful to consider briefly the opportunities that exist for the parties and court to take advantage of information technology (IT) in order to conduct and manage litigation more efficiently.⁵³ In certain county court proceedings claims may be issued electronically and, to a limited degree, managed online.⁵⁴ Further, [CPR 7.12](#) states that a practice direction may permit or require a claimant to start their claim by requesting the issue of a claim form electronically; and [CPR 5.5](#) states that a practice direction may make provision for documents to be filed or sent to the court by electronic means. PD 51O was made under these provisions in 2015 to govern a (then) new system of electronic filing known as CE-File in the Business and Property Courts.⁵⁵ CE-File enables claims and applications to be commenced and managed online via a digital case file, with all paper documents (save those required to be held in their original format such as wills) being uploaded and thereafter returned or destroyed, along with any emails or other communications between the court and the parties. Use of CE-File to start and continue claims was made mandatory in most cases in the Business and Property Courts with effect from 2017, and since then PD 51O was gradually expanded to make it available (in some instances obligatory) in most other civil jurisdictions of the High Court and in the Civil Division of the Court of Appeal.⁵⁶ PD 51O was replaced from 1 October 2025 with PD 5C, which standardises the use of CE-File across these jurisdictions. The upshot is that in the High Court and Court of Appeal, traditional paper-based court files have been largely replaced by a digitally-managed system.⁵⁷
12. 30 At the same time, even CE-File as operated under PD 5C does not amount to a fully comprehensive or “end-to-end” dispute management IT system. Service of documents and many communications with the court still take place outside the system (albeit often via email), and there is little prospect of integrating artificial intelligence into what is essentially an online version of a conventional court file to assist with case management or listing decisions.⁵⁸ Further, as noted above, the county court continues to be reliant in the majority of cases on paper-based methods of working, supplemented by email and a relatively rudimentary digital case information platform. The Supreme Court has gone rather further in its efforts to digitise its process. With effect from 2 December 2024, filing in the Supreme Court is managed via an online ‘portal’ to which all represented parties are required to subscribe.⁵⁹ The Supreme Court Rules 2024 and Portal Practice Direction contemplate that in relation to such parties, all documents will be filed, and all communication with the court will take place, via the portal.⁶⁰ To facilitate this the portal incorporates an ‘open’ channel of communication with the court which is visible to all users of the case file, and a confidential channel for use in appropriate circumstances.⁶¹ Significantly, documents filed via the portal need not be separately served on other represented parties by email; rather, service will be effected by way of an alert automatically generated by the portal itself, notifying the intended recipient that a new document is available.⁶² Accordingly, filing and service have become “functionally identical” in the Supreme Court, since no additional step is required beyond the act of uploading.⁶³
12. 31 Attention should also be paid to the availability of IT to improve and streamline arrangements for hearings. Where the parties are able to organise the case material on a web-based electronic platform or in an interactive e-bundle, this can greatly contribute to the efficient conduct of hearings and trials. This is especially so in cases where documentation is extensive, or where it is convenient to maintain a core bundle of documents which can be amended or updated throughout the life of the case.⁶⁴ Of course, e-bundles can also run the risk of promoting inefficiency and increasing cost if they are treated by parties as a bottomless pit into which endless documents of peripheral relevance can be dumped. The finite nature of traditional printed bundles and considerations of cost involved in their production encourages parties to be disciplined in the selection of materials for inclusion,

and judges should be astute to ensure that such discipline is carried over to the production of e-bundles which are increasingly used in their courtrooms. Equally, videolink facilities are now widely available and most if not all legal representatives have become well-used to conducting hearings virtually since the coronavirus pandemic. Parties can therefore be expected to avail themselves of such facilities where this would promote efficiency and save costs (PD 32 Annex 3). Whilst virtual hearings can pose challenges for both the principle of open justice and court control of parties' and observers' behaviour during hearings, the court's powers to overcome these difficulties have been strengthened following the rapid adoption of such hearings during the coronavirus pandemic.⁶⁵ As such, these considerations should not necessarily prevent the court from embracing remote methods of conducting hearings, particularly short interim applications where no oral evidence is required, or where attendance in person would necessitate disproportionate travel or expense.

Footnotes

- 53 For a review of the many cris de cœur calling for better use of IT to assist the court in managing litigation, and the steps taken in that regard, see the previous edition of this work at [Ch.11 Dispute Management and Party Compliance, Part I paras 11.35 ff.](#)
- 54 That is, through the Money Claims Online service provided for in PD 7C, and the Online Civil Money Claims pilot established by PD 51R. See [Ch.4 Commencement paras 4.28 ff.](#) and [Ch.22 Trial and Evidence para 22.7 ff.](#)
- 55 The umbrella name given to the specialist civil jurisdictions of the High Court dealing with cases of a commercial or chancery nature, including the Admiralty Court, the Commercial Court, the Circuit Commercial Court (formerly the Mercantile Courts), the Technology and Construction Court and the various specialist lists of the Chancery Division. See further [CPR 57A.1](#); PD 57AA, para.1.1.
- 56 PD 51O paras 2.2 ff.
- 57 PD 5C paras 1.3 and 2.1–2.2. See also PD 5B, which enables parties to communicate with the court and file certain documents by email. Where PD 5C applies so as to require CE-File to be used for these purposes, however, those provisions will take precedence: see PD 5C para.1.6(4).
- 58 Cf. J. Cabral et al, “Using Technology to Enhance Access to Justice” (2012) 26(1) *Harvard Journal of Law and Technology* 243; J. Sorabji, “Compliance Problems and Digitising Case Management in England and Wales” in A. Higgins and R. Assy (eds), *Principles, Procedure and Justice: Essays in Honour of Adrian Zuckerman* (Oxford: Oxford University Press, 2020).
- 59 [Supreme Court Rules 2024 \(SI 2024/949\) r.4](#); Portal Practice Direction para.P.15.
- 60 [Supreme Court Rules 2024 \(SI 2024/949\) rr.7, 9](#); Portal Practice Direction para.P.2, cf. paras P.18 and P.30.
- 61 Portal Practice Direction para.P.30.
- 62 [Supreme Court Rules 2024 \(SI 2024/949\) r.8](#); Portal Practice Direction para.P.7.
- 63 Portal Practice Direction para.P.7.
- 64 See for example the Commercial Court Guide (2022), para.D2.1.
- 65 See [Courts Act 2003 s.85A](#); [Remote Observation and Recording \(Courts and Tribunals\) Regulations 2022 \(SI 2022/705\)](#), discussed in Ch.3 Fair Trial at paras 3.119–3.120.

Case Management Objectives and Powers

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 12 - Case Management & Enforcing Party Compliance

Part I—Techniques for Case Management

Case Management Objectives and Powers

Two phases of dispute management

- 12.32 While the bulk of the present chapter is concerned with the instruments for court control of litigation, it is important to clarify at the outset that case management under the CPR is not simply focused on the effective management of cases after proceedings have been commenced. It is also focused on the pre-action management of disputes via the pre-action protocols, which as Sir Terence Etherton MR explained form part of the architecture of the modern civil justice system.⁶⁶ Thus, whilst court control of the pre-action process is limited by the fact that, as a general rule, the court's jurisdiction over parties to a dispute does not arise until a claim is issued, once proceedings are on foot it enjoys wide powers to take pre-action conduct into account when making case management decisions and costs orders.⁶⁷ In addition, defendants are no longer free unilaterally to rescile from admissions that were made in writing pre-action;⁶⁸ and, in cases where pre-action conduct amounts to an interference with the administration of justice, contempt proceedings may be brought notwithstanding that no claim was ultimately issued.⁶⁹ There are also statutory exceptions to the general rule that the court has no direct power over the parties until proceedings are issued, such as the power to grant certain forms of interim relief pre-action and the power to grant pre-action disclosure.⁷⁰ Thus, whilst the court's powers in respect of the pre-action and post-issue phases of litigation differ, they nonetheless form two parts of the dispute management process which should be viewed holistically rather than in isolation.

Case management objectives

- 12.33 The two phases of the dispute management process have the same overarching objectives; the promotion of settlement and the efficient and proportionate management to judgment of those cases that cannot settle. Practice Direction—Pre-Action Conduct and Protocols (PD PAC) spells out the aims applicable to the pre-action phase, at para.3:

“... the court will expect the parties to have exchanged sufficient information to—

- (a)understand each other's position;
- (b)make decisions about how to proceed;
- (c)try to settle the issues without proceedings;
- (d)consider a form of Alternative Dispute Resolution (ADR) to assist with settlement;
- (e)support the efficient management of those proceedings; and
- (f)reduce the costs of resolving the dispute.”⁷¹

Those aims are carried over, in expanded form, into the post-issue phase. Having stated that the “court must further the overriding objectives by actively managing cases” ([CPR 1.4\(1\)](#)), the [CPR](#) go on to spell out the aims of active case management. [CPR 1.4\(2\)](#) states:

Rule 1_4:(2)

- “(2) Active case management includes—
- (a) encouraging the parties to co-operate with each other in the conduct of the proceedings;
 - (b) identifying the issues at an early stage;
 - (c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;
 - (d) deciding the order in which issues are to be resolved;
 - (e) ordering or encouraging the parties to use, and facilitating the use of, alternative dispute resolution;
 - (f) helping the parties to settle the whole or part of the case;
 - (g) fixing timetables or otherwise controlling the progress of the case;
 - (h) considering whether the likely benefits of taking a particular step justify the cost of taking it;
 - (i) dealing with as many aspects of the case as it can on the same occasion;
 - (j) dealing with the case without the parties needing to attend at court;
 - (k) making use of technology; and
 - (l) giving directions to ensure that the trial of a case proceeds quickly and efficiently.”

- 12.34 Neither list is exhaustive, nor do they confer powers on the court. Rather, they indicate the aims or policies that are behind the pre-action protocols and the court’s case management powers in the [CPR](#), which parties ought to take account of when managing their dispute and which the court must keep in mind when giving management directions. For example, during the pre-action phase it is more important that there should be party compliance with the spirit of the pre-action protocols and the objectives articulated in PD PAC, than a rigidly formalistic adherence to the specific provisions of the relevant protocol.⁷² Post-issue, the court will pay particular attention to identifying any scope for the issues between the parties to be narrowed, and similarly will encourage (and where appropriate, order) them to engage in ADR outside the court system, with a view to saving costs for the parties and court resources. When considering specific case management orders, it is the court’s duty to ensure that the cost of the process is proportionate to the benefits likely to be obtained, with proportionality being judged both by reference to the circumstances of the particular case and by reference to the general availability of court resources. The court must also always keep in mind the importance of efficiency and expedition. The need for speed and efficiency figures in a variety of contexts, such as when the court fixes a timetable for trial ([CPR 28.5](#) and [29.8](#)); in the restrictions imposed on the parties’ freedom to extend time limits by agreement among themselves;⁷³ and in the general exhortation for the court to deal with as many aspects of the case as possible on the same occasion ([CPR 1.4\(2\)\(i\)](#)). For instance, if a hearing is needed to give directions for disclosure, the court should on the same occasion aim to deal with as many other aspects of the pre-trial preparations as possible.
- 12.35 Not all the aims in [CPR 1.4\(2\)](#) can be fully implemented in every case, however, and indeed they are capable of being at odds with each other in particular circumstances. For instance, if the court decides to deal with the issues in a particular order, it

may not be able to deal with all of them on the same occasion.⁷⁴ Such conflicts do not, however, represent a defect; they are merely illustrative of the fact that the overriding objective calls for compromises between different aspects of justice: correct resolution, timely resolution and proportionate use of resources.

Case management powers

12.36 Primary responsibility for effective dispute management prior to commencement rests with the parties, since the court has no direct means to secure compliance with the pre-action protocols before litigation commences, as noted above. The court's powers only arise once proceedings commence, and are therefore primarily designed to incentivise compliance and deter non-compliance with the protocols during the pre-action phase. Once proceedings have commenced, court powers will be used to further the overriding objective. Failure to comply with pre-action protocols must, for instance, be taken into account when the court gives case management directions (CPR 3.1(4)).⁷⁵ A stay may be imposed where failure to comply resulted in the claim remaining obscure when proceedings were started.⁷⁶ The court may order a party who has not complied with a protocol to pay a sum of money into court (CPR 3.1(5)).⁷⁷

12.37 Once litigation commences, the court's case management powers are listed in CPR 3.1:

Rule 3_1

(1) The list of powers in this rule is in addition to any powers given to the court by any other rule or practice direction or by any other enactment or any powers it may otherwise have.

(2) Except where these Rules provide otherwise, the court may—

(a) extend or shorten the time for compliance with any rule, practice direction or court order (even if an application for extension is made after the time for compliance has expired);

(b) adjourn or bring forward a hearing;

(c) require that any proceedings in the High Court be heard by a Divisional Court of the High Court;

(d) require a party or a party's legal representative to attend the court;

(e) hold a hearing and receive evidence by telephone or by using any other method of direct oral communication;

(f) direct that part of any proceedings (such as a counterclaim) be dealt with as separate proceedings;

(g) stay the whole or part of any proceedings or judgment either generally or until a specified date or event;

(h) consolidate proceedings;⁷⁸

(i) try two or more claims on the same occasion;

(j) direct a separate trial of any issue;

(k) decide the order in which issues are to be tried;

- (l) exclude an issue from consideration;
- (m) dismiss or give judgment on a claim after a decision on a preliminary issue;
- (n) order any party to file and exchange a costs budget;
- (o) order the parties to engage in alternative dispute resolution;
- (p) take any other step or make any other order for the purpose of managing the case and furthering the overriding objective, including hearing an Early Neutral Evaluation with the aim of helping the parties settle the case.”

- 12.38 The list is not exhaustive, as the rules make clear ([CPR 3.1\(1\)](#) and [3.1\(2\)\(p\)](#)). Further powers are set out elsewhere in the [CPR](#), and the court has inherent jurisdiction and powers, for example, to control its own procedure to prevent it being used to achieve injustice.⁷⁹ Moreover, the courts will not hesitate to identify a necessary procedural power even where it is not expressly provided for. For example, the general case management power contained in [CPR 3.1\(2\)\(p\)](#) has been held to enable the amendment and withdrawal of applications once issued on such terms as the court considers appropriate.⁸⁰
- 12.39 Autonomous initiative is an indispensable aspect of any active case management system, and the court is therefore given the power to make orders of its own motion ([CPR 3.3](#)). However, the court must ensure that the exercise of this power is carried out on the basis of all the available information and that it does not infringe the parties’ right to be heard.⁸¹ Accordingly, where the court proposes to make an order of its own initiative, it would normally give the affected parties an opportunity to make representations or even hold a hearing for that purpose. The court may make an order without first hearing the parties ([CPR 3.3\(4\)](#)), but in such circumstances the parties remain at liberty to apply to have the order set aside, varied or stayed ([CPR 3.3\(5\)](#)).⁸² The power to make orders of the court’s own initiative extended to striking out a statement of case, and [CPR 3.4\(3\)](#) empowers it to make any consequential order it considers appropriate when it strikes out a statement of case.⁸³ [CPR 3.3\(9\)](#) states that if the court of its own initiative strikes out a statement of case or dismisses an application, and it considers that the claim or application is totally without merit, it must also consider whether it is appropriate to make a civil restraint order under [CPR 3.11](#).⁸⁴ A court exercising case management powers such as these has a considerable measure of discretion. An appeal court would not interfere with a case management decision, including where it is made of the court’s own initiative, unless it involved an error of principle or law, or the court misapprehended some material factual matter.⁸⁵
- 12.40 The exercise of the powers set out in [CPR 3.1\(2\)](#) will be discussed in the context of the various procedures in which they are normally exercised. The promotion of settlement, including the court’s power to direct the parties to engage in [ADR](#) where appropriate, is considered in Ch.1.⁸⁶ Here attention needs to be drawn to four general matters: extensions of time; the exercise of powers to control the issues and evidence; management of cases involving litigants in person; and the court’s ancillary powers to vary and revoke orders.

Court control over time limits

- 12.41 Since it is the court’s responsibility to ensure that litigation progresses expeditiously, the parties’ freedom to determine the litigation timetable and decide the periods for completing specific process requirements is limited. The parties’ freedom to agree or vary time limits is addressed in [CPR 2.11](#):

“Unless these Rules or a practice direction provides otherwise or the court orders otherwise, the time specified by a rule or by the court for a person to do any act may be varied by the written agreement of the parties.”

- 12. 42** A written agreement does not have to be in a single document and can be constituted by an exchange of letters. In *Thomas v Home Office*, the Court of Appeal indicated that an oral agreement that was then confirmed in writing by both sides was sufficient.⁸⁷ However, it was held in the same case that an oral agreement between two solicitors subsequently recorded in a letter sent by one solicitor to the other, but not answered by the other, could not be said to constitute a written agreement of the parties. Furthermore, it was not sufficient for one solicitor merely to communicate to a third party what had allegedly been agreed. Nor was it sufficient for each side to note their oral agreement, unless the notes were exchanged.
- 12. 43** A number of rules limit the scope for agreed changes to time limits. First, time limits cannot be varied where this would affect the key stages of the litigation. On the fast, intermediate and multi-tracks, parties may not vary the date for performing any procedural requirement if the change would necessitate varying the date for any case management conference or pre-trial review, the return of the pre-trial checklist, or the date of the trial or the trial period.⁸⁸ Given that the dates of these principal milestones of litigation are fixed in advance by the court, the scope for agreed changes to the times for the performance of process requirements is in practice fairly circumscribed. If parties were permitted to agree multiple variations of time without recourse to the court, the cumulative effect of which was to radically alter the court-imposed timetable, the court’s ability to control case management would be rendered nugatory.⁸⁹ Moreover, while the court need not generally be informed of variations agreed by the parties under CPR 2.11 (PD 28 para.4.5 and PD 29 para.6.5), in some jurisdictions the court monitors even minor variations closely. For instance, in the Commercial Court, agreed variations must be communicated to the court, so that the court can maintain oversight and control of the timetable (PD 58 para.7.1).⁹⁰
- 12. 44** Second, party freedom is more strictly controlled in the appeal procedure, where the parties may not extend any of the time limits governing appeals, whether imposed by a rule, Practice Directions 52A–E or a court order (CPR 52.15(2)).
- 12. 45** Third, parties cannot validly agree to extend the time for the performance of peremptory orders or of binding requirements imposed by rules and practice directions irrespective of the impact on the key stage of the litigation (CPR 3.8(3)), except in the narrow circumstances prescribed in CPR 3.8(4). These provisions state:

Rule 3_8:(4)

- “(3) Where a rule, practice direction or court order –
- (a) requires a party to do something within a specified time, and
 - (b) specifies the consequence of failure to comply,
- the time for doing the act in question may not be extended by agreement between the parties except as provided in paragraph (4).
- (4) In the circumstances referred to in paragraph (3) and unless the court orders otherwise, the time for doing the act in question may be extended by prior written agreement of the parties for up to a maximum of 28 days, provided always that any such extension does not put at risk any hearing date.”

- 12. 46** While party freedom to vary time limits for compliance with process requirements is limited in the ways outlined above, the court’s power to extend time limits is more extensive. CPR 3.1(2)(a) states that the court may “extend or shorten the time for compliance with any rule, practice direction or court order (even if an application for extension is made after the time

for compliance has expired)”. Even in the absence of agreement, therefore, or when the parties’ ability to agree is constrained by the rules, it is always open to a party to apply for an extension of time for the performance of any process requirement (including after the deadline for performance has already expired), or for the postponement or adjournment of any hearing.

- 12. 47** The court’s powers to extend time limits are not unlimited, however. Certain restrictions are placed on [CPR 3.1\(2\)\(a\)](#) by rules, such as [CPR 7.6](#) (extension of time to serve a claim form)⁹¹ or the time limits imposed under [CPR 36](#).⁹² Similarly, the court may not use its powers under the [CPR](#) to extend statutory time limits or limitation periods unless and to the extent authorised to do so by statute.⁹³ Further, in a variety of circumstances the court’s power to extend the time for compliance with a rule or order is governed by, or at least falls to be considered in accordance with, [CPR 3.9](#); this aspect is considered in more detail below in Part II of this chapter.⁹⁴ But beyond this, the court’s discretion is very wide.

- 12. 48** Given that under the [CPR](#) the court is involved with case management from an early stage, the jurisdiction to extend time limits should not normally give rise to serious problems. Case management directions will usually reflect the procedural needs of the case and the parties’ ability to perform their process requirements. If the parties encounter difficulties in complying with time limits, the court would normally be able to accommodate them provided they have applied for an extension in good time so that the litigation timetable is not unduly disrupted, and a hearing date will not be lost.⁹⁵ Inevitably, there will be cases at the extremes where disruption or loss of a hearing date will result but an extension or adjournment is nevertheless unavoidable; in all cases, the question will be whether the extension sought furthers the overriding objective, giving full and proper weight not just to the interests of the parties but also to those of other users of the court system.⁹⁶ This will include taking account of the extent to which a party has previously received the indulgence of the court as a result of a failure to comply with time limits. In deciding whether and how to exercise the power under [CPR 3.1\(2\)\(a\)](#), the court should bear in mind that the way in which applications to extend time are resolved is bound to influence the litigation culture generally. If litigants and their advisers perceive that such applications will be acceded to as a matter of course, or that failure to meet time limits will be easily overlooked, parties would tend to regard deadlines less seriously than they should. These considerations are underlined by the fact that applications to extend time would ordinarily come before the court in circumstances where one party objects to the extension, or where the decision is reserved for the court for one of the three reasons set out above. The task of striking an appropriate balance between an unreasonably inflexible approach and an excessively forgiving one in such cases is not easy, but ultimately the power to extend time limits under [CPR 3.1\(2\)\(a\)](#) must be exercised with circumspection.

Power to control issues

- 12. 49** [CPR 3.1\(2\)](#) lists the powers of the court with regard to issues in the case. It states that the court may:

Rule 3_1

- “(j) direct a separate trial of any issue;
- “(k) decide the order in which issues are to be tried;
- “(l) exclude an issue from consideration...”

The first two are self-explanatory. For example, in a claim for malicious falsehood the court may order a trial of the falsity of the words complained of as a preliminary issue if this would assist the parties to know where they stood and save costs.⁹⁷ In a claim for damages for medical negligence the court may direct that the issue of liability should be tried first, leaving quantum to be determined later. Alternatively, the court may decide not to split the trial of liability from the trial of quantum but direct that the issues should be addressed in a particular order at trial.⁹⁸ In a personal injury claim where the long-term outcome for the 10-year-old claimant was uncertain and speculative, the court directed that the assessment of damages should be completed on a staged basis, postponing a final resolution until a point some years in the future.⁹⁹

12. 50 A decision to direct the hearing of specified preliminary issues or to split the trial may have far-reaching consequences for the nature of the trial. Such an order can, when made properly, enable proceedings to be managed efficiently and speedily, thus securing cost and time benefits to the parties and the court. A trial of a preliminary issue such as limitation may dispose of the case without the need to incur further costs on dealing with the remainder of the issues. Even where the case remains on foot following such a trial, this approach may help the parties to narrow the issues in dispute in the light of the determination of the preliminary issue, which may lead to the promotion of settlement or more efficient case management of the remaining issues.
12. 51 On the other hand, the taking of preliminary issues may lead to unnecessary expense and delay, as noted by Lord Scarman in *Tilling v Whiteman*, where he stated that, “[p]reliminary points of law are too often treacherous shortcuts. Their price can be ... delay, anxiety and expense”.¹⁰⁰ It may, for example, be difficult satisfactorily to disaggregate preliminary issues from other issues in the case; and there may be a risk of the court having to consider the same evidence or hear from the same witnesses twice at different stages of the proceedings. Equally, a direction for a split or preliminary issues trial may have the effect of elongating the proceedings overall, particularly where the conclusions of the court at the first trial are challenged on appeal.
12. 52 To maximise the prospect that a trial of preliminary issues will promote effective case management, David Steel J (sitting as a judge of the Court of Appeal) in *McLoughlin v Grovers (A Firm)* explained when a court could properly exercise the power under CPR 3.1(2)(j):¹⁰¹

Rule 3_1

- “(a) Only issues which are decisive or potentially decisive should be identified;
- “(b) The questions should usually be questions of law;¹⁰²
- “(c) They should be decided on the basis of a schedule of agreed or assumed facts;¹⁰³
- “(d) They should be triable without significant delay, making full allowance for the implications of a possible appeal;¹⁰⁴
- “(e) Any order should be made by the court following a case management conference.¹⁰⁵”

The fifth requirement, that this type of order should only be made following a case management conference, addresses the risk of “mission creep” in what the court may be asked to decide at a split or preliminary issues trial.¹⁰⁶ A case management conference mitigates that risk by requiring the proposed preliminary issues to be identified with precision.¹⁰⁷ A failure properly to identify the issue can itself often lead to inefficient case management, delay and otherwise avoidable costs, as the Supreme Court noted in *Woodland Trust v Essex County Council*.¹⁰⁸ In that case the preliminary issue was one that was neither likely to be decisive, as there were other independent bases on which the claim was brought, and the issue was not itself defined precisely enough due to the fact that the pleadings were vague.¹⁰⁹

12. 53 The power to exclude an issue from consideration is less straightforward because the court cannot refuse to adjudicate upon an issue that has been properly joined in the pleadings. The court may, of course, strike out a statement of case or dispose of an issue by summary judgment, even of its own initiative. But CPR 3.1(2)(l) cannot empower the court, for example, to exclude from consideration the issue of frustration that the parties have raised in a claim for breach of contract. To make sense of this provision the term “issue” must bear a limited meaning. It cannot mean an issue that is essential to the success of the claim or the defence. In *McPhilemy v Times Newspapers Ltd*, Lord Woolf MR stated that:

“while under the rules a party cannot be prevented from putting forward an allegation which is central to his or her defence, the court can control the manner in which this is done and thus limit the costs involved.”¹¹⁰

Thus, the court may exclude from consideration issues that are not central to the case, on the grounds that they are so peripheral that deciding them is unlikely to contribute to the determination of the central issues on which the claim and defence must stand or fall. This power reflects the public dimension of civil procedure. A party is entitled to its day in court. But it is not entitled to be heard by the court in an unlimited fashion, or to have every marginal issue heard and determined. That would be unjust to others who have need of curial resolution of their own disputes.

- 12. 54** In *Crown House Technologies Ltd v Cardiff Commissioning Ltd*,¹¹¹ Coulson J exercised the power to exclude an issue from consideration under both CPR 3.1(2)(l) and the court’s inherent jurisdiction. The order limited part of the claimant’s claim to £9,702.65, in circumstances where it had been pleaded in excess of £200,000. The exclusion was made on the basis that the claimant’s disclosure failed to evidence the claim to the full amount claimed. The evidence supported the lower figure. The claimant had also failed to provide any explanation as to how it reached the full figure. It simply stated that further evidence would be provided. Coulson J explained that the failure to provide a proper explanation was contrary to the spirit of a previous case management order that required the claimant to identify what was being claimed and its basis. In those circumstances, the court could properly restrict the party’s claim to those issues in respect of which there had been compliance with the terms of the prior case management order.

Power to control evidence

- 12. 55** The court’s ability to control the litigation process would be seriously impeded without a facility for exercising some control over evidence. One of the shortcomings of the old system was the parties’ freedom to adduce as much evidence as they wished and of whatever kind they chose. Generally speaking, provided the evidence was relevant and admissible¹¹² it could be put before the court regardless of whether it made a worthwhile contribution to the outcome, how long it delayed the final resolution or how much it added to the overall cost or to the court’s burden. The CPR attempts to redress this problem.¹¹³
- 12. 56** The court has traditionally had the power to exclude evidence which although relevant made such a small contribution to the determination of the issues that its usefulness was outweighed by practical considerations, such as the need to avoid delay and confusion.¹¹⁴ In determining whether a given piece of evidence should be admitted the court has always had to consider whether the evidence had a logical relationship to the issue and, further, whether it made a sufficient contribution to justify its reception.¹¹⁵ As Lord Hoffmann put it, the “degree of relevance needed to qualify for admissibility is not a fixed standard, like a point on some mathematical scale of persuasiveness. It is a *variable* standard, the probative value of the evidence being balanced against the disadvantages of receiving it such as taking up a lot of time or causing confusion”.¹¹⁶ In appropriate cases, the court must also consider the interests of justice and the public interest.¹¹⁷ Evidence that was in itself sufficiently probative could be excluded if it added little to what other evidence on the same issue had shown and if it would unduly harm the public interest. Furthermore, the court has always possessed discretion to exclude relevant evidence where it was obtained improperly or in breach of an ECHR right.¹¹⁸
- 12. 57** Prior to the CPR, however, the court’s power to exclude insufficiently relevant or useful evidence was applied sparingly, and the utility of the power was limited in practice because the court had little opportunity to assess the usefulness of evidence in advance of the trial. Under the CPR, the court has ample opportunity to consider in advance of the trial the available evidence, its usefulness and desirability, and to give appropriate directions. CPR 32.1 states:

Rule 32_1

“(1) The court may control the evidence by giving directions as to—
 (a) the issues on which it requires evidence;
 (b) the nature of the evidence which it requires to decide those issues; and
 (c) the way in which the evidence is to be placed before the court.
 (2) The court may use its power under this rule to exclude evidence that would otherwise be admissible.
 (3) The court may limit cross-examination.”

CPR 32.1 applies in all proceedings, including small claims.¹¹⁹ The court’s power under CPR 32.1(c) extends to requiring a party to provide evidence by means of a witness statement, and such an order does not breach the principle that the court may not order a party to call a witness it does not wish to call.¹²⁰

12.58 Although CPR 32.1(2) states that the court may “exclude evidence that would otherwise be admissible”, the power to which the rule refers is not so much a power to *exclude* evidence as it is the power to *limit* evidence. The court, it is suggested, has no power to forbid a party to adduce clearly material evidence on an issue that is properly before the court. To do so would amount to a denial of the right to fair presentation of evidence and, therefore, an infringement of the right to fair trial.¹²¹ However, the court does have the power to limit the amount of evidence that a party may adduce on a particular issue, such as the number of experts that the parties may call. CPR 32.1(3) empowers the court to limit cross-examination at trial, but not to forbid it altogether. Thus, the court may limit the time allotted to cross-examination,¹²² though it may not effectively deny a party the opportunity to challenge an opponent’s evidence, especially where issues of fact are in dispute.¹²³

12.59 The power to exclude evidence under CPR 32.1(2) is essentially a case management power, which has to be exercised in accordance with the overriding objective.¹²⁴ The court may exclude admissible evidence or limit cross-examination for reasons of proportionality and in the interests of the effective disposition of the issues, as Lord Phillips has explained:

“when considering whether to admit evidence, or permit cross-examination, on matters that are collateral to the central issues, the judge will have regard to the need for proportionality and expedition. He will consider whether the evidence in question is likely to be relatively uncontroversial, or whether its admission is likely to create side issues which will unbalance the trial and make it harder to see the wood from the trees.”¹²⁵

Thus, parties no longer have an absolute right to call any evidence that is admissible and arguably relevant, or conduct any cross-examination they see fit. The court may now exclude admissible and relevant evidence that would give rise to disproportionate delay or expense, provided that this accords with the overriding objective.¹²⁶ The court may exclude evidence that is of low probative value,¹²⁷ such as secondary evidence that denies the opponent an opportunity to effectively challenge the case made against him.¹²⁸ For the modern approach to excluding evidence that has been obtained improperly or in breach of an ECHR right, see Ch.22.¹²⁹

12.60 In addition to the exclusion of evidence on grounds of proportionality under CPR 32.1(2), it should be remembered that evidence may be excluded under the CPR where the conditions imposed by rules or court orders on a party’s right to adduce certain evidence have not been met. For instance, CPR 31.21 and PD 57AD para.12.5 state that a party may not rely on any document that they have failed to disclose. The court may also set a deadline by which an updated schedule of loss must be filed and direct that if the claimant fails to comply, the claim should be determined on the basis of the existing schedule.¹³⁰ Unless a party serves a witness statement or expert report within the time allotted by the court, they would not be allowed to rely on the witness or the expert at the trial without the court’s permission (CPR 32.10 and CPR 35.13, respectively). In

a similar vein, the court may exclude evidence under [CPR 32.1\(2\)](#) where to permit a party to adduce it would enable them to side-step a prior deadline or restriction which they have not complied with. In *Gladwin v Bogescu*,¹³¹ the claimant failed to serve a witness statement in time and was subsequently barred from giving evidence at trial. The question then arose whether the statement could be adduced as hearsay evidence ([Civil Evidence Act 1995 s.2\(4\)](#)). While Turner J accepted that the debarring order did not extinguish the “evidential potency” of the witness statement, which could in principle be adduced as hearsay evidence, it should also be excluded under [CPR 32.1\(2\)](#) to avoid the debarring order being rendered nugatory.¹³² Where the exclusion of evidence for non-compliance with rules or court orders could determine the outcome of the case (as where the court does not allow the claimant to call an expert to testify that their injuries were caused by the defendant’s act), the jurisdiction must obviously be exercised with care. The general principle is that if the exclusion is a fair and proportionate response to the party’s default, the exclusion would stand, even if it effectively puts paid to the party’s claim or defence. This aspect is discussed further below in Part II of this chapter.

12. 61 The power to control the evidence by reference to particular issues under [CPR 32.1\(1\)](#) is ancillary to the court’s general case management powers. As we have seen, the court has considerable discretion concerning which issues are to be tried, the order in which they are to be tried and the manner of their disposal. [CPR 32.1\(1\)](#) enables the court to give appropriate evidential directions when it orders a separate trial of a particular issue, when it decides to exclude a certain issue from consideration at a certain stage or when it gives directions about the order in which the issues are to be tried ([CPR 3.1\(2\)\(j\)–\(l\)](#)). If the court decides to determine a case without an oral hearing ([CPR 1.4\(2\)\(j\)](#)), the court would give directions about the nature of the written evidence that it will entertain. However, where the case turns on the testimony of a witness who testifies on an important issue, the court may not dispense with an oral hearing except with the agreement of both parties.¹³³

12. 62 In addition to the power in [CPR 32.1\(1\)](#), [CPR 32.2\(3\)](#) enables the court to give directions (a) identifying or limiting the issues to which witness evidence may be directed; (b) identifying the witnesses who may be called or whose evidence may be read; and (c) limiting the length or format of witness statements. The rule was added in order to overcome the waste created by lengthy and irrelevant witness statements, which was identified in Jackson LJ’s report.¹³⁴ This power complements that in [CPR 35.4](#) under which the court can restrict expert evidence where it will further the overriding objective by reducing trial cost and time.

12. 63 [CPR 32.2\(3\)](#) enables the court to restrict evidence generally, and not just in relation to particular issues,¹³⁵ although the power must be exercised circumspectly. As explained by Green J in *MacLennan v Morgan Sindall (Infrastructure) Plc*,¹³⁶ while the power to restrict evidence may be exercised either before or after it has been obtained, it ought wherever possible to be exercised at an early stage. Earlier restrictions are more likely to save time and cost.¹³⁷ Additionally, before exercising the power, the court should pay regard to its powers under [CPR 32](#) as a whole:

“The Court needs to use all the powers at its disposal to ensure the efficient and fair conduct of the trial. The power to prohibit the calling of witnesses sits towards the more extreme end of the Court’s powers and hence is a power a judge will ordinarily consider after less intrusive measures have been considered and rejected.”¹³⁸

Any decision to restrict the evidence prior to trial should be taken in light of all the evidence available at the time of the case management hearing, in order to minimise the risk that evidence that would ultimately have been significant is not prematurely excluded.¹³⁹ To avoid injustice, or unnecessary cost and delay, where the court excludes evidence under [CPR 32.2\(3\)](#) the parties should have liberty to apply to vary the order, or to vary by consent. Parties will be expected to co-operate with each other constructively where the question of varying such an order arises.¹⁴⁰

12. 64 A final consideration that should be mentioned is that the advent of generative artificial intelligence (AI) has made judicial control of evidence, including witness evidence, more relevant than ever before. So far, no practice directions or practice notes have been issued in England specifically governing the use of generative AI in the creation of witness statements or evidence generally. Other jurisdictions have done so. For instance, in New South Wales, a Supreme Court practice direction

prohibits the use of generative AI in the creation of affidavits, witness statements, character references or other documents that are supposed to reflect a witness' evidence or opinion, and expert reports must not be prepared using generative AI without prior leave of the court.¹⁴¹ Sir Geoffrey Vos MR struck a more optimistic note as to the possibilities of generative AI, suggesting that England would not follow so restrictive an approach.¹⁴² Generative AI has been used in the preparation of a translation of witness statements deployed in English courts, eliciting no judicial remark at all (let alone disapprobation).¹⁴³ It should of course be remembered that a witness statement "must, if practicable, be in the intended witness's own words and must in any event be drafted in their own language" (PD 32 para 18.1). But that language does not rule out the use of generative AI in the preparation of such documents, any more than it prevents a lawyer drafting a witness statement after consultation with the witness, provided that the result remains in truth the witness' own evidence. The pitfalls that use of generative AI may bring¹⁴⁴ may well have to be dealt with as an aspect of the court's power to control evidence before it under its case management power in CPR 32.1.

Litigants in Person

12. 65

The CPR applies to all litigants equally. While litigants in person (LiPs) deserve special consideration, because they are not usually familiar with the rules and with court procedures, they are not generally treated as if they are a separate category of litigant from those who are legally represented.¹⁴⁵ The court can, however, provide assistance to LiPs to facilitate effective case management to further the overriding objective. In *Mole v Hunter*, Tugendhat J explained that the court may provide a degree of administrative assistance to LiPs, such as the production of trial bundles. A represented opponent, too, may feel compelled to make allowances that would be unnecessary if both parties were represented. Such a transfer of work to the court and to represented parties may help to overcome what has been described as an "efficiency deficit" for LiPs,¹⁴⁶ but in doing so it inflicts a wider efficiency deficit on the civil justice system. The need to provide LiPs with administrative assistance drains the time and resources of court staff; there are more likely to be procedural errors and misconceived or wasteful applications; hearings are likely to be lengthened; and there is greater scope for error.¹⁴⁷ All this has an adverse impact on the court's ability to ensure that proceedings generally are managed efficiently and proportionately.¹⁴⁸

12. 66

The court's general case management powers are supplemented by a specific case management power that applies where at least one party to proceedings is a LiP (CPR 3.1A). This power requires the court to pay particular attention to the fact that a party is a LiP when making case management decisions (CPR 3.1A(2)–(3)). In this respect it does not create a substantive case management power.¹⁴⁹ While the power requires the court to calibrate any case management directions to the specific needs of LiPs, it must do so within limits. The court could not, for instance, direct a represented party to reduce their level of legal assistance or to provide funds for the LiP to secure legal representation.¹⁵⁰ Proper use of the power could, for instance, entail the court helping a LiP to understand the steps they would need to take to obtain relevant evidence such as a transcript of a hearing in previous proceedings.¹⁵¹ It would also enable the court to direct a represented party to prepare trial bundles for all the parties and the court.¹⁵² Where appropriate, the court might deviate from standard directions to require the represented party to provide the LiP with its skeleton argument and authorities earlier than normal. The case management power thus seeks to overcome, in part, the efficiency and justice deficits that LiPs often face.¹⁵³

12. 67

The CPR may therefore have a number of powers to calibrate the approach to case management where one or more of the parties is a LiP, but there remains a single set of rules applicable to both represented and unrepresented parties. Yet neither the overriding objective nor CPR 3.1 nor 3.1A provides a basis for modifying the CPR, or specific rules within it, where LiPs are concerned. In particular, the Court of Appeal has stressed that LiPs "must obey the rules as to time, and, in the absence of exceptional circumstances, time limits can properly be insisted on".¹⁵⁴ It follows from this that, as the Supreme Court has held, a LiP cannot expect undue charity or lenience where they fail to comply with rules or orders and then seek relief from the consequences.¹⁵⁵ This point is considered further below in Part II of this chapter.¹⁵⁶

The power to revoke and vary orders

12. 68 CPR 3.1(7) provides the court with a power to revisit any previously made order:

Rule 3_1

“A power of the court under these Rules to make an order includes a power to vary or revoke the order.”

It is important to stress that this is a case management power that is principally applicable to case management orders made under the CPR.¹⁵⁷ The authorities considering whether and to what extent CPR 3.1(7) may be invoked against a final order are considered in Ch.23.¹⁵⁸ For present purposes, suffice it to note that the “overwhelming thrust” of the case law is that the court’s power under CPR 3.1(7) either cannot or should not be used to discharge a sealed final order.¹⁵⁹ This is unsurprising, bearing in mind that CPR 3.1(7) appears in a part of CPR 3 headed “Case management”; final orders can be challenged by other established mechanisms such as appeal and CPR 52.30; and those mechanisms are more than capable of accommodating fresh evidence where a change in circumstances has undermined the conclusions on which the final order was based. CPR 3.1(7) is ancillary to the court’s other case management powers, and is intended to provide the court with sufficient flexibility to modify its directions where the case management requirements of a case change *without the parties needing to have recourse to appeal*.

12. 69 It goes without saying that the power to vary or revoke case management orders must be exercised with a view to furthering the overriding objective (CPR 1.2). However, the CPR contains no further guidance on how to exercise the power in specific cases.¹⁶⁰ Although on the face of the rule the power is unfettered, some principles concerning its exercise have emerged. For example, in *Lloyd’s Investment (Scandinavia) Ltd v Ager-Hanssen*, Patten J indicated that an applicant “must either show some material change of circumstances or that the judge who made the earlier order was misled in some way, whether innocently or otherwise, as to the correct factual position before him”.¹⁶¹ The Court of Appeal endorsed this view in *Collier v Williams*.¹⁶² Thus, to revoke an order the court must be satisfied to the civil standard that it has been misled,¹⁶³ or that there has been a change of circumstances the nature and extent of which justify revocation.¹⁶⁴ Outside these circumstances, there might exceptionally be room within CPR 3.1(7) to grant a variation following a prompt application to address a matter which ought to have been dealt with but had been overlooked in genuine error. However, the court would be unlikely to intervene in such a case where any appreciable amount of time has passed.¹⁶⁵

12. 70 Restraint in the exercise of the CPR 3.1(7) power is therefore paramount. If the court could easily be persuaded to revoke case management directions it would become easy to thwart case management plans and hold up the orderly progress of a case, which would in turn defeat the overriding objective rather than promote it. The court will seek to ensure that the power to vary will be used in order to resolve problems that have arisen due to unforeseen circumstances, and not in order to circumvent a problem which has arisen due to foreseeable circumstances.¹⁶⁶ As always, indolence in applying under CPR 3.1(7) will weigh against the court’s indulgence.¹⁶⁷ Before reaching a decision under CPR 3.1(7) the court must be satisfied that it has all the relevant facts before it, and should consider whether it is necessary to direct the cross-examination of witnesses or the production of documents in order to resolve the application, or whether the resolution of the issue should await trial.¹⁶⁸

12. 71 The power to revoke or vary orders under CPR 3.1(7) can interact with CPR 3.9, discussed further below. While an application for relief from sanctions under the latter rule is generally made on the understanding that the sanction has been applied properly, in certain circumstances that can be challenged. As Lord Dyson MR explained in *Mitchell*, where a party wishes to revoke or vary the order that gave rise to the sanction, that should ordinarily be done by way of appeal from that order. He noted, however, that exceptionally an application to vary or revoke the order may be made under CPR 3.1(7).¹⁶⁹ He went

on to explain that where an application wishes both to seek to vary an order under that rule, and seek relief from sanctions under CPR 3.9, the application under CPR 3.1(7) should be considered first.¹⁷⁰

12.72

In *Thevarajah v Riordan*, the Supreme Court held that where an applicant makes multiple applications for relief from sanctions, CPR 3.1(7) will apply to second, and hence any subsequent, applications for relief.¹⁷¹ Lord Neuberger PSC went on to hold that there was no material change in circumstance for the purposes of a second application for relief from sanctions where, following the refusal of an application for relief from sanctions, a party subsequently complied with the unless order. As he explained:

“By refusing the party’s first application for relief from sanctions, the court would have effectively been saying that it was now too late for that party to comply with the ‘unless’ order and obtain relief from sanctions. So, if the court on a second application for relief from sanctions granted the relief sought simply because the ‘unless’ order had been complied with late, its reasoning would ex hypothesi be inconsistent with the reasoning of the court which heard and determined the first application for relief.

Of course, that does not mean that late compliance, subsequent to a first unsuccessful application for relief from sanctions, cannot give rise to a successful second application for relief from sanctions. If, say, the ‘unless’ order required a person or company to pay a sum of money, and the court subsequently refused relief from sanctions when the money remained unpaid, the payment of the money thereafter might be capable of constituting a material change of circumstances, provided that it was accompanied by other facts ...”¹⁷²

In *Hall v Elia*, Proudman J held that the approach taken by Lord Neuberger PSC in *Thevarajah v Riordan* was equally applicable to the situation where an applicant made a second, and further, application for a stay of execution.¹⁷³

Footnotes

- 66 *Jet2Holidays Ltd v Hughes [2019] EWCA Civ 1858; [2020] 1 W.L.R. 844* [36], [43]. For discussion of the pre-action protocols see Ch.1 Overriding Objective paras 1.101 ff.
- 67 CPR 3.1(4); CPR 44.2(5); see Ch.1 Overriding Objective paras 1.109–1.110. The court will not, however, insist on compliance where in the circumstances the protocol would achieve no useful purpose: *Orange Personal Communications Services Ltd v Hoare Lea (A Firm) [2008] EWHC 223 (TCC)*.
- 68 See Ch.1 Overriding Objective para.1.108.
- 69 *Jet2Holidays Ltd v Hughes [2019] EWCA Civ 1858; [2020] 1 W.L.R. 844*; see Ch.1 Overriding Objective para.1.103.
- 70 Senior Courts Act 1981 ss.33–34.
- 71 Also see Woolf, Final Report Ch.10 para.1; and *Jet2Holidays Ltd v Hughes [2019] EWCA Civ 1858; [2020] 1 W.L.R. 844* [38].
- 72 2025 WB C1A-005.
- 73 See below paras 12.41 ff.
- 74 See for example *Leaflet Co Ltd v Royal Mail Group Ltd [2008] EWHC 3514 (Ch)*.
- 75 Failure to comply may also be taken into account when determining the appropriate consequence following a default, or when considering whether to grant relief from sanctions under CPR 3.9. For example, the court could withhold permission to amend a statement of case, if the need for this would have been avoided had the party complied with the relevant protocol, or it may grant an extension subject to strict conditions: *Price v Price (t/a Poppyland Headware) [2003] EWCA Civ 888*. The court will also take failure to comply with the pre-action protocols into account when determining costs: CPR 44.2(5)(a); *Daejan Investments Ltd v Park West Club Ltd [2003] EWHC 2872 (TCC); [2004] B.L.R. 223*. See further Ch.1 Overriding Objective paras 1.109–1.110.
- 76 *Cundall Johnson & Partners LLP v Whipps Cross University Hospital NHS Trust [2007] EWHC 2178 (TCC)*.

- 77 Such an order would be inappropriate where both sides failed to comply with pre-action protocols. See *Mealey Horgan Plc v Horgan, The Times, 6 July 1999* (although the sentiments expressed in this case arose from the late service of witness statements rather than breaches of pre-action protocols).
- 78 For a summary of the principles governing when the court will order consolidation under CPR 3.1(2)(h), see *Harrington & Charles Trading Company Limited (In Liquidation) v Mehta [2023] EWHC 998 (Ch)* [55]–[56].
- 79 See below, Part II paras 12.250 ff; S, Sime “Inherent Jurisdiction and the Limits of Civil Procedure” in Principles, Procedure and Justice (OUP, 2020).
- 80 *Parrot Pay Ltd (in liq) v Goddington Pierce Ltd (in prov liq) [2023] EWHC 2774 (Ch)* [9]; and see *Otto v Inner Mongolia Happy Lamb Catering Management [2023] EWHC 2920 (Ch); [2024] Costs L.R. 57* [15]–[18]. However, the general power in CPR 3.1(2)(p) cannot be relied upon where there is specific provision in the CPR: *XYZ v Various Companies [2013] EWHC 3643 (QB)*.
- 81 *Shawton Engineering Ltd v DGP International Ltd [2003] EWCA Civ 1956; [2004] C.P. 23.*
- 82 *Collier v Williams [2006] EWCA Civ 20*. For the approach to be taken in such applications see *R (Kuznetsov) v Camden LBC [2019] EWHC 3910 (Admin)* and *Riniker v Al-Turk [2023] EWHC 2910 (KB)*. The usual requirements of CPR 23.3 apply. The applicable test is lower than that under CPR 3.1(7), discussed below at paras 12.68 ff.
- 83 Including entering a judgment to which a party is entitled following the striking out (PD 3A para.4.2).
- 84 See Ch.3 Fair Trial paras 3.41 ff.
- 85 See Ch.25 Appeal paras 25.127 ff.
- 86 Ch.1 Overriding Objective paras 1.111 ff.
- 87 *Thomas v Home Office [2006] EWCA Civ 1355; [2007] 1 W.L.R. 230.*
- 88 CPR 28.3(2) and 29.5(2).
- 89 *Griffin Underwriting Ltd v Varouxakis (Free Goddess) [2018] EWHC 3259 (Comm); [2019] 1 W.L.R. 2529* [47].
- 90 *Griffin Underwriting Ltd v Varouxakis (Free Goddess) [2018] EWHC 3259 (Comm); [2019] 1 W.L.R. 2529* [45]–[47].
- 91 See Ch.5 Service paras 5.90 ff. In *R (Good Law Project Ltd) v Secretary of State for Health and Social Care [2022] EWCA Civ 355; [2022] 1 W.L.R. 2339*, it was held that CPR 7.6 and the distinctive principles that have been developed in relation to the exercise of that jurisdiction make it unnecessary and undesirable to consider also CPR 3.9 and the principles espoused in *Denton v TH White Ltd [2014] EWCA Civ 906; [2014] 1 W.L.R. 3926* in this context.
- 92 *Titmus v General Motors UK Ltd [2016] EWHC 2021 (QB)*.
- 93 See for example *Reddy v The General Medical Council [2012] EWCA Civ 310* [24]. See also *Mucelli v Government of Albania [2009] UKHL 2; [2009] 1 W.L.R. 276*, in the context of the time limit for lodging an appeal from an extradition order made under the Extradition Act 2003 s.26(4); a limited power to extend time has since been introduced at s.26(5), but this does not alter the general principle expressed in *Mucelli*. The effect of s.26(5) was discussed in *Public Prosecutors Office of the Athens Court of Appeal v O'Connor (Northern Ireland) [2022] UKSC 2* [14]. In *Stockton-On-Tees BC v Latif [2009] EWHC 228 (Admin)*, it was held that the power under CPR 3.1(2)(a) did not empower a magistrates’ court or a crown court to extend the statutory time limit for appealing a decision to revoke a private hire vehicle licence. Also see *Cowan v Foreman [2019] EWCA Civ 1336*, in which it was held that the overriding objective and the court’s case management powers were of no relevance in exercising a statutory discretion to extend time (in that case, to issue a claim under the Inheritance (Provision for Family and Dependants) Act 1975).
- 94 As to the scope of CPR 3.9, see below, Part II paras 12.197 ff; and see paras 12.222 ff for discussion of the principles relevant to the application of CPR 3.9.
- 95 *Hallam Estates v Baker [2014] EWCA Civ 661; [2014] 4 Costs L.R. 660.*
- 96 See *Boyd & Hutchinson (A Firm) v Foenander [2003] EWCA Civ 1516; Fitzroy Robinson Ltd v Mentmore Towers Ltd [2009] EWHC 3070 (TCC); Bilita (UK) Ltd (in liquidation) v Tradition Financial Services Ltd [2021] EWCA Civ 221.*
- 97 *Ajinomoto Sweeteners Europe SAS v Asda Stores Ltd [2009] EWHC 781 (QB)*.
- 98 *Electrical Waste Recycling Group Ltd v Philips Electronics UK Ltd [2012] EWHC 38 (Ch)*.
- 99 *Cook v Cook [2011] EWHC 1638 (QB)*.
- 100 *Tilling v Whiteman [1980] AC 1, 25.*
- 101 *McLoughlin v Grovers (A Firm) [2001] EWCA Civ 1743; [2002] QB 1312* [66].
- 102 For example, jurisdictional challenges or limitation defences; see *KR v Bryn Alyn Community (Holdings) Ltd [2003] QB 1441. Sharn Panesar Ltd v Pistachios in the Park Ltd [2020] EWHC 194 (QB)* is an example of a case where a preliminary issues trial of disputed facts was unfair because the judge made findings which went beyond the ambit of the evidence heard.
- 103 See *Steele v Steele [2001] CP Rep 106*: “The more the facts are in dispute, the greater the risk that the law cannot be safely determined until the disputes of fact have been resolved. Indeed, the determination of a preliminary issue, if there

are serious disputes of fact, will run a serious risk of being either unsafe or useless. Unsafe because it may be determined on facts which turn out to be incorrect, and this could even risk unfairly prejudicing one of the parties; useless because, having been determined on facts which turn out to be wrong, it would be of no value”; see also *Hope Not Hate Ltd v Farage* [2017] EWHC 3275 (QB) and *Lachaux v Independent Print Ltd* [2017] EWCA Civ 1334; [2018] QB 594.

104 See *Re Kenyan Emergency Group Litigation* [2016] EWHC 600 (QB) [31].

105 It should be noted that considerations (b) and (c) may be of less relevance where the proposal is to split the determination of liability from the assessment of quantum in, for example, a negligence claim. In such cases there may be a more or less clear division between the issues and evidence which go to the former and those which go to the latter, such that the court can safely determine disputed factual issues relevant to liability without unduly trespassing on the territory of the prospective future quantum trial. Cf. the Technology and Construction Court Guide (2022) at para.8.1.6; and *Soroka v Payne Hicks Beach (A Firm)* [2025] EWHC 602 (Ch).

106 *Neurim Pharmaceuticals (1991) Ltd v Generics UK Ltd* [2021] EWHC 2198 (Pat) [37]–[38].

107 *Lahey v Pirelli Tyres Ltd* [2007] EWCA Civ 91; [2007] 1 W.L.R. 991 [5].

108 *Woodland Trust v Essex County Council* [2013] UKSC 66; [2014] AC 537.

109 See also *FPH Law (A Firm) v Brown* [2018] EWCA Civ 1629; [2018] Costs LR 823 [20].

110 *McPhilemy v Times Newspapers Ltd (No.1)* [1999] 3 All ER 775, 791, 794.

111 *Crown House Technologies Ltd v Cardiff Commissioning Ltd* [2018] EWHC 323 (TCC) [16]–[20].

112 Admissibility in civil proceedings is primarily governed by relevance. Evidence is relevant to an issue of fact if, taken by itself or in connection with other evidence, it renders more probable the existence or non-existence of a disputed fact: J. Stephen, *Digest of the Law of Evidence*, 12th edn (London: Macmillan, 1936) art.1; H. Malek (ed.), *Phipson on Evidence*, 20th edn (London: Sweet & Maxwell, 2022), Chs 1 and 7. Evidence which is relevant may nonetheless be inadmissible as a matter of law if, for example, it was made under cover of “without prejudice” negotiations, or if it attracts legal professional privilege or the privilege against self-incrimination (unless the holder of the privilege agrees to waive it). In general terms, the grounds on which relevant evidence may be excluded as a matter of law are much more limited in civil proceedings than in criminal proceedings. For example, in *O'Brien v Chief Constable of South Wales Police* [2005] UKHL 26; [2005] 2 All ER 931 the House of Lords refused to import into civil proceedings the limitations placed on similar fact evidence in criminal proceedings.

113 See further Ch.22 Trial and Evidence paras 22.76 ff and 22.89 ff.

114 *Hollingham v Head* (1858) 27 L.J.C.P. 241; 4 C.B.N.S. 388; and *Vernon v Bosley* [1994] P.I.Q.R. P337, 340.

115 *Agassiz v London Tramway Co* (1872) 21 W.R. 199. In *A-G v Hitchcock* (1847) 1 Exch. 91, at 105, Rolfe B. remarked that “[i]f we lived for a thousand years instead of about sixty or seventy, and every case was of sufficient importance, it might be possible, and perhaps proper to raise every possible inquiry as to the truth of statements made. In fact mankind finds it to be impossible”. See also *Hollingham v Head* (1858) 27 L.J.C.P. 241; 4 CBNS 388.

116 *L. Hoffmann, “Similar Facts after Boardman”* (1975) 91 L.Q.R. 193, 205.

117 *Marcel v Commissioner of Police for the Metropolis* [1992] Ch 225.

118 Here, it has been held that the admission of evidence that has been obtained through violation of ECHR rights does not automatically infringe the right to a fair trial: *Westminster Property Management Ltd, Re Official Receiver v Stern* [2001] 1 All ER 633; [2000] 1 W.L.R. 2230, CA; see also *Khan v United Kingdom* (2001) 31 E.H.R.R. 45; and *Commissioner of Police of the Metropolis v Times Newspapers Ltd* [2011] EWHC 2705 (QB). There nevertheless must be a discretion to exclude such evidence, which is (now) to be exercised in accordance with the overriding objective: see *Jones v University of Warwick* [2003] EWCA Civ 151; [2003] 1 W.L.R. 954 and Ch.22 Trial and Evidence paras 22.81 ff. The position is obviously different in relation to evidence obtained in breach of ECHR, art.3, the prohibition of which is absolute: see *Gafgen v Germany* (2011) 52 E.H.R.R. 1; *Othman v United Kingdom* (2012) 55 E.H.R.R. 1; *Ibrahim v United Kingdom* (2015) 61 E.H.R.R. 9; *Shagang Shipping Co Ltd v HNA Group Co Ltd* [2020] UKSC 34; [2020] 1 W.L.R. 3549; and see Ch.22 Trial and Evidence para.22.82.

119 The other rules of CPR 32 do not apply, however, to small claims: CPR 27.2(1)(c).

120 *QX v Secretary of State for the Home Department* [2022] EWCA Civ 1541.

121 See *Jones v University of Warwick* [2003] EWCA Civ 151; [2003] 1 W.L.R. 954 [27]; and *Serious Organised Crime Agency v Olden* [2010] EWCA Civ 143.

122 *Hayes v Transco Plc* [2003] EWCA Civ 1261; and see *Imerman v Imerman* [2010] EWCA Civ 908; Ch.22 Trial and Evidence paras 22.13 ff.

123 *R (Wilkinson) v Broadmoor Special Hospital* [2002] EWCA Civ 1545; cf. *Rea v Rea* [2022] EWCA Civ 195.

124 *O'Brien v Chief Constable of South Wales Police* [2005] UKHL 26; [2005] 2 All ER 931.

- 125 *O'Brien v Chief Constable of South Wales Police* [2005] UKHL 26; [2005] 2 All ER 931, [56]. See also *HSBC Asia Holdings BV v Gillespie* [2011] I.C.R. 192 (EAT); *Kimathi v Foreign & Commonwealth Office* [2016] EWHC 3004 (QB), where it was held to be disproportionate, unjust and contrary to the overriding objective to permit the cross-examination of 11 individuals who had translated the claimants' witness statements.
- 126 *Grobelaar v Sun Newspapers Ltd, The Times*, 12 August 1999, CA; *GKR Karate (UK) Ltd v Yorkshire Post Newspapers Ltd* [2000] 2 All ER 931; [2000] 1 W.L.R. 257; and *O'Brien v Chief Constable of South Wales Police* [2005] UKHL 26; [2005] 2 All ER 931.
- 127 *HSBC Asia Holdings BV v Gillespie* [2011] I.C.R. 192 (EAT). See also *Anglo Continental Educational Group (GB) Ltd v Capital Homes (Southern) Ltd* [2009] EWCA Civ 218: a party who considered that a witness statement was inadmissible on a question of interpretation may apply for it to be excluded.
- 128 *Post Office Counters Ltd v Mahida* [2003] EWCA Civ 1583.
- 129 Chapter 22 Trial and Evidence paras 22.81 ff; and see *Jones v University of Warwick* [2003] EWCA Civ 151; [2003] 1 W.L.R. 954; *Mustard v Flower* [2019] EWHC 2623 (QB); and *Ras Al Khaima Investment Authority v Azima* [2021] EWCA Civ 349; [2021] 1 C.L.C. 715.
- 130 *Stockman v Payne* (17 February 2000, unreported, QB). See also *Walsh v Misseldine* [2000] All ER (D) 261, CA.
- 131 *Gladwin v Bogescu* [2017] EWHC 1287 (QB); [2017] 4 Costs L.O. 437.
- 132 *Gladwin v Bogescu* [2017] EWHC 1287 (QB); [2017] 4 Costs L.O. 437 [22]–[27].
- 133 *Wright v Michael Wright (Supplies) Ltd* [2013] EWCA Civ 234.
- 134 See Jackson LJ, Review of Civil Litigation Costs: Final Report (London: HMSO, 2010) pp.376–369.
- 135 *Fenty v Arcadia Group Bands Ltd* [2013] EWHC 1945 (Ch); [2013] Bus. L.R. 1165 [37].
- 136 *MacLennan v Morgan Sindall (Infrastructure) Plc* [2013] EWHC 4044 (QB); [2014] 1 W.L.R. 2462.
- 137 *MacLennan v Morgan Sindall (Infrastructure) Plc* [2013] EWHC 4044 (QB); [2014] 1 W.L.R. 2462 [12].
- 138 *MacLennan v Morgan Sindall (Infrastructure) Plc* [2013] EWHC 4044 (QB); [2014] 1 W.L.R. 2462 [12(i)].
- 139 *MacLennan v Morgan Sindall (Infrastructure) Plc* [2013] EWHC 4044 (QB); [2014] 1 W.L.R. 2462 [12(iv)]: the court should ensure it has the “fullest possible evidence available to it”.
- 140 *MacLennan v Morgan Sindall (Infrastructure) Plc* [2013] EWHC 4044 (QB); [2014] 1 W.L.R. 2462 [12(v)].
- 141 See Supreme Court Practice Note SC Gen 23 (NSW) on the Use of Generative Artificial Intelligence, paras 10 and 19. See also Practice Direction No 1/2025 (CCJ) on the Use of Generative Artificial Intelligence Tools in Court Proceedings, which includes a similar prohibition: para.1.
- 142 Sir Geoffrey Vos MR, “Speech by the Master of the Rolls at the Lawtech UK Generative AI Event”, London, 5 February 2025, para.16.
- 143 See *Re HLHP Oriental Food Ltd* [2023] EWHC 2920 (Ch) [3].
- 144 Particularly on the veracity of authorities used in skeleton arguments, see *R (Ayinde) v London Borough of Haringey* [2025] EWHC 1040 (Admin).
- 145 *Nata Lee Ltd v Abid* [2014] EWCA Civ 1652 [53]; *Elliott v Stobart Group* [2015] EWCA Civ 449 [39]; *Jones v Longley* [2016] EWHC 1309 (Ch) [56]–[57]; *Ogiehor v Belinfantie* [2018] EWCA Civ 2423; [2018] 6 Costs L.R. 1329 [24]; and *Barton v Wright Hassall LLP* [2018] UKSC 12; [2018] 1 W.L.R. 1119. In certain instances, the rules exempt LiPs from the requirement to use electronic filing systems which are primarily designed for professional users, see for example PD 5C and the *Supreme Court Rules 2024 r.4*, together with the Portal Practice Direction.
- 146 A.A.S. Zuckerman, “No Justice Without Lawyers—The Myth of an Inquisitorial Solution” (2014) 33 C.J.Q. 355, 355.
- 147 *Wright v Michael Wright (Supplies) Ltd* [2013] EWCA Civ 234 [2].
- 148 In this regard, the reduction in legal aid following the introduction of the *Legal Aid, Sentencing and Punishment of Offenders Act 2012* merely promotes a false economy. This policy has the effect of increasing the number of LiPs before the courts, effectively transfers the financial burden of their litigation to the court system—and at a cost that is likely to be higher than it would have been if funded via the legal aid scheme.
- 149 *Mole v Hunter* [2014] EWHC 658 (QB) [112]–[113]; *Simou v Salliss* [2017] EWCA Civ 312 [62]; see also Lord Dyson MR, “The Application of the Amendments to the Civil Procedure Rules”, speech delivered at the District Judges’ Annual Seminar, Judicial College, 22 March 2013.
- 150 See *Maltez v Lewis* (2000) 16 Const LJ 65 (Ch), rejecting the suggestion that the court’s case management powers had cut down a party’s “fundamental right” to choose their own legal representative.
- 151 Cf. *Williams v Nilsson and another* [2021] EWHC 3184 (Ch).
- 152 *Maltez v Lewis* (2000) 16 Const LJ 65 (Ch); cf. *Axnoller Events Ltd v Brake* [2021] EWHC 1706 (Ch).
- 153 It should also be noted that CPR 3.1A requires the court to conduct hearings involving LiPs in such a way as to further the overriding objective (CPR 3.1A(4)). It also permits the court to ascertain from a LiP the issues on which they intend

- to give evidence and the areas upon which they seek to cross-examine witnesses, and to assist the LiP in questioning witnesses (CPR 3.1A(5)). The implications of these powers are discussed in Ch.3 Fair Trial paras 3.170 ff.
- 154 *Neville Morrison v Hillcrest Care Ltd [2005] EWCA Civ 1378* [22]. See also *Ford v The Commissioner of Police for the Metropolis [2006] EWHC 3223 (QB)* [15]: “A litigant in person is exercising the right of the citizen to conduct litigation on his or her own behalf but it is a right and not a privilege. The rules are to be applied and applied to all parties whether represented or not”.
- 155 See *Barton v Wright Hassall LLP [2018] UKSC 12; [2018] 1 W.L.R. 1119*.
- 156 See below, Part II paras 12.242 ff.
- 157 *Deg-Deutsche Investitions und Entwicklungsgesellschaft MbH v Koshy [2004] EWHC 2896 (Ch)*.
- 158 See Ch.23 Judgment and Orders paras 23.45 ff.
- 159 *Vodafone Group PLC v IPCOM GmbH & Co KG [2023] EWCA Civ 113; [2013] R.P.C. 10* [35]. The difference between interim and final orders depends on the nature of the order itself, not on the nature of the hearing at or after which it was made: *Sangha v Amicus Finance Plc [2020] EWHC 1074 (Ch)* [26].
- 160 *Kojima v HSBC [2011] EWHC 611 (Ch)* [20]; cf. *Cole v Howlett [2015] EWHC 1697 (Ch)* [49]. For illustrations of the different circumstances in which variation of orders may or may not be permitted, see *Oyston v Rubin [2021] EWHC 448 (Ch)* and *Walton Family Estates Ltd v GJD Services Ltd [2021] EWHC 464 (Comm)*.
- 161 *Lloyd's Investment (Scandinavia) Ltd v Ager-Hanssen [2003] EWHC 1740 (Ch)* [7]. See also *Arif v Zar [2012] EWCA Civ 986; West African Gas Pipeline Co Ltd v Willbros Global Holdings Inc [2012] EWHC 396 (TCC); Tibbles v SIG Plc (t/a Asphaltic Roofing Supplies) [2012] EWCA Civ 518; [2012] 1 W.L.R. 2591; Athena Capital Fund SICAV-FIS v Crownmark Ltd [2020] EWHC 2945 (Comm)*.
- 162 *Collier v Williams [2006] EWCA Civ 20*; and see, to similar effect, *Allsop v Banner Jones Ltd [2021] EWCA Civ 7; [2022] Ch 55* [24].
- 163 Cf. *Latvian Shipping Co v Russian People's Insurance Co (ROSN) Open Ended Joint Stock Co [2012] EWHC 1412 (Comm)* [120]–[121]. In that case, Field J considered that the CPR 3.1(7) power was available in respect of an order granting leave to appeal under the Arbitration Act 1996 s.69. But even if CPR 3.1(7) did not strictly apply, the court would have jurisdiction to set aside the order under its inherent jurisdiction on the ground that it had been misled, since the misleading would amount to an abuse of the court’s process.
- 164 *West African Gas Pipeline Co Ltd v Willbros Global Holdings Inc [2012] EWHC 396 (TCC)*: mere deficiencies in disclosure which become apparent later do not automatically trigger variations of the original costs order.
- 165 *Tibbles v SIG Plc (t/a Asphaltic Roofing Supplies) [2012] EWCA Civ 518; [2012] 1 W.L.R. 2591* [42].
- 166 *Prince Abdulaziz v Apex Global Management Ltd [2014] EWCA Civ 1106* [60].
- 167 *Tibbles v SIG Plc (t/a Asphaltic Roofing Supplies) [2012] EWCA Civ 518; [2012] 1 W.L.R. 2591*. See also *JSC VTB Bank v Skurikhin [2020] EWCA Civ 1337* [52]: if the change in circumstances relied upon was brought about by the party making the application in order to improve their prospects of succeeding, this is likely to amount to an abuse of process and the application should be refused.
- 168 *JSC BTA Bank v Ablyazov [2011] EWHC 2506 (Comm)*.
- 169 *Mitchell v News Group Newspapers Ltd [2013] EWCA Civ 1537; [2014] 1 W.L.R. 795* [44].
- 170 *Mitchell v News Group Newspapers Ltd [2013] EWCA Civ 1537; [2014] 1 W.L.R. 795* [45]; also see *Newland Shipping & Forwarding Ltd v Toba Trading FZC [2014] EWHC 210 (Comm); [2014] 2 Costs LR 279* [35]–[45].
- 171 *Thevarajah v Riordan [2015] UKSC 78; [2016] 1 W.L.R. 76*.
- 172 *Thevarajah v Riordan [2015] UKSC 78; [2016] 1 W.L.R. 76* [21]–[22].
- 173 *Hall v Elia [2016] EWHC 1023 (Ch)* [16]–[19].

Conditional and Unless Orders as a Case Management Tool

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 12 - Case Management & Enforcing Party Compliance

Part I—Techniques for Case Management

Conditional and Unless Orders as a Case Management Tool

- 12.73 A distinction needs to be made between bare orders, conditional orders and unless orders. Bare orders do not specify the consequences of non-compliance. The power to make an order subject to conditions, including a condition to pay a sum of money into court (a “conditional order”), and the power to specify the consequences of failure to comply with the terms of an order (an “unless” or “peremptory order”), is provided by [CPR 3.1\(3\)](#):

Rule 3_1

- “(3) When the court makes an order, it may—
 (a) make it subject to conditions, including a condition to pay a sum of money into court; and
 (b) specify the consequence of failure to comply with the order or a condition.”

- 12.74 The conditions that may be imposed in ordering a party to take a particular step, or the consequences that may be stipulated in an unless order, are very wide-ranging. For example, an order may state that unless the claimant posts security for costs by a certain date its statement of case would be struck out. Or an order may direct that unless the defendant gives disclosure by a certain date, the defence will be struck out. Equally, [CPR 3.1\(5\)](#) empowers the court to order a party to pay a sum of money into court if that party has, without good reason, failed to comply with a rule, practice direction or a relevant pre-action protocol. [CPR 3.1\(2\)\(g\)](#) states that the court may stay any proceedings or judgment either generally or until a specified date or event.¹⁷⁴ Lastly, [CPR 3.1\(2\)\(p\)](#) states that the court may make any order for the purpose of managing the case and furthering the overriding objective. There is therefore a great variety of conditional and unless orders that the court may make, providing a wide range of flexible responses to party default.¹⁷⁵

- 12.75 The power to make such orders is not new. They have always been among the principal instruments by which the court controlled its proceedings.¹⁷⁶ Now that the court has a responsibility actively to manage cases, the unless order has assumed a more prominent role, since it can be used to prevent recalcitrant parties from defeating the court’s efforts to implement the overriding objective. Similarly, conditional orders have become more popular under the [CPR](#) since they allow the court to satisfy the defaulting party’s desire to proceed to adjudication on the merits while protecting the interests of the non-defaulting party.¹⁷⁷ Thus, for instance, the court may grant an extension of time subject to a condition of payment into court. Before exercising the power in [CPR 3.1\(3\)](#), a court should identify the purpose of imposing a condition or of stipulating the consequences of non-compliance in advance, and satisfy itself that the condition or prospective sanction represents a proportionate and effective means of achieving the intended purpose.¹⁷⁸

- 12.76 The power to make conditional and unless orders provides the court with a useful case management tool. However, it must not be assumed that without a conditional or unless order the court may not visit the defaulting party with appropriate consequences. Bare orders are just as binding as conditional and unless orders, and must be obeyed. The court is therefore not bound to give an extension to a party who has failed to comply with a bare order. The court’s approach to non-compliance with process

requirements, including those imposed by bare, conditional and unless orders, is considered in Part II of this chapter. Here, we consider briefly the circumstances in which the court might make an order subject to conditions, or an order specifying the consequences of failure to comply.

Conditional orders

- 12.77 A distinction must be drawn between conditional orders made for case management purposes and conditional orders made to secure compliance with orders or judgments directing the payment of money by one litigant to another. The latter are in essence orders to enforce payment. A conditional order made for case management purposes would include, for instance, an order granting permission for late service of particulars of claim conditional on payment into court. By contrast, a conditional order to enforce payment would be used where the court grants permission to appeal conditional on the appellant complying with the money judgment entered against them by the lower court.¹⁷⁹ The considerations pertinent to conditional case management orders are quite different from those pertinent to enforcement orders.¹⁸⁰ This section is concerned with the making of conditional case management orders.
- 12.78 The jurisdiction to make orders subject to conditions is a useful case management tool. It enables the court to fashion flexible solutions which do justice to both parties, most often in response to party default. There is an almost infinite range of conditions that the court may impose. For example, the court may grant an extension of time for service of the particulars of claim, but subject to the condition that no claim is made other than what can be substantiated by reference to a particular expert report, thus effectively denying the claimant the benefit of later “expert shopping”.¹⁸¹ Permission to call a fresh expert may be made subject to disclosing the report of an earlier expert.¹⁸² When granting an extension of time to appeal, the court may impose a condition that the appellant’s costs of the appeal should be irrecoverable.¹⁸³ If the court grants a defendant permission to raise late in the day arguments about the enforceability of a loan agreement, it may mitigate any potential injustice to the claimants by imposing a condition that the defendant would not be at liberty to claim the recovery of any money they had paid to the claimants in the past, even if the credit agreement were ultimately held to be unenforceable.¹⁸⁴
- 12.79 One of the more common orders that may be made under [CPR 3.1\(3\)](#) is that of payment into court as a condition of the defaulting party’s continued participation in the litigation process.¹⁸⁵ Such payment may be ordered as security for judgment or as security for costs. A condition of payment into court may be attached, for instance, to permission to amend a statement of case, or as a condition for obtaining an extension of time to serve an expert report or to fulfil any other process requirement.
- 12.80 It will also be noted, however, that [CPR 3.1\(5\)](#) provides a specific power to order the payment of a sum into court:

Rule 3_1

(5) The court may order a party to pay a sum of money into court if that party has, without good reason, failed to comply with a rule, practice direction or a relevant preaction protocol.”

[186](#)

Moore-Bick LJ drew a distinction between the court’s power to order a payment into court under [CPR 3.1\(3\)](#) and [3.1\(5\)](#):

“rule 3.1(5) is clearly intended to give the court power to punish a party who without good reason fails to comply with the established procedural code, including the pre-action protocols. Although such an order may well have a beneficial influence on the future conduct of the litigation, it is directed more to what has gone on in the past than what will go on in the future. To that extent it is quite different in nature from a condition of the kind contemplated by rule 3.1(3) which, combined with a sanction for failure to comply, usually of a stringent nature, is designed to

control the future conduct of the party on whom it is imposed ... The very fact that it allows the court to make an order subject to conditions is sufficient to show that the rule is concerned with the basis on which the proceedings will be conducted in the future, and that remains the case even when the condition is imposed in order to make good the consequences of some kind of previous misconduct.”¹⁸⁷

- 12.81 The distinction is far from clear-cut since an order under **CPR 3.1(3)** could be made as a condition for granting relief from sanctions.¹⁸⁸ Although the purpose of such an order is to secure future compliance, it is also true that it may well be a response to past breaches. A different explanation of the difference in the context of payment into court is that **CPR 3.1(3)** empowers the court to impose a procedural consequence *ex ante* whereas **CPR 3.1(5)** allows the court to do so *ex post facto*. In reality, however, there is a large overlap between the two jurisdictions, as the Court of Appeal recognised in *Royal Bank of Scotland Plc v Hicks*,¹⁸⁹ when it observed that **CPR 3.1(3)** is simply not subject to the jurisdictional precondition that a party has failed to comply with a rule, practice direction or relevant pre-action protocol.
- 12.82 A condition of payment into court would be justified where the party against whom the order is made has been guilty of a substantial default, or where it is required to protect other parties from the consequences of further defaults, or where there are reasons for suspecting that the defaulting party’s motives are improper, such as a desire to delay the final resolution or to harass an opponent. A condition of payment into court may be imposed on permission to amend a statement of case, where a party seeks to alter the basis of their claim late in the day, or where there is a suspicion that the amendment is a mere ploy to hold up the final resolution.¹⁹⁰ The mere fact that a party has a weak case does not necessarily justify ordering payment into court as security.¹⁹¹ Simon Brown LJ explained that:
- “A party only becomes amenable to an adverse order for security under **CPR 3.1(5)** ... once he can be seen either to be regularly flouting proper court procedures (which must inevitably inflate the costs of the proceedings) or otherwise to be demonstrating a want of good faith—good faith for this purpose consisting of a will to litigate a genuine claim or defence as economically and expeditiously as is reasonably possible in accordance with the overriding objective.”¹⁹²
- 12.83 Conditional orders requiring payment into court must also be distinguished from orders made under **CPR 25**. **CPR 25** makes special provision for ordering security for costs in certain circumstances, which have nothing to do with case management.¹⁹³ It is important to note here that the court has warned against using **CPR 3.1(3)** (or indeed **3.1(5)**) as a way of getting round the conditions of **CPR 25**.¹⁹⁴ But **CPR 3.1(3)** was used to order security for costs of an appeal where it was necessary in order to remedy a technical shortcoming of **CPR 25** rather than circumvent it.¹⁹⁵ Moore-Bick LJ said that the “court has ample powers under rules [3.1(2)(p)] and 3.3 to make whatever orders are needed for the proper management of the proceedings. The purpose of rule 3.1(3) is to enable the court to grant relief on terms and when the power is exercised the condition ought properly to be expressed as part of the order granting the specific relief to which it relates”.¹⁹⁶
- 12.84 The court must not impose on a party a condition of payment that it knows that the party cannot meet, for such a stipulation would effectively prevent the party from continued participation in the proceedings and would therefore amount to a denial of the party’s right of access to justice.¹⁹⁷ In *Goldtrail Travel Ltd v Aydin*,¹⁹⁸ the Supreme Court set out the approach a court should take when assessing whether to impose a financial condition upon a party.¹⁹⁹ No condition imposed should stifle a party’s claim or defence.²⁰⁰ It is for the party asserting that a condition would do so to establish it on the balance of probabilities. If the condition is a financial one and it is asserted that the party to be subject to it does not have the funds to meet it, they must establish on the balance of probabilities that they cannot raise those funds from, for instance, friends, relatives or business associates.²⁰¹ Where a corporate party is concerned, the court needs to approach with caution any assertion that it, or the controlling shareholder that funds it, could not raise the necessary funds to meet the condition. At the same time, the court should always keep in mind that the issue is whether the company can raise the funds—in other words its separate legal

personality should be kept firmly in mind.²⁰² The key criterion is whether on the balance of probabilities the company is able to establish that it cannot secure the necessary funds to meet the condition from its owner or someone closely associated to it. That question should be answered by reference to “the probable availability of the funds by reference to the underlying realities of the company’s financial position; and by reference to all aspects of its relationship with its owner, including, obviously, the extent to which he is directing (and has directed) its affairs and is supporting (and has supported) it in financial terms”.²⁰³

Unless orders

- 12.85 Prior to the CPR it was thought that a peremptory order should not normally be made in the first instance.²⁰⁴ In particular, it was thought that an order stipulating that a statement of case be struck out in the event of non-compliance should only be made where the party in default had already failed to comply with rules or bare orders, and only where the court was satisfied that previous default was inexcusable.²⁰⁵ Whether such a principle was ever supportable, it is clear that it no longer holds today. Today the court must not sit back and suffer repeated defaults before responding. To have to wait until the reasonable period for performance has elapsed and then give the litigant a further period to comply on pain of a sanction would effectively compel the court to allow litigants substantially more than reasonable time for compliance.²⁰⁶ At the same time, it has been observed that unless orders should not be made lightly, and are reserved for situations where some problem has arisen or is likely to arise, as where a party has intentionally failed to perform process obligations or there is reason to fear future unco-operative conduct.²⁰⁷
- 12.86 It stands to reason that unless orders will be taken seriously only if the parties believe that they will be enforced. The wise counsel that one should not make threats that one is not prepared to carry out applies to court orders with even greater poignancy. Idle threats would diminish the authority of the court and undermine the normative force of rules and court orders. “If once it became known that the court was unable or unwilling to maintain the effectiveness of its orders,” Rix LJ observed, “then it would lose all control over litigation of this kind, with terrible consequences for the administration of justice”.²⁰⁸
- 12.87 It follows that the court should only make unless orders that are capable of being enforced. In *JSC BTA Bank v Shalabayev*,²⁰⁹ the unless order provided that unless the defendants identified the documents in respect of which they wished to claim legal professional privilege by a certain date they would be debarred from doing so. Since the court cannot override legal professional privilege, the threat was hollow and the court felt obliged to grant relief from the sanction. It is suggested that had the court stipulated a different consequence, such as striking out the defence, it would have been enforceable. The court may properly order that unless the defendant made disclosure, they would be debarred from defending the action. But it would be wrong to order that they would be debarred from defending if they did not surrender to face committal for contempt proceedings.²¹⁰
- 12.88 Before making an unless order the court will have carefully considered all the circumstances and the appropriateness of the consequences.²¹¹ Given the serious consequences of failure to comply with an unless order, it is essential that the court should give the parties an opportunity to be heard before making an order, even where it makes the order of its own initiative.²¹² It goes without saying that it would be unjust to visit the consequences of non-compliance on a party who had no notice of the unless order. If the unless order has been made after hearing the parties, and after careful consideration of what should follow from a default, it follows that its consequences will generally be fair and proportionate once a default has occurred. This has implications for the approach to be taken to applications for relief from the consequences of an unless order, discussed further below in Part II of this chapter.²¹³
- 12.89 CPR 2.9(1)(b) also requires that an unless order express the time limit for compliance as a calendar date, unless this is not practicable. This is only right, given the serious consequences of breach of an unless order (including failure of the underlying

claim or defence).²¹⁴ The unless order should specify a period for compliance which runs from the date the order has been served, or alternatively an unambiguous calendar date. The latter is preferable.²¹⁵

Footnotes

- 174 See *Ferrexpo AG v Gilson Investments Ltd [2012] EWHC 721 (Comm)*.
- 175 See for an example *Northern Rock (Asset Management) Plc v Chancellors Associates Ltd [2011] EWHC 3229 (TCC)*.
- 176 Even before the CPR the court was able to make unless orders of its own initiative: *Star News Shops Ltd v Stafford Refrigeration Ltd [1998] 4 All ER 408 at 415; [1998] 1 W.L.R. 536* at 544–545, CA. For a review of the history of unless orders dating back into the nineteenth century see *Marcan Shipping (London) Ltd v Kefalas [2007] EWCA Civ 463; [2007] 1 W.L.R. 1864* [11]–[14].
- 177 *Price v Price [2003] EWCA Civ 888*; and *Southern & District Finance Plc v Turner [2003] EWCA Civ 1574*.
- 178 *Huscroft v P & O Ferries Ltd [2010] EWCA Civ 1483; [2011] 1 W.L.R. 939; Gama Aviation (UK) Ltd v Taleveras Petroleum Trading DMCC [2019] EWCA Civ 119*.
- 179 There are other conditional orders that may be made; for instance, when deciding an application for summary judgment under CPR 24 the court may dismiss the application but make it conditional on the respondent making payment into court as security for judgment or costs.
- 180 For example, it is by no means clear that the principles applicable to allowing an appellant to proceed with the appeal provided they made payment of costs ordered against them, set out in *Ali v Hudson (t/a Hudson Freeman Berg) [2003] EWCA Civ 1793* [40], apply equally to orders designed to deal with case management.
- 181 *Price v Price (t/a Poppyland Headware) [2003] EWCA Civ 888*. The court may even impose a condition of making a prompt application for relief from sanctions: *Seven v Gossage [2006] EWCA Civ 631*.
- 182 *Beck v Ministry of Defence [2003] EWCA Civ 1043*.
- 183 *Lloyd Jones v T-Mobile (UK) Ltd [2003] EWCA Civ 1162; [2004] C.P. Rep. 10*.
- 184 *Southern & District Finance Plc v Turner [2003] EWCA Civ 1574* [33].
- 185 Another example is a costs judge making an unless order that if the payer does not comply with an interim costs order a final costs certificate will be issued against them: *Days Healthcare UK Ltd (formerly Days Medical Aids Ltd) v Pihsiang Machinery Manufacturing Co Ltd [2006] EWHC 1444 (QB); [2006] 4 All ER 233*. See also *Royal Bank of Scotland Plc v Hicks [2012] EWCA Civ 1665*.
- 186 Curiously, the power under CPR 3.1(5) is ostensibly limited to situations of non-compliance with a rule, practice direction or pre-action protocol, and does not mention non-compliance with court orders. It would, however, be wrong to conclude that the court has no power to impose such a condition following breach of a bare order. Since the court may strike out a statement of case for non-compliance with a court order, as well as for non-compliance with the rules (CPR 3.4(2)(c)), it would be odd if it lacked the power to respond to non-compliance with a court order in a less drastic way under CPR 3.1(5).
- 187 *Huscroft v P&O Ferries Ltd [2010] EWCA Civ 1483; [2011] 1 W.L.R. 939* [17].
- 188 *Lazari v London and Newcastle (Camden) Ltd [2013] EWHC 97 (TCC)*.
- 189 *Royal Bank of Scotland Plc v Hicks [2012] EWCA Civ 1665* [12].
- 190 See for instance *SX Holdings Ltd v Synchronet Ltd [2001] C.P. Rep. 43, CA*.
- 191 *Olatawura v Abiloye [2002] EWCA Civ 998; [2002] 4 All ER 903*; and *Ali v Hudson (t/a Hudson Freeman Berg) [2003] EWCA Civ 1793*. See also *Marstons Plc v Charman [2009] EWCA Civ 719*; and *Eli Lilly & Co v Neopharma Ltd [2011] EWHC 1852 (Pat)* [13].
- 192 *Olataura v Abiloye [2002] EWCA Civ 998; [2002] 4 All ER 903* [25]; see also *Ali v Hudson (t/a Hudson Freeman Berg) [2003] EWCA Civ 1793*.
- 193 See Ch.10 Interim Remedies, paras 10.243 ff.
- 194 *Huscroft v P&O Ferries Ltd [2010] EWCA Civ 1483; [2011] 1 W.L.R. 939* [14].
- 195 *Royal Bank of Scotland Plc v Hicks [2012] EWCA Civ 1665*.
- 196 *Huscroft v P&O Ferries Ltd [2010] EWCA Civ 1483; [2011] 1 W.L.R. 939* [18].
- 197 *MV Yorke Motors Ltd v Edwards [1982] 1 All ER 1024; [1982] 1 W.L.R. 444, HL*; and *Anglo-Eastern Trust Ltd v Kermanshahchi [2002] C.P. Rep. 36, CA*.
- 198 *Goldtrail Travel Ltd v Aydin [2017] UKSC 57; [2017] 1 W.L.R. 3014*.

- 199 The question whether the principles in *Goldtrail* apply beyond the context of payment conditions was left undecided by
the Court of Appeal in *Athena Capital Fund Sicav-Fis SCA v Crownmark Ltd [2021] EWCA Civ 414*.
- 200 *Goldtrail Travel Ltd v Aydin [2017] UKSC 57; [2017] 1 W.L.R. 3014* [12]–[13].
- 201 *Goldtrail Travel Ltd v Aydin [2017] UKSC 57; [2017] 1 W.L.R. 3014* [15].
- 202 *Goldtrail Travel Ltd v Aydin [2017] UKSC 57; [2017] 1 W.L.R. 3014* [18].
- 203 *Goldtrail Travel Ltd v Aydin [2017] UKSC 57; [2017] 1 W.L.R. 3014* [23]–[24]; and see *Gama Aviation (UK) Ltd v Taleveras Petroleum Trading DMCC [2019] EWCA Civ 119* and *Harbour Castle Ltd v David Wilson Homes Ltd [2019] EWCA Civ 505*.
- 204 An unless order, Auld LJ stated, “is by its nature intended to mark the end of the line for a party who has failed to comply with it and any previous orders of the court”: *Hytec Information Systems Ltd v Coventry City Council [1997] 1 W.L.R. 1666* at 1676, CA.
- 205 *Star News Shops Ltd v Stafford Refrigeration Ltd [1998] 4 All ER 408* at 415; *[1998] 1 W.L.R. 536* at 545, CA.
- 206 In *Circuit Systems Ltd v Zuken-Redac (UK) Ltd [2001] EWCA Civ 481; [2001] B.L.R. 253*, it took 11 years before the tardy claim was finally struck out.
- 207 *JSC BTA Bank v Ablyazov [2010] EWHC 2219 (QB)*.
- 208 *JSC BTA Bank v Ablyazov [2012] EWCA Civ 1411* [188].
- 209 *JSC BTA Bank v Shalabayev [2011] EWHC 2915 (Ch)*.
- 210 *JSC BTA Bank v Ablyazov [2012] EWCA Civ 1411*.
- 211 *JSC BTA Bank v Ablyazov [2012] EWCA Civ 564*. See also *Al-Subaihi v Al-Sanea [2020] EWHC 3206 (Comm)*.
- 212 *Ryder Plc v Dominic James Beever [2012] EWCA Civ 1737*. See also *Haley v Siddiqui [2014] EWHC 835 (Ch)* [15].
- 213 *Mitchell v News Group Newspapers Ltd [2013] EWCA Civ 1537; [2014] 1 W.L.R. 795* [45]; *Haley v Siddiqui [2014] EWHC 835 (Ch)* [15].
- 214 See *Poule Securities Ltd v Howe [2021] EWCA Civ 1373* [21]–[26].
- 215 *Poule Securities Ltd v Howe [2021] EWCA Civ 1373* [26].

The CPR System of Tracks

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 12 - Case Management & Enforcing Party Compliance

Part I—Techniques for Case Management

The CPR System of Tracks

Introduction

12. 90 Efficient case management means allocating procedural resources economically and effectively. The idea behind the overriding objective is that the investment of resources in any given dispute should be no more than is required for a fair and expeditious resolution of the dispute. The process, in other words, should be proportionate to the needs of the case in hand. Proportionality does more than conserve public resources, and enable the investment of court time and energy where it is most needed. A quick and cheap approach to small claims makes courts more accessible to impecunious parties whose claims are only just large enough to be economically viable, and whose only realistic alternative is not suing at all. However, the drive for speed and economy should not be taken to its extremes. A small claims court which decided cases by tossing a coin would be quick and cheap, and “fair” in the trivial sense that both parties have the same (non-existent) opportunity to present their case and equal chances of success. However, such a dispute resolution mechanism would not only be inaccurate of itself, but would reduce public confidence in the entire justice system.
12. 91 The **CPR** adopt two techniques to achieve the proportionate allocation of resources to defended claims. The first, as we have seen above, is the application of the overriding objective at the level of individual case management decisions. The second is the creation of four procedural tracks (the small claims track, the fast track, the intermediate track and the multi-track), and the court-controlled allocation of claims to one of those tracks on the basis of size and complexity. The basic principle underlying the system of tracks is that claims are granted fewer procedural resources if they are low value (such that the consequences of a wrong decision are less grave) and more straightforward (such that the court is less likely to reach a wrong decision with a limited investigation), but more rigorous procedures where they are more complex or higher-value. At one level, allocation to track might be regarded as merely an example of the first procedural technique, inasmuch as the court makes a judgment about the level of procedural investment a particular case requires when it determines which track it should be funnelled into. This is not the full picture, however. Claims proceeding on the lower-level tracks have fewer resources devoted to them not only in terms of the procedures employed to adjudicate the parties’ dispute (what we might term “investigative” resources, such as the level of disclosure, number of witnesses and experts called, length of hearing, and so on), but also in terms of the court time allocated to supervise the conduct and progress of the litigation (what we might call “administrative” resources). These tracks therefore adopt template procedures which should be suitable for the majority of cases which fall within their remit, to avoid the wastage of administrative resources that would be involved in calibrating the litigation process to be precisely proportionate to the value and complexity of each claim. Implicit in this approach is the recognition that many lower value and lower complexity claims can adapt to streamlined procedures with little in the way of individualised decision-making about matters of case management. Effective case management, particularly for cases in the lower-level tracks, therefore involves finding the right balance between the **CPR**’s twin approaches of administrative restraint and procedural rigour.
12. 92 It is important to stress that integral to the tracks system, particularly following Jackson LJ’s reforms,²¹⁶ are the rules governing the recoverability of costs in each track. The lower the level of track, the more exacting are the costs rules, with no costs shifting in the small claims track, recoverable costs which are fixed by reference to the value and complexity of the claim and the stage it reached by the time it concluded in the fast and intermediate tracks, and costs which are at large and in the discretion of the court in the multi-track (subject to costs management in claims worth up to £10 million). The detail of these rules is addressed

in Ch.28;²¹⁷ for present purposes, suffice it to note that their aim is both to promote the proportionality of recoverable costs based on the value and complexity of the case and the intensity of the procedures applicable in each track, and to discourage the parties from privately investing an excessive amount in the case (i.e. so as to minimise the shortfall between the amount they are prepared to spend privately on lawyers and the amount they stand to recover in the event that they succeed).

12.93 It should be noted that the tracks system and associated costs rules were substantially reformed in 2023 following recommendations by Jackson LJ in 2017.²¹⁸ CPR 26, CPR 28, CPR 45 and their practice directions were replaced to allow for the extension of fixed recoverable costs to the whole of the fast track, as well as the creation of the intermediate track. The previous rules, applicable to cases which commenced before 1 October 2023, are discussed in the previous edition of this work.²¹⁹

12.94 In addition to the CPR system of tracks, a distinct set of procedural rules is available in proceedings in the Business and Property Courts in the form of the Shorter and Flexible Trials Schemes.²²⁰ Unlike the tracks system, use of this process is primarily driven by the parties. The Shorter Trials Scheme provides for a truncated procedure, with a condensed timetable and tightly controlled pleadings and evidence. The Flexible Trials Scheme enables the parties to design streamlined pre-trial and trial procedures (with a focus on written evidence and submissions) to suit their particular case, subject to court approval.

The Four Procedural Tracks

Overview

12.95 There are four procedural tracks to which defended claims are allocated (CPR 26.1(2)). The normal scope of each track (subject to important qualifications discussed below) and their basic procedural features are as follows:

- The small claims track is intended for claims of up to £10,000. It offers a quick and informal process, shorn of technicalities, which can (at least in theory) be undertaken without the need for legal representation.
- The fast track is for claims with a value of between £10,000 and £25,000, which are expected to be tried in a one-day hearing and require limited, if any, expert evidence. The fast track is also the track for non-monetary claims, such as injunctions, declarations and specific performance, which are unsuitable for the small-claims track and at the same time do not require more intensive multi-track treatment. Fast-track procedure is intended to be straightforward with cases brought to trial within 30 weeks.²²¹ Where a claim is allocated to the fast track it will also be assigned to a ‘band’ based on its complexity, which has ramifications for the quantum of fixed costs that may be recovered by the successful party.
- The intermediate track is for monetary claims with a value of between £25,000 and £100,000, which are triable in up to three days and do not require extensive expert evidence. Claims seeking non-monetary relief which are unsuitable for the fast track (for example, because they require a trial longer than one day) are not automatically within the normal scope of the intermediate track but may proceed in that track if the court deems it appropriate. Intermediate track procedure is more flexible than the fast track equivalent, but nonetheless there are restrictions on the volume of witness and expert evidence which apply by default in all intermediate track cases. As with the fast track, claims which are allocated to the intermediate track must be assigned to a complexity band which will affect the amount of fixed costs recoverable at the end of the case.
- The multi-track caters for cases of higher value, complexity or importance. It allows greater flexibility, depth of investigation and judicial involvement in the pre-trial stage than the other tracks.

12.96

Directions in the small claims track and fast track are required to follow a standard form unless the court orders otherwise ([CPR 27.4](#) and PD 27A para.2.2; [CPR 28.7\(2\)](#) and PD 28 para.9.4). Directions in the intermediate track and multi-track are not by default required to follow a standard form, but template directions are available for a variety of intermediate track and multi-track cases. Within the tracks, there are three main points at which the court may review the case and give directions before trial, namely allocation (which in some cases will also include assignment to a complexity band), the case management conference (CMC), and the pre-trial review (PTR). However, on the small claims track and fast track directions will normally be given on paper at the allocation stage and there will be no CMC or PTR. On the intermediate track and multi-track, not every stage will require a hearing and one or more may be completed on paper, or in a single hearing. In the majority of disputes, case management will consist of allocation to the correct track and court supervision of compliance with the directions given. Some disputes will, however, demand intensive and intrusive management, and the [CPR](#) provide the court with ample powers to meet this demand, as noted above.

- 12. 97** The scope of the tracks is reflected, albeit imperfectly, in the assignment of cases to particular courts and judges. Claims on the small-claims track are tried in the county court, almost invariably before a district judge—they can only be assigned to a circuit judge with that circuit judge’s consent (PD 2B para.11.2(1)). Claims on the fast track and intermediate track also proceed in the county court; proceedings may generally only be issued in the High Court if the value is above the intermediate track upper limit of £100,000 (PD 7A para.2.1), and cases commenced in the High Court in breach of this rule will normally be transferred to the county court (PD 29 para.2.2). Certain cases with a lower value may be issued in the High Court by reason of their subject matter, namely personal injury claims with a value of £50,000 or more (PD 7A para.2.2); cases that are required by an enactment to be tried in the High Court (PD 29 para.2.2(a)); cases that fall within a specialist list (PD 29 para.2.2(b)); and cases mentioned in PD 29 para.2.6 (PD 29 para.2.2(c)), such as claims in respect of professional negligence, the Fatal Accidents Act, fraud or undue influence, defamation, malicious prosecution, false imprisonment or contentious probate, or claims against the police. However, claims of this nature are in practice often transferred to the county court (unless statute requires them to remain in the High Court),²²² and those that are retained in the High Court for reasons of complexity or importance will almost invariably be suitable for allocation to the multi-track. Fast track and intermediate track claims in the county court may be tried before a district or circuit judge (although the default position is assignment to a district judge: PD 2B para.11.1). As just noted, claims on the multi-track may be tried in either the county court or the High Court, unless the claim is required by statute to proceed in the High Court. Multi-track claims in the county court will usually be heard in the court that is designated as the civil trial centre for the relevant area (PD 26 para.18).

Normal scope of the small claims track

- 12. 98** The small-claims track is generally the normal track for any claim that has a financial value of not more than £10,000 ([CPR 26.9\(4\)](#)). This general rule is subject to important qualifications.
- 12. 99** First, personal injury claims valued at less than £10,000 in total will only fall within the scope of the small claims track if the damages sought as compensation for pain, suffering and loss of amenity do not exceed £1,500,²²³ or, in road traffic accident cases, £5,000²²⁴ subject to the exceptions in [CPR 26.10](#) (in which case the limit is lowered to £1,000).²²⁵ Damages for pain, suffering and loss of amenity (also known as “general damages”) do not include damages for financial loss, such as loss of earnings (known as “special damages”).²²⁶ Thus, a claim for £9,000 special damages in respect of lost earnings, plus £950 general damages for pain and suffering will normally be allocated to the small claims track. But a claim for £7,000 special damages and £2,000 general damages will normally be allocated to the fast track, unless it is a road traffic accident claim which does not fall within the exceptions in [CPR 26.10](#). It should also be noted that personal injury claims made by a child for whiplash injury arising from a road traffic accident are excluded from the small claims track regardless of value, where the accident occurred on or after 31 May 2021([CPR 26.11](#)).
- 12. 100** Second, specific rules apply in residential tenancy cases, as follows. The small-claims track is the normal track for a residential tenant’s claim against their landlord, where the tenant seeks an order requiring the landlord to carry out repairs to the premises (whether or not the tenant also seeks other remedies); the cost of the repairs is estimated to be not more than £1,000; and the

financial value of any other claim for damages is not more than £1,000 ([CPR 26.9\(1\)\(b\)](#)). Claims seeking relief above these limits will generally be allocated to the fast track. Similarly, the court will not allocate a claim to the small claims track if it includes a claim by a residential tenant against their landlord for harassment or unlawful eviction ([CPR 26.12\(2\)](#)). Again, such claims will generally be allocated to the fast track. Claims for possession can only be allocated to the small claims track where all the parties agree ([CPR 55.9\(2\)](#)), and are subject to the fast track's fixed recoverable costs regime with certain modifications ([CPR 55.9\(3\)](#)).

12. 101 Third, PD 26 para.15(4) states that cases involving disputed allegations of dishonesty will not usually be suitable for the small-claims track, regardless of value. Such claims may instead be allocated to the multi-track (for example, where a personal injury claimant is accused of fabricating their injuries, even if the amount claimed is relatively small). ²²⁷

Normal scope of the fast track

12. 102 The fast track is the normal track for any claim for which the small claims track is not the normal track, and which has a financial value of not more than £25,000 ([CPR 26.9\(5\)](#)). Where a claim for up to £25,000 also includes a claim for non-monetary relief (such as an injunction, declaration or specific performance), the fast track will still be the normal track provided the court is satisfied that it is in the interests of justice for the claim to proceed in the fast track ([CPR 26.9\(5\)\(b\)](#)).

12. 103 These rules are subject to the important qualification that if the trial is likely to last for more than one day, the fast track will not be the normal track irrespective of the claim's value ([CPR 26.9\(6\)\(a\)](#)). Equally, the fast track will not be the normal track if oral expert evidence is likely to be needed in more than two disciplines, or if the parties are likely to need to call more than one expert each in relation to any given field ([CPR 26.9\(6\)\(b\)](#)). ²²⁸

Normal scope of the intermediate track

12. 104 The intermediate track is the normal track for any claim for which the small claims track or the fast track is not the normal track ([CPR 26.9\(7\)\(a\)](#)), which is for monetary relief of not more than £100,000 ([CPR 26.9\(7\)\(b\)](#)), and which involves a maximum of three parties (two claimants against one defendant or one claimant against two defendants) ([CPR 26.9\(7\)\(d\)](#)). If the claim includes a claim for non-monetary relief the intermediate track will never be the default track ([CPR 26.9\(8\)](#));²²⁹ instead, non-monetary claims which are unsuitable for the fast track will default to the multi-track. However, as we shall presently see the court retains a discretion to allocate such a claim to the intermediate track. ²³⁰

12. 105 These rules are again subject to the qualification that if the trial is likely to last for more than three days, or if the parties are likely to need to call more than two experts each to give oral evidence at trial, the intermediate track will not be the normal track ([CPR 26.9\(c\)\(i\)–\(ii\)](#)). [CPR 26.9\(c\)\(iii\)–\(iv\)](#) add that the intermediate track will not be the normal track if the claim cannot be justly and proportionately managed under the procedure set out in [Section IV of CPR 28](#), or if there are "additional factors" rendering it unsuitable for allocation to the intermediate track. It is not clear what these provisions add, however, given that the court is required to take considerations of these types into account whenever it exercises its track allocation discretion.

Normal scope of the multi-track

12. 106

The multi-track is the normal track for any claim for which the small claims track, the fast track or the intermediate track is not the normal track ([CPR 26.9\(12\)](#)). Thus, a claim will normally be allocated to the multi-track where it exceeds £100,000 in value; where it includes a claim for non-monetary relief and it is not suitable for allocation to the fast track; or it will require a trial lasting longer than three days or more extensive expert evidence than is permitted on the intermediate track. In addition, certain types of claim must proceed in the multi-track based on their subject matter, for example abuse claims, asbestos-related disease claims, clinical negligence claims worth over £25,000 (unless the defendant has at the pre-action stage admitted liability in full), and certain claims against the police alleging intentional or reckless wrongdoing or breach of the [HRA 1998](#) ([CPR 26.9\(10\)–\(11\)](#)).

12. 107 Some categories of case are automatically allocated to the multi-track, such that [CPR 26](#) does not apply or is substantially modified. This is the case for [CPR 8](#) claims ([CPR 8.9\(c\)](#)); contentious probate claims ([CPR 57.2\(4\)](#)); proceedings in the commercial list of the Commercial Court ([CPR 58.13\(1\)](#)); proceedings in the Circuit Commercial Court ([CPR 59.11\(1\)](#)); Technology and Construction Court claims ([CPR 60.6\(1\)](#)); claims under the [Arbitration Act 1996](#) ([CPR 62.7](#)); and most intellectual property ([CPR 63.1\(3\)](#)) and insolvency claims.²³¹

Track Allocation and Assignment to Complexity Bands

Principles guiding the exercise of discretion in allocation decisions

12. 108 The normal rules on allocation to tracks are set out above. However, as noted above, outside the specific circumstances where allocation to a particular track is mandatory, the court has discretion to deviate from these rules ([CPR 26.12\(1\)](#)). [CPR 26.13\(1\)](#) non-exhaustively sets out the matters which the court will consider in exercising its discretion:

- “(a)the financial value, if any, of the claim;
- (b)the nature of the remedy sought;
- (c)the likely complexity of the facts, law or evidence;
- (d)the number of parties or likely parties;
- (e)the value of any counterclaim or additional claim and the complexity of any matters relating to it;
- (f)the amount of oral evidence which may be required;
- (g)the importance of the claim to persons who are not parties to the proceedings;
- (h)the views expressed by the parties; and
- (i)the circumstances of the parties.”

12. 109 It is implicit in the rules that the court will take into account the usual directions and approach to case management within a particular track, as well as the costs consequences that are likely to flow from allocation to that track. In practice this may often point towards retaining a case within its normal track, since the procedural and costs rules for each track are intended to provide a coherent scheme which is designed to suit the track’s ‘normal’ cohort of cases. For instance, whilst PD 26 para.15(3) gives a non-exhaustive list of cases generally suitable for the small claims track (including consumer disputes, accident claims, disputes about the ownership of goods, and most landlord and tenant disputes other than, for example, possession and harassment claims), if such a case is outside the small claims track’s normal financial limits, it would only be allocated to that track where it can be fairly accommodated within the (restrictive) standard directions available for small claims,²³² and

where it would not be unjust to subject the claim to the limited costs-recovery regime applicable to the small claims track.²³³ Further, if cases could too readily be allocated to tracks other than the norm, this would undermine the predictability of the tracks system which could in turn defeat the purpose of subjecting cases on the fast and intermediate tracks to fixed costs.

- 12. 110** The court's overarching duty is to deal with cases justly and in accordance with the overriding objective.²³⁴ While this may, occasionally, militate in favour of allocating a case to a higher track than the norm on the basis that it cannot be dealt with fairly under the procedural and costs rules applicable to its default track, it is important to bear in mind that these considerations may also justify allocating a claim to a lower level of track than would ordinarily be the case.²³⁵ CPR 26.9(7)(c)(i) serves as a reminder that, with the benefit of robust case management, some claims which look at first blush like multi-track claims could in fact be accommodated within the intermediate track.²³⁶ Meanwhile, CPR 26.9(8)-(9) hint at the fact that allocation to the intermediate track instead of the multi-track may sometimes enhance rather than diminish access to justice, as where the parties have a particular need to understand their likely costs exposure in advance and would therefore benefit from the fixed recoverable costs regime applicable to intermediate track cases.²³⁷

- 12. 111** When making allocation decisions, the court will be assisted by information concerning the parties' intentions to apply for summary disposal, or to add other parties; the steps they have taken and intend to take in preparing evidence; the directions they believe will be appropriate; any particular facts which might affect the trial timetable; and any matters which make it desirable for the court to fix an allocation or case management hearing. PD 26 para.3(3) therefore encourages parties to volunteer such information to the court, and the main opportunity for doing so is in their directions questionnaires. The procedure for gathering information relevant to the CPR 26.13(1) factors and making allocation decisions is considered further below.

Value of the claim

- 12. 112** The court is not bound to accept the value that a party places on its claim (CPR 26.13(2)). This facility primarily exists to guard against the risk of parties overstating the value of the claim so as to drive it into a higher track than would otherwise be justified; it is no part of the court's role to put a higher value on the claimant's claim than the claimant seeks, nor to include items that the claimant has left out.²³⁸ Where the court believes that the amount the claimant is seeking exceeds what it can reasonably expect to recover, it may direct the claimant to justify the amount (CPR 26.7(4) and PD 26 para.14(6)).

- 12. 113** In determining the financial value of a claim, the court will disregard any claim for interest or costs, and any contributory negligence (CPR 26.13(2)(b)-(d)). The court will also disregard any amount which is not in dispute—that is, for which the defendant admits liability (CPR 26.13(2)(a)). The following are examples of amounts that are not in dispute for the purpose of the calculation (PD 26 para.14(7)): any sum in respect of which judgment has already been entered; any specific sum claimed as a distinct item and which the defendant admits;²³⁹ and any sum offered by the defendant which has been accepted by the claimant in satisfaction of any item which forms a distinct part of the claim. Thus, for instance, if a claimant claims £15,000 but the defendant makes an admission of items amounting to £10,000, that reduces the amount in dispute to £5,000, such that the normal track for the claim will be the small claims track. In claims involving non-monetary remedies, the court will not have regard to the notional amounts ascribed to the non-monetary relief in CPR 45.45(1)(a)(ii) and CPR 45.50(2)(b)(ii), the purpose of which is to help determine the quantum of fixed costs recoverable at the end of a fast track or intermediate track case (CPR 26.13(2)(e)); instead, the fact and nature of any non-monetary remedy sought is a factor which the court must take into consideration under CPR 26.13(1)(b).

- 12. 114** Where two or more claimants make separate claims against the defendant, the court will generally not aggregate the claims but rather will regard the largest of them as determining the financial value of the claims (CPR 26.13(3), PD 26 para.14(10)). Similarly, the value of any counterclaim or CPR 20 claim does not form part of the "financial value" for the purposes of identifying the normal track for the claim, but it is a factor the court will take into account in its decision on allocation (CPR

[26.13\(1\)\(e\)](#)). Where the value of a counterclaim outstrips the value of the main claim such that it would be within the normal scope of a higher track if it was the main claim, then the court would be entitled to allocate the proceedings to that track.

Likely length of the trial

12. 115 The likely length of the hearing or trial is an important consideration in deciding the appropriate track ([CPR 26.9\(6\)\(a\)](#) and [CPR 26.9\(7\)\(c\)\(i\)](#)). Cases on the small-claims track are usually allocated between one and three hours,²⁴⁰ and will not normally be allocated to that track if more than one day is required (PD 26 para.15(5)); claims on the fast track are usually allocated one court day (i.e. five hours: see PD 26 para.16(3)(a)); and claims on the intermediate track, up to three days (although there is by no means a presumption that intermediate track trials will last longer than a day).²⁴¹ Claims on the multi-track may be of any duration. As a general rule, the likely length of the trial should include time for the judge to deliver judgment and assess costs.²⁴²

12. 116 However, the trial estimate is not conclusive when it comes to allocation (see PD 26 para.15(5), PD 26 para.16(3)(c), and [CPR 26.9\(9\)\)](#).²⁴³ The court is not bound to accept the parties' assessment of the length of the trial, not least because it has considerable control over the length of the trial through the exercise of its case management powers and can require the parties to comply with any timetable that it sets.²⁴⁴ As we have seen above, it may limit the evidence admitted, impose time limits on cross-examination, and give directions as to the issues to be addressed orally at trial.²⁴⁵ Moreover, where there is to be a split or preliminary issues trial this is not of itself a barrier to the claim being allocated to the fast or intermediate track (see for example PD 26 para.16(3)(d)), and indeed the fixed costs rules applicable to both tracks make provision for such trials ([CPR 45.48](#) and [CPR 45.51](#)).

Complexity and the importance of the claim to persons who are not parties

12. 117 The court will take into consideration the importance to the wider community of the questions of law or fact arising in the proceedings. However, in principle, important questions of law can still be decided on the small-claims track.²⁴⁶ The allocation of money and time to cases primarily turns on the complexity of the factual investigation and the amount of time needed to dispose fairly of the claim at trial: an important question of law can still be adequately ventilated before a district judge in the three hours usually allocated to small-claims cases, and is still subject to appeal to a circuit judge and the Court of Appeal.

The views expressed by the parties

12. 118 PD 26 para.14(9) makes it clear that, although the court will treat the parties' views as an important factor, the decision on allocation belongs ultimately to the court. Accordingly, the court is not bound by the parties' agreement or common view. This must be right, since the allocation decision will ultimately determine the amount of public resources that will be spent on the particular dispute, compared with other litigants waiting for their ration of justice.

Assignment to a complexity band

12. 119 When a claim is assigned to the fast track or the intermediate track, the court must at the same time assign it to a complexity band ([CPR 26.14\(1\)\)](#).²⁴⁷ The complexity bands do not serve a case management purpose as such. Rather, they are relevant to the calculation of the amount of fixed recoverable costs that will be payable when the claim comes to an end, in conjunction with the stage the claim had reached before it settled or was otherwise disposed of. In simple terms, the higher the complexity band and the further progressed the claim was when it concluded, the greater the amount of costs that will be recoverable.

The relevant rules are to be found in **CPR 45** (principally **CPR 45.45** and **CPR 45.50**) and **PD 45** (principally Tables 12 and 14). They are discussed further in Ch.28.

- 12. 120** Because the complexity bands are mainly relevant to costs recovery rather than the management of the claim, the parties have greater latitude to agree which band ought to be assigned (**CPR 26.14(4)**). But even where the parties agree, the court has a discretion to decide otherwise (**CPR 26.14(5)**). When deciding which complexity band a case should be assigned to, the court is to have regard to the factors set out in **CPR 26.13(1)** (**CPR 26.14(5)**). When weighing these considerations, the court is likely to pay particular attention to factors which have a direct and appreciable impact on the costs needed to be expended by the parties, for example, the volume of evidence, the existence of a counterclaim or additional claim, and the number of parties. The pure financial value of a claim may have a lesser role to play in assignment than allocation, bearing in mind, first, that financial value does not necessarily correspond to the amount of expenditure required to bring the case to trial, and second that the calculations in **PD 45** Tables 12 and 14 incorporate a percentage of damages as part of the costs award.
- 12. 121** The trouble with relying on the same factors for assignment as for allocation is that assignment is a more granular exercise, yet the **CPR 26.13(1)** factors are not capable of guiding the court's discretion with any real precision. Moreover, as we have seen, allocation is undertaken against a framework of reasonably clear rules which establish the default track which the claim will be funnelled into unless the court exercises its discretion to allocate it elsewhere. With assignment, identification of the complexity band to which a case will normally be assigned depends on interpreting the (brief) descriptions of the bands themselves (see **CPR 26.15** and **CPR 26.16**). The problem is more acute in relation to the intermediate track bands than the fast track bands: whereas the fast track bands are defined by reference to particular types of case which are commonly dealt with in the fast track (for example, band 1 refers to non-personal injury road traffic accident claims, and band 2 refers to road traffic accident personal injury claims which are within the scope of the "RTA Protocol"),²⁴⁸ the intermediate track bands call for an evaluative judgment based on the number of issues in dispute, the relative complexity of the case, and whether it is 'unsuitable' for assignment to a lower band. Thus, band 1 refers to "[a]ny claim where (a) only one issue is in dispute; and (b) the trial is not expected to last longer than one day"; band 2 refers to "[a]ny less complex claim where more than one issue is in dispute"; band 3 is for "[a]ny more complex claim where more than one issue is in dispute, but which is unsuitable for assignment to complexity band 2"; and band 4 is for "[a]ny claim which would normally be allocated to the intermediate track, but which is unsuitable for assignment to complexity bands 1 to 3" (**CPR 26.16**). Whilst some guidance is given as to the characteristics of personal injury claims that would normally be suitable for each band, it is a far cry from the starting point which the court benefits from when considering allocation to track.²⁴⁹

Procedure for Allocation and Assignment

Provisional allocation by a court officer and directions questionnaires

- 12. 122** In most cases, a defended **CPR 7** claim is provisionally allocated by a court officer to the track that appears to be the most suitable, based on the information contained in the parties' statements of case (**CPR 26.4(1)(a)(i)**).²⁵⁰ The court will serve a notice on each party specifying the proposed allocation (**CPR 26.4(1)(a)(ii)**). That notice of proposed allocation will inform the parties how to obtain the directions questionnaire, require them to file and serve it, and, if the proposed allocation is to the fast track, intermediate track or multi-track, require them to file proposed directions (**CPR 26.4(1)(b)**).²⁵¹ The notice must specify the date by which these documents must be filed, which will be at least 14 days after it is deemed served on the party in question if the proposed allocation is to the small claims track, and at least 28 days after the date of deemed service if the proposed allocation is to one of the other tracks (**CPR 26.4(6)**). Given the importance of these documents to the court's decisions on allocation and assignment, the date may not be varied by agreement between the parties (**CPR 26.4(7)**) and failure to comply by the deadline can lead to the defaulting party's statement of case being struck out (see **CPR 26.4(9)–(10)**).²⁵²

- 12. 123**

There are two forms for the directions questionnaire, Form N180 for claims provisionally allocated to the small claims track, and Form N181 for claims provisionally allocated to the fast, intermediate and multi-track. Both forms require the parties to give their views on the appropriate track and hearing venue, and to provide information about the number of witnesses and whether they are seeking the court's permission to use experts. Form N181 also asks the parties about their compliance with the relevant pre-action protocol; efforts made in reaching a settlement; whether the parties seek a stay to facilitate settlement; details about proposed expert or other witnesses; whether they intend to make particular applications, such as for summary judgment; their assessment of the likely length of the trial; and the likely costs. Where the claim appears suitable for multi-track allocation, the directions questionnaire will require the parties to file and exchange costs budgets by the date specified ([CPR 3.13](#)). Parties may also provide such further information as they consider relevant to allocation, assignment to a complexity band, or case management (PD 26 para.3(1)): for example, if they intend to issue an additional claim or to add another party.

12. 124 Parties must co-operate in preparing their responses to the directions questionnaire (PD 26 para.4(1)), and they must seek to agree any proposed case management directions (PD 26 para.4(2)). Where a party provides further information that may affect the allocation or assignment decisions, beyond answering the questions set out in the questionnaire, it must first seek confirmation from the other parties that they agree that the information is correct and should be provided to the court—or, at the very least, it must send a copy of the information to all other parties (PD 26 para.3(2)).

12. 125 Above all, parties are encouraged to discuss settlement. Accordingly, when a party files the directions questionnaire, it may request a stay pending a settlement attempt ([CPR 26.5\(1\)](#)). Where all the parties have requested a stay for settlement, the court will direct a one-month stay ([CPR 26.5\(2\)](#)). Alternatively, it may direct a stay of such period as appears appropriate on its own initiative ([CPR 26.5\(3\)](#)). The court may extend the stay ([CPR 26.5\(4\)](#)) or bring it to an early end. Where a stay is granted, the claimant must notify the court if a settlement is reached ([CPR 26.5\(5\)](#)). If by the end of the stay period the claimant does not tell the court that a settlement has been reached, the court will give case management directions, including the allocation of the case to one of the four tracks and (where applicable) assignment to a complexity band, to ensure that the case does not become dormant ([CPR 26.5\(6\)](#)).

12. 126 Other steps in the proceedings may sometimes intervene before provisional allocation takes place or directions questionnaires are filed. For example, where a default judgment or a judgment on admission is entered prior to this point but further proceedings are still necessary (such as a hearing to determine the quantum of damages), the court entering the judgment may direct the parties to file directions questionnaires, allocate the case to a particular track (and assign it to a complexity band if applicable), or give such other directions as are appropriate (PD 26 paras 20–21). Where there is a court hearing prior to provisional allocation or the filing of directions questionnaires—for example, on an application for interim relief or summary judgment—the court may dispense with the directions questionnaires and treat the hearing as an allocation (and if applicable, assignment) hearing. In such circumstances, the court will make an order for allocation and assignment (assuming this is necessary following the resolution of the application), and will give directions for case management (PD 26 para.5).

Court decision on allocation and assignment

12. 127 Once all the parties have filed directions questionnaires (or when the time for doing so has expired and the court proceeds to give directions instead of, for example, striking out the defaulting party's statement of case),²⁵³ the court will proceed to make a decision on allocation and, where relevant, assignment to a complexity band ([CPR 26.7\(1\)](#)). As noted above, if a stay has been ordered under [CPR 26.5](#), the decision will be postponed until the stay has come to an end ([CPR 26.7\(2\)](#)). The decision will usually be made by a master or district judge on the papers, with brief reasons set out in the notice of the allocation (PD 26 para.9(5)(a)).²⁵⁴ However, if the court's decisions on allocation and assignment accord with the wishes expressed by all the parties, no reasons need be given (PD 26 para.9(5)(b)).

12. 128

Cases are normally allocated, and complexity bands assigned, on the basis of the statements of case and the information provided in the directions questionnaires (PD 26 para.9(2)). Where the court finds these materials insufficient, it may order a party to provide further information ([CPR 26.7\(4\)](#) and PD 26 para.9(3)). It may even hold a hearing if necessary to determine allocation and assignment ([CPR 26.7\(5\)](#), PD 26 para.13(1)), but this will only be done, given the impact on costs and court resources, where the court considers this is necessary.

- 12. 129** At the allocation and assignment stage, the court also has the opportunity to consider other ways of disposing of the case. Rather than allocating the claim to a track, it could strike it out or award summary judgment of its own initiative (PD 26 paras 10-12). Where a party has applied for summary disposal before or at the same time as filing its directions questionnaire, the court will normally defer the decision on allocation and assignment until after the application has been dealt with (PD 26 para.11(2)); and where a party has merely indicated its intention to apply in its directions questionnaire, the court will normally direct a hearing with a view to dealing with the application and (if necessary following its resolution) allocation and assignment at the same time (PD 26 paras 11(3)-(4)). Once the case is allocated, the court will also make case management directions reflecting the allocation.

The power to re-allocate and re-assign

- 12. 130** A party who is dissatisfied with the track allocated or the complexity band assigned may request that the claim be reallocated or reassigned, as the case may be. The court may also make such an order of its own initiative ([CPR 26.18](#)). However, the court will only reallocate a claim where it is satisfied there are good reasons for doing so, in particular, if there has been a change of circumstances since the original allocation which is such as to justify reallocation.²⁵⁵ This may happen, for instance, where the value of the claim changes substantially, the claim is amended so as to add new causes of action, or the defendant makes new allegations that a claim is fraudulent.²⁵⁶ As regards reassignment to a different complexity band, the principle that there must be a change in circumstances which is such as to justify this is made explicit in [CPR 26.18\(3\)](#). If there has not been a change in circumstances as such but rather a party believes that the court's decision on allocation or assignment was wrong in the first place, its normal remedy would be to appeal (in which case the appeal would only be allowed if the decision was outside the wide ambit of discretion afforded to judges when performing their case management duties).²⁵⁷

- 12. 131** Where a claim is reallocated to a different track or reassigned to a different complexity band, the costs consequences applicable to the new track or band will generally apply as though the claim had been allocated to the new track, or assigned to the new band, from the outset ([CPR 27.15](#), [CPR 45.14\(1\)-\(2\)](#)). The exception is where a claim was originally allocated to the multi-track but is then removed to the small claims track (for example, because the defendant concedes part of the claim leaving only a small residue to be determined), in which case the court has a discretion to order that the multi-track costs rules shall apply down to the point of reallocation ([CPR 27.15\(2\)](#)).²⁵⁸ The general position that the new track or band's costs rules shall apply as though the claim had been allocated or assigned in that way from the outset underlines the importance of restraint in exercising the power in [CPR 26.18](#). If the parties have progressed the case in accordance with the existing directions, it may be unfair and unduly disruptive to reallocate the claim to a different track. Consequently, the fact that a claim has changed in value will not normally of itself justify reallocation; but if the change in value is substantial such that the claim is now significantly in excess of the normal limit for the existing track, this would point in favour of reallocation even if that entails some delay in completing the litigation.²⁵⁹ Equally, if the application for reallocation or reassignment is made before the parties have incurred substantial expenses in compliance with the existing directions, that would be a factor in favour of granting the application.²⁶⁰ If the scope of the claim or the issues has developed such that a trial more than one or three days is now needed, that may well justify reallocation or reassignment but it is not conclusive (see PD 26 para.16(3)(c)). It should be noted that special provision is made for cases which were originally allocated to the intermediate track, in that there must be "exceptional reasons" to justify reallocation to a different track if case management directions have already been given ([CPR 26.18\(2\)](#)).

- 12. 132**

These considerations have a bearing on the approach to be taken to applications to amend a party's statement of case. When dealing with an application for permission to amend which, if granted, would take the claim outside the existing track limit, the court has three options.²⁶¹ First, the court may refuse an amendment that is likely to result in costs being thrown away or which would unfairly prejudice the other party, especially where the need for a late amendment arises not from unforeseen circumstances but from the claimant's failure to assess the value of the claim correctly.²⁶² If the court refuses to allow the proposed amendment, it can proceed to dispose of the case on the existing track. The second option is to allow the amendment but keep the case in the existing track. As noted above, the mere fact that the claim's value now exceeds the existing track limit does not necessarily mean re-allocation is required, though an important consideration will be whether the revised claim can be adequately argued within the limits of the existing track's procedure. The third option, therefore, is to grant the amendment and simultaneously reallocate the case to a different track, in which case consideration would be given to whether some or all of the costs consequences of this should be borne by the party seeking the amendment.

Procedure on the Four Tracks

Small claims track procedure

Directions and hearing arrangements

12. 133

The small claims track is designed to offer an expeditious and uncomplicated procedure for disposing of modest claims. Hearings are informal, with a broad discretion for the court to adopt a method of proceeding that it considers fair. The White Book reports that some district judges hold hearings literally "round a table",²⁶³ which may assist in creating a less adversarial atmosphere and encouraging compromise. The strict rules of evidence do not apply (CPR 27.8), although evidence which would otherwise be inadmissible may simply be given less weight. The normal rules of disclosure do not apply (CPR 27.2(1)(b)): parties are generally only required to produce the documents upon which they intend to rely (CPR 27.4(3)(a)). Expert evidence is strictly limited and may not be called without court permission (CPR 27.5). Other than interim injunctions, no interim remedies are available (CPR 27.2(1)(a)). However, in other respects, the small-claims track is governed by the same rules as apply to higher-value claims. The pre-action protocols and formal process for commencing proceedings still apply; the court may grant any final remedy that would be available on the other tracks (CPR 27.3); and the parties can appeal a judgment, to a circuit judge in the first instance, and then to the Court of Appeal pursuant to the rules governing second appeals.²⁶⁴

12. 134

The allocation notice will normally be accompanied by standard directions and notice of a fixed hearing date (CPR 27.4(1)(a)). The standard directions require the exchange of all documents upon which the parties intend to rely no later than 14 days before the hearing and that the parties bring the originals to the hearing (CPR 27.4(3)(a), PD 27A Appendix B). PD 27A Appendix A sets out lists of the types of information and evidence that the court would normally expect to need in particular types of cases (road traffic accident claims, building disputes, repairs, sale of goods and similar contract claims, landlord and tenant claims, and breach of duty cases). The district judge may also give different directions, known as "special directions" (CPR 27.4(3)(b)), and may if necessary hold a preliminary hearing with a view to giving such directions (CPR 27.6(1)(a)). The type of special directions that might be given in a small claims track case are indicated by PD 27A Appendix C, and include for example requiring a party to clarify its case, or directions for a single joint expert.

12. 135

The claim will usually proceed straight to a final hearing on the basis of the directions given at the allocation stage, but the court may hold a preliminary hearing with a view to disposing of the case summarily (CPR 27.6(1)(b)–(c)), or it may propose that the case be determined on the basis of written materials without the need for a hearing, if the parties agree (CPR 27.4(1)(e) and CPR 27.10). Parties often represent themselves at small claims track hearings, and may be represented by a lay representative (PD 27A para.3.2(1)); corporate bodies may be represented by their officers or employees (PD

27A para.3.2(4)). Each party will be called in turn to present its argument and call witnesses. The parties will normally be allowed to cross-examine each other's witnesses, though the court can limit the length or scope of cross-examination ([CPR 27.8\(5\)](#)).²⁶⁵ The court may also question witnesses itself (PD 27A para.4.3(1)–(2)), and may adopt a more interventionist approach than in other tracks. The court is required to give reasons ([CPR 27.8\(6\)](#)), usually orally, and as briefly and simply as the nature of the case allows (PD 27A para.5.3)).

12. 136

The court may proceed with the hearing where a party has failed to appear. If the party has given seven days' notice in writing that it will not attend, the court will take into account its statement of case and other documents duly filed and served ([CPR 27.9\(1\)](#)); otherwise, the court may strike out the claimant's claim (if the claimant fails to appear) ([CPR 27.9\(2\)](#)), or else decide the claim on the claimant's evidence alone (if the defendant fails to appear) ([CPR 27.9\(3\)](#)). A party who was absent from the hearing and who failed to provide the notice required by [CPR 27.9\(1\)](#) may apply (within 14 days of the date on which notice of the judgment was served on it) to have the decision set aside and the case reheard. The court may grant such an application only if the applicant establishes that it had a good reason for not attending and that it has a reasonable prospect of success ([CPR 27.11\(3\)](#)).²⁶⁶

Costs on the small claims track

12. 137

[CPR 27.14](#) strictly limits costs recovery on the small claims track. The court may not order a party to pay any sum to another party in respect of their costs, save for the items listed in [CPR 27.14\(2\)](#). This list includes, in summary, court fees; certain fixed costs associated with issuing the claim (see PD 45 Table 2); up to £260 in respect of legal advice and assistance if the claim included a claim for an injunction or specific performance (PD 27A para.7.2); travel expenses; witness expenses and expert fees up to a maximum of £95 per witness and £750 per expert (PD 27A para.7.3); and certain fixed costs where the claim was within the scope of the "RTA Protocol"²⁶⁷ or the "EL/PL Protocol".²⁶⁸ Thus, the costs of legal representation to prepare the case and appear in court are not usually recoverable. The same rules apply to appeals from claims decided on the small claims track ([CPR 27.14\(2\)](#)), including second appeals,²⁶⁹ although the reasonable costs of obtaining a transcript for the purpose of such an appeal is recoverable ([CPR 27.14\(2\)\(i\)](#)).

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An important qualification to the foregoing is that the court has discretion to order costs to be paid by a party who has behaved unreasonably; the quantum is assessed immediately after the hearing ends by a summary procedure ([CPR 27.14\(2\)\(g\)](#)). Unreasonable behaviour is difficult to precisely define and highly fact-sensitive, but includes improper, unreasonable or negligent acts or omissions of parties and their representatives.²⁷⁰ Examples include requesting a last-minute adjournment because the evidence has not been prepared; making a dishonest claim; and failing to remedy procedural defects when ordered to do so. A party's rejection of an offer of settlement cannot trigger the consequences of [CPR 36](#) (since Pt 36 does not apply),²⁷¹ and will not of itself constitute unreasonable behaviour, but the court may take it into consideration when it is applying the unreasonableness test ([CPR 27.14\(3\)](#)).

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The language of [CPR 27.14\(2\)](#) is clear and unequivocal: "The court *may not order* a party to pay a sum to another party in respect of that other party's costs", except insofar as otherwise specified. Inexplicable, then, is the Court of Appeal's decision in *Chaplair Ltd v Kumari*, which allowed a landlord to recover costs on an indemnity basis under a contractual term in a lease, even though the claim was litigated on the small-claims track.²⁷² The effect of the court's decision is that, by including indemnity costs clauses in standard form contracts, economically powerful interests will be able to expend significant resources litigating against individual consumers and tenants almost risk-free (albeit subject to general law limitations on unfair contractual terms). If the individual responds by incurring additional costs to come closer to equality of arms with the indemnified party, they may well be left out of pocket by [CPR 27.14\(2\)](#) if they win, and bankrupt under the indemnity if they lose. It is difficult to imagine a more powerful disincentive for litigation, or a more profound subversion of the purpose of the small claims track's cost-restriction rules.

Fast track procedure

Directions at the allocation stage

- 12. 140** Fast track cases are generally managed by means of court directions given at two stages: at the allocation stage and on filing the pre-trial checklist (previously known as the listing questionnaire). In the interests of efficiency and economy, it is envisaged that the court will give directions at these stages without a hearing ([CPR 28.2\(2\)](#) and PD 28 para.9.1). Furthermore, the court will normally base its directions on the standard forms for the fast track ([CPR 28.7\(2\)](#) and PD 28 para.9.4). In practice, parties frequently seek to agree directions, which should themselves be based on the standard forms. The court may simply adopt the agreed directions if satisfied that they are suitable (PD 28 para.3.5).
- 12. 141** The allocation stage is the most important stage for giving directions on the fast track. On allocating a claim to the fast track, the court will give directions for case management through to trial ([CPR 28.2\(1\)](#)), the date or period for which will be within 30 weeks of the date of the allocation notice (PD 28 para.10.1). The directions upon allocation will therefore primarily be concerned with the following matters: disclosure of documents (typically within four weeks of the allocation notice); ²⁷³ exchange of witness statements (typically within 10 weeks); expert evidence (typically to be exchanged within 14 weeks); filing of completed pre-trial checklists (typically within 22 weeks); and fixing the trial date or period (PD 28 para.9.5). To meet such a tight timetable, the parties may well need to make considerable preparations in advance of commencing proceedings.
- 12. 142** Where expert evidence is necessary ([CPR 35.4](#)), the court will normally order the parties to appoint a joint expert (PD 28 para.3.9(d)). If there are good reasons for allowing the parties to instruct their own experts, the rules limit each party to one expert in each field, in up to two fields of expertise ([CPR 26.9\(6\)\(b\)](#)). Oral expert evidence will be allowed only if it is necessary in the interests of justice, such as when an expert's credibility is challenged; otherwise expert evidence will be in writing ([CPR 35.5\(2\)](#)).
- 12. 143** The parties' freedom to change the timetable directed by the court is limited on the fast track. The date for any case management conference or pre-trial review, the return of the pre-trial checklist, the date of the trial or the trial period may be varied only with court permission ([CPR 28.3\(1\)](#)), and consequently the parties may not agree to vary any other deadline which would have the effect of necessitating a variation to one of these dates ([CPR 28.3\(2\)](#)). Subject to these restrictions (and the restrictions that apply in the case of unless orders pursuant to [CPR 3.8\(4\)](#)), the parties may agree other extensions of time between themselves, such as extending the deadline for the exchange of witness statements ([CPR 2.11](#)). Failure to comply with deadlines is viewed particularly seriously in the fast track given the aim of bringing cases on for trial within 30 weeks. The court will not normally allow a failure to comply with directions to lead to the postponement of the trial unless the circumstances are exceptional (PD 28 para.5.4(1)). This may mean depriving the defaulting party of the right to contest an issue or rely on particular evidence (PD 28 para.5.4(3)). Even where an adjournment is unavoidable, the court will normally try to address at least some issues on the date already reserved for the case (PD 28 para.5.4(4)). Where the court has no choice but to postpone the trial altogether, it will do so for the shortest possible time and give directions for the taking of the necessary steps in the meantime as rapidly as possible (PD 28 para.5.4(5)).
- 12. 144** Although oral interim hearings are not normally required in fast track cases, where a party needs to apply for directions that are not included in the case management timetable (such as permission to amend a statement of case), it must do so as soon as possible so as to minimise the need to change that timetable. ²⁷⁴

Directions at the listing stage

12. 145 When the time for completing the pre-trial processes has expired, the court will need to know to what extent the parties have complied with its directions. To this end, the parties are required to complete a pre-trial checklist by a certain date, which will be not more than eight weeks before the trial date or the trial period ([CPR 28.4\(2\)](#)). In a typical fast track timetable, therefore, the pre-trial checklists are sent by the court to the parties 20 weeks after allocation, and returned 22 weeks after allocation (PD 28 para.9.5). The court will then give its final directions for trial to the extent they are outstanding, usually consisting of fixing or confirming the trial date (as the case may be), setting the trial timetable in consultation with the parties, ²⁷⁵ and directing the preparation of a trial bundle ([CPR 28.5](#)).

12. 146 If none of the parties' pre-trial checklists have been filed by the due date, the court will order that unless they are filed within seven days from service of its order, the claim, defence and any counterclaim will be struck out ([CPR 28.4\(3\)](#), PD 28 para.6.5(1)). If only some of the parties have responded, the court will fix the trial date and give its final directions to trial based only on the checklists that have been filed ([CPR 28.4\(4\)](#), PD 28 para.6.5(2)). Failure to file a checklist may therefore carry considerable disadvantage.

Fast-track trial

12. 147 The fast-track trial offers the parties an efficient and expeditious means of presenting their respective cases and obtaining court adjudication. In some cases, the judge will read the trial bundles before the hearing and be familiar with the case. The trial will then proceed directly to the evidence, without the need for opening speeches (PD 28 para.8.2), and will be conducted according to any trial directions already given, unless the trial judge decides otherwise ([CPR 28.6](#)). Witness statements stand in place of examination-in-chief, so that oral evidence is confined to cross-examination. If, unusually, the trial is not completed on the day it is listed, it will normally be continued on the next working day (PD 28 para.10.3).

Costs on the fast track

12. 148 With effect from 1 October 2023, the court's power to award costs in fast track cases is limited to the fixed recoverable costs provided for by [CPR 45, Sections VI and IX](#) ([CPR 28.8](#)). The court will normally calculate the quantum of costs owing pursuant to these rules at the conclusion of the trial. They are discussed in more detail in Ch.28. ²⁷⁶

Intermediate track procedure

12. 149 The intermediate track procedure resembles the fast track procedure in many respects; indeed, they share a common set of rules ([CPR 28.1–28.6](#) and PD 28 paras 1–8), with a number of additional differentiating provisions ([CPR 28.7–28.8](#) and PD 28 paras 9–10 for the fast track, and [CPR 28.12–28.15](#) for the intermediate track). Thus, directions through to trial will typically be given at or shortly after allocation, and will generally deal with disclosure of documents, exchange of witness statements, expert evidence, filing of completed pre-trial checklists, whether to fix a pre-trial review, and fixing the trial date or period ([CPR 28.2\(4\)](#), [CPR 28.4\(1\)](#), [CPR 28.14\(1\)](#)). Parties are encouraged to agree directions, and the court may simply adopt them if satisfied that they are suitable ([CPR 28.13](#), PD 28 para.3.5). The parties' freedom to alter the timetable is limited in that no variation to the date of a hearing or of return of the pre-trial checklist is allowed without the court's permission, nor may the parties agree any variation which would imperil these dates ([CPR 28.3](#)). As with the fast track, it is especially important that costly adjournments are avoided given that recoverable costs are fixed (see PD 28 para.5.4). Pre-trial checklists are required not more than eight weeks before the trial date or period ([CPR 28.4\(2\)](#)), to enable the court to ascertain the extent of compliance with directions and give final directions for trial ([CPR 28.5](#)). Failure by all of the parties to file pre-trial checklists may lead to their statements of case being struck out ([CPR 28.4\(3\)](#), PD 28 para.6.5(1)).

12. 150

Overall, therefore, intermediate track procedure is a relatively trim procedure not greatly different from the fast-track procedure, focused on setting a full but straightforward timetable through to trial at an early stage. It is important that the process followed on the intermediate track is broadly consistent and limited in this way, in order to control party investment in the case in light of the fact that recoverable costs are fixed.²⁷⁷ This is thought to be practicable for intermediate track cases since they are generally limited to £100,000 and do not involve large numbers of parties, complex remedies or seriously onerous factual investigation.

12. 151

At the same time, intermediate track cases are those which formerly represented the lower echelons of the multi-track and are more valuable, serious and complex than fast track cases, so a degree more flexibility and intervention by the court is called for. The principal points of departure between the fast track procedure and the intermediate track procedure are fivefold. First, whereas fast track directions are usually given on paper at the same time as allocation in most cases, in the intermediate track the court may prefer to convene a case management conference to appropriately tailor the directions for disclosure, witness statements, expert evidence and the length of trial ([CPR 28.2\(3\)](#) and [CPR 28.12](#)).²⁷⁸ Any interim application a party wishes to make should be issued in time for it to be heard at the case management conference (PD 28 para.2.4). Second, the total aggregate length of witness statements and summaries in the intermediate track is generally limited to 30 pages ([CPR 28.14\(3\)\(b\)](#)). Third, the restrictions on expert evidence are somewhat different to those in the fast track. Expert reports are limited to 20 pages each, and although oral expert evidence is limited to two experts per party, there is no provision limiting the parties to one expert per field ([CPR 28.14\(2\)\(a\)](#) and [CPR 28.14\(3\)\(c\)](#)). Fourth, there is greater facility in the intermediate track to hold a pre-trial review after the pre-trial checklists have been filed ([CPR 28.12](#), [CPR 28.14\(1\)\(d\)](#)), although it may be that they are seldom held in practice. The functions of pre-trial reviews and the circumstances in which they may be held are discussed below in the context of the multi-track procedure. Fifth, whereas fast track trials are limited to one day, a trial in the intermediate track may be up to three days ([CPR 28.14\(2\)\(b\)](#)), and there may be a need for a separate hearing to deal with judgment and consequential matters, where judgment is reserved.²⁷⁹ As in the fast track, recoverable costs on the intermediate track are fixed albeit that a distinct set of rules and scales apply (namely, [CPR 45 Sections VII and IX](#), discussed in more detail in Ch.28).²⁸⁰

Multi-track procedure

12. 152

The multi-track procedure caters for a wide variety of cases with different needs. At one end of the spectrum, cases with a value of little more than the £100,000 intermediate track limit may not require intensive case management but rather can proceed according to relatively standard directions for that type of case. At the other end of the spectrum, hands-on judicial case management (sometimes by a docketed or “managing” judge)²⁸¹ may be required in substantial disputes involving large sums of money and many parties. The strength of multi-track management is that the court can tailor its approach to the needs of the case (PD 29 para.3.2).

12. 153

It should be noted that the procedure set out in [CPR 29](#) does not apply to certain specialist proceedings notwithstanding that they are automatically treated as allocated to the multi-track, including those in the commercial list ([CPR 58.13\(2\)](#)), proceedings in the Circuit Commercial Court ([CPR 59.11\(2\)](#)), claims under the [Arbitration Act 1996](#) ([CPR 62.7\(3\)](#)), and intellectual property claims ([CPR 63.8\(2\)](#)). Instead, the rules dealing with these proceedings and their associated practice directions establish their own specialised versions of the multi-track procedure. Similarly, although [CPR 29](#) applies to Technology and Construction Court claims, this is subject to the modifications set out in [CPR 60](#) and PD 60 ([CPR 60.6\(2\)](#)). The present section focuses on the general procedure laid down in [CPR 29](#).

Directions at the allocation stage and case management conference

12. 154

It is common in multi-track claims to hold a case management conference following allocation in order to give directions ([CPR 29.2\(1\)\(b\)](#), PD 29 para.4.5), but this is by no means a given. A case management conference may not be necessary, for example, where the parties have agreed the directions required and the court approves the agreed directions ([CPR 29.4](#),

PD 29 paras 4.6–4.8). Alternatively, a case management conference might be dispensed with if the case is not particularly complex, the parties have followed any relevant pre-action protocol or otherwise cooperated so as to identify and narrow the issues, and the court has the information it needs to give directions based on their directions questionnaires ([CPR 29.2\(1\)\(a\)](#), PD 29 para.4.9).²⁸² There is therefore an incentive for the parties to cooperate and provide appropriate information to the court prior to multi-track allocation, to enable appropriate directions to be made without incurring the expense of a separate hearing.

12. 155 On allocation to the multi-track, the court’s first concern is to ensure that the issues between the parties are identified and that the necessary evidence is prepared and disclosed (PD 29 para.4.3). If a case management conference is required, therefore, it may direct that it be held immediately, or it may give initial directions and list a case management conference thereafter (see PD 29 paras 4.5, 4.10 and 4.12). It should be remembered that the court may convene a case management conference at any time from the allocation of the case to the listing stage, although the parties must be given at least three days’ notice of any case management conference ([CPR 3.3\(3\)\(b\)](#) and PD 29 para.3.7).

12. 156 At the case management conference, the court will (PD 29 para.5.1):

- “(1)review the steps which the parties have taken in the preparation of the case and their compliance with any directions that the court may have given,
- (2)decide and give directions about steps which are to be taken to secure the progress of the claim in accordance with the overriding objective, and
- (3)ensure as far as it can that all agreements that can be reached between the parties about the matters in issue and the conduct of the claim are made and recorded.”

The topics that are therefore likely to be on the agenda include whether the amount claimed and the issues in the case are sufficiently clear; whether any amendments are required to a statement of case; what scope of disclosure is required; what directions should be made for expert evidence; what factual witness evidence is required; and whether a split trial or preliminary issues trial should be ordered (PD 2.9 para.5.3). The court will also consider whether different claims in the proceedings should be tried together or separately, whether to join parties or consolidate proceedings; and the costs implications of every case management decision it proposes to make ([CPR 3.1\(2\)](#)).

12. 157 To facilitate the court’s task, the parties are encouraged to provide the court with all the information it may require, including an agreed case summary which briefly sets out the nature of the dispute and its chronology (PD 29 paras 5.6–5.7). Detailed rules concerning preparation for a case management conference apply in specialist proceedings. For instance, in the Commercial Court the parties need to prepare a case memorandum, agree a list of the important issues and prepare a case management bundle.²⁸³ Given the importance of the case management conference and its potential for influencing the case’s development, it must be attended by legal representatives who are fully acquainted with the case and who are adequately authorised to deal with any issues that are likely to arise ([CPR 29.3\(2\)](#) and PD 29 para.5.2). A wasted costs order may be made where the representative is insufficiently prepared or their instructions are inadequate (PD 29 para.5.2(3)).

12. 158 At the conclusion of the case management conference, the court will give directions for the management of the litigation (PD 29 para.5.1(2)). Such directions may include amendments to statements of case; the extent of disclosure; the manner in which expert evidence is to be prepared; and the time for exchange of witness statements. One of the most important aspects of the directions will be the deadlines for compliance with the procedural requirements set out in the directions and the date for a pre-trial review. The court will fix a trial date or trial window at the earliest opportunity and specify the date by which the parties must file a pre-trial checklist ([CPR 29.2\(2\)–\(3\)](#)). In fixing a multi-track trial the court will consider the availability of witnesses and counsel, as well as court timetables and the need to ensure that justice is not unreasonably delayed.²⁸⁴ There is discretion to grant an expedited trial, and in exercising it, the court will consider whether the applicant has a good reason for seeking it (such as the risk of irreparable harm), the level of interference with the administration of

justice (including the interests of parties in other cases), the prejudice to the other side (such as the difficulties of having to prepare its case more quickly) and other factors such as whether the applicant has proceeded with due expedition.²⁸⁵

- 12. 159** Where a party wishes to obtain an order not routinely made at a case management conference, and which is likely to be opposed, such as an interim injunction, it should file and serve an application in time for it to be heard at the case management conference (PD 29 para.5.8(1)). If the time allowed for the case management conference is likely to be insufficient for the application, it should inform the court at once so that the listing of the case management conference can, if possible, be amended accordingly (PD 29 para.5.8(2)). An adverse costs order may be made against a party who fails to comply with these requirements (PD 29 para.5.8(3)).

Pre-trial checklist and listing hearing

- 12. 160** The pre-trial checklist is designed to provide the court with information about the parties' compliance with the case management directions and all other matters that are necessary to enable the court to decide when and where to hold the trial, assess the likely length of the trial, and in some cases to identify the level of judge required to hear the case.²⁸⁶ The pre-trial checklist must be returned by the deadline specified in the case management directions which fixed the trial date or period ([CPR 29.6\(2\)](#)).²⁸⁷ However, the court may dispense with a pre-trial checklist if it considers it unnecessary ([CPR 29.6\(1\)](#)). The parties are encouraged to exchange draft checklists to avoid the court being given conflicting or incomplete information (PD 29 para.8.1(5)). Where at least one party files a pre-trial checklist, the court may give such directions as it considers appropriate. This may include giving directions to complete the preparations for trial, cancelling any pre-trial review that has already been fixed if this no longer appears to be necessary, or directing that a listing hearing or pre-trial review be held ([CPR 29.6\(4\)](#), [CPR 29.7](#), [CPR 29.8](#)). Where all parties have failed to return the completed checklist, the court will give them seven days to comply and their claim or defence and any counterclaim will be struck out without further order if they fail to do so ([CPR 29.6\(3\)](#), PD 29 para.8.3(1)).

Pre-trial review

- 12. 161** By the time the pre-trial checklists have been returned, most cases will be ready for trial without the need for a further case management hearing (other than perhaps a listing hearing where only some of the parties have returned pre-trial checklists or if the information in them is incomplete). But a minority of cases may require closer judicial management even at this late stage. As noted above, when the court receives the completed pre-trial checklists, it must decide whether to hold a pre-trial review or, if one has already been ordered, whether to cancel it ([CPR 29.7](#)). The High Court is unlikely to order a pre-trial review in cases where the trial is estimated to last 10 days or less in the King's Bench Division, whereas in the Chancery Division a pre-trial review will be held in most cases where the trial estimate is more than five days.²⁸⁸

- 12. 162** If possible, the pre-trial review will be held by the judge who is going to try the case, normally eight to 10 weeks before the trial. It should be attended by the advocates who are to represent the parties at trial.²⁸⁹ The pre-trial review has three main objects. The first is to examine whether the pre-trial steps undertaken by the parties, especially the disclosure of evidence, have narrowed the issues. The second is to check preparedness for trial and to give any final directions that are necessary to enable the trial to take place (including checking that well-organised bundles will be ready in time to enable the trial judge to study the case before trial). The third is to make arrangements for trial, including determining a timetable for the conduct of the trial and considering the mode by which witnesses will give their evidence (for example, in person or remotely). The court may direct the order in which the issues are to be addressed, allot time to the different stages of the trial, and in heavy cases make provision for suitable breaks between different stages. Trial judges will expect the timetable to be followed and will keep advocates to their allotted time to conserve court resources. The conduct of trials is considered more fully in Ch.22.

Footnotes

- 216** Reforms in 2013 introduced a more extensive form of fixed recoverable costs for certain fast track claims than existed previously, as well as costs budgeting in certain multi track cases. In 2023, the whole of the fast track became subject to fixed recoverable costs, and the intermediate track was introduced along with its own system of fixed costs.
- 217** See Ch.28 Costs para.28.148 for the rules governing costs in the small claims track; paras 28.153 ff for the fast and intermediate tracks; and paras 28.39 ff for the general rules applicable where costs are in the discretion of the court. Costs management is considered at paras 28.103 ff.
- 218** Jackson LJ, Review of Civil Litigation Costs: Supplemental Report Fixed Recoverable Costs (London: HMSO, 2017) (hereinafter “Jackson, Supplemental Report”).
- 219** See Ch.12 Procedural Tracks and Schemes and Ch.28 Costs paras 28.198 ff of the previous edition of this work.
- 220** PD 57AB.
- 221** PD 28 para.10.1.
- 222** 2025 WB 26.9.7. Indeed, some specialist jurisdictions of the High Court operate an informal threshold below which cases will generally be transferred to the county court. For example, the Technology and Construction Court will generally transfer cases worth less than £500,000 to the county court: see Technology and Construction Court Guide (2022) para.1.3.8; and see *West Country Renovations Ltd v McDowell [2012] EWHC 307 (TCC); [2013] 1 W.L.R. 416* [10] (discussing the informal threshold which the Technology and Construction Court previously applied, of £250,000). Where the High Court and county court have concurrent jurisdiction over a claim issued in the Chancery Division of the High Court, the claim will be “scrutinised” to see if it should remain in the High Court if its value is less than £500,000: Chancery Guide (2022), para.3.11(b).
- 223** CPR 26.9(1)(a)(ii)(cc).
- 224** CPR 26.9(1)(a)(ii)(aa).
- 225** CPR 26.9(1)(a)(ii)(bb) and CPR 26.10. The exceptions in CPR 26.10 are that the accident occurred before 31 May 2021; the claimant was a pedestrian, wheelchair-user, cyclist, motorcyclist or equestrian; the defendant’s vehicle was registered outside the United Kingdom; or the claimant was a child or undischarged bankrupt when the proceedings were started. CPR 26.9(2).
- 226** *Kearsley v Klarfeld [2005] EWCA Civ 1510* [18], [33].
- 227** In practice, however, oral expert evidence is rarely required at fast track trials.
- 228** It is suggested, however, that a claimant would not be able to include a spurious or wholly incidental claim for non-monetary relief (such as a declaration) in order to evade allocation to the intermediate track: see Jackson, Supplemental Report, Ch.7 para.1.5.
- 229** This might be the case, for example, where an individual of modest means who seeks an injunction to restrain a nuisance by a wealthy opponent needs to limit their adverse costs risk in order to be able to pursue their claim: see Jackson, Supplemental Report, Ch.7 para.1.5.
- 230** Insolvency (England and Wales) Rules 2016 r.12.1(2).
- 231** Cf. CPR 27.4 and PD 27A para.2.
- 232** Cf. CPR 27.14.
- 233** PD 26 para.9(1). See also PD 26 para.16(1) (court to allocate claims to the fast track where that is the normal track unless it believes that the claim cannot be dealt with justly on that track); CPR 26.9(7)(c)(iii)-(iv) (court to consider whether the claim can be justly and proportionately managed under the intermediate track procedure, and whether there are any “additional factors which would make the claim inappropriate for the intermediate track”, when determining whether the intermediate track should be treated as the normal track).
- 234** Though the court will not usually exercise its discretion in this way where the sum in dispute substantially exceeds the normal limit for a track: see, in the context of reallocation, *Maguire v Molin [2002] EWCA Civ 1083* [28].
- 235** Cf. Jackson, Supplemental Report at Ch.7, paras 3.2(iii) and 4.3. See also PD 26 para.16(3)(b), which makes a similar point in relation to the fast track, i.e. that the court’s extensive powers to control the evidence should be taken into account in assessing whether a claim can be heard within one day.
- 236** This was a point made by Jackson LJ in his Supplemental Report at Ch.7, paras 1.5 and 3.7–3.8.
- 237** *Khiaban v Beard [2003] EWCA Civ 358* [18].

239 *Akhtar v Boland* [2014] EWCA Civ 872 [23]–[24].

240 2025 WB 26.9.4.

241 Jackson, Supplemental Report, Ch.7 para.4.3.

242 CPR 26 and PD 26 are not clear on this point. However, on the fast track judgments will normally be given orally and consequential matters dealt with at the conclusion of the hearing; this therefore needs to be accommodated within the one-day trial estimate. On the intermediate track judgments will more frequently be reserved (cf. Jackson, Supplemental Report, Ch.7 para.4.11), but this is not a given. In any event, the intermediate track fixed costs rules make provision for consequential hearings which take place separately from the trial (see [CPR 45.50](#) and PD 45, Table 14, S12). Consequently, if the only reason why an intermediate track trial would take longer than three days is because there is a possibility of a separate consequential hearing, it is suggested that the court would be entitled to disregard this for the purposes of allocation.

243 See also Jackson, Supplemental Report, Ch.7 para.3.2(viii). In relation to the fast track, there is a slight qualification to the position in that a claim may not be allocated to that track where the trial will last more than one day and the reason for this is that the case involves a counterclaim or additional claim that will be tried with the main claim (PD 26 para.16(3)(e)).

244 Cf. PD 26 para.16(3)(b); [CPR 26.9\(7\)\(c\)\(i\)](#); and see Jackson, Supplemental Report at Ch.7, paras 3.2(iii) and 4.3.

245 See also [Ch.22 Trial and Evidence](#) paras 22.13 ff.

246 See, in relation to the pre-CPR small claims arbitration system, *Afxal v Ford Motor Co Ltd* [1994] 4 All ER 720, 734.

247 This does not apply to claims for noise-induced hearing loss which are governed by the fixed costs rules in [CPR 45 Section VIII](#). Unlike the fixed costs rules applicable to the fast track and intermediate track more widely, the rules in [CPR 45 Section VIII](#) do not calculate costs by reference to complexity bands, but only by reference to the number of defendants and the point at which the claim settled or was otherwise disposed of.

248 I.e. the Pre-action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents.

249 Perhaps for this reason, Jackson LJ proposed that in intermediate track cases the court should have an opportunity to revisit the complexity band assigned at the case management conference, at which point it would have the benefit of the parties' submissions: see his Supplemental Report at Ch.7, para.3.11. Unfortunately this proposal was not carried over into the rules, which instead only permit reassignment where there has been a change of circumstances: see [CPR 26.18\(3\)](#) and below, para.[12.130](#).

250 As noted above at para [12.107](#), certain specialist proceedings are automatically allocated to the multi-track such that [CPR 26](#) does not apply. Courts handling proceedings of these kinds employ their own processes for obtaining early information about the case, rather than following the procedure described in this section. For example, the Technology and Construction Court sends out a case management information sheet and a case management directions form: see PD 60 para.8.2; and the Technology and Construction Court Guide (2022) at para.5.3.

251 The court will serve LiPs with the questionnaire ([CPR 26.4\(2\)](#)). PD 26 paras 2–4 sets out further information concerning directions questionnaires.

252 For example, where a party in a designated money claim fails to file a directions questionnaire by the date specified in the notice of proposed allocation, [CPR 26.4\(9\)](#) empowers the court to serve a further notice requiring them to comply within seven days. If they remain in default their statement of case will be struck out without further order ([CPR 26.4\(9\)\(b\)](#)).

253 [CPR 26.17](#) requires notice of the court's decision on allocation and assignment to be served on each party.

254 Cf. [CPR 26.4\(10\)\(a\)](#) and [CPR 26.7\(4\)](#).

255 *Conlon v Royal Sun Alliance Insurance plc* [2015] EWCA Civ 92 [19].

256 *Kearsley v Klarfeld* [2005] EWCA Civ 1510 [18], [33].

257 See further [Ch.25 Appeal](#) paras 25.234–25.235.

258 But where the claim was originally allocated to the fast track or the intermediate track, there is no such discretion. The potential injustice of this is discussed in Ch.28 Costs para.28.148.

259 *Maguire v Molin* [2002] EWCA Civ 1083 [28].

260 Cf. *Tibbles v SIG Plc (t/a Asphaltic Roofing Supplies)* [2012] EWCA Civ 518; [2012] 1 W.L.R. 2591.

261 *Maguire v Molin* [2002] EWCA Civ 1083 [25]–[26].

262 In *Jones v Beaumont Premier Properties Ltd* [2006] EWHC 1143 (QB), the court refused to allow an amendment to a claim so as to increase the value (and, incidentally, move the case into a different track) after liability had been determined in favour of the claimant. Cox J held that the amendment would prejudice the defendant, who would have assessed both the appropriate level of resources to expend in defending the liability aspect of the claim, and the desirability of appealing, by reference to the amount initially claimed.

263 2025 WB 27.8.1.

- 264 See the discussion of the rules governing second appeals in [Ch.25 Appeal paras 25.37 and 25.108 ff.](#)
- 265 See also PD 27 para.4.3(3)–(4).
- 266 See WB 2025 27.11.3–27.11.5.
- 267 Pre-action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents.
- 268 Pre-action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims.
- 269 *Akhtar v Boland [2014] EWCA Civ 943* [7]; see also 2025 WB 27.14.4.
- 270 *Dammermann v Lanyon Bowdler LLP [2017] EWCA Civ 269* [30]; see further 2025 WB 27.14.4.
- 271 CPR 27.2(1)(g).
- 272 *Chaplair Ltd v Kumari [2015] EWCA Civ 798* [37].
- 273 Although in some fast track cases, disclosure will already be complete or the parties may agree that no further disclosure is required, especially if the parties have adequately complied with the pre-action protocols which will have involved exchanging the most important documents relating to the dispute.
- 274 Cf. PD 28 para.2.7.
- 275 Cf. [CPR 39.4](#). See WB 2025 28.5.7 for a specimen timetable for a one-day trial.
- 276 Ch.28 Costs paras 28.153 ff and 28.156 ff.
- 277 See Jackson, Supplemental Report, Ch.7 paras 1.3 and 4.1.
- 278 As noted at para.[12.121](#), given the difficulty of ascertaining the appropriate complexity band for an intermediate track case it might be thought that the case management conference would be the best time to determine (or at least revisit) this, the court having had the benefit of the parties' submissions. Indeed, this formed part of Jackson LJ's proposals: see his Supplemental Report at Ch.7, para.3.11. Unfortunately this proposal is not reflected in the rules, which instead only permit reassignment where there has been a change of circumstances: see [CPR 26.18\(3\)](#) and above, para.[12.130](#).
- 279 Cf. PD 45 Table 14, S.12.
- 280 Ch.28 Costs paras 28.153 ff and 28.158 ff.
- 281 For an example of the approach taken to docketing judges for case management, see the Chancery Guide (2022) at paras 16.19 ff. For a discussion of the advantages of docketing, see Lord Neuberger MR, "Docketing: Completing Case Management's Unfinished Revolution, 9th Lecture in the Implementation Programme", speech delivered at the Solicitors' Costs Conference 2012, London, 9 February 2012.
- 282 Cf. PD 29 para.4.12.
- 283 See Commercial Court Guide (2022) paras D4.1, D5.1 and D6.1.
- 284 *Collins v Gordon [2008] EWCA Civ 110* [2].
- 285 *WL Gore & Associates GmbH v Geox SPA [2009] EWCA Civ 622* [25].
- 286 For examples of listing policies in the High Court, see the King's Bench Guide (2025) para.10.91(2); Chancery Guide (2022) paras 6.84–6.87.
- 287 2025 WB 29.6.1.
- 288 See for example the King's Bench Guide (2025) para.10.87; Chancery Guide (2022) para.11.5.
- 289 See the King's Bench Guide (2025) para.10.84; Chancery Guide (2022) para.11.1.

Shorter and Flexible Trials Schemes

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 12 - Case Management & Enforcing Party Compliance

Part I—Techniques for Case Management

Shorter and Flexible Trials Schemes

- 12. 163** PD 57AB provides for Shorter and Flexible Trials Schemes to operate in the Business and Property Courts (PD 57AB para.1.2). The schemes provide for pre-trial procedures that are very different from those employed in the conventional tracks. Although there is no specific reference to the multi-track in PD 57AB, it is clear that the schemes are intended for cases that would otherwise sit within the lower echelons of the multi-track claims heard in the relevant jurisdictions of the High Court. Unlike allocation to the conventional tracks, use of the process laid down by the schemes is primarily controlled by the parties themselves rather than the court.

Shorter Trials Scheme

- 12. 164** The Shorter Trials Scheme aims to reduce the length of trials to no more than four days, including reading time (PD 57AB para.2.3).
- 12. 165** A claimant can unilaterally opt into the Shorter Trials Scheme by indicating this choice on the claim form (PD 57AB para.2.8). The defendant can agree to the claimant's election or may apply to have the case transferred out of the scheme (PD 57AB para.2.9). Where the defendant has agreed to the scheme but the claimant subsequently changes its mind, the claimant may also apply to have the case transferred out even though PD 57AB makes no express provision for this.²⁹⁰ Equally, the court may transfer a case out of the scheme of its own initiative, to ensure that claims that are inappropriately started in the scheme do not remain in it just because the defendant has failed to raise an objection.²⁹¹ If a claim does not begin life in the scheme, either party may apply to transfer it in (PD 57AB para.2.12). The court may, of its own initiative, "suggest" that a case would be suitable for transfer into the scheme, although it has no power to order this if neither of the parties wants it (PD 57AB para.2.13). Thus, entry into the scheme is initially driven by the parties, but once a dispute has arisen about whether a case should proceed in the scheme the decision rests with the court; in this sense, entry into the scheme cannot be said to be entirely consensual. Moreover, the court retains ultimate control over transfer out of the scheme regardless of the wishes of the parties.
- 12. 166** As a general rule, any application to transfer a case in or out of the scheme should be made prior to the first case management conference so that it can be determined at that stage (PD 57AB paras 2.9, 2.12, 2.35). Given the marked difference between the procedure conventionally followed in multi-track cases and that applicable under the Shorter Trials Scheme, it would not normally be desirable for substantial progress to be made under one route before switching to the other. At the same time, where a case is proceeding in the scheme its suitability should be kept under review and an order for transfer out made if necessary.²⁹² In deciding whether a case should proceed under the scheme, the court will consider the overriding objective, the types of case for which the scheme is intended and generally suitable (see PD 57AB paras 2.2-2.3), in particular whether the case can be properly accommodated within a four-day trial,²⁹³ and the parties' wishes (PD 57AB para.2.14). The scheme will not normally be suitable for claims involving allegations of fraud or dishonesty; requiring extensive disclosure; involving multiple issues or multiple parties; in the Intellectual Property Enterprise Court; or relating to public procurement (PD 57AB para.2.2).

12. 167

As indicated above, the Shorter Trials Scheme makes fairly radical changes to the court process that would otherwise be followed in a multi-track case, beginning with the pre-action letter of claim. If the claimant intends to opt into the scheme, the pre-action protocols are disapplied (PD 57AB para.2.16). Instead, the claimant should generally send a pre-action letter of claim notifying the defendant that it intends to opt into the scheme (PD 57AB para.2.18), and giving succinct but sufficient details of the claim to enable the defendant to understand and to investigate the allegations (PD 57AB para.2.17). The defendant should respond within 14 days, agreeing to or opposing the claim being heard under the scheme, or seeking further information (PD 57AB para.2.19). Proceedings should then be started promptly following the defendant's response (PD 57AB para.2.24), and the particulars of claim must be served with the claim form (PD 57AB para.2.20).

- 12. 168** The particulars of claim should include a brief summary of the dispute that identifies the anticipated issues, a full statement of remedies claimed, and detailed calculations of any sums claimed (PD 57AB para.2.21). They should be no more than 20 pages in length (PD 57AB 2.22)²⁹⁴ and should be accompanied by what is described as a bundle of "core documents" (PD 57AB para.2.23). Similar requirements apply to the defence (PD 57AB paras 2.30–2.32). The meaning of "core documents" is not explained in the practice direction, but the concept is likely to approximate in practice to the scope of "initial disclosure" in PD 57AD para.5.1. PD 57AB para.2.32 suggests that "core documents" are those on which a party intends to rely, whilst "initial disclosure" under PD 57AD para.5.1 is disclosure of "(1) the key documents on which [a party] has relied (expressly or otherwise) in support of the claims or defences advanced in its statement of case (and including the documents referred to in that statement of case); and (2) the key documents that are necessary to enable the other parties to understand the claim or defence they have to meet".²⁹⁵ The standard of disclosure under the scheme could hardly be wider than under PD 57AD, because this would contradict the scheme's purpose of enabling shorter trials than would otherwise be available in the Business and Property Courts.
- 12. 169** At the case management conference, in addition to considering the suitability of the case for the Short Trials Scheme, the court will review and approve a list of issues prepared by the parties, give directions for trial and fix a trial date or period which is not more than eight months after the conference (PD 57AB para.2.38). Disclosure is limited to documents upon which the parties rely and those specifically requested by the other side, unless the parties agree or the court orders otherwise (PD 57AB para.2.42).²⁹⁶ Witness statements generally stand as evidence in chief, are limited to 25 pages in length and may be limited to identified issues (PD 57AB para.2.44–2.45). Expert evidence is generally given by written reports, with oral evidence limited to identified issues (PD 57AB para.2.46). Interim applications are dealt with without a hearing (unless a hearing is "necessary"), and are subject to tight time limits (PD 57AB para.2.48). To accommodate the condensed procedural timetable envisaged by the scheme, the parties' usual ability to agree extensions of time under **CPR 2.11** and **CPR 3.8(4)** is dispensed with and they may instead only extend deadlines by agreement up to seven days (PD 57AB para.2.49). According to PD 57AB para.2.50, material submitted late by a party in breach of a deadline will only be allowed to be relied upon at trial in "exceptional circumstances" (implying an even more exacting approach to such applications than where **CPR 3.9** is engaged).
- 12. 170** At the trial itself, the court will manage the trial so that the trial estimate is adhered to, save in exceptional circumstances (PD 57AB para.2.53). The court will endeavour to hand down judgment within six weeks of the trial or final written submissions (PD 57AB para.2.55). Costs are determined summarily except in exceptional circumstances (PD 57AB para.2.59), based on schedules of costs filed within 21 days of the end of the trial (PD 57AB para.2.57).

Flexible Trials Scheme

- 12. 171** The Flexible Trials Scheme enables parties to adapt the pre-trial procedure to suit their particular case by agreement—for example, in relation to disclosure, witness evidence, expert evidence and submissions at trial (PD 57AB para.3.1). At the same time, the aim is to reduce costs, reduce the time required for trial and enable earlier trial dates to be obtained, by calibrating the scope of disclosure and oral evidence precisely to the minimum necessary for fair resolution of the dispute (PD 57AB para.3.3).
- 12. 172**

The parties opt into the Flexible Trials Scheme by agreeing in advance of the first case management conference and informing the court accordingly (PD 57AB para.3.6). Unless there is good reason to order otherwise, the court will give directions in accordance with the parties' agreement (PD 57AB para.3.8). Unlike the Shorter Trials Scheme, there are no rules preventing the application of the Flexible Trials Scheme to cases alleging fraud or dishonesty.

- 12.173 PD 57AB para.3.9 sets out the standard directions made when the Flexible Trials Scheme is adopted. However, the parties are free to agree variations to the standard directions in advance of the first case management conference (PD 57AB para.3.7) and, again, the court should follow their agreement unless there are good reasons to order otherwise (PD 57AB para.3.8). However, where the variation seeks wider disclosure than is envisaged by PD 57AB para.3.9(a), the parties should limit it to particular defined issues.
- 12.174 The standard directions limit disclosure to documents relied upon and documents a party actually knows adversely affect its case, adversely affect another party's case or support another party's case, without any need for searches (PD 57AB para.3.9(a)). However, parties remain entitled to request specific disclosure from other parties (PD 57AB para.3.9(a)). Further, the standard directions provide that witness evidence (including expert evidence) will be given by written statements, and oral evidence limited to identified issues or identified witnesses (PD 57AB para.3.9(c)–(d)). Where an issue is to be determined at trial based on written evidence, it is not necessary for the party to put its case to the other party's witnesses; where an issue is to be determined on the basis of oral evidence, it is only necessary for the party to put the principal parts of its case to the other party's witnesses (PD 57AB para.3.9(f)). Submissions are generally made in writing, with cross-examination and oral submissions subject to time limits (PD 57AB para.3.9(e)).
- 12.175 The effect of the Flexible Trials Scheme is to move further away from the traditional common law adversarial proceeding—with its “cards on the table” approach to disclosure, emphasis on live evidence to test witnesses’ credibility and preference for oral advocacy to test parties’ arguments—and to bring the trial process closer to the civil law or arbitration model. These systems favour limited or specific disclosure, and focus on documentary evidence and written advocacy. It may be that, by facilitating proceedings which mimic the more permissive and cost-effective arbitration process, but in the English courts and therefore with the guarantee of judicial impartiality and state enforcement, the scheme draws to English courts litigants who might otherwise opt for private modes of dispute resolution.

Footnotes

- 290 *Sprint Electric Ltd v Buyer's Dream Ltd [2019] EWHC 1853 (Ch).*
- 291 *Family Mosaic Home Ownership Ltd v Peer Real Estate Ltd [2016] EWHC 257 (Ch), [2016] 4 W.L.R. 37.*
- 292 *EMFC Loan Syndications LLP v The Resort Group Plc [2021] EWCA Civ 844* [110]–[111]; and see *DBE Energy Ltd v Biogas Products Ltd [2020] EWHC 1232 (TCC)* [12].
- 293 *Excel-Eucan Ltd v Source Vagabond System Ltd [2018] EWHC 3864 (Ch)* [16].
- 294 Where a case is transferred into the Shorter Trials Scheme, it may be disproportionate to require the parties to redraft or amend their pleadings to comply with these requirements: *Family Mosaic Home Ownership Ltd v Peer Real Estate Ltd [2016] EWHC 257 (Ch), [2016] 4 W.L.R. 37* [22].
- 295 See further Ch.15 Disclosure paras 15.31 ff.
- 296 To this end, PD 57AD does not apply to cases within the scheme (PD 57AD para.1.4(5)), nor does CPR 31.5(2) or CPR 31.7 (PD 57AB para.2.39).

Introduction

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Mainwork

Chapter 12 - Case Management & Enforcing Party Compliance

Part II—Enforcing Party Compliance

Introduction

12. 176 The court's duty actively to manage cases necessitates the availability of powers to enforce party compliance with rules, practice directions and orders. These powers are conferred by the rules, but may also take their source from the court's inherent power to control its own process. So, for example, the court has an inherent jurisdiction to protect its process from abuse by committing a party for contempt arising from an interference with the proper administration of justice, a power which extends to abuse of pre-action protocols.²⁹⁷ In addition to the power to commit for contempt, the court has the ability to impose cost sanctions on parties post-issue for non-compliance with the pre-action protocols.²⁹⁸
12. 177 Powers to enforce compliance come into play in a wide variety of circumstances. They can arise whenever a party has failed to comply with its pre-action responsibilities; seeks an extension of time for fulfilling its process requirements post-issue; seeks relief from any sanction applicable in consequence of a procedural default; seeks permission for late amendment of statements of case; or seeks to amend case management directions. Since effective case management depends upon party compliance with the rules, the court's approach to non-compliance will in the end determine the nature, duration and effectiveness of the litigation process. More broadly, it will shape the culture of litigation and the attitude of the legal profession, since only if it is well-understood that procedural default will not be tolerated will a culture of efficiency and compliance become embedded among litigants and their representatives.
12. 178 As we have seen in Ch.1, the parties' responsibilities and the court's discretionary powers must be exercised with a view to promoting the overriding objective. Parties must assist the court in furthering the overriding objective through, for instance, ensuring that they conduct litigation efficiently and proportionately (CPR 1.3).²⁹⁹ As seen earlier in this chapter, the court must further the overriding objective by actively managing cases (CPR 1.4(1)), including encouraging party co-operation, deciding the order in which to resolve the issues, encouraging (and if necessary, compelling) the parties to engage in ADR, fixing the timetable, and making cost-benefit assessments of taking particular procedural steps (CPR 1.4(2)).
12. 179 Just as case management decisions are necessarily fact-sensitive, so too is the exercise of the court's powers to enforce compliance with rules and orders. At the same time, however, the exercise of these powers must be broadly predictable in order to enable the parties to know what is expected of them and what they can expect from the court. Litigants must have some means of predicting how the court will view their pre-action conduct should litigation commence, or how it will respond to an application for an extension of time or to failure to perform certain process requirements. Of course, discretionary powers cannot be reduced to a set of hard-and-fast rules, capable of mechanical application. But coherent principles, policies and guidelines for the exercise of discretion are both achievable and necessary. In the absence of a well-articulated set of standards, case management is likely to become unpredictable, which in turn is bound to give rise to wasteful satellite litigation that undermines the efficiency of the civil justice system. Over the years, therefore, the court has progressively developed principles and policies to guide the exercise of its case management and compliance powers.
12. 180 Principles and policies are of particular importance in relation to the enforcement of process requirements and dealing with litigant default. The powers that the court possesses under the CPR to excuse defaults and to allow defaulting parties further opportunities to comply are similar to those that it had under the Rules of the Supreme Court (RSC) and the County Court

Rules (CCR). As before, failure to comply with rules does not invalidate any step taken in the proceedings and the court may either set aside the defective step or remedy the error (CPR 3.10). The court continues to have the power to extend the time for compliance with any rule or court order even after the expiry of the relevant deadline (CPR 3.1(2)(a)). Much of the failure of the old system could be attributed to the judiciary's willingness to forgive party failure to comply with process deadlines, which resulted in a culture of lax compliance.³⁰⁰

- 12.181 The power to forgive defaults, litigant-induced delay and other forms of non-compliance must be exercised in the interests of the civil justice system as a whole and so as to further the overriding objective. Since the best-laid case management plans would be worthless if litigants did not fulfil their process obligations by the relevant deadlines, the success of the pre-action protocols and of court control of proceedings depends on the court's ability to secure good standards of compliance. As explained in Ch.1, the criterion for success is whether the court is able to manage disputes so that those which cannot settle are determined at trial within a reasonable time and at proportionate cost. Until relatively recently the court often fell short of this goal, despite Lord Woolf's reforms.³⁰¹ All too often the court tolerated litigant failure to comply with rules and court orders, beyond what was warranted by the overriding objective, and thereby undermined its utility.³⁰² Lately, however, the court has developed a more exacting approach to non-compliance, with the result that the court is now less likely to tolerate inexcusable defaults.³⁰³ The change of approach was initiated by Jackson LJ's reports,³⁰⁴ which resulted in amendments to the overriding objective and the rule governing relief from sanctions in 2013 (although the precise approach taken to relief from sanctions was not that recommended in Jackson LJ's Final Report).³⁰⁵ Lord Dyson MR stressed that these reforms were designed to ensure that the court became less tolerant of non-compliance than previously.³⁰⁶ How that approach presents in practice is addressed below.

Footnotes

297 *Jet2Holidays Ltd v Hughes [2019] EWCA Civ 1858; [2020] 1 W.L.R. 844.*

298 CPR 44.2(5).

299 *Gotch v Enelco Ltd [2015] EWHC 1802 (TCC); [2015] TCLR 8 [42]–[49].*

300 See discussion in Ch.1 Overriding Objective paras 1.5 ff. Also see *John Calden (Administrator of the Estate of Amanda Calden) v Dr Nunn & Partners [2003] EWCA Civ 200* [42] where Brooke LJ criticised "how litigation of this kind was conducted in the pre-CPR days when matters were habitually delayed until far too late, and then the parties' experts had to be put to inconvenience to meet the dictates of a fast-approaching trial."

301 Lord Woolf, Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales (London: HMSO, 1996) (hereinafter "Woolf, Interim Report"); Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales (London: HMSO, 1996) (hereinafter "Woolf, Final Report"). As noted by Lord Dyson MR in *Denton v TH White Ltd [2014] EWCA Civ 906; [2014] 1 W.L.R. 3926 [81]*, the approach taken to non-compliance following the CPR's introduction was redolent of the pre-CPR approach, which understood the court's role to be to secure justice on the merits above all else.

302 *Fred Perry (Holdings) Ltd v Brands Plaza Trading Ltd [2012] EWCA Civ 224.*

303 Following the landmark cases of *Mitchell v News Group Newspapers Ltd [2013] EWCA Civ 1537; [2014] 1 W.L.R. 795*; and *Denton v TH White Ltd [2014] EWCA Civ 906; [2014] 1 W.L.R. 3926*. See also *Global Torch Ltd v Apex Global Management Ltd (No 2) [2014] UKSC 64; [2014] 1 W.L.R. 4495; Su-Ling v Goldman Sachs International [2015] EWHC 759 (Comm).*

304 Jackson LJ, Review of Civil Litigation Costs: Preliminary Report (London: HMSO, 2009) (hereinafter "Jackson, Preliminary Report"); Jackson LJ, Review of Civil Litigation Costs: Final Report (London: HMSO, 2010) (hereinafter "Jackson, Final Report").

305 *Denton v TH White Ltd [2014] EWCA Civ 906; [2014] 1 W.L.R. 3926 [33]–[34];* and see below, paras 12.225 ff.

306 Lord Dyson MR, "The Application of the Amendments to the Civil Procedure Rules: 18th Lecture in the Implementation Programme", speech delivered at the District Judges' Annual Seminar, Judicial College, 22 March 2013; Lord Dyson, "The Jackson Reforms and Civil Justice" in Justice: Continuity and Change (Oxford: Hart, 2018). See the discussion in Ch.1 Overriding Objective paras 1.2–1.4 and 1.34 ff.

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Consequences of Failure to Comply With Process Requirements

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Mainwork

Chapter 12 - Case Management & Enforcing Party Compliance

Part II—Enforcing Party Compliance

Consequences of Failure to Comply With Process Requirements

12. 182 A rough distinction may be drawn between pre-determined consequences of party default, and consequences that are determined by the court in response to the default. The consequence of non-compliance with process requirements are sometimes stated by the CPR. For instance, [CPR 3.7A1](#) provides that where a claimant has failed to pay the trial fee after being sent a fee notice the claim will be struck out. In other instances, sanctions for non-compliance are set out in a court order. As will be explained below, this distinction is of no great significance in practice because the court has discretion to grant relief from sanctions.

Pre-determined consequences take effect automatically, subject to relief from sanctions

12. 183 [CPR 3.8\(1\)](#) states:

“Where a party has failed to comply with a rule, practice direction or court order, any sanction for failure to comply imposed by the rule, practice direction or court order has effect unless the party in default applies for and obtains relief from the sanction.”

“Sanction” refers to any adverse consequence to a party. As Leggatt J explained in *Summit Navigation Ltd v Generali Romania Assigurare Reasigurare SA*:

“The term ‘sanction’ seems to me apt to include any consequence adverse to the party to whom it applies. I also consider that it makes much better sense to construe CPR 3.8 and 3.9 as a coherent scheme rather than as drawing a distinction between a ‘consequence’ of failure to comply and a ‘sanction’ for failure to comply with a rule, practice direction or court order. I interpret r.3.8(3) [which refers to “the consequence of failure to comply”] and r.3.8(1) as dealing with the same situation, in the one case before, and in the other case after, the time specified for doing an act has expired. I can see no sensible reason for supposing that the provisions were not intended to be symmetrical. It follows that any application to disapply a consequence specified in a court order for failing to do something within a time specified in the order is an application for relief from a ‘sanction’ within the meaning of these rules.”³⁰⁷

12. 184 Accordingly, where an order specifies that a defendant’s defence will be struck out unless they provide disclosure by a certain date, if the defendant defaults its defence will cease to be valid.³⁰⁸ Where a claim has been struck out for non-compliance with an unless order, the claimant’s acceptance of a [CPR 36](#) offer would be of no consequence since there is no longer a claim to be settled.³⁰⁹

12. 185

Once CPR 3.8(1) has bitten, the only way that the party in default can avoid the sanction is by applying for relief from the sanction, which is decided by reference to the two considerations listed in CPR 3.9 (discussed further below). The consequences of CPR 3.8 cannot be circumvented by invoking the general power to extend time in CPR 3.1(2)(a). A party in default may pre-empt the sanction by seeking an extension of time for performing the required procedural step before the deadline for compliance with the unless order has expired (i.e. before the sanction has taken effect).³¹⁰ For example, a party who has been made subject to an unless order to give disclosure by a certain time may apply for an extension of time prior to expiry of the period. If an extension is granted but the unless order is not altered otherwise, the original sanction will automatically come into effect upon the expiry of the extension, if the party still fails to comply within the extended period.

Obtaining judgment following automatic strike-out

12. 186 CPR 3.5 provides:

Rule 3.5

“(1) This rule applies where—

(a) the court makes an order which includes a term that the statement of case of a party shall be struck out if the party does not comply with the order; and

(b) the party against whom the order was made does not comply with it.

(2) A party may obtain judgment with costs by filing a request for judgment if—

(a) the order referred to in paragraph (1)(a) relates to the whole of a statement of case; and

(b) where the party wishing to obtain judgment is the claimant, the claim is for—

(i) a specified amount of money;

(ii) an amount of money to be decided by the court;

(iii) delivery of goods where the claim form gives the defendant the alternative of paying their value; or

(iv) any combination of these remedies.

(3) Where judgment is obtained under this rule in a case to which paragraph 2(b)(iii) applies, it will be judgment requiring the defendant to deliver goods, or (if he does not do so) pay the value of the goods as decided by the court (less any payments made).

(4) The request must state that the right to enter judgment has arisen because the court’s order has not been complied with.

(5) A party must make an application in accordance with Part 23 if they wish to obtain judgment under this rule in a case to which paragraph (2) does not apply.”

12. 187 This rule applies where a party’s statement of case has been struck out automatically following non-compliance (for example, under CPR 3.7–3.7AA for non-payment of certain fees or under CPR 3.8 following non-compliance with an unless order).³¹¹ It does not apply where the court makes a striking-out order under CPR 3.4(2) (in which case the court would normally give the non-defaulting party such judgment as it is entitled to at the same time as ordering the strike out).³¹²

12. 188 Where the conditions of CPR 3.5(2) are fulfilled, default judgment is obtainable by request. A default judgment by request is an administrative act not involving any judicial consideration.³¹³ A defendant may obtain a judgment by request whenever the whole of the statement of case is struck out, and, if the party seeking judgment is the claimant, where their claim is for money. In all other cases—that is, where a statement of case has only been partially struck out, or where a claimant cannot bring themselves within the conditions of CPR 3.5(2)(b)—a default judgment can be obtained only by making an application to the court (CPR 3.5(5)).³¹⁴ A court dealing with such an application will give such judgment as the non-defaulting party is entitled to obtain on the basis of its own statement of case.
12. 189 Whether default judgment is sought by way of a request under CPR 3.5(2) or by application to the court under CPR 3.5(5), it may obviously only be granted if there has in fact been a breach of a rule or order so as to result in automatic striking out. If, for example, a party applies for judgment under CPR 3.5(5) following non-compliance with an unless order, it would need to be shown that the defaulting party had breached the order (and if there is a dispute about this, the application for default judgment must be supported by evidence setting out in sufficient detail the nature and extent of the alleged default). It is not open to the defaulter to raise objections to the underlying unless order at the hearing of the application, since the court at that stage is only concerned to determine whether the order was complied with.³¹⁵ Since a request for default judgment is made without notice to the respondent and does not involve judicial consideration, provision is made for the respondent to have the judgment set aside as of right if the conditions for default judgment were not fulfilled at the time it was entered (CPR 3.6(3)). This would occur, for instance, where a defendant was ordered to pay money into court on pain of being struck out, and the claimant obtained judgment under CPR 3.5 even though the defendant did pay the requisite sum in, or judgment was entered before the time for paying in had expired. To preserve certainty and to encourage respondents to come forward quickly with disputes about the validity of judgments entered under CPR 3.5, a default judgment may be set aside as of right under CPR 3.6(3) only if the application is made within 14 days of the judgment being served (CPR 3.6(2)).
12. 190 In other circumstances, the defaulting party may seek to avoid default judgment being entered by making an application for relief from sanctions under CPR 3.9 (discussed further below). Thus, where an application is required under CPR 3.5(5), the respondent would be free to counter with an application for relief from sanctions. Equally, recourse may be had to CPR 3.9 where default judgment has been entered and the party against whom it was given cannot have it set aside as of right under CPR 3.6(3), for example because 14 days have elapsed since service of the judgment, or because the judgment was properly entered in the first place (CPR 3.6(4)).

Consequences determinable after the default

12. 191 Where the consequences of party default are not laid down by the rules and have not been stipulated by an order, they may be determined by the court. The court may act of its own motion, or upon application by one of the parties. Where a party fails to comply with a direction given by the court, any other party may apply for an order that the defaulting party must do so, or for a sanction to be imposed, or both (PD 28 para.5.1 and PD 29 para.7.1). A party wishing to make such an application must do so without delay and should first warn the other party of its intention to do so (PD 28 para.5.2 and PD 29 para.7.2).
12. 192 The CPR provide the court with a wide range of measures with which to respond to party default. At one extreme the court has a wide power to extend or shorten the time periods for the performance of process duties (CPR 3.1(2)(a)).³¹⁶ It also has a wide power to rectify errors of procedure under CPR 3.10. On the other hand, it may impose conditions on the party's continued participation in the litigation process (CPR 3.1(3)),³¹⁷ or it may order payment of a sum of money into court, for instance under CPR 3.1(5). There are many other possible responses. For example, the court may discharge an interim injunction granted to the claimant if it considers that the claimant has unreasonably protracted the process while benefiting from the restraint imposed on the defendant. Where a personal injury claimant has been guilty of persistent defaults, the court may refuse them permission

to expand their claim by adding new heads of loss, or permission to rely on new experts. In *Price v Price*, it appeared that the claimant delayed serving particulars of claim because he did not like proceeding on the basis of an expert report for which he had obtained the agreement of the defendants' insurers.³¹⁸ The Court of Appeal held that the just and proportionate outcome to the application for an extension of time to serve particulars of claim was to grant an extension on condition that no claim was made other than what could be substantiated by reference to the initial expert report.

- 12.193 Striking out a statement of case is the most potent response to party default. The power is set out in [CPR 3.4\(2\)\(c\)](#), which provides that the court may exercise its power of strike out if it appears "that there has been a failure to comply with a rule, practice direction or court order". Striking out a statement of case in such circumstances is a very serious matter since it effectively decides the case against the defaulting party not on the merits but for procedural reasons. As with all the court's case management powers, its powers to determine the consequences of party default must be guided by the overriding objective. Where appropriate, regard must also be had to the right to fair trial under the ECHR art.6 (especially where the decision would effectively determine the case),³¹⁹ and to the possible impact of case management decisions on other Convention rights, such as freedom of expression under art.10.³²⁰ The principles which guide the court in relation to dismissal for want of prosecution and other forms of serious procedural default are discussed below, as are the principles which govern strike-out for other kinds of abuse of process.

Power to rectify procedural error

- 12.194 Under [CPR 3.10](#) the court has extensive discretion to remedy any procedural error. This includes errors of drafting such as applying for an extension of time to serve particulars of claim when the intention was to apply for an extension of time to serve the claim form,³²¹ or other technical errors.³²² However, while the rule permits the court to remedy procedural steps taken defectively, it does not permit the court to remedy procedural steps which erroneously were never taken at all, for in this case, there will not have been an erroneous failure to comply with the [CPR](#).³²³ Nor can [CPR 3.10](#) be used to override the requirements of other specific provisions in the rules. For example, [CPR 3.10](#) cannot be used to circumvent the requirement in [CPR 2.6](#) and [7.5](#) that claimants serve a sealed claim form within 4 months of issue, since [CPR 7.6\(3\)](#) expressly subjects the court's power to extend time for serving the claim form after the period of service has expired to the fulfilment of certain necessary conditions.³²⁴ In other words, although [CPR 3.10](#) is to be read widely, "an error of procedure" for the purposes of the rule must be understood as an error in the procedure established by the [CPR](#) where the consequences are not otherwise prescribed by the rules, and which occurs after, not prior to, the valid commencement of proceedings.³²⁵

- 12.195 [CPR 3.10](#) should not be unduly restricted so as to deprive it of its utility: without it, "civil litigation would be even more beset by technicalities than it is already".³²⁶ So, where a defendant makes clear its intention to dispute the court's jurisdiction, but fails to tick the box on the acknowledgment of service form reflecting that intention and does not make the relevant application within 14 days of acknowledging service as required by [CPR 11\(4\)](#), [CPR 3.10](#) is in principle available to remedy the error so as to treat a later application to contest jurisdiction as having been made under [CPR 11\(1\)](#).³²⁷ Where the remedying power is available, it may be exercised in a variety of ways, stretching from allowing the process to go forward as if no error has occurred, at one extreme, to invalidating the process or striking out a party's statement of case, at the other.

Footnotes

307 *Summit Navigation Ltd v Generali Romania Assigurare Reasigurare SA* [2014] EWHC 398 (Comm); [2014] 1 W.L.R. 3472 [27].

- 308 *Marcan Shipping (London) Ltd v Kefalas* [2007] EWCA Civ 463; [2007] 1 W.L.R. 1864. For other instances see: *Tarn Insurance Services Ltd v Kirby* [2009] EWCA Civ 19; [2009] C.P. Rep. 22; and *Rybak v Langbar International Ltd* [2010] EWHC 2015 (Ch).
- 309 *Joyce v West Bus Coach Services Ltd* [2012] EWHC 404 (QB).
- 310 *Robert v Momentum Services Ltd* [2003] EWCA Civ 229; [2003] 1 W.L.R. 1577; and *Irwin Mitchell Solicitors v Patel* [2003] EWCA Civ 633.
- 311 CPR 3.7–3.7A1 impose specific sanctions for non-payment of certain court fees by claimants, whilst CPR 3.7A and 3.7AA make similar provision in respect of non-payment of certain fees by defendants. CPR 3.7B imposes sanctions for dishonoured cheques.
- 312 CPR 3.4(3); PD 3A para.4.2.
- 313 *Henriksen v Pires* [2011] EWCA Civ 1720 [12].
- 314 For a discussion of the difference between a default judgment by request and a default judgment by application see Ch.9 Disposal Without Trial.
- 315 *Marcan Shipping (London) Ltd v Kefalas* [2007] EWCA Civ 463; [2007] 1 W.L.R. 1864 [37].
- 316 See above, paras 12.41 ff.
- 317 *Biguzzi v Rank Leisure* [1999] 1 W.L.R. 1926 at 1932–1933, CA. See also *Walsh v Misseldine* [2000] All ER (D) 261 [69], [82], CA; and *Southern & District Finance Plc v Turner* [2003] EWCA Civ 1574 [34].
- 318 *Price v Price (t/a Poppyland Headware)* [2003] EWCA Civ 888.
- 319 *Decker v Hopcraft* [2015] EWHC 1170 (QB) [30].
- 320 *Giggs v Newsgroup Newspapers Ltd* [2012] EWHC 431 (QB).
- 321 *Steele v Mooney* [2005] EWCA Civ 96; [2005] 2 All ER 256.
- 322 *Hillingdon LBC v Vijayatunga* [2007] EWCA Civ 730.
- 323 *London Borough of Ealing v Persons Unknown* [2021] EWHC 2132 (QB) [27]–[30].
- 324 *Vinos v Marks & Spencer Plc* [2001] 3 All ER 784, CA; *Ideal Shopping Direct Ltd v Mastercard* [2022] EWCA Civ 14; [2022] 1 W.L.R. 1541 [146]–[153]; cf. *Pitalia v NHS England* [2023] EWCA Civ 657; [2023] 1 W.L.R. 3584.
- 325 *Peterson v Howard de Walden Estates Ltd* [2023] EWHC 929 (KB); [2023] 1 W.L.R. 3057. So, failure to take a step required to be taken prior to the commencement of a claim (such as failure to pay the correct fee) is not a matter capable of rectification under CPR 3.10.
- 326 *Pitalia v NHS England* [2023] EWCA Civ 657; [2023] 1 W.L.R. 3584 [32(ii)].
- 327 *Pitalia v NHS England* [2023] EWCA Civ 657; [2023] 1 W.L.R. 3584. Where the power under CPR 3.10 is exercised in this way, the defendant would not be treated as having submitted to the court's jurisdiction under CPR 11(5).

Discretionary Relief from the Consequences of Party Default

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 12 - Case Management & Enforcing Party Compliance

Part II—Enforcing Party Compliance

Discretionary Relief from the Consequences of Party Default

Power to grant relief from sanctions on the court's own initiative

12. 196 The power to grant relief from sanctions may be exercised by the court on its own initiative, despite the fact that CPR 3.8(1) provides that sanctions have effect “unless the party in default applies for and obtains relief from the sanction”. According to Moore-Bick LJ, the rule makes mention of the defaulting party’s application only because it “naturally assumes that the party in default will make an application for relief”, not because the rule seeks to restrict the court’s jurisdiction to act of its own initiative in appropriate circumstances.³²⁸ At the same time, the court’s jurisdiction to act of its own motion “is one which is likely to be exercised only rarely”.³²⁹ Likewise, where an application for relief is made informally at a hearing, the court has power to entertain it but this power should be exercised sparingly, and only where the non-defaulting party is not disadvantaged by the informal nature of the application.³³⁰ The point is that CPR 3.8(1) places the onus firmly on the party in default to come to court for an order disapplying a sanction, and that it will usually be necessary for appropriately detailed evidence to be placed before the court to enable it to consider the various matters to which CPR 3.9 refers.

Scope of CPR 3.9

12. 197 CPR 3.9 applies only to applications for relief from sanctions that have been “imposed for failure to comply with any rule, practice direction or court order”. It comes into play most obviously where a step is required by a rule or order which expressly specifies the consequence that will be triggered by default. For example, CPR 3.9 would be engaged where the court has ordered a party to give disclosure, directed that its statement of case would be struck out if this has not been done by a certain time, and the party fails to comply.³³¹ Likewise where a party fails to serve a witness statement within the time specified by the court, such that CPR 32.10 operates to prevent the witness from being called without the court’s permission.³³² But CPR 3.9 does not apply where no sanction is imposed.³³³ For instance, where a party makes a late application for permission to adduce expert evidence in an additional discipline under CPR 35.4(1), that will not of itself engage CPR 3.9.³³⁴ Nor will an application to extend time for provision of a director’s witness statement pursuant to an *Island Records* order³³⁵ in a patent infringement case.³³⁶

12. 198 CPR 3.9 will equally apply where a sanction is imposed not as the automatic consequence of non-compliance, but as an additional step which nonetheless flows directly from the default—for example, the entry of a default judgment under CPR 12.3 where the defendant has failed to file an acknowledgment of service or a defence, or under CPR 3.5 where a statement of case has been automatically struck out.³³⁷ Assuming judgment has been properly entered so that there is no entitlement to have it set aside as of right under CPR 13.2 or CPR 3.6(3), CPR 3.9 would be engaged upon any application to have the judgment set aside or varied. Where, however, the court has acted of its own motion and without a hearing to determine a sanction following non-compliance with an earlier order, CPR 3.9 would not apply to an application by the defaulting party to vary or set aside the order imposing the sanction.³³⁸ In such circumstances, the starting point would not be (as it is in applications for relief under

CPR 3.9) that “the sanction has been properly imposed and complies with the overriding objective”,³³⁹ since the defaulting party has had no opportunity to persuade the court that this is not the case.

- 12. 199** There has also been a tendency to consider CPR 3.9 even where the default did not strictly speaking incur a sanction, but the existence of a sanction is the implicit consequence of the rule or order that has been breached. This application of the CPR 3.9 test, known as the “implied sanctions” doctrine,³⁴⁰ was advocated by Brooke LJ in *Sayers v Clarke Walker*, which concerned an application for permission to appeal out of time:

“[I]t is equally appropriate to have regard to ... CPR 3.9 when a court is considering an application for an extension of time for appealing in a case of any complexity. The reason for this is that the applicant has not complied with [what is now CPR 52.12(2)], and if the court is unwilling to grant him relief from his failure to comply through the extension of time he is seeking, the consequence will be that the order of the lower court will stand and he cannot appeal it. Even though this may not be a sanction expressly ‘imposed’ by the rule, the consequence will be exactly the same as if it had been, and it would be far better for courts to follow ... CPR 3.9 on this occasion, too, than for judges to make their own [guidelines] for cases where sanctions are implied and not expressly imposed.”³⁴¹

In *R (Hysaj) v Secretary of State for the Home Department*,³⁴² the Court of Appeal reviewed the authorities concerning the implied sanctions doctrine and affirmed the approach taken in *Sayers*. The implied sanctions doctrine has been taken to apply to out-of-time applications for an oral renewal following a refusal of permission to seek judicial review on the papers;³⁴³ and to applications for permission to file a respondent’s notice late, since a respondent who has failed to file its notice within the time limit specified in CPR 52.13 would be precluded from relying upon grounds that were not before the court below unless the application was granted.³⁴⁴

- 12. 200** In identifying whether a rule or order that has been breached carries with it an implied sanction, much will depend on “what the default position would be if no extension of time (or other relief) was granted”.³⁴⁵ If a party who wishes to take a particular step would be precluded from doing so as a result of their non-compliance unless that default was excused by the court, then the importance of applying a consistent approach to dealing with the consequences of default indicates that CPR 3.9 principles apply.³⁴⁶ This requires attention to be paid to the scheme of the relevant rules and the purpose for which a time limit has been imposed. For example, PD 16 paras 4.2 and 4.3 require personal injury claimants to attach to their particulars of claim a schedule of loss and any medical evidence on which they wish to rely. Yet it cannot be said to be implicit within those provisions that a claimant would be held to their failure to serve those documents with their particulars of claim, given the wide range of claims covered by PD 16 para.4, the fact that in many cases the losses the claimant has suffered and the medical evidence needed to support their claim will not be clear at the outset of the litigation, and the fact that it would normally be necessary to direct updated schedules of loss and medical evidence in any event.³⁴⁷ Unfortunately, these considerations have sometimes been overlooked. In *Viegas v Cutrale*, the Court of Appeal held that no implied sanction attached to CPR 17.2(2), such that a party who seeks to strike out pre-service amendments to a statement of case outside the 14-day period provided for in that rule need only obtain an extension of time under CPR 3.1(2)(a) in order to do so.³⁴⁸ In so deciding, the court relied on the dictum of Birss LJ in *Yesss (A) Electrical Ltd v Warren* that “the hurdle for identifying something as an unexpressed but implicit sanction must be a high one” and that “the scope for identifying any further implied sanctions over and above [the specific recognised instances of implied sanctions identified in *Sayers* and *Altomart Ltd v Salford Estates Ltd*] must be very narrow”.³⁴⁹ Elevating Birss LJ’s dictum to a statement of wider principle in this way has the unfortunate effect of artificially restricting the operation of the implied sanctions doctrine, and diverting attention from the important question of what the underlying policy of the rules dictates the default position should be if no extension of time is granted. In the case of CPR 17.2(2), the object of the 14-day time limit is to ensure that challenges to pre-service amendments are ventilated swiftly,³⁵⁰ and the obvious corollary of that time limit is therefore that late applications to disallow may not be made unless the court gives permission.³⁵¹ That being so, it is difficult to see why the starting point should not be that “the sanction [i.e. refusal to entertain such as application] has been properly imposed and complies with the overriding objective”.³⁵²

- 12. 201**

It has also been held that [CPR 3.9](#) should not be invoked where no sanction has been imposed yet (whether expressly or by implication), because the application for an extension of time is made *before* the expiry of the relevant time limit. This was the approach taken by the Court of Appeal in *Robert v Momentum Service Ltd.*³⁵³ In *Hallam Estates v Baker*,³⁵⁴ Jackson LJ endorsed the distinction drawn in *Robert v Momentum* without considering whether it was sustainable as a matter of principle. Consequently, in-time applications for extensions continue to be dealt with under [CPR 3.1\(2\)\(a\)](#) without reference to [CPR 3.9](#), even if considered by the court after the expiry of the time limit.³⁵⁵

- 12.202 However, it is doubtful whether such a distinction is properly justifiable because the question facing a court in both types of situation is essentially the same: whether a party should be allowed to perform the required process after the deadline set for compliance. True, where the deadline has not yet passed, the party has not yet defaulted on a process requirement. But this consideration would be significant only if the consequences of non-compliance were “sanctions” in the punitive sense of the word, so that the court would need to mete out punishment to the party who breached the rules or a court order. Since, as explained in Part I of this chapter,³⁵⁶ the consequences of default are not punitive in nature but merely procedural effects, it should make little difference whether the default has already taken place. It is difficult to see why, in a *Sayers* type of situation, an applicant for an extension of time who applies the day after the expiry of the time to appeal should be treated differently from one who has applied the day before the expiry of time.³⁵⁷
- 12.203 The Court of Appeal did however consider the factors relevant to [CPR 3.9](#) in relation to an in-time application to extend time in *Jalla v Royal Dutch Shell Plc.*³⁵⁸ Although the court accepted that the regime under [CPR 3.9](#) was not directly applicable because there had not yet been a failure to comply as at the date the extension of time was sought, in the circumstances the principles identified in *Denton v TH White Ltd*, considered below,³⁵⁹ were “applicable, at least by analogy, when considering the application of the overriding objective”.³⁶⁰ In *Jalla*, the claimants were required to serve pleadings setting out the dates on which they had each sustained damage so that the court could determine whether their claims were time-barred. They had already secured a number of extensions of time, the last one by agreement on the basis that there would be no further extensions and any application for another extension would be opposed by the defendants. On the last possible day for compliance, the claimants requested a further extension of time. The Court of Appeal considered the application analogous to one for relief from sanctions, because “[n]o extension of time meant no continuing claim for the vast majority of [the] claimants, just as if the [consent order] had indeed been an unless order”, and because the timing of the application was such that the claimants “were throwing themselves on the mercy of the court in order to prevent the vast majority of their claims from coming to a shuddering halt”.³⁶¹
- 12.204 Applying [CPR 3.9](#) in all situations where an applicant seeks to escape the consequences of a procedural default, past or future, has the advantage of enabling the court to develop an integrated approach to non-compliance. That is not to say that the timing of the application should make no difference; for example, where an application for an extension is made prior to expiry of the deadline, there is less likely to be prejudice to the opposing party. But these sorts of considerations can easily be accommodated by considering the application through the prism of [CPR 3.9](#), and should not result in a bright-line distinction between applications made before and after the expiry of a deadline. These arguments are bolstered by the fact that [CPR 3.9](#) has been streamlined and simplified. Whereas it might have been said previously that applying the old [CPR 3.9](#) whenever a party sought to depart from the set timetable would have the disadvantage of importing the complexities of the original [CPR 3.9](#) checklist into run-of-the-mill applications, this argument has no force today.
- 12.205 The way in which the court approaches the exercise of its discretion under [CPR 3.9](#) is discussed further below, along with the disadvantages of the approach which obtained prior to 2013 under the original rule. First, however, it is necessary to outline the interaction between the imposition and enforcement of process requirements, and general considerations of proportionality and the right of access to the court. As we shall presently see, a proper understanding of the nature of this interaction has significant implications for the exercise of the power to grant relief from the consequences of party default.

Proportionality, the right to fair trial and discretion in enforcing rules and orders

12. 206 By their very nature, rules of process impose restrictions on the conduct of litigation, such as time limits for fulfilling process requirements, or conditions for participating in the process, including the requirement of documentary disclosure or of filing witness statements. Such restrictions must be compatible with the right to fair trial under ECHR art.6, which permits the state to impose restrictions on the right of access to court provided that the restrictions are “proportionate”; that is to say, they serve a legitimate aim, are suitable and necessary for regulating the litigation process, and do not destroy the very essence of the right.³⁶² The court therefore has the power to impose reasonable sanctions for failure to comply with process obligations,³⁶³ and it is perfectly legitimate to deny a litigant a trial on the merits when they have been granted an opportunity for trial but have chosen to forfeit it by defying case management orders.³⁶⁴
12. 207 The ECtHR has also held that the aims of ensuring finality, certainty and the protection of defendants from stale claims justify the imposition of limitation periods for the bringing of civil proceedings.³⁶⁵ A claimant who fails to meet the time limit cannot complain of injustice when their claim is barred. This reasoning applies equally to litigation timetables, which are also designed to achieve the legitimate objectives of final adjudication within a reasonable time and at reasonable cost. Accordingly, the ECtHR has recognised that as long as the time limits are not so short or so inflexible as to impede access to justice, they may be enforced even if the defaulting party is thereby denied adjudication on the merits.³⁶⁶ Equally, the ECtHR has recognised that a party is not only entitled to expect its opponent to conduct litigation in a reasonable time, but is itself under a duty to conduct litigation just as diligently.³⁶⁷
12. 208 Proportionality, in this sense,³⁶⁸ requires that when the court makes a case management order, it must consider its consequences to ensure they are proportionate to the aim sought.³⁶⁹ A deadline for filing an expert report that is too short to allow the expert to compile a report would in effect deprive the party of a reasonable opportunity to retain an expert, and may thereby deny the party an effective opportunity to establish its case. Equally, the time allowed for disclosure must be proportionate to the volume of documents and to the difficulty of the search required to be undertaken. When stipulating the consequence of non-compliance with an order, the court should ensure that the proposed consequence is proportionate to the prospective breach, having regard to all the circumstances of the case.³⁷⁰ In this vein, in *Biguzzi v Rank Leisure Plc* it was held that the court, having a wide range of case management orders at its disposal, should adopt the measure that is most appropriate in the circumstances.³⁷¹
12. 209 However, the use of the concept of proportionality in the exercise of the court’s power to grant extensions of time for the fulfilment of process requirements, or to grant relief from sanctions following non-compliance, has given rise to considerable confusion. The source of confusion lies in a failure to distinguish between two different questions. The first question concerns the reasonableness of a particular rule or a particular case management order. As indicated above, process rules must themselves be compliant with ECHR art.6, and when the court makes a particular case management order it must ensure that it is reasonable and proportionate. But there is a second and quite different question: namely, what should the court do when a litigant has failed to comply with an order which was reasonable and proportionate when it was made?
12. 210 In relation to this second question, the starting point should be to ask why the litigant deserves more time or a further opportunity to comply, in circumstances where they have been given a reasonable opportunity to comply in the first place, on pain of a sanction that has been assessed to be proportionate to the nature of the process requirement concerned. For example, where the litigant has encountered unforeseeable difficulties in compliance, more time should be given, all else being equal. This is because if it turns out that the time originally allocated for compliance has been insufficient notwithstanding that the litigant has acted reasonably, then the reasonableness of the initially allocated time has to be reconsidered and more time may need to be

allowed. Equally, an automatic sanction set up by a rule or order might only be considered to be disproportionate ex post facto where circumstances have changed, or with the benefit of hindsight because the default that has occurred is, on analysis, trivial.

12. 211 Unfortunately, in dealing with relief from sanctions the court sometimes lost sight of the difference between ex ante considerations of reasonableness and proportionality of process arrangements, and of ex post facto excuses for non-compliance. For instance, in *Woodhouse v Consignia*,³⁷² Brooke LJ recognised that under the ECHR art.6, the right of access to court is not absolute but may be subject to limitations, and that a limitation on access will be compatible with the right if it is imposed in pursuit of a legitimate aim and there is a reasonable relationship of proportionality between the court's order and the aim that it seeks to achieve. If these observations were confined to the making of case management orders or unless orders, they would be unexceptional. But Brooke LJ went on to say that if judges applied the checklist contained in the old CPR 3.9, any refusal of relief from sanctions was likely to be "proportionate" in the sense conveyed by ECHR art.6. "Proportionality" in making relief from sanctions decisions was thus soon taken to mean that even where the defaulting party had no reasonable excuse, it would be disproportionate to refuse the defaulter a further opportunity to comply (and often more than one) if they would thereby lose the chance to establish their case, especially where they had an arguable case and where it was of considerable value. In *CIBC Mellon Trust Co v Stolzenberg*, Arden LJ said:

"the state can impose restrictions on the right of access to court provided that the restrictions serve a legitimate aim, are proportionate and do not destroy the very essence of the right. Here, the legitimate aim in imposing a sanction is to secure compliance with court orders, which in the instant case were made to ensure the effectiveness of freezing orders. The imposition of a sanction is proportionate if it is reasonably necessary for achieving that aim. The essence of the right of access to court is not destroyed because the litigant has the opportunity to seek relief against the sanctions. The refusal of that relief is Convention-compliant if the same tests are satisfied."³⁷³

12. 212 This approach makes perfect sense where the question is whether to make an unless order in the first place, but not where the court is deciding whether to grant relief, as was the case in *Stolzenberg* and its progeny. If the consequence of non-compliance stipulated by the original order was proportionate, then no issue of proportionality of this kind could arise in an application for relief from that same sanction. As just explained, a refusal of relief would only be 'disproportionate' in the sense alluded to here if there was a reasonable excuse for the failure to comply, or if the default was insignificant. The starting point should therefore be (and as we shall presently see, now is) that the consequence flowing from a party's default was properly imposed and was such as to comply with the overriding objective. Assuming it was, the only matter left to be considered on an application for relief is the test applicable to CPR 3.9 itself. Here, as we shall see, the court has to focus on whether refusing a further opportunity to comply would achieve the overriding objective bearing in mind that litigation must be conducted efficiently and at proportionate cost, and that compliance with rules, practice directions and court orders must generally be enforced.

The defects of the old CPR 3.9 and reform in 2013

The original CPR 3.9

12. 213 As we have seen in Ch.1, one of the principal problems with the pre-CPR system was the culture of lax compliance with process requirements to which it had given rise.³⁷⁴ With CPR 3.8 and CPR 3.9, the CPR established a substantially revised regime for dealing with party default, which Lord Woolf hoped would lead "to a change of culture, in which judges can make orders confident that parties will not feel that they can ignore orders or that they can escape unscathed by appealing".³⁷⁵ Unfortunately, that hope was not fulfilled.

12. 214

The defects of the old [CPR 3.9](#) were exposed at some length in earlier editions of this work.³⁷⁶ As interpreted by the court, the former [CPR 3.9](#) had two unfortunate effects. First, as a matter of practice the court tolerated delays and non-compliance with orders. Second, the exercise of discretion under the former [CPR 3.9](#) tended to be lengthy, time-consuming and liable to give rise to unnecessary disputes over its application, in view of the multiplicity of non-hierarchised factors that the court was required to consider.³⁷⁷ Since the court was not guided by any overarching principle, the outcome of the exercise was difficult to predict, which meant that satellite litigation was bound to increase and that a whole jurisprudence developed explaining the meaning of the different factors.³⁷⁸

The meaning of the revised CPR 3.9

12. 215 The defects of the original [CPR 3.9](#) led Jackson LJ to recommend its replacement with a better-drafted rule. His Preliminary Report considered a proposal which would expressly require the court to consider “the primary need to enforce compliance with rules, practice directions and orders save where there has been good reason for the default or in exceptional circumstances”.³⁷⁹ This proposal had the merit of articulating in plain language that rules and orders should be enforced save where there was a good reason for the default or in exceptional circumstances.

12. 216 Unfortunately, this wording was rejected in favour of a bland restatement of the overriding objective. The amended [CPR 3.9](#) came into effect on 1 April 2013,³⁸⁰ and states:

“(1)On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need—
 (a)for litigation to be conducted efficiently and at proportionate cost; and
 (b)to enforce compliance with rules, practice directions and orders.
 (2)An application for relief must be supported by evidence.”

12. 217 On the face of it, this says very little that was not already in the rules. The words of the opening sentence, “so as to enable it to deal justly with the application”, merely restate the overriding objective set out in [CPR 1.1\(1\)](#) and could be said to be redundant. The same may be said of subparagraph (a), since according to [CPR 1.1\(2\)](#) dealing with cases justly includes “saving expense”, dealing with the case in ways which are proportionate to the amount of money involved, to the importance of the case, to the complexity of the issues and to the financial position of each party. Likewise with subparagraph (b), since [CPR 1.1\(2\)](#) already made clear that dealing with a case justly and at proportionate cost includes ensuring that the case is dealt with expeditiously and fairly, allotting to it an appropriate share of the court’s resources, and since 1 April 2013 it has added for good measure that the imperatives of the overriding objective include “enforcing compliance with rules, practice directions and orders” ([CPR 1.1\(2\)\(g\)](#)). The requirements of efficiency, proportionality and the due enforcement of rules and orders are clearly better articulated in the overriding objective. Since [CPR 1.2](#) requires the court to give effect to the overriding objective when it exercises any power given to it by the Rules (which includes the power to grant relief from sanctions), the subparagraphs of [CPR 3.9\(1\)](#) seem redundant.

12. 218 It is a pity that an important rule change meant to introduce a more exacting court approach to dealing with litigant default should have been expressed in such anodyne language. The only way to make sense of [CPR 3.9](#) is by understanding the mischief it sought to address, namely the “concern that relief against sanctions is being granted too readily at the present time. Such a culture of delay and non-compliance is injurious to the civil justice system and to litigants generally”.³⁸¹ The current [CPR 3.9](#) was intended to cure these defects by providing a clear, principled approach to litigant default, thereby encouraging better compliance and reducing the need for wasteful litigation about enforcing compliance.³⁸²

12. 219 In 2013 Lord Dyson MR gave an important speech in which he explained that the purpose of the rule change was to simplify the test and reverse the tolerant culture towards non-compliance with rules and court orders. The aim of the reformed rules, he said, was:

“To reinforce the importance of conducting and managing litigation so as to ensure that no more than proportionate costs are incurred as between the parties and that no one piece of litigation is permitted to utilise more of the court’s resources than is proportionate, taking account the needs of other litigants. It thus requires the court to focus much more clearly and consistently than it has in the past on these essential aspects of case management in the light of the overriding objective.”³⁸³

Lord Dyson MR indicated that where a litigant failed to comply with the deadline for filing a witness statement, for example, the court should be astute to refuse a further opportunity for compliance and should be willing to proceed to try the case without the witness in question.³⁸⁴ Lord Dyson MR was conscious of the fact that the reformed CPR 3.9 may be considered superfluous and tried therefore to give it some content when he said:

“Here lies the answer to the superfluity question as well as the remit question. Dealing with a case justly does not simply mean ensuring that a decision is reached on the merits. It is a mistake to assume that it does. Equally, it is a mistaken assumption, which some have made, that the overriding objective of dealing with cases justly does not require the court to manage cases so that no more than proportionate costs are expended. It requires the court to do precisely that; and so far as practicable to achieve the effective and consistent enforcement of compliance with rules, PDs and court orders.”³⁸⁵

12. 220 Lord Dyson MR’s speech is illuminating, but the fact remained that the wording of the revised CPR 3.9 could at best have been regarded as containing a coded message to follow a more exacting approach to granting relief from sanctions. Furthermore, since the words of CPR 3.9 do not establish clear standards, different judges might have interpreted the rule differently. In this regard, it must be noted that the subparagraphs of CPR 3.9 are not exhaustive, and that the court must therefore have regard to all the circumstances of the case.³⁸⁶ As such, it was of fundamental importance that clear appellate guidance be given on the approach to relief from sanctions. This guidance was given in *Mitchell v News Group Newspapers Ltd*,³⁸⁷ and *Denton v TH White Ltd*,³⁸⁸ discussed below.

12. 221 This in turn means that precedents applying the former CPR 3.9 no longer hold and should be treated with considerable caution.³⁸⁹ For example, the underlying strength of the defaulting party’s case on the merits, a factor that attracted considerable weight before 2013, no longer carries its former importance.³⁹⁰ Nor does the issue of whether the non-defaulting party suffered prejudice from the default, which was arguably the factor that contributed more than any other to undermining the binding force of rules and court orders, and to the failure to promote a culture of compliance.³⁹¹ Whilst the balance of prejudice still has a role to play in the application of the current CPR 3.9, as we shall presently see, reasoning that places significant weight on the prejudice to the parties while failing to take proper account of the wider public interest in the administration of justice is no longer appropriate. A limited number of observations made about the old CPR 3.9 do, however, remain pertinent. As with any exercise of discretion under the CPR, the court must bear in mind the overriding objective.³⁹² Further, in *Fred Perry (Holdings) Ltd v Brands Plaza Trading Ltd (t/a Brands Plaza)*,³⁹³ Lewison LJ correctly observed that it “cannot be stressed too strongly … that a decision whether or not to grant relief against sanctions is an exercise of discretion. That is not a question of ticking boxes or adding up the score of each party under the various paragraphs, in some cases some of the factors will have greater weight than others and in some cases some of the factors will not apply at all”.

The implementation of the revised CPR 3.9

- 12.222 The amendments to [CPR 1.1](#) (discussed in detail in Ch.1) and [CPR 3.9](#) in 2013 heralded a shift in the court's approach. It was to focus on the achievement of "justice in the majority of cases" and not simply justice in particular cases.³⁹⁴ As a consequence, parties could not expect the same approach to relief from sanctions as had previously been the case. Lord Dyson MR explained that this shift meant that under the revised rule:

"Parties can no longer expect indulgence if they fail to comply with their procedural obligations. Those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds. But more importantly they serve the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the court enables them to do so."³⁹⁵

The message emerging from this is clear: litigants could not expect the court or other parties to accommodate their private preferences of time and place. Case management arrangements are laid down by the court after consultation with the parties and are designed to fit the needs of the particular case and the parties' circumstances. As the case proceeds, circumstances may require changes to be made to case management directions, but otherwise the parties are expected to comply. A party who has encountered no unforeseen obstacle should not normally be given an extension of time or relief from the consequences of missing a deadline, unless the default was insignificant. Any approach that tolerates failure to comply with rules and court orders would defeat the purpose of [CPR 3.9](#) and perpetuate the lax attitude to compliance which was commonplace prior to the introduction of the revised rule.

- 12.223 In *AON v Australian National University*³⁹⁶ the High Court of Australia similarly revised its approach. Instead of prioritising the delivery of individual justice, as it had done previously, the court emphasised that cases were to be managed to secure effective access to justice for all court users and not simply for those engaged in specific litigation. One consequence of this was that where, for instance, a party sought a late amendment to pleadings or relief from sanction,³⁹⁷ courts may need to make decisions that would appear to be unjust in respect of the parties to the litigation. As the High Court of Australia noted, however, what may appear to be unjust in the context of the immediate proceedings, might not be so when considered in the wider context of ensuring the proper administration of justice for litigants in other proceedings.³⁹⁸ The court's focus in managing claims had to shift from looking at the prejudice caused to parties that would arise from refusing to grant relief from sanctions, to the prejudice caused to the effective management of the justice system as a whole from non-compliance with procedural obligations.

- 12.224 It was necessary for the Court of Appeal to set the tone for the implementation of the Mark II overriding objective and the current [CPR 3.9](#) in order to avoid a repetition of past error,³⁹⁹ just as the High Court in Australia provided clear and authoritative guidance in *AON v Australian National University*.⁴⁰⁰ This was especially important, because on the one hand the Court of Appeal has responsibility for the administration of civil procedure, and to this end monitors and develops principles for the exercise of discretion under the [CPR](#);⁴⁰¹ and on the other, there is limited scope for an appellate court to interfere with the exercise of case management powers, and will only do so if the first instance decision is "so plainly wrong that it must be regarded as outside the generous ambit of discretion entrusted to the judge".⁴⁰² Precedents are likely to offer limited guidance, except at the level of general principle.⁴⁰³ The Court of Appeal has on numerous occasions reiterated its commitment to self-imposed constraint on appellate interference with case management decisions, including the working out of the consequences of procedural defaults.⁴⁰⁴ This was not affected by the introduction of the Mark II overriding objective and current [CPR 3.9](#). The Court of Appeal stressed this point in *Fred Perry (Holdings) Ltd* when it reiterated that it is "vital that the Court of Appeal supports first instance judges who make robust but fair case management decisions".⁴⁰⁵

Mitchell and Denton

- 12.225 The Court of Appeal's resolve to implement the ideas behind the 2013 reforms was tested by Master McCloud's decision in *Mitchell v News Group Newspapers Ltd.*⁴⁰⁶ The claimant brought a claim for defamation, but failed to discuss costs budgets with the defendant and to file a budget seven days before the first case management conference (CMC), in breach of (what was then) PD 51D para.4.1–4.2. The Master ordered that although the claimant's budget was filed shortly before the CMC, it was to be treated as comprising only of court fees, by analogy with CPR 3.14 which deals with failure to file a budget altogether. The claimant applied for relief from this sanction, which the Master refused, observing:

“The new overriding objective is in marked contrast to the old one in form and, in my judgment, in substance. The court must now, as a part of dealing with cases justly, ensure that cases are dealt with at proportionate cost and so as to ensure compliance with rules, orders and practice directions. In that sense what we now mean by ‘dealing with cases justly’ has changed, or if it has not changed then at the very least there is a significant shift of emphasis towards treating the wider effectiveness of court management and resources as a part of justice itself.”⁴⁰⁷

The Master went on to note that, as a result of the claimant's application, she had had to vacate a number of cases in an expedited list for claims arising from asbestos-related diseases, and continued:

“[T]he issue here is not the relative importance of the claims ... rather it is the right of other litigants to have a ‘fair crack of the whip’ where judicial and court resources are very limited, and the right not to be delayed while the courts dispose of matters which ought not to arise in the first place if rules are complied with ... I do not wish to be misunderstood as saying that evidence of specific detriment to other litigants is necessary in any given case. Breach of rules may I think be assumed to risk impact upon other claims, [but] the above illustrates one mechanism as to how that occurs where an application for relief is required due to a breach.”⁴⁰⁸

- 12.226 The Master gave short shrift to the claimant's excuse that he was represented by a small firm of solicitors with limited resources, which was especially stretched at the time due to the absence of some staff.⁴⁰⁹ Likewise, she was unimpressed by the argument that the claim was important to the claimant and should therefore not be jeopardised by the sanction, noting that if the importance of the case to a party weighed too heavily, one would never be able to impose sanctions. She concluded by recording that the “stricter approach” following the Jackson reforms had been “central” to her decision, and that prior to 1 April 2013 she would have been more likely to have granted relief on the terms sought.⁴¹⁰

- 12.227 The tenor of this approach was that parties cannot externalise the cost of their inefficiency and impose it on other litigants, but rather would have to bear the cost of failure to comply themselves. When the appeal from the Master's decision reached the Court of Appeal, clear guidance was given that Master McCloud's approach was to be maintained.

- 12.228 Lord Dyson MR gave the judgment of the court.⁴¹¹ He first canvassed the fact that both the Woolf and Jackson reforms were intended to introduce a stricter, less forgiving approach to procedural non-compliance.⁴¹² That was in line with a proper understanding of the role of case management, namely to ensure that litigation was conducted efficiently and proportionately, with proper regard being given to the needs of other court users. The justice system had to be regarded as a managed public service, and as such the court had to consider the prejudice caused to other litigants in deciding whether to grant relief from the consequences of non-compliance, rather than focusing on prejudice between the parties in the instant case.⁴¹³ The court affirmed Lord Dyson MR's statement in his implementation lecture, “Justice in the individual case [was] now only achievable

through the proper application of the CPR consistently with the overriding objective". That meant taking account of the need to secure rule compliance, and the need to ensure that appropriate resources are allotted to all litigants (CPR 1.1(2)(e)–(g)).⁴¹⁴

12. 229 The means by which this stricter approach was to be achieved, in the context of applications under CPR 3.9, was through the application of a two-stage test. The first stage required the court to consider whether the non-compliance was trivial. If it was trivial then relief ought generally to be granted provided the application had been made promptly.⁴¹⁵ If the non-compliance was more than trivial, then the burden lay upon the party seeking relief to persuade the court that there was good reason to grant relief.⁴¹⁶ Examples of a good reason might be a party or solicitor suffering an illness or accident that precluded compliance. Examples that would rarely amount to a good reason to justify relief were overlooking deadlines, overwork or incompetence.⁴¹⁷ While it was accepted that this approach might appear harsh, it was necessary if the issue of lax compliance was not to reassert itself.

12. 230 The test adopted was not entirely novel. A similarly strict approach had previously been applied by the Court of Appeal to applications for extensions of time to serve claim forms.⁴¹⁸ In that context, it had ultimately resulted in greater compliance and a reduction in applications for extensions of time,⁴¹⁹ thereby securing greater efficiency and proportionality in relation to that discrete aspect of proceedings. Lord Dyson MR, while noting that some judges would find the *Mitchell* test unattractive, explained that once it was understood it would result in greater compliance and hence more efficient and proportionate management of litigation overall:

“In our view, once it is well understood that the courts will adopt a firm line on enforcement, litigation will be conducted in a more disciplined way and there should be fewer applications under CPR 3.9. In other words, once the new culture becomes accepted, there should be less satellite litigation, not more.”⁴²⁰

12. 231 *Mitchell v News Group Newspapers Ltd*, applied effectively, ought to have avoided the previous complexities regarding the application of CPR 3.9. It ought to have reinforced the importance of compliance effectively and would thus have reduced delay and wasteful satellite litigation. It was, however, widely misunderstood and criticised,⁴²¹ and led to an increase in satellite litigation.⁴²² This stemmed from an overzealous application of the test. The Court of Appeal therefore reconsidered the approach taken in *Mitchell* in *Denton v TH White Ltd*.⁴²³ The court affirmed that the aim underpinning the decision in *Mitchell* remained “substantially sound”, and accordingly made clear that it did not intend to weaken the approach articulated in *Mitchell*.⁴²⁴ This point was reaffirmed in *Lord Chancellor v Taylor Willcocks Solicitors*.⁴²⁵ Nevertheless, Lord Dyson and Vos LJ in *Denton* explained that the approach laid down in *Mitchell* had not been fully understood:

“... It is clear that the guidance in *Mitchell* needs to be clarified and further explained. It seems that some judges have ignored the fact that it is necessary in every case to consider all the circumstances of the case (what we have characterised as the third stage). ... But other judges have adopted what might be said to be the traditional approach of giving pre-eminence to the need to decide the claim on the merits. That approach should have disappeared following the Woolf reforms. There is certainly no room for it in the post-Jackson era.”⁴²⁶

12. 232 To ensure that the need to consider all the circumstances of the case was properly taken account of, without tempering the general approach, the court in *Denton* reformulated the *Mitchell* two-stage test. The *Denton* test has three stages. The first stage, rather than focusing on the question whether the non-compliance was trivial, requires the court to consider if it was serious or significant.⁴²⁷ Where the breach was neither serious nor significant, relief ought generally to be granted.⁴²⁸ Assuming the breach was serious or significant, the second stage requires the court to consider the reasons for the non-compliance.⁴²⁹ Again, where a good reason exists, the court is likely to grant relief. The Court of Appeal in *Mitchell* had considered that illness might constitute a good reason. A party asserting a good reason on the basis of illness would do well to furnish the court with specific evidence of the illness and its effect on the relevant person’s ability to comply.⁴³⁰ Where

there is no good reason for the non-compliance, the court must go on to consider all the circumstances of the case. This is to ensure the application for relief is dealt with in accordance with the overriding objective.⁴³¹ As the Supreme Court noted in *AIC v Federal Airports Authority of Nigeria*,

“The critical advance made in the *Denton* case was to make it plainer than had appeared to the profession after the earlier leading case of *Mitchell* ... that relief might nonetheless be granted at stage (iii) even if there had been a serious breach or failure to comply for which no good reason had been shown.”⁴³²

- 12. 233** In considering the circumstances, the seriousness of the breach will be important (bearing in mind that the third stage is only likely to be reached if the breach is not insignificant, and there was no good reason for it).⁴³³ Further, the party’s track record of complying with rules and orders will be relevant,⁴³⁴ as will the promptness of the application (though promptness is not a pre-requisite for granting relief).⁴³⁵ If the non-compliance would result or has resulted in the trial date being adjourned, that will generally be a factor strongly indicating that the court should refuse relief.⁴³⁶ Any adjournment of a trial date will, inevitably, have an adverse impact on the court’s ability to manage its resources effectively.
- 12. 234** The final stage of the *Denton* test could, if interpreted broadly, have led back to the position that existed prior to the introduction of the revised CPR 3.9. In *Chartwell Estate Agents Ltd v Fergies Properties SA*,⁴³⁷ the court considered “all the circumstances”,⁴³⁸ and regarded it as particularly significant that both parties were in default. That fact apparently justified the grant of relief, together with the fact that a refusal of relief would have caused prejudice to the parties by bringing the proceedings to an end, and the fact that the trial date could have been preserved if relief were granted. Here the emphasis once again appeared to be on the prejudice as between the parties. If that understanding of the “all the circumstances” element of the test under CPR 3.9 prevailed, the utility of *Mitchell* and *Denton* would be lost as the court would revert to considering whether prejudice to the non-defaulting party could be remedied in costs. Generally, however, this has not eventuated. As Lord Neuberger PSC made clear in *Global Torch Ltd v Apex Global Management Ltd*,⁴³⁹ it is not acceptable to approach relief from sanctions by asking whether harm to the non-defaulting party could be remedied by way of costs.
- 12. 235** One of the consequences of the overzealous application of the *Mitchell* test was that it encouraged satellite litigation, as parties sought to take advantage of their opponent’s procedural error. This in itself undermined the effective management of proceedings in accordance with the overriding objective. The Court of Appeal properly deprecated such conduct in *Denton*. Lord Dyson MR and Vos LJ stressed that effective case management required not only a culture of compliance with rules, practice directions and orders, but equally constructive and co-operative conduct (CPR 1.3). Lawyers were expected to advise their clients as to their obligation to assist the court in furthering the overriding objective, and meretricious, opportunistic stances seeking unreasonably to resist applications for relief from minor and inadvertent procedural defaults were to be avoided. Thus, whilst CPR 1.3 does not give “carte blanche to a defaulting party to blame the other side for delays caused by its own breach”,⁴⁴⁰ parties that unreasonably resist applications for relief which clearly ought to be granted should expect the court to take firm action to penalise such behaviour, including through the use of costs sanctions.⁴⁴¹
- 12. 236** The importance of the Court of Appeal’s decisions in *Mitchell* and *Denton* cannot be underestimated in terms of their effect on efficient and proportionate case management. While their primary focus was relief from sanctions for non-compliance, the rationale underpinning the approach in the two decisions has impacted the court’s approach to other aspects of case management even when neither an express nor an implied sanction has been imposed. For instance, late applications to amend statements of case are now dealt with in a manner consistent with *Denton*,⁴⁴² although CPR 3.9 does not strictly apply to such situations;⁴⁴³ as are applications to depart from an agreed or approved budget under CPR 3.18.⁴⁴⁴ Where a party seeks the court’s indulgence in order to perform a procedural step which has the potential to disrupt or delay the progress of the litigation, the *Denton* criteria provide a structured approach to inform the exercise of the court’s discretion. It is in this sense that the “ethos” of *Denton* may be said to apply to a wide range of case management decisions which do not directly engage CPR 3.9 (and in respect of which the starting assumption of a sanction that has been “properly imposed and complies with the

overriding objective” does not strictly hold). Unlike previous attempts to adopt a stricter approach to procedural laxity and non-compliance, the approach in *Mitchell* and *Denton* has now taken root. Any suggestion that *Denton* might have heralded a weakening of the approach laid down in *Mitchell* appears, fortunately, to have been unfounded.

Particular issues arising in applications under CPR 3.9

Relief from the consequences of unless orders

12. 237 As explained in Ch.1 and above, if it is widely known that non-compliance with rules or orders is likely to be excused, their normative force is likely to be undermined.⁴⁴⁵ By the same token, knowledge that default may result in adverse consequences should incentivise timely compliance with process requirements. These considerations are particularly true of unless orders, for three closely related reasons.⁴⁴⁶ First, an unless order states that a particular consequence will flow from non-compliance, and if the court too readily relieves those consequences, the court would lose much of its management authority.⁴⁴⁷ When making an unless order, the court must be prepared to put its money where its mouth is. Second, when making the unless order, the court should have heard the parties,⁴⁴⁸ and considered the appropriateness and proportionality of the proposed sanction in relation to the process requirement to be complied with and the circumstances of the case as a whole.⁴⁴⁹ As such, the starting point is that the order was fair, reasonable and proportionate at the time it was made, and so its consequences will be equally fair, reasonable and proportionate once a default has occurred.⁴⁵⁰ Third, unless orders are in practice likely to have been imposed where a party has failed to perform process obligations or there is some other reason to fear future uncooperative conduct.⁴⁵¹

12. 238 Consequently, the inherent seriousness of breaching an unless order, together with the fact that unless orders are often imposed following prior instances of default, has implications for the first and third stages of the *Denton* test. As Jackson LJ explained in *British Gas Trading Ltd v Oak Cash and Carry Ltd*:

“An ‘unless’ order … does not stand on its own. The court usually only makes an unless order against a party which is already in breach. The unless order gives that party additional time for compliance with the original obligation and specifies an automatic sanction in default of compliance. It is not possible to look at an unless order in isolation. A party who fails to comply with an unless order is normally in breach of an original order or rule as well as the unless order.

In order to assess the seriousness and significance of a breach of an unless order, it is necessary also to look at the underlying breach. The court must look at what X failed to do in the first place, when assessing X’s failure to take advantage of the second chance which he was given.”⁴⁵²

In other words, non-compliance is very likely to be regarded as serious and significant for the purposes of the first stage of the *Denton* test;⁴⁵³ and thus it is a factor which will weigh heavily at the third stage. There are two reasons for this: first, the non-compliant party will often be in breach of two successive obligations, both of which required them to do the same thing; and second, the imposition of an unless order with an automatic sanction for default already makes clear emphasis the court has placed upon the need to ensure compliance.⁴⁵⁴

12. 239 When considering the third stage, the court must take a robust line in enforcing unless orders. The automatic consequences of breach of an unless order should therefore generally be allowed to stand, unless something has happened subsequent to the order which would render those consequences unfair, such as where the party was prevented from complying by circumstances

beyond their control.⁴⁵⁵ If, however, the applicant can show that the order was not just and proportionate at the time it was made, its consequences should not bite;⁴⁵⁶ though it must be noted that in such circumstances the affected party should have appealed the order rather than waiting to raise their objections upon an application for relief from its consequences.⁴⁵⁷

Party and lawyer responsibility for default

12. 240 One of the factors that had to be taken into consideration under the old [CPR 3.9](#) was whether the default was caused by the party or their legal representative. The court was reluctant to refuse relief even where solicitors were responsible for considerable and inexcusable delays.⁴⁵⁸ The court acknowledged that it had the power to refuse relief even where the default was entirely the solicitor's responsibility, but the bar for doing so was set high.⁴⁵⁹ Generally this would be the case only where, as a result of the lawyer's default, another party suffered prejudice. For instance, if it was no longer possible to hold a fair trial due to delay (because the evidence had perished, for example), the proceedings would have to be brought to an end even though the client bore no personal responsibility for the delay.⁴⁶⁰ The consequences of default would normally be enforced where they followed an agreed order, even if the default was the responsibility of the party's solicitor.⁴⁶¹
12. 241 Given the guidance set out in *Mitchell*,⁴⁶² the court ought not to have regard to this factor when applying the *Denton* test. Unfortunately, however, applicants for relief from sanctions persist in raising the issue.⁴⁶³ Although it may appear unjust at first sight to refuse an extension of time or relief from sanctions when the default was due to the carelessness of a party's legal representatives, it causes greater harm in the long term to spare litigants the consequences of their lawyers' defaults. A litigant who has lost due to their lawyer's default may bring proceedings against the latter for breach of contract and negligence.⁴⁶⁴ A policy of absolving clients from the consequences of their lawyers' default would undermine the court's ability to enforce process requirements because it would oblige the court to grant relief whenever a legal representative puts up their hands and accepts responsibility. This in turn would be to encourage sloppy practice, and to impose a burden on the administration of justice.

Litigants in Person

12. 242 Guidance on the approach to take where a LiP seeks relief from sanctions was given by the Supreme Court in *Barton v Wright Hassall LLP*.⁴⁶⁵ A LiP issued a claim against his former solicitors. On the last day on which service could be effected, the LiP purported to serve the claim form on the defendant's solicitors by email. However, the solicitors had not previously confirmed that they would accept service by email, so service was defective and the claim became statute-barred. The LiP applied unsuccessfully to have service validated retrospectively, and ultimately appealed to the Supreme Court, which by a three to two majority upheld the decision not to validate service retrospectively. The majority noted that although the case management process and hearings would often be adapted to accommodate the needs of a LiP, there was no justification for "lower[ing the] standard of compliance with rules or orders of the court" where a LiP was concerned.⁴⁶⁶ To adopt a generally lenient approach to LiPs would undermine [CPR 1.1\(1\)\(f\)](#) and the imperative to secure procedural fairness for all litigants.
12. 243 In view of the general rule in *Barton v Wright Hassall*, it follows that impecuniosity will not, by itself, justify a relaxation of rules or orders. *Axnoller Events Ltd v Brake*, which concerned whether a LiP should be provided with a hard copy of the bundle by the represented party, the judge remarked:

"Some expenditure by each of the parties is unavoidable. Equipping yourself with the necessary papers for the trial process is part of that. The reference in [CPR 1.1\(2\)\(a\)](#) to 'equal footing' does not mean that litigation cannot take place unless all parties have equal resources. But in any event, the 'equal footing' is only one of

several (potentially competing) matters which the court must take into account in dealing with litigation justly and at proportionate cost.”⁴⁶⁷

- 12. 244** The general rule in *Barton v Wright Hassall* can, however, be relaxed in limited circumstances. First, as Briggs LJ explained in his dissenting judgment in *Nata Lee v Abid*, it may occasionally be the case that a litigant’s status as a LiP is directly relevant to the assessment of, say, how serious the breach is under the first stage of the *Denton* test.⁴⁶⁸ What would have been a serious breach for a solicitor, may be a less serious breach for a LiP.⁴⁶⁹ Second, while LiPs were generally expected to familiarise themselves with the *CPR*, if there was non-compliance in circumstances where the relevant rule was “inaccessible or obscure”, a more lenient approach might be justified. However, in *Barton v Wright Hassall*, even the rules governing service were held not to be so obscure as to justify greater indulgence.⁴⁷⁰

Relief from the consequences of consent orders

- 12. 245** Consent orders require special considerations in connection with relief from sanctions (or indeed, applications to vary case management directions). A distinction is drawn between a consent order that is founded on a contract between the parties and a consent order based on the parties’ willingness to submit to the court’s order.⁴⁷¹ An example of the latter would be a case where the claimant has applied for an extension of time to file an expert report and following an agreement between the parties the court orders that the report be filed by a certain date.⁴⁷² This order is no different from any other management order and the court has the usual powers to vary it or set it aside. The former, referred to as a “true consent order or judgment”, is somewhat different because it represents the terms of a contract between the parties.

- 12. 246** It was thought that the court had no power to vary the terms of a true consent order any more than it could vary the parties’ contract.⁴⁷³ It is doubtful whether that view was ever wholly accurate. A distinction needs to be drawn between an order that represents a contractually agreed settlement of the substantive dispute and an order that represents the parties’ agreement about the management of the litigation. Where the parties have obtained from the court a case management order the court retains control over its order. The *CPR* put the matter beyond dispute by expressly entrusting the court with control over the litigation process.⁴⁷⁴ Buxton LJ in *Chaggar v Chaggar* said that “it is no longer the case, nor should it be, that the agreement or determination of the parties as to how cases should be conducted should deprive the judge of his overall discretion to conduct the case fairly and to control carefully, not least from the point of view of expense, how it should develop”.⁴⁷⁵ In *Safin (Fursecroft) Ltd v Badrig’s Estate*,⁴⁷⁶ the Court of Appeal confirmed that under the *CPR* the court has an unfettered power to vary time limits in all consent orders. In determining whether to exercise the power it was important to give weight to the fact of the parties’ agreement, although the particular weight to be given to it depended on all the circumstances. The court therefore retains the power to vary a case management order made by consent, or indeed to grant relief from sanctions flowing from an agreed unless order.⁴⁷⁷

- 12. 247** The more difficult question is what weight the court should attach to the fact of the agreement when it is faced with an application to vary a consent order or grant relief from sanctions. Neuberger J explained that whenever the court considers whether to grant an extension of time for the performance of acts stipulated in a consent order it should “place very great weight on what the parties have agreed and should be slow, save in unusual circumstances, to depart from what the parties have agreed”.⁴⁷⁸

- 12. 248** The weight to be given to the consideration that an order was agreed would vary according to the nature of the order and thus the agreement. The fact that the agreement compromised a substantive dispute, Tomlinson LJ explained in *Pannone LLP v Aardvark Digital Ltd*, would normally have very great and perhaps decisive weight.⁴⁷⁹ Where, however, the agreement

was no more than a procedural accommodation in relation to case management, the weight to be accorded to the fact of the parties' agreement as to the consequences of non-compliance, while still real and substantial, would nonetheless rarely be decisive.⁴⁸⁰ In *Placito v Slater*,⁴⁸¹ the claimant agreed to an order stating that unless he commenced proceedings by a certain date, he would not be able to enforce his rights. The court would not grant an extension in the absence of unanticipated or unusual circumstances which had prevented him from complying with the order.

Footnotes

- 328 *Marcan Shipping (London) Ltd v Kefalas* [2007] EWCA Civ 463; [2007] 1 W.L.R. 1864; see also *Keen Phillips v Field* [2006] EWCA Civ 1524; [2007] 1 W.L.R. 686 [16]–[19]; *Boodia v Yatsyna* [2021] EWCA Civ 1705; [2021] 4 W.L.R. 142.
- 329 *Marcan Shipping (London) Ltd v Kefalas* [2007] EWCA Civ 463; [2007] 1 W.L.R. 1864 [33]–[35]. See also *Rybak v Langbar International Ltd* [2010] EWHC 2015 (Ch), in *Kinsley v Commissioner of Police for the Metropolis* [2010] EWCA Civ 953; and *Nelson v Circle Thirty Three Housing Trust Ltd* [2014] EWCA Civ 106 [18].
- 330 *Hadi v Park* [2022] EWCA Civ 581; [2022] 4 W.L.R. 61.
- 331 *Michael v Phillips* [2017] EWHC 142 (QB).
- 332 *Chartwell Estate Agents Ltd v Fergies Properties SA* [2014] EWCA Civ 506; [2013] 3 Costs LR 588.
- 333 *Lufthansa Technik AG v Panasonic Avionics Corp* [2023] EWCA Civ 1273; [2024] 1 W.L.R. 2012 [21]; *Yesss (A) Electrical Ltd v Warren* [2024] EWCA Civ 14 [25]–[26].
- 334 *Yesss (A) Electrical Ltd v Warren* [2024] EWCA Civ 14. But where the court has given directions for exchange of expert evidence in a particular discipline, and a party fails to serve their report in that discipline by the deadline imposed by the court, CPR 35.13 would operate to prevent them from relying on the report or calling the expert at trial unless relief from sanctions was obtained: *Yesss (A) Electrical Ltd v Warren* at [22].
- 335 *Island Records Ltd v Tring International Plc* [1996] 1 W.L.R. 1256; [1995] 3 All ER 444, Ch D.
- 336 *Lufthansa Technik AG v Panasonic Avionics Corp* [2023] EWCA Civ 1273; [2024] 1 W.L.R. 2012.
- 337 *FXF v English Karate Federation Ltd* [2023] EWCA Civ 891; [2024] 1 W.L.R. 1098 [59], [68]. The same would be true of the striking out of a claim for non-attendance at trial.
- 338 *Haley v Siddiqui* [2014] EWHC 835 (Ch).
- 339 *Haley v Siddiqui* [2014] EWHC 835 (Ch) [15]; referring to *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537; [2014] 1 W.L.R. 795 [45].
- 340 See S. Sime, “Lord Dyson and the Implied Sanctions Doctrine” [2015] C.J.Q. 267.
- 341 *Sayers v Clarke Walker (a firm)* [2002] EWCA Civ 645; [2002] 1 W.L.R. 3095 [21]. See also *Price v Price (t/a Poppyland Headware)* [2003] EWCA Civ 888; *Short v Birmingham City Council* [2004] EWHC 2112 (QB); *Yeates v Aviva Insurance UK Ltd* [2012] EWCA Civ 634.
- 342 *R (Hysaj) v Secretary of State for the Home Department* [2014] EWCA Civ 1633; [2015] 1 W.L.R. 2472. And see *Mark v Universal Coatings & Services Ltd* [2018] EWHC 3206 (QB); [2019] 1 W.L.R. 2376 [52].
- 343 *R (V) v Secretary of State for the Home Department* [2012] EWHC 1499 (Admin).
- 344 *Salford Estates (No 2) Ltd v Altomart Ltd (Practice Note)* [2014] EWCA Civ 1408; [2015] 1 W.L.R. 1825.
- 345 *Lufthansa Technik AG v Panasonic Avionics Corp* [2023] EWCA Civ 1273; [2024] 1 W.L.R. 2012 [22].
- 346 Cf. *Sayers v Clarke Walker (a firm)* [2002] EWCA Civ 645; [2002] 1 W.L.R. 3095 [21].
- 347 *Mark v Universal Coatings & Services Ltd* [2018] EWHC 3206 (QB); [2019] 1 W.L.R. 2376 [49], [52]–[54].
- 348 *Viegas v Cutrale* [2024] EWCA Civ 1122; [2025] 1 W.L.R. 1467, departing from Mann J's decision in *Various Claimants v G4S Plc* [2021] EWHC 524 (Ch); [2021] 4 W.L.R. 46 [60]–[72].
- 349 *Viegas v Cutrale* [2024] EWCA Civ 1122; [2025] 1 W.L.R. 1467 [58], citing *Yesss (A) Electrical Ltd v Warren* [2024] EWCA Civ 14 [31], [33].
- 350 Indeed, late applications to disallow pre-service amendments may have a seriously prejudicial effect on the party whose amendments are disallowed. For example, a claimant's amendment to add a new party or cause of action may be disallowed on the basis that the new claim was arguably time-barred at the date the amendment was made. In such circumstances, the claimant's remedy would be to issue fresh proceedings. If the defendant delayed in making its application to disallow the amendments, there is an obvious risk that the fresh proceedings will turn out to be time-barred, whereas they might not have been if the application to disallow had been made within the 14 days contemplated by CPR 17.2(2).

- 351 As Mann J held in *Various Claimants v G4S Plc* [2021] EWHC 524 (Ch); [2021] 4 W.L.R. 46 [60]–[72].
- 352 *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537; [2014] 1 W.L.R. 795 [45]; cf. *Viegas v Cutrale* [2024] EWCA Civ 1122; [2025] 1 W.L.R. 1467 [58].
- 353 *Robert v Momentum* [2003] EWCA Civ 299; [2003] 1 W.L.R. 1577 [33]. See also *Wiemer v Zone* [2012] EWHC 107 (QB).
- 354 *Hallam Estates v Baker* [2014] EWCA Civ 661; [2014] 4 Costs LR 660 [26]; see also *Re Guidezone Ltd* [2014] EWHC 1165 (Ch); [2014] Costs LR 554.
- 355 Cf. *Cavadore Ltd v Jawa* [2021] EWHC 3382 (Ch) [30]–[35], in which the claimants were refused permission to amend an in-time application notice seeking an extension of time, because this would have had the effect of enabling them to avoid the need to apply for relief from sanctions “by the back door”.
- 356 See above Part I paras 12.12 ff.
- 357 See *Hashtroodi v Hancock* [2004] EWCA Civ 652; [2004] 3 All ER 530.
- 358 *Jalla v Royal Dutch Shell Plc* [2021] EWCA Civ 1559.
- 359 *Denton v TH White Ltd* [2014] EWCA Civ 906; [2014] 1 W.L.R. 3926; discussed below at paras 12.232 ff.
- 360 *Jalla v Royal Dutch Shell Plc* [2021] EWCA Civ 1559 [33], cf. also [47].
- 361 *Jalla v Royal Dutch Shell Plc* [2021] EWCA Civ 1559 [33].
- 362 See, for instance, *Stubbings v UK RJD 1996-IV No.18*; [1996] 23 E.H.R.R. 213; and *Perez de Rada Cavanilles v Spain* [1998] 29 E.H.R.R. 109: limitation periods are compliant with art.6 provided they are not so short as to deprive claimants of a practical opportunity to bring proceedings. See also Ch.3 Fair Trial paras 3.28 ff.
- 363 *Hennings v Germany* [1992] 16 E.H.R.R. 83.
- 364 *Woodhouse v Consignia Plc* [2002] EWCA Civ 275; [2002] 2 All ER 737 [43]; and *JSC BTA Bank v Ablyazov* [2012] EWCA Civ 1411.
- 365 *Stubbings v UK RJD 1996-IV No.18*; [1996] 23 E.H.R.R. 213. See O. Settem, Applications of the ‘Fair Hearing’ Norm in ECHR Article 6(1) to Civil Proceedings (Springer, 2016).
- 366 *Perez de Rada Cavanilles v Spain* [1998] 29 E.H.R.R. 109. In this particular case an inflexible limitation of a mere few days to challenge a decision was held to be contrary to ECHR art.6(1).
- 367 *Bakowska v Poland*, App No. 33539/02 (12 January 2010, unreported, ECtHR), [54], cited in O. Settem, Applications of the ‘Fair Hearing’ Norm in ECHR Article 6(1) to Civil Proceedings (Springer, 2016) p.95.
- 368 See the discussion of the different senses of proportionality in Ch.1 Overriding Objective paras 1.59 ff.
- 369 *JSC BTA Bank v Ablyazov* [2012] EWCA Civ 1411. See also *Tarn Insurance Services Ltd v Kirby* [2009] EWCA Civ 19 [79].
- 370 See above, Part I paras 12.85–12.89.
- 371 *Biguzzi v Rank Leisure Plc* [1999] 1 W.L.R. 1926, CA.
- 372 *Woodhouse v Consignia Plc* [2002] EWCA Civ 275; [2002] 2 All ER 737 [43]–[44].
- 373 *CIBC Mellon Trust Co v Stolzenberg (Sanctions: Non-compliance)* [2004] EWCA Civ 827 [161]; see also *Barnett v Nigel Hall Menswear Ltd* [2013] EWHC 91 (QB) [14].
- 374 See Ch.1 Overriding Objective paras 1.5 ff.
- 375 Woolf, Final Report Ch.6 para.15.
- 376 Zuckerman on Civil Procedure, 2nd edn (London: Sweet & Maxwell, 2006), paras 10.105 ff.
- 377 See *Bansal v Cheema* [2001] C.P. Rep. 6 [22]. See also *Moon v Kent County Council* [2001] EWCA Civ 1877 [23]; *Meredith v Colleys Valuation Services Ltd* [2001] EWCA Civ 1456; [2002] C.P. Rep. 10 [16]; and *R C Residuals Ltd v Linton Fuel Oils Ltd* [2002] EWCA Civ 911; [2002] 1 W.L.R. 2782 [13], [20]–[21].
- 378 See for instance the lengthy discussion in *Hansom v E Rex Makin & Co* [2003] EWCA Civ 1801.
- 379 M. Legg and A. Higgins, “Responding to Cost and Delay Through Overriding Objectives: Successful Innovation” in C. Picker and G. Seidman (eds), The Dynamism of Civil Procedure: Global Trends and Developments (Cham: Springer 2016), pp.157–181; citing Jackson, Preliminary Report, Ch.43 para.4.21.
- 380 Civil Procedure (Amendment) Rules 2013 (SI 2013/262).
- 381 *Fred Perry (Holdings) Ltd v Brands Plaza Trading Ltd (t/a Brands Plaza)* [2012] EWCA Civ 224 [49].
- 382 See *Fred Perry (Holdings) Ltd v Brands Plaza Trading Ltd (t/a Brands Plaza)* [2012] EWCA Civ 224 [50]; *Mannion v Ginty* [2012] EWCA Civ 1667 [18]. See also *Byrne v Poplar Housing and Regeneration Community Association Ltd* [2012] EWCA Civ 832.
- 383 Lord Dyson MR, “The Application of the Amendments to the Civil Procedure Rules: 18th Lecture in the Implementation Programme”, speech delivered at the District Judges’ Annual Seminar, Judicial College, 22 March 2013.

- 384 Lord Dyson MR, “The Application of the Amendments to the Civil Procedure Rules”, speech delivered at the District
Judges’ Annual Seminar, Judicial College, 22 March 2013, paras 13, 16, 24 and 28.
- 385 Lord Dyson MR, “The Application of the Amendments to the Civil Procedure Rules”, speech delivered at the District
Judges’ Annual Seminar, Judicial College, 22 March 2013.
- 386 *CIBC Mellon Trust Co v Stolzenberg (Sanctions: Non-compliance) [2004] EWCA Civ 827* [30].
- 387 *Mitchell v News Group Newspapers Ltd [2013] EWCA Civ 1537; [2014] 1 W.L.R. 795*.
- 388 *Denton v TH White Ltd [2014] EWCA Civ 906; [2014] 1 W.L.R. 3926*.
- 389 Similarly, pre-CPR authorities are no longer of relevance to the approach to be taken to non-compliance with process
requirements generally, and with time limits in particular, as Lord Woolf made clear in *Biguzzi v Rank Leisure Plc*
[1999] 1 W.L.R. 1926.
- 390 *Global Torch Ltd v Apex Global Management Ltd (No 2) [2014] UKSC 64; [2014] 1 W.L.R. 4495* [29]–[31]; *R (Hysaj)*
v Secretary of State for the Home Department [2014] EWCA Civ 1633; [2015] 1 W.L.R. 2472 [46]–[48].
- 391 See for example *Cohort Construction (UK) Ltd v Julius Melchior [2001] C.P. Rep 23, CA; Collins v CPS Fuels Ltd*
[2001] EWCA Civ 1597; *Robert v Momentum Services Ltd [2003] EWCA Civ 299; [2003] 1 W.L.R. 1577*; and, for a
particularly extreme example, *Douglas v Hello! Ltd [2003] EWHC 55 (Ch); [2003] 1 All ER 1087*.
- 392 *Bank of Scotland v Pereira [2011] EWCA Civ 241; [2011] 3 All ER 392* [29].
- 393 *Fred Perry (Holdings) Ltd v Brands Plaza Trading Ltd (t/a Brands Plaza) [2012] EWCA Civ 224* [18]. See also *Bank*
of Scotland v Pereira [2011] EWCA Civ 241; [2011] 3 All ER 392 [29]; and *Venulum Property Investments Ltd v Space*
Architecture Ltd [2013] EWHC 1242 (TCC).
- 394 Ch. 1 Overriding Objective paras 1.34–1.40.
- 395 Lord Dyson MR, “The Application of the Amendments to the Civil Procedure Rules”, speech delivered at the District
Judges’ Annual Seminar, Judicial College, 22 March 2013, para.27, cited with approval in *Mitchell v News Group*
Newspapers Ltd [2013] EWCA Civ 1537; [2014] 1 W.L.R. 795 [38].
- 396 *AON v Australian National University [2009] HCA 27, (2009) 239 CLR 175* [23]–[26], [92]–[96]; and J. Sorabji, English
Civil Justice after Woolf and Jackson (Cambridge: Cambridge University Press, 2014) p.232.
- 397 The approach was held to be of general application (*Kowalski v MMAL Staff Superannuation Fund Pty Ltd [2009] 178*
FCR 401, 414) and specifically of application to party default (*Mijac Investments Pty Ltd v Graham [2010] FCA 87*).
- 398 *AON v Australian National University [2009] HCA 27, (2009) 239 CLR 175* [26].
- 399 Indeed, that the CPR had, prior to 2013, failed to deliver the hoped-for benefits of court control of litigation was by and
large the fault of the Court of Appeal: see for instance *Carlco Ltd v Chief Constable of Dyfed Powys [2002] EWCA Civ*
1754; and see Lord Dyson MR, “The Application of the Amendments to the Civil Procedure Rules”, speech delivered at
the District Judges’ Annual Seminar, Judicial College, 22 March 2013, para.22. Though the most extreme and expensive
example was at the level of the House of Lords: *Three Rivers DC v Bank of England (No.3) (Summary Judgment) [2001]*
UKHL 16; see A. Zuckerman, “A Colossal Wreck—the BCCI-Three Rivers Litigation” (2006) 25 C.J.Q. 287.
- 400 *AON v Australian National University [2009] HCA 27, (2009) 239 CLR 175*.
- 401 *Callery v Gray (Nos 1–2) [2002] UKHL 28; [2002] 3 All ER 417; [2002] 1 W.L.R. 2000*, per Lord Bingham at [6] and
[8], and per Lord Hoffman at [17].
- 402 *Royal & Sun Alliance Insurance Plc v T & N Ltd [2002] EWCA Civ 1964* [38]; and *Walbrook Trustee (Jersey) Ltd v*
Fattal [2008] EWCA Civ 427 [33].
- 403 *Collins v CPS Fuels Ltd [2001] EWCA Civ 1597* [50].
- 404 *Collins v CPS Fuels Ltd [2001] EWCA Civ 1597* [53]. See also *Powell v Pallisers of Hereford Ltd [2002] EWCA Civ*
959 [32]; *Chartwell Estate Agents Ltd v Fergies Properties SA [2014] EWCA Civ 506; [2014] 3 Costs LR 588* [62]; and
Abdulle v Commissioner of Police of the Metropolis [2015] EWCA Civ 1260; [2016] 1 W.L.R. 898.
- 405 *Fred Perry (Holdings) Ltd v Brands Plaza Trading Ltd (t/a Brands Plaza) [2012] EWCA Civ 224* [16].
- 406 *Mitchell v News Group Newspapers Ltd [2013] EWHC 2355 (QB)*.
- 407 *Mitchell v News Group Newspapers Ltd [2013] EWHC 2355 (QB)* [27].
- 408 *Mitchell v News Group Newspapers Ltd [2013] EWHC 2355 (QB)* [29].
- 409 *Mitchell v News Group Newspapers Ltd [2013] EWHC 2355 (QB)* [53].
- 410 *Mitchell v News Group Newspapers Ltd [2013] EWHC 2355 (QB)* [65].
- 411 *Mitchell v News Group Newspapers Ltd [2013] EWCA Civ 1537; [2014] 1 W.L.R. 795*.
- 412 See *Biffa Waste Services Ltd v Dinler [2013] EWHC 3582 (QB)*.
- 413 *Mitchell v News Group Newspapers Ltd [2013] EWCA Civ 1537; [2014] 1 W.L.R. 795* [39].
- 414 *Mitchell v News Group Newspapers Ltd [2013] EWCA Civ 1537; [2014] 1 W.L.R. 795* [38].

- 415 *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537; [2014] 1 W.L.R. 795 [40]. This was a factor that was emphasised as being of importance to the final part of the test as reformulated by the Court of Appeal in *Denton v TH White Ltd* [2014] EWCA Civ 906; [2014] 1 W.L.R. 3926, see *British Gas Trading Ltd v Oak Cash & Carry Ltd* [2016] EWCA Civ 153; [2016] 1 W.L.R. 4530.
- 416 *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537; [2014] 1 W.L.R. 795 [41].
- 417 *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537; [2014] 1 W.L.R. 795 [41], [48].
- 418 See *Hashtroodi v Hancock* [2004] EWCA Civ 652; [2004] 1 W.L.R. 3206, as noted in *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537; [2014] 1 W.L.R. 795 [42]–[43].
- 419 *Hoddinott v Persimmon Homes (Wessex) Ltd* [2007] EWCA Civ 1203 [59].
- 420 *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537; [2014] 1 W.L.R. 795 [48], [60].
- 421 See, for instance, S. Sime, “Sanctions after Mitchell” (2014) 33 C.J.Q. 133.
- 422 *Denton v TH White Ltd* [2014] EWCA Civ 906; [2014] 1 W.L.R. 3926 [21].
- 423 *Denton v TH White Ltd* [2014] EWCA Civ 906; [2014] 1 W.L.R. 3926.
- 424 *Denton v TH White Ltd* [2014] EWCA Civ 906; [2014] 1 W.L.R. 3926 [24].
- 425 *Lord Chancellor v Taylor Willcocks Solicitors* [2014] EWHC 3664 (QB).
- 426 *Denton v TH White Ltd* [2014] EWCA Civ 906; [2014] 1 W.L.R. 3926 [81]. Jackson LJ dissented in respect to the approach to be taken to the third stage of the test.
- 427 See, for instance, *British Gas Trading Ltd v Oak Cash & Carry Ltd* [2016] EWCA Civ 153; [2016] 1 W.L.R. 4530 (breach of unless order).
- 428 *Denton v TH White Ltd* [2014] EWCA Civ 906; [2014] 1 W.L.R. 3926 [24]–[28]. On defaults that were serious and significant see, for instance, *Yampolskaya v AB Bankas Snoras (In Bankruptcy)* [2015] EWHC 2136 (QB). In *Utilise TDS Ltd v Davies* [2014] EWCA Civ 906; [2014] 1 W.L.R. 3296, which formed part of the appeal in Denton, a 45-minute delay in compliance with an unless order to file a costs budget was not serious or significant. In particular, it did not put the trial date at risk; also see *Caliendo v Mishcon de Reya (A Firm)* [2015] EWCA Civ 1029; [2015] 5 Costs LR 849. In *Greig v Stirling* [2014] EWHC 4017 (QB), an application was made four days out of time. As such it was not a serious or significant default.
- 429 *Denton v TH White Ltd* [2014] EWCA Civ 906; [2014] 1 W.L.R. 3926 [29]–[30]. Also see *Durrant v Chief Constable of Avon & Somerset* [2013] EWCA Civ 1624; [2014] 2 All ER 757 (no good reason for failure to serve witness statements); *Kimathi v Foreign & Commonwealth Office* [2017] EWHC 939 (QB) (significant delay in seeking to join group litigation register without good reason); *British Gas Trading Ltd v Oak Cash & Carry* [2016] EWCA Civ 153; [2016] 1 W.L.R. 4530 (solicitor’s work could have been delegated to other members of the firm); and *R (Kigen) v Secretary of State for the Home Department* [2015] EWCA Civ 1286; [2016] 1 W.L.R. 723 (waiting for decision of Legal Aid Agency concerning funding is not a good reason for non-compliance).
- 430 See *Bruce v Wychavon District Council* [2023] EWCA Civ 1389 [37]–[45], where Coulson LJ noted, in the context of an application to set aside under CPR 39.1, the importance of providing specific evidence justifying non-attendance at the hearing giving rise to the default judgment or order.
- 431 *Denton v TH White Ltd* [2014] EWCA Civ 906; [2014] 1 W.L.R. 3926 [31]–[38].
- 432 *AIC Ltd v Federal Airports Authority of Nigeria* [2022] UKSC 16; [2022] 1 W.L.R. 3223 [55].
- 433 *Denton v TH White Ltd* [2014] EWCA Civ 906; [2014] 1 W.L.R. 3926 [35].
- 434 *Denton v TH White Ltd* [2014] EWCA Civ 906; [2014] 1 W.L.R. 3926 [36]. In *McTear v Englehard* [2016] EWCA Civ 487; [2016] 4 W.L.R. 108, the Court of Appeal considered the correct approach where applications for relief were made in respect of multiple breaches; in that case there were two. It was held that each breach should be considered separately apart from in respect of the third, and final, test.
- 435 *Chartwell Estate Agents Ltd v Fergies Properties SA* [2014] EWCA Civ 506; [2014] 3 Costs LR 588 [34]; *Denton v TH White Ltd* [2014] EWCA Civ 906; [2014] 1 W.L.R. 3296 [36]; and *British Gas Trading Ltd v Oak Cash and Carry Ltd* [2016] EWCA Civ 153; [2016] 1 W.L.R. 4530.
- 436 *Denton v TH White Ltd* [2014] EWCA Civ 906; [2014] 1 W.L.R. 3926 [34]; and *British Gas Trading Ltd v Oak Cash & Carry* [2016] EWCA Civ 153; [2016] 1 W.L.R. 4530. However, the Court of Appeal made clear in *Solanki v Intercity Telecom Ltd* [2018] EWCA Civ 101; [2018] 1 Costs LR 103, approving the approach in *Teinaz v Wandsworth LBC* [2002] ICR 1471, that a trial may properly be adjourned on the application of a party notwithstanding the adverse effect it may have on the other parties or the court, where the applicant demonstrates that they are unable to attend for medical reasons. See also *Simou v Salliss* [2017] EWCA Civ 312; *Manning and Napier Fund Inc v Tesco Plc* [2020] EWHC 2106 (Ch).
- 437 *Chartwell Estate Agents Ltd v Fergies Properties SA* [2014] EWCA Civ 506; [2013] 3 Costs LR 588. Also see *Greig v Stirling* [2014] EWHC 4017 (QB).
- 438 Albeit as part of the *Mitchell* test; *Denton* not having yet been decided.

- 439 *Global Torch Ltd v Apex Global Management Ltd (No 2) [2014] UKSC 64; [2014] 1 W.L.R. 4495.*
- 440 *Diriye v Bojaj* [2020] EWCA Civ 1400; [2021] 1 W.L.R. 1277 [68]–[69]; cf. *Swivel UK Ltd v Tecnolumen GmbH* [2022] EWHC 825 (Ch) [42].
- 441 *Denton v TH White Ltd* [2014] EWCA Civ 906; [2014] 1 W.L.R. 3926 [39]–[43]; see for example *Viridor Waste Management Ltd v Veolia ES Ltd* [2015] EWHC 2321 (Comm). It should be noted that the emphasis here is on minor and inadvertent procedural defaults that should “obviously” attract relief, and the court will not embark on protracted discussions of whether a party should have consented to the application, nor should it need to do so: *R (Idira) v The Secretary of State for the Home Department* [2015] EWCA Civ 1187; [2016] 1 W.L.R. 1694 [80]–[84]. See the discussion of the scope of the parties’ duty to co-operate in Ch.1 Overriding Objective paras 1.94 ff.
- 442 See Ch.7 Statements of Case paras 7.59 ff; *Global Torch Ltd v Apex Global Management Ltd (No 2) [2014] UKSC 64* [2014] 1 W.L.R. 4495; *Su-Ling v Goldman Sachs International* [2015] EWHC 759 (Comm) [38]; *Georgiev v Kings College Hospital NHS Foundation Trust Appeal* [2016] EWHC 104 (QB) [8]; *Henderson v Dorset Healthcare University Foundation NHS Trust* [2016] EWHC 3032 (QB) [60]; and *Nesbit Law Group LLP v Acasta European Insurance Co Ltd* [2018] EWCA Civ 268.
- 443 *Ahmed v Ahmed* [2016] EWCA Civ 686 [16].
- 444 2025 WB 3.18.3.
- 445 See Ch.1 Overriding Objective paras 1.17 ff.
- 446 For examples of the pre-CPR approach to granting relief from peremptory orders, see *Grand Metropolitan Nominee (No.2) Co Ltd v Evans* [1993] 1 All ER 642; [1992] 1 W.L.R. 1191, CA; and *Re Jokai Tea Holdings Ltd* [1993] 1 All ER 630, CA. In the absence of prejudice the court was generally willing to forgive non-compliance, provided a fair trial was still possible and any prejudice suffered by the opponent could be compensated in costs. In particular, the court was prepared to forgive defaults for which lawyers, rather than parties, were responsible. As such, the court’s approach to peremptory orders was fundamentally similar to its approach to other species of non-compliance.
- 447 *JSC BTA Bank v Ablyazov* [2012] EWCA Civ 1411, [188]. See *Pittville Ltd v Frankau Ltd* [2016] EWHC 2683 (Ch); [2016] 6 Costs L.R. 1059 for a specific example of the harm identified here.
- 448 *Ryder Plc v Dominic James Beever* [2012] EWCA Civ 1737; see also *Haley v Siddiqui* [2014] EWHC 835 (Ch) [15].
- 449 *Marcan Shipping (London) Ltd v Kefalas* [2007] EWCA Civ 463; [2007] 1 W.L.R. 1864 [36].
- 450 *Marcan Shipping (London) Ltd v Kefalas* [2007] EWCA Civ 463; [2007] 1 W.L.R. 1864; *Tarn Insurance Services Ltd v Kirby* [2009] EWCA Civ 19 [79]; and *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537; [2014] 1 W.L.R. 795, [45]. See also *Vernon v Spoudeas* [2010] EWCA Civ 666 [59] per Jackson LJ.
- 451 *JSC BTA Bank v Ablyazov* [2010] EWHC 2219 (QB).
- 452 *British Gas Trading Ltd v Oak Cash and Carry Ltd* [2016] EWCA Civ 153; [2016] 1 W.L.R. 4530 [38]–[39].
- 453 *CIBC Mellon Trust Co v Stolzenberg (Sanctions: Non-compliance)* [2004] EWCA Civ 827 [167]. Though not every breach of an unless order will automatically amount to a serious and significant error: see for instance *Falmouth House Ltd v Abou-Hamdan* [2017] EWHC 779 (Ch). Where a breach is serious, that is all that matters; there is no room for considering “fine gradations” of seriousness by comparing one case with another: *Diriye v Bojaj* [2020] EWCA Civ 1400; [2021] 1 W.L.R. 1277 [46].
- 454 *British Gas Trading Ltd v Oak Cash and Carry Ltd* [2016] EWCA Civ 153; [2016] 1 W.L.R. 4530 [41].
- 455 *Rybak v Langbar International Ltd* [2010] EWHC 2015 (Ch); *JSC BTA Bank v Ablyazov* [2012] EWCA Civ 564.
- 456 See for instance *Marstons Plc v Charman* [2009] EWCA Civ 719, where the unless order was held to be disproportionate, unfair, unnecessary and generally unhelpful to the timely dispatch of the case.
- 457 *Tibbles v SIG Plc (t/a Asphaltic Roofing Supplies)* [2012] EWCA Civ 518; [2012] 1 W.L.R. 2591. Alternatively, the party could apply for the order to be varied or revoked under CPR 3.1(7), though this will be rarer.
- 458 *Flaxman-Binns v Lincolnshire CC* [2004] EWCA Civ 424; [2004] 1 W.L.R. 2232.
- 459 *Lambeth LBC v Onayomake* [2007] EWCA Civ 1426.
- 460 *Sharif v Garrett & Co (a firm)* [2001] EWCA Civ 1269; [2002] 1 W.L.R. 3118. See also *Flaxman-Binns v Lincolnshire CC* [2004] EWCA Civ 424; [2004] 1 W.L.R. 2232; *Rowe v Tregaskes* [1968] 3 All ER 447; [1968] 1 W.L.R. 1475, CA; and *Co-operative Retail Services Ltd v Guardian Assurance (CA, unreported, 28 July 1999)*.
- 461 *Placito v Slater* [2003] EWCA Civ 1863; [2003] 1 W.L.R. 1605.
- 462 *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537; [2014] 1 W.L.R. 795 [41].
- 463 See for example *Depp v News Group Newspapers Ltd* [2020] EWHC 1734 (QB). It is unfortunate that in that case, the court considered it relevant that an unless order requiring disclosure had been breached as a result of the claimant’s solicitors misunderstanding the nature of their client’s disclosure obligations under the rules.

- 464 Such a claim will likely fall to be considered as a loss of a chance case: see *Perry v Raley's Solicitors [2019] UKSC 5; [2020] AC 352*.
- 465 *Barton v Wright Hassall LLP [2018] UKSC 12; [2018] 1 W.L.R. 1119*. See also *EDF Energy Customers Ltd v Re-Energized Ltd [2018] EWHC 652 (Ch) [37]*.
- 466 *Barton v Wright Hassall LLP [2018] UKSC 12; [2018] 1 W.L.R. 1119* [18], endorsing *R (Hysaj) v Secretary of State for the Home Department [2015] 1 W.L.R. 2472* [44], and *Nata Lee Ltd v Abid [2014] EWCA Civ 1652*.
- 467 *Axnoller Events Ltd v Brake [2021] EWHC 1706 (Ch) [27]*.
- 468 *Nata Lee Ltd v Abid [2014] EWCA Civ 1652* [53]; and *Barton v Wright Hassall LLP [2018] UKSC 12; [2018] 1 W.L.R. 1119* [18]. Also see *Tinkler v Elliott [2012] EWCA Civ 1289* [32].
- 469 *Barton v Wright Hassall LLP [2018] UKSC 12; [2018] 1 W.L.R. 1119* [42].
- 470 *Barton v Wright Hassall LLP [2018] UKSC 12; [2018] 1 W.L.R. 1119* [19].
- 471 *Siebe Gorman & Co Ltd v Pneumac Ltd [1982] 1 All ER 377; [1982] 1 W.L.R. 185, CA*.
- 472 For a different example of a pragmatic concession see *CEF Holdings Ltd v Mundey [2012] EWHC 1524 (QB)*, [189] ff.
- 473 *Siebe Gorman & Co Ltd v Pneumac Ltd [1982] 1 All ER 377; [1982] 1 W.L.R. 185, CA*. For discussion see Ch.23 Judgment and Orders.
- 474 *Ropac Ltd v Inntrepreneur Pub Co (CPC) Ltd [2001] C.P. Rep. 31, ChD*.
- 475 *Chaggar v Chaggar [2002] EWCA Civ 1637; Parkin v Bromley Hospitals NHS Trust [2002] EWCA Civ 478* [38]; *Pannone LLP v Aardvark Digital Ltd [2011] EWCA Civ 803*; and *Chiu v Waitrose Ltd [2011] EWHC 1356 (TCC)*.
- 476 *Safin (Fursecroft) Ltd v Badrig's Estate [2015] EWCA Civ 739*; and *Riodan v Moon Beevor Solicitors (A Firm) [2018] EWHC 1452 (QB)*.
- 477 *Chiu v Waitrose Ltd [2011] EWHC 1356 (TCC)*.
- 478 *Ropac Ltd v Inntrepreneur Pub Company (CPC) Ltd [2001] C.P. Rep. 31, ChD*; approved by the Court of Appeal in *Confetti Records v Warner Music UK Ltd (Security for Costs: Extension of Time) [2003] EWCA Civ 1748*. See also *Safin (Fursecroft) Ltd v Badrig's Estates [2015] EWCA Civ 739; Jalla v Royal Dutch Shell Plc [2021] EWCA Civ 1559*.
- 479 *Pannone LLP v Aardvark Digital Ltd [2011] EWCA Civ 803*, as explained by Sir Terence Etherton C in *Safin (Fursecroft) Ltd v Badrig's Estate [2015] EWCA Civ 739* [61].
- 480 *Pannone LLP v Aardvark Digital Ltd [2011] EWCA Civ 803*.
- 481 *Placito v Slater [2003] EWCA Civ 1863; [2003] 1 W.L.R. 1605*.

Costs Consequences of Non-Compliance

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 12 - Case Management & Enforcing Party Compliance

Part II—Enforcing Party Compliance

Costs Consequences of Non-Compliance

- 12. 249** Failure to comply with process requirements may result in adverse costs consequences. The general principles governing costs decisions will be discussed in Ch.28. For present purposes it is sufficient to observe that in deciding what costs order to make the court must have regard, among other things, to the conduct of the parties during the proceedings and even before proceedings ([CPR 44.2\(4\)–\(5\)](#)). The court has always had the power to require a litigant who has applied for an extension of time or for late performance to pay the costs of the application. However, now the court may also take a party's default into consideration when making a final costs order. If the court finds that a party conducted its case in a dilatory manner, or that through its failure to comply with process obligations the litigant impeded or delayed final resolution, the court may deny a winning litigant its costs or even order it to pay the opponent's costs. This is a powerful measure which, if applied consistently, should encourage greater compliance.

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Striking Out for Abuse of Process

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 12 - Case Management & Enforcing Party Compliance

Part II—Enforcing Party Compliance

Striking Out for Abuse of Process

Introduction

- 12.250 In addition to its case management powers under the [CPR](#), the court has a wide discretionary power at common law to prevent its processes from being abused. The power is said to arise from the court's inherent jurisdiction to safeguard its authority and processes from being undermined by disruptive, oppressive or otherwise inappropriate use of court procedures.⁴⁸² [CPR 3.4\(2\)\(b\)](#), which provides that the court may strike out a statement of case on the grounds that it amounts to "an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings", exemplifies one aspect of this general jurisdiction.
- 12.251 The jurisdiction is very wide and it is therefore neither possible nor desirable to force it into categories or reduce it to hard-and-fast rules. While the case law provides no ready-made solution to every problem, it offers helpful illustrations of how the jurisdiction may be usefully employed. The court may therefore draw assistance from past decisions, but it is incumbent on it to consider all the circumstances of the case in light of current judicial policies regarding the conduct of litigation. Whether particular conduct amounts to abuse of process must be considered by reference to the overriding objective.⁴⁸³
- 12.252 The purpose of the present section is to draw attention to the range of situations in which the jurisdiction to prevent abuse of process may be invoked and to the type of considerations that are involved in its exercise. It also considers the possibility of striking out a further claim where the first action was struck out for abuse of process. However, discussion of the abuse of process jurisdiction to prevent litigation of issues that have already, or could have, been decided in previous proceedings will be postponed to Ch.26, which deals with finality of litigation. For present purposes, it suffices to note that abuse of process in the *Henderson v Henderson* sense⁴⁸⁴ may be found in circumstances where a party was given a fair opportunity to raise, but failed to raise, at an earlier hearing (including an earlier interim hearing) a matter which subsequently becomes the basis for its claim.⁴⁸⁵ On an application to strike out for abuse of process on this basis, the court will need to conduct a broad merits-based judgment taking account of the public and private interests involved, together with all the facts of the case, "focussing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before".⁴⁸⁶ A finding of abuse will be rare unless there is some element of unjust harassment, vexation or oppression involved in the respondent's conduct.⁴⁸⁷

General principles governing the exercise of the jurisdiction

Abuse of process fills the gap where rules run out

12.253

The purpose of civil procedure is to enable the court to do justice; namely, to decide controversies fairly and in accordance with the law and the true facts. The processes established by the rules, such as issuing claims and defending claims, obtaining disclosure or adducing witness testimony, are meant to enable the parties to advance their cases and assist the court to bring litigation to a satisfactory conclusion. Procedural rules are designed to promote fairness, but no rules can be drafted with such specificity or detail to guarantee that they are never exploited to divert the process from its aim of doing justice. Even the much-expanded range of responses to party default, which the CPR have brought about, cannot always provide an adequate solution.

- 12. 254** One of the principal aims of the abuse of process jurisdiction is to enable the court to deal with problems to which the rules either provide unsatisfactory solutions, or which they altogether fail to address. Abuse of process, Lord Bingham CJ has explained, consists in “using [the court’s] process for a purpose or in a way significantly different from its ordinary and proper use”. ⁴⁸⁸ The jurisdiction to prevent such misuse of procedure thus transcends the rules. It provides the court with the power to prevent or disqualify procedural acts not because they are contrary to the rules, but because they amount to a misuse of the process. ⁴⁸⁹ This is, Lord Diplock said, an “inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people”. ⁴⁹⁰

- 12. 255** The jurisdiction to take measures that express court disapproval of party conduct that the rules do not otherwise forbid, or even permit, is peculiar to procedural law. The court does not possess a comparable jurisdiction in relation to laws that confer substantive rights or impose burdens. ⁴⁹¹ The same may not be said of procedural rules because procedure is a means to an end. A distinction is therefore drawn between proper and improper means. In this sense procedure does have a spirit. Since we know the proper purpose for which procedure may be employed, we can identify the purposes for which it should not be used. ⁴⁹² Identifying misuse is assisted by the overriding objective which, in conjunction with the case management goals set out at **CPR 1.4**, establishes general standards of appropriate procedural conduct.

- 12. 256** Since the abuse of process jurisdiction comes into its own when the process used would otherwise be valid, there is no need to invoke it when a litigant has used a procedure which is invalid or ineffective. A question of abuse of process can arise only where the mode used for commencing proceedings could be in accordance with the letter of the rules, but is nevertheless improper in the circumstances. In *Clark v University of Lincolnshire and Humberside*, the question arose whether the claimant had abused the process of the court by commencing proceedings by means of a **CPR 8** claim instead of by means of judicial review. Lord Woolf explained the approach that a court should adopt when considering whether this amounted to abuse of process:

“the court will not strike out a claim which could more appropriately be made under [another procedure] solely on the basis of the procedure which has been adopted. It may however do so, if it comes to the conclusion that in all the circumstances, including the delay in initiating the proceedings, there has been an abuse of the process of the court under the **CPR**”. ⁴⁹³

Since abuse of process turns not on the interpretation of rules but on the use made of them, there can be no hard-and-fast test capable of simple application. The court must assess the effect that a particular process would have on other parties or the system.

- 12. 257** Given that power to deal with abuse of process is a residual jurisdiction, its use is predominantly appropriate in situations where its exercise is required in order to reach a just conclusion. There is no need to use this power where the court can find a satisfactory solution under the CPR or other legislation. It would normally be preferable to invoke the specific sanction provided for particular conduct rather than to have recourse to the general abuse of process doctrine. If a claim may be dismissed on the grounds that it is time-barred, it would normally be pointless to describe the act of initiating such a claim as an abuse of process. ⁴⁹⁴ Equally, there is nothing to be gained from regarding every statement of case that discloses no

reasonable grounds for bringing or defending a claim as abuse of process, when it may be struck out under CPR 3.4(2)(a).⁴⁹⁵ However, what is clear is that abuse of process “may include unreasonably vague and incoherent statements of case which are likely to obstruct the just disposal of the case”.⁴⁹⁶ That stands to reason. A statement of case is designed to let the opposing party know precisely the case it has to meet, and to inform the court of the issues in dispute. A vague and incoherent pleading may be abusive if it does not fairly put the opposing party on notice of the case being advanced against it, as it would be liable (if not struck out) to waste the parties’ (and the court’s) time and resources by inviting responsive pleadings, disclosure and evidence beyond that which would be required if the abusive statement of case were clear and concise.

Strike out for abuse of process is a measure of last resort

12. 258 Any decision to strike out for abuse of process or under CPR 3.4(2)(b) will be reached as a course of last resort. In *Orji v Nagra*,⁴⁹⁷ Coulson LJ described a strike out under the rule as a “draconian remedy”,⁴⁹⁸ explaining:

“Even in a case where abuse may be made out, it does not necessarily follow that the claim should be struck out ... The remedy of striking out must be proportionate in all the circumstances. There are obviously numerous alternative remedies, so the striking out of a valid claim should always be the last option.”⁴⁹⁹

A party seeking to strike out a statement of case for abuse of process must therefore surmount a high hurdle. “It needs to be shown that the conduct of the party in question is so objectionable that they should forfeit their right to take part in a trial, such as where that party is determined to pursue proceedings with the object of preventing a fair trial (through the use of forgeries and perjured evidence)”.⁵⁰⁰ So, for example, where a defendant faces reiterative allegations in a variety of different versions of a statement of case, the better approach may well be to seek careful case management by the court in order to enable a swift resolution at a trial, rather than to make a series of strike out applications which will themselves be liable to cause additional cost, delay and distraction.

12. 259 In *McDonald v Excalibur & Keswick Groundworks Ltd*, Nicola Davies LJ, focusing on the words “otherwise likely to obstruct the just disposal of proceedings” in CPR 3.4(2)(b), described the essence of the rule as being that a party “is guilty of misconduct which is so serious that it would be an affront to the court to permit him to continue to prosecute his [case]”.⁵⁰¹ The court asked the question in this way: “is the litigant’s conduct of such a nature and degree as to corrupt the trial process so as to put the fairness of the trial in jeopardy?”⁵⁰² In that case, the claimant’s relevant conduct, which had involved giving a materially different account in his witness statement from that contained in his statement of case, fell well short of that description, notwithstanding that it “had the potential to undermine not only his credibility but also the viability of his claim”.⁵⁰³ Although the result reached in that case is unremarkable, it would not be desirable to allow the simple language of the rule to be overlaid with heavy glosses. This runs the risk of curtailing the exercise of a jurisdiction designed to be flexible. As the Court of Appeal rightly stated in *Orji*, “the categories of abuse are not closed and ... a flexible approach to r.3.4(2)(b) must always be adopted”.⁵⁰⁴

12. 260 Despite the high bar for strike out recognised in the case law, it should not be thought that extreme instances of procedural default cannot amount to abuse of process, or that the court will not exercise its power to strike out on this basis.⁵⁰⁵ As we shall presently see, wholesale disregard of the rules may properly be characterised as abuse of process meriting strike-out. So may severe indolence or delay, although usually some additional abusive factor will be required.⁵⁰⁶ The point made here is merely that the abuse of process jurisdiction has no part to play in run-of-the-mill cases of failure to comply with rules or court orders. To treat such situations as abuse of process devalues the currency. Thus, where a defendant seeks an adjournment in order to deny the claimant the remedy to which the claimant is then entitled, but which will not be available to them later, the court does not need to invoke the abuse of process jurisdiction in order to dismiss the application. Instead, it can be dismissed on the straightforward ground that the reason given for the application does not justify its grant.⁵⁰⁷

Private and public dimensions of abuse of process

- 12.261 The jurisdiction to strike out for abuse of process may be invoked to safeguard two different interests: the interests of individual litigants who need to be protected from unfair practices, and the interests of the public in the proper functioning of the justice system. It is because of the public dimension that the court has discretion to act of its own accord to protect itself against abuse.⁵⁰⁸ Thus, wholesale disregard of rules and orders amounts to abuse of process both because it undermines the court's authority and because it tends to deprive other parties of fair adjudication.⁵⁰⁹ In a case where the defendant had been accused of murdering his opponent, Lightman J said:

“the conduct of Mr van Hoogstraten is such a flagrant abuse of process and such a challenge to the administration of justice that (irrespective whether a fair trial is possible) an order [striking out his defence and counterclaim] is required in the interests of the administration of justice. No greater challenge to the administration of justice and no greater perversion of the course of justice can be conceived than the murder of the opposing party to obtain an advantage in the litigation. It is conduct which no court, with its necessary concern for the administration of justice can tolerate. Such an order is both proportionate and necessary.”⁵¹⁰

- 12.262 On the other hand, the abuse of process jurisdiction does not give the court a free hand to interfere whenever it disapproves of the way a litigant conducts its case. The right of access to court combined with the principle of party autonomy underpin the right to conduct one's case as one chooses within the rules. A case which is merely weak is therefore not liable to be struck out as an abuse of process, although summary judgment may be appropriate in such a case. On the other hand, where a pleading is unreasonably vague, or where a party has persistently vacillated as to the nature of its claim—seeking to advance inconsistent cases at different points within the same or related proceedings—then strike out would be available.⁵¹¹ In this regard, the private and public dimensions of abuse of process are important to the court's decision whether to strike out. Strike out is a draconian remedy, and abuse of process provides a ground for restraining a party from pursuing its case only when its conduct is such as to involve serious unfairness to another party or where it threatens the proper administration of justice.

Founding abuse on disruptive consequences

- 12.263 Proceedings may amount to abuse of process due to their tendency to disrupt the proper administration of civil justice. For instance, trying to litigate an issue that has already been decided in a test case amounts to abuse of process, because it obstructs the court's attempt to determine a common issue for the benefit of all litigants with an interest in the outcome.⁵¹² Similarly, it is an abuse of process to advance factual allegations which are inconsistent with allegations raised in previous proceedings,⁵¹³ to make repeated applications relating to the same issue without any alteration of the circumstances⁵¹⁴ or to pursue an appeal where the respondent has offered to settle on the basis that they concede all the points that would have been subject to the appeal.⁵¹⁵ Such conduct, as Henderson LJ explained in *Otkritie International Investment Management Ltd v Urumov*, fails to accord with “... the modern principles of case management which include encouraging the settlement of disputes, concentrating on the real issues between the parties, and making the best use of scarce judicial resources”.⁵¹⁶ It imposes an improper and unjustifiable burden not only on other parties to the litigation, but also on the court and litigants in other proceedings, contrary to the overriding objective. The same may be said of a party who unreasonably fails to apply for a consolidation of joint claims in order to avoid several liability for costs,⁵¹⁷ or of a party who floods the court with numerous groundless applications,⁵¹⁸ or of a party who is guilty of wholesale disregard of its process obligations.⁵¹⁹

- 12.264

Indeed, the introduction of the CPR together with the overriding objective has significantly extended the scope of abuse of process by bringing into play the effect of process on court resources. As Lord Phillips MR explained in *Jameel v Dow Jones and Co*, an “abuse of process is of concern not merely to the parties but to the court. It is no longer the role of the court simply to provide a level playing field and to referee whatever game the parties choose to play upon it. The court is concerned to ensure that judicial and court resources are appropriately and proportionately used in accordance with the requirements of justice”.⁵²⁰ The claim for defamation in that case was dismissed as an abuse of process because the damage to the claimant’s reputation was shown to be so trivial that the proceedings could not be regarded as serving the legitimate purpose of protecting the claimant’s reputation.⁵²¹

Abuse resting on improper motive

- 12. 265** It is an abuse of process to employ the court’s procedures for purposes other than the just determination of disputes. An improper intention is not a necessary precondition for establishing abuse of process, but it is a factor to be taken into account in arriving at the decision whether to allow a particular process.⁵²² Improper motive and underhand tactics are always highly relevant factors. Thus, it is an abuse of process to bring or maintain proceedings with no intention of bringing them to a conclusion.⁵²³ It is similarly an abuse of process to advance a claim, or take some other procedural step, in order to harass an opponent or harm them, or in order to advance an improper or dishonest purpose.⁵²⁴ It is also abusive to misstate the true value of a claim when drafting a claim form for tactical reasons.⁵²⁵
- 12. 266** The absence of a legitimate interest in employing a particular procedure may amount to abuse of process. Thus, it has been held that bringing proceedings against a local authority merely for the purpose of establishing a fact that was relevant to a dispute with a third party amounted to abuse of process because local authorities have limited resources with which to perform important public functions and should not, therefore, be dragged into litigation in which they have no interest and in which no genuine relief is sought against them.⁵²⁶ However, as long as a litigant has an acceptable reason for seeking court adjudication, its claim will not be thrown out on grounds of abuse of process.⁵²⁷ It is not abuse of process to initiate a bona fide claim while lacking the means to pay the defendant’s costs.⁵²⁸ But it is an entirely different matter if a claimant knowingly advances a groundless claim in order to harass the defendant.⁵²⁹

Wholesale disregard of the rules

Pre-CPR approach to dismissal for want of prosecution

- 12. 267** The RSC contained a number of provisions empowering the court to dismiss an action if the claimant failed to advance their cause as dictated by the rules.⁵³⁰ In addition to these express provisions, the court had an inherent jurisdiction to dismiss an action for want of prosecution, where the claimant failed to comply with the rules or had been responsible for excessive delay in proceeding with the action. The guiding principles were the same whether the court was acting under its express powers or under its inherent jurisdiction.⁵³¹ During the 1960s one line of cases stressed the need to observe the time limits and advocated a policy of reacting to excessive delays with dismissal.⁵³² Although some sympathy for this view could still be found in the 1980s,⁵³³ the dominant view had shifted towards a more relaxed approach. The case of *Allen v Sir Alfred McAlpine & Sons Ltd*⁵³⁴ illustrates the two approaches and, indeed, the shift towards the latter. The claimants, whose claim was struck out for unjustified delays, argued that the court ought not to strike out an action without trial because it would thereby deprive a litigant of its access to justice. But Lord Denning countered:

“All through the years men have protested the law’s delay and counted it as a grievous wrong, hard to bear … To put right this wrong, we will in this court do all in our power to enforce expedition: and, if need be, we will strike out actions when there has been excessive delay. This is a stern measure; but it is within the inherent jurisdiction of the court, and the rules of court expressly permit it. It is the only effective sanction that they contain.”⁵³⁵

12. 268 By contrast, Diplock LJ adopted a different approach. He explained that an application of this kind was usually made only after the expiry of the limitation period so that a dismissal “is then a draconian order and will not be lightly made”.⁵³⁶ He therefore felt that a dismissal would only be justified where the delay threatened the possibility of a fair trial.⁵³⁷ He provided a refined formulation of his view a decade later in *Birkett v James*,⁵³⁸ when he said:

“The power should be exercised only where the court is satisfied either (1) that the default has been intentional and contumelious, e.g. disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (2) (a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or have caused serious prejudice to the defendant either as between themselves and the plaintiff or between each other or between them and a third party.”⁵³⁹

12. 269 Both limbs of this test were driven by the justice on the merits philosophy. The first limb is founded on the view that a claimant who has flouted the authority of the law forgoes the right to demand adjudication. Some judges took the view that this limb was confined to situations where a litigant has not only intentionally flouted a court order, but also continued in their defiance so that it became impossible to hold a fair trial.⁵⁴⁰ Under the second limb, delay would justify dismissal only if the delay undermined the possibility of fair trial, or if it prejudiced or harmed the defendant’s interests. The possibility of fair trial would be undermined by the loss or deterioration of evidence, especially the defendant’s evidence. The need to avoid delay, to promote conformity with the time limits and to ensure fairness to other litigants needing access to the courts did not figure in Lord Diplock’s formulation.⁵⁴¹

12. 270 Accordingly, delay on its own was no grounds for dismissal, no matter how inordinate and inexcusable. The consequences of the principle of *Birkett v James* were inevitable: a weakening of the normative force of time limits. Litigants could rest assured that failure to comply with deadlines would have no serious adverse consequences, except in the most extreme situations. In addition to creating a normative deficit, this approach gave rise to a whole industry of satellite litigation on the interpretation of the *Birkett v James* principles. By 1993, the second limb of Lord Diplock’s test had acquired no fewer than 15 sub-rules.⁵⁴² Resolving an argument concerning these rules could require a two-day hearing in the Court of Appeal and a judgment running into many pages,⁵⁴³ and end up involving more effort and more cost than the substantive proceedings.⁵⁴⁴ Brooke LJ summed up the pre-CPR situation as follows:

“It is now well known that the decision of this court in *Allen v McAlpine* … spawned an almost relentless flow of expensive, time consuming, ancillary litigation over the next 30 years. In those days the court had no effective power to manage cases, and the orders it made (whether manual or automatic) were often as much honoured in the breach as in the observance.”⁵⁴⁵

12. 271 Not surprisingly, defendants were deterred from applying for dismissal. Many would in any event prefer to let sleeping dogs lie. As a result, proceedings could drag on for many months and even years without making appreciable progress towards a final resolution. The situation was particularly lethargic in the county courts, where most actions were, and continue to be, tried. In 1989, the legislature introduced a new measure designed to bring down the curtain on actions that had remained dormant for a certain length of time in the county courts, called the automatic directions procedure: CCR Ord.17 r.11.⁵⁴⁶

Under this regime, once pleadings were closed, “unless a day has already been fixed the plaintiff shall within 6 months request the proper officer to fix a day for the hearing”.⁵⁴⁷ Rule 11(9) provided:

“If no request is made pursuant to paragraph (3)(d) within 15 months of the day on which pleadings are deemed to be closed (or within 9 months after the expiry of any period fixed by the court for making such request), the action shall be automatically struck out.”

- 12. 272** The legislative intention was to bring to an end actions in which no progress had been made for nine full months after the time when the claimant should have asked for a hearing. However, this constituted such a departure from the justice on the merits philosophy that the courts were not prepared to tolerate it. The Court of Appeal held that the automatic striking out provision did not deprive the court of its discretion to extend the period within which a person is required to do any act in any proceedings.⁵⁴⁸ As a result, it was faced with numerous appeals representing a wide variety of circumstances concerning the effect of CCR Ord.17 r.11.⁵⁴⁹

- 12. 273** The upshot was that the normative deficit of time rules remained unchecked in the county courts as well as in the High Court. It is instructive to observe how the lofty ideal of deciding cases on their true merits rather than on procedural grounds degenerated into a morass of complex and detailed rules embodied in a litany of authorities; how the laudable discretion to cure procedural defects became laden with a large edifice of technical case law. Ironically, all this tended to distract attention from the merits and channel effort and resources into litigation about procedure.

Grounds for striking out for want of prosecution

- 12. 274** Since the introduction of the CPR the court has become more astute to recognise that where a claimant brings proceedings and deliberately fails to prosecute them to conclusion (sometimes referred to as “warehousing the claim”), this may be tantamount to abuse.⁵⁵⁰ This idea finally gained impetus following Lord Woolf MR’s judgment in *Grovit v Doctor*, in which the claimant was found to have acted abusively in keeping a libel action alive for two years with no intention of prosecuting it to a conclusion.⁵⁵¹ Whilst delay on its own will not automatically and invariably lead to the claim being struck out, as Lord Woolf MR made clear, it would frequently do so.⁵⁵² Significantly, Lord Woolf MR explained that a claimant’s inactivity could itself be relied upon as evidence of the absence of an intention to advance the action. Accordingly, once it is established that the claimant has allowed the action to stagnate, the burden shifts to them to show why the action should not be struck out.

- 12. 275** In the later decision of *Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd*,⁵⁵³ Lord Woolf MR elaborated on the ideas he had developed in *Grovit v Doctor* and confirmed that “wholesale disregard of the rules is an abuse of process”.⁵⁵⁴ As he went on to make clear, only claims that are intended to be pursued properly ought to be commenced, and where a claimant has good reason for pausing the pursuit of a claim for a substantial period of time, they should not do so unilaterally but rather should seek the consent of the court and the other parties.⁵⁵⁵ Given that the ground for dismissal under the *Grovit v Doctor* line of authority was abuse of process, Lord Woolf MR did not find it difficult to reject the claimants’ argument, based on *Birkett v James*, that an action could not be dismissed for want of prosecution while the limitation period was still extant.⁵⁵⁶ He said that the “fact that the limitation period has not expired, does not figure to the same degree in a case where there has been contumelious conduct on behalf of a plaintiff and where the proceedings which are being struck out constitute an abuse of process. In such circumstances, the plaintiff may well find that if he brings fresh proceedings after the original proceedings are struck out they are stayed because of his conduct”.⁵⁵⁷ He went on to say that “the change in culture which is already taking place will enable courts to recognise in the future, more readily than heretofore, that a wholesale disregard of the rules is an abuse of process,” and spoke of the “more ready recognition that wholesale failure, as such, to comply with the rules justifies an action being struck out, so long as it is just to do so”.⁵⁵⁸

- 12.276 In *Alibrahim v Asturion Foundation*,⁵⁵⁹ the Court of Appeal considered the approach to be taken when assessing whether to strike out a claim for abuse of process following *Grovit v Doctor* and its progeny. Arnold LJ held that there were two stages to the analysis: “first, the court should determine whether the claimant’s conduct was an abuse of process; and if so, secondly, the court should exercise its discretion as to whether to strike out the claim”.⁵⁶⁰ While questions of unfairness to the other party will be relevant to the second part of the test, they are not relevant to whether or not there has been an abuse of process in the first place.⁵⁶¹ In determining these questions in the context of a claimant who had unilaterally ceased to pursue its claim for a substantial period, the court needed to consider the reason why the claimant had done so, and the objective strength of that reason by reference to the length of the period of time.⁵⁶²

Wholesale disregard of the rules

- 12.277 A party’s case may also fall to be struck out where it is guilty of gross non-compliance with rules and orders (as distinct from a claimant’s failure actively to prosecute its case). Conduct that demonstrates a litigant’s willingness to flout the court’s authority or a complete disregard of process obligations can also amount to abuse of process.⁵⁶³ Such conduct is sometimes described as intentional and contumelious, to stress that it is seen as an affront or challenge to the court’s authority. The stock example given in this context is that of wilful disobedience of a peremptory order.⁵⁶⁴ If the court were to tolerate purposeful disobedience of its rules, or wholesale disregard of rules and court orders, its standing as a court of law would be undermined. The same may be true, however, of serious and repeated non-compliance with rules and orders, even where the non-compliance is incompetent rather than intentional. The effect on the administration of justice is the same.
- 12.278 Procedural time limits are to be regarded as the framework within which litigation has to be resolved, and going outside this framework will not necessarily be tolerated. Accordingly, the fact that no prejudice is caused to the opposing party by serious non-compliance with rules and orders will not necessarily be determinative of whether the defaulter is guilty of abuse of process.⁵⁶⁵ In *UCB Corporate Services Ltd v Halifax (SW) Ltd*,⁵⁶⁶ the claimants were guilty of repeated failures to comply with rules and court orders. The claim was struck out on the grounds that this amounted to abuse of process, such that the continuation of the proceedings could not be tolerated. The claimants argued that the claim should not be struck out, relying on *Biguzzi v Rank Leisure*, where Lord Woolf MR sought to discourage dismissal of a party’s case when there were other ways of dealing with the default.⁵⁶⁷ But Lord Lloyd rejected this argument, saying that it “would be ironic indeed if the Civil Procedure Rules and *Biguzzi* led judges to treat cases of delay with greater leniency than under the old procedure. That could not have been the intention of the Master of the Rolls in *Biguzzi*”.⁵⁶⁸

Abuse where fresh proceedings are brought following strike-out

- 12.279 Where a default judgment is entered against a claimant following the striking out of their claim, they will be barred by the principle of res judicata from bringing fresh proceedings against the same party for the same cause of action, for as long as the default judgment stands (though as we have seen, they may apply to have the default judgment set aside under CPR 3.6).⁵⁶⁹ If a claim has been struck out but no default judgment has been entered, the claimant is not barred from issuing fresh proceedings in respect of the same claim, because an order striking out a claim is not a decision on the merits and does not give rise to res judicata.⁵⁷⁰ However, bringing fresh proceedings may itself amount to abuse of process.⁵⁷¹ Whether a claimant applies for a default judgment to be set aside, or whether they start fresh proceedings in the absence of a default judgment, the issue facing the court is essentially the same: whether a claimant whose claim has been struck out should be allowed another bite at the cherry. Since the issue is effectively identical, so should be the approach to resolving it.

- 12.280 Here a distinction should be drawn between situations where the original strike-out was because the claimant had abused the court's process, and those where the original claim was struck out for some other reason such as failure to comply with an unless order. In *Securum Finance Ltd v Ashton*,⁵⁷² Chadwick LJ stressed the point that a claimant who had had one claim struck out for want of prosecution had to demonstrate special reasons why the court should not strike out a second claim as an abuse of process:

“For my part, I think that the time has come for this court to hold that the ‘change of culture’ which has taken place in the last three years—and, in particular, the advent of the *Civil Procedure Rules*—has led to a position in which it is no longer open to a litigant whose action has been struck out on the grounds of inordinate and inexcusable delay to rely on the principle that a second action commenced within the limitation period will not be struck out save in exceptional cases. The position, now, is that the court must address the application to strike out the second action with the overriding objective of the *Civil Procedure Rules* in mind—and must consider whether the claimant’s wish to have ‘a second bite at the cherry’ outweighs the need to allot its own limited resources to other cases. In exercising its discretion as to whether to strike out the second action, that court should start with the assumption that if a party has had one action struck out for abuse of process some special reason has to be identified to justify a second action being allowed to proceed.”⁵⁷³

- 12.281 The phrase “special reason” is not a technical term. It is merely a forensic shorthand which encapsulates the broad approach to be adopted by the court when a claim has failed as a result of an abuse of process and the court is considering whether a second action relating to the same issues should be allowed to continue.⁵⁷⁴ When considering whether a fresh action also amounts to abuse of process, Briggs J observed in *Wahab v Khan*, it is incumbent on the court to have regard to any adverse consequences of injustice or unfairness to a defendant, and whether there has been a disproportionate use of the court’s resources.⁵⁷⁵ This last consideration was of some relevance in *Securum Finance Ltd v Ashton*,⁵⁷⁶ in that the claimants were allowed to advance their struck-out claim because it raised the same issues as a new claim that they were free to advance. Consequently, consideration of the struck-out claim would not take up any additional court resources.

- 12.282 This approach to second claims goes beyond situations where there has been inexcusable delay in pursuing an initial claim (as in *Securum Finance Ltd v Ashton*), to all situations where the original strike-out was founded on abuse of process. In *Collins v CPS Fuels Ltd*,⁵⁷⁷ a claim by a child for personal injuries was struck out as an abuse of process for persistent delays and the failure to comply with a number of case management orders notwithstanding that liability was admitted; that it was still possible to have a fair trial of the issue of quantum; that the striking out would give a windfall to the defendant; and that it was likely to result in satellite litigation against the claimant’s solicitors. The balance tilted in favour of striking out because the claimant had persistently defaulted on process obligations and failed to attend two case management conferences. The Court of Appeal approved the judge’s conclusion because case management hearings are an essential tool in the control and management of cases, and a litigant’s failure to engage with them undermines the court’s ability to control litigation.⁵⁷⁸ It further agreed with the judge’s conclusion that, in such circumstances, a second claim commenced by the claimant was properly to be struck out as an abuse of process.

- 12.283 By contrast, where an initial claim has been struck out for non-compliance with process requirements falling short of abuse, the question is whether the claimant should be allowed to re-start the litigation process and have another chance to fulfil their process obligations. In *Aktas v Adepta*⁵⁷⁹ the Court of Appeal considered the approach where a claim had been struck out due to negligent failure to serve the claim form in time. A second claim had been issued and struck out as an abuse of process. The Court of Appeal considered whether in such circumstances the second claim ought to have been struck out on that basis. It held that as the first claim was not itself struck out as an abuse of process, the second claim had been wrongly struck out as such.⁵⁸⁰ In reaching this conclusion, Rix LJ clarified that a second claim would amount to an abuse of process if the first claim was itself struck out as abusive because there had been intentional and contumelious conduct on the part of the claimant; because there had been inordinate and inexcusable delay or want of prosecution; or because there had been a wholesale disregard for the rules of court.⁵⁸¹ A negligent failure to serve a claim form did not fall within any of these three categories. The three criteria

summarised by Rix LJ should not be regarded as exhaustive or fixed, however. In *Harbour Castle Ltd v David Wilson Homes Ltd*, the Court of Appeal implicitly accepted the possibility that further criteria could be identified in future cases.⁵⁸² Further, *Aktas v Adepta* should not be taken as meaning that second actions will never amount to an abuse of process where the first claim was not itself struck out as an abuse of process. Rather, where the initial claim was not struck out as an abuse of process, the burden lies upon the party asserting that the second claim is abusive to persuade the court that that is clearly the case.⁵⁸³

- 12. 284** In some circumstances, the court striking out a claim may not intend to forestall the possibility of fresh proceedings based on the same claim. Mance LJ explained that there are occasionally situations where “a judge might think it better to clear the slate, putting the onus on the claimant to re-start matters properly, if he ever could at some future stage”.⁵⁸⁴ This might be the appropriate course to take where the claim has been premature or so poorly presented that the best course is to strike out the claim, leaving the door open for a fresh start. In such circumstances it is unlikely in the extreme that the second claim would be deemed an abuse of process. However, such cases are likely to be rare, and where the court proposes to leave the door open to future proceedings it should clearly say so and explain its reasoning.

Consequences following abuse of process

Striking out, alternatives to striking out and costs consequences

- 12. 285** As is apparent from the foregoing, the stock response to abuse of process is to strike out the offending statement of case. Alternatively, where a discrete aspect of the procedure used was tainted by abuse, the court may confine itself to disallowing the particular offending process, such as an interim application, service of the claim form or an application for permission to appeal or an appeal.⁵⁸⁵ But other sanctions are also available, both as an alternative to striking out or in addition to it. Adverse costs orders would usually follow a finding of abuse of process. Under the CPR the court has extensive discretion to make orders of costs, and CPR 44.2 specifically requires the court to take into account the conduct of the parties when it considers what costs should be awarded. This embraces conduct before and during the proceedings, including the extent to which the parties complied with the relevant pre-action protocol, the reasonableness of their allegations and the manner in which they pursued the issues. In addition to responding to past abuse, the court may also take steps directed at preventing future abuses. Thus, the court may issue an injunction restraining a party from commencing proceedings that would amount to abuse of process.

- 12. 286** Where abuse of process has been found, it is almost inevitable that the party’s conduct should be found wanting and that a costs order should be made accordingly. Costs may be awarded on an indemnity basis where the abusive conduct caused particular hardship or unreasonable expenditure to an opponent,⁵⁸⁶ although it must be remembered that costs orders, whether on a standard or indemnity basis, are intended to compensate receiving parties for their expenditure, not to punish paying parties.⁵⁸⁷ Where responsibility for the abuse of process rests with legal representatives, the court may make a wasted costs order against them. The wasted costs jurisdiction is established by the Senior Courts Act 1981 s.51(6)–(7) (as substituted by the Courts and Legal Services Act 1990 s.4(1)), which empowers the court to order a legal representative to meet wasted costs resulting from an improper, unreasonable or negligent act or omission.⁵⁸⁸

Tort of abuse of process

- 12. 287**

In addition to procedural measures for dealing with abuse of process, there is a substantive remedy in the form of the tort of abuse of process.⁵⁸⁹ The tort consists of the employment of a legal process with a predominant objective other than that for which the process was designed, with the result that another person has suffered damage.⁵⁹⁰ The question whether that legal process may be criminal or civil, or civil only, for the purposes of the tort has not been finally resolved by the courts, although the trend of authority indicates that the tort is limited to civil cases only.⁵⁹¹ The claimant in tort does not need to show that the claim was groundless; nor that it terminated in their favour. Rather, all they need to establish is that the defendant's predominant purpose in using the legal process was other than that for which it was designed, and that they suffered damage as a result.⁵⁹² However, what seems clear is that actionable abuse for the purposes of the tort is narrower in scope than abuse that would justify procedural remedies.⁵⁹³

- 12. 288** An example of the tort is provided by *Grainger v Hill*,⁵⁹⁴ where the abuse consisted of swearing an affidavit of debt, obtaining a writ of capias, sending the sheriff's officers with the writ to the claimant and having him arrested. The defendants were found to have used this process, which was designed for the recovery of a debt, in order to extract from the claimant a ship's register to which the defendants had no right. However, giving false evidence is not sufficient by itself to found a tort of abuse of process; for there to be an action for abuse of process there has to be an additional element of misuse of process.⁵⁹⁵
- 12. 289** The tort of abuse is rarely pursued. Indeed, cases giving rise to the tort have been described as "extremely rare", and the tort itself as being "on the verge of extinction".⁵⁹⁶ Apart from *Grainger v Hill*, the only other successful example in English law is *Gilding v Eyre* in 1861,⁵⁹⁷ although litigants in Australia have enjoyed greater success in pursuing the tort.⁵⁹⁸ Resort to the tort of abuse of process is limited in practice both because of the greater availability of procedural avenues for dealing with abuse, and because once the court has ruled that abuse of process has taken place, the affected party will normally be compensated in costs (and usually indemnity costs), leaving little extra damage to be claimed in tort.

Tort of malicious prosecution of civil proceedings

- 12. 290** A further tort, that of malicious prosecution, has a long history in respect of criminal proceedings.⁵⁹⁹ The Supreme Court confirmed that it is equally applicable to the prosecution of civil proceedings in *Willers v Joyce (Re Gubay (Deceased) No.1)*.⁶⁰⁰ In order to make out the tort, the claimant must prove not only that the defendant had no reasonable and probable cause for bringing the claim, but also that the defendant did not have a bona fide reason for doing so.⁶⁰¹ It is also necessary that the malicious claim was determined in favour of the tort claimant, and at the same time that they have suffered consequential loss and damage (beyond any compensation, for example in costs,⁶⁰² they received upon conclusion of the malicious claim).⁶⁰³
- 12. 291** The ambit of the tort remains in development.⁶⁰⁴ Apart from *Willers v Joyce* itself, in which the claimant's claim for malicious prosecution of civil proceedings was ultimately dismissed,⁶⁰⁵ the tort has been little-used in practice since its existence was affirmed. This is not unexpected. Given the range of powers that the court has under the CPR and its inherent jurisdiction to protect its own process, as well as its ability to award costs on the indemnity basis, it is likely that any claim that was brought maliciously and without reasonable and probable cause would be struck out at an early stage. Where that occurs, as with the tort of abuse of process, an award of indemnity costs would be likely to leave little additional damage which it is worth pursuing under the tort of malicious prosecution.

Footnotes

- 482 *J. Jacob*, “*The Inherent Jurisdiction of the Court*” (1970) 23 C.L.P. 23; *J.A. Jolowicz*, “*Abuse of Process: Handle with Care*” (1990) 43 C.L.P. 77; A. Choo, *Abuse of Process and Judicial Stays in Criminal Proceedings*, 2nd edn (Oxford: Oxford University Press, 1993); *M.S. Dockray*, “*The Inherent Jurisdiction to Regulate Civil Proceedings*” (1997) 113 L.Q.R. 120; R. James, “*Delay and Abuse of Process*” (1999) 18 C.J.Q. 289; G. Watt, “*Henderson Is Dead! Long Live Henderson!—the Modern Rule of Abuse of Process*” (2001) 20 C.J.Q. 90. See also *Mann v Chetty* [2000] All ER (D) 1531, CA; and M. Taruffo (ed.), *Abuse of Procedural Rights: Comparative Standards of Procedural Fairness* (The Hague: Kluwer Law International, 1998).
- 483 See *Otkritie International Investment Management Ltd v Urumov* [2017] EWCA Civ 134 [23]–[24].
- 484 *Henderson v Henderson* (1843) 3 Hare 100. See further Ch. 26 Finality of Litigation.
- 485 See *Denaxe Ltd v Cooper* [2023] EWCA Civ 752; [2024] Ch 65 [155] and [163].
- 486 *Outotec (USA) Inc v MW High Tech Projects UK Ltd* [2024] EWCA Civ 844; [2024] 4 W.L.R. 85 [53]. As to this formula, which is drawn from *Johnson v Gore Wood & Co* [2002] 2 AC 1, see Ch. 26 Finality of Litigation. The *Aldi Stores Ltd v WSP Group Plc* [2008] 1 W.L.R. 748 guidelines, discussed in that chapter, may be relevant to the broad merits-based evaluation.
- 487 *Outotec (USA) Inc v MW High Tech Projects UK Ltd* [2024] EWCA Civ 844; [2024] 4 W.L.R. 85 [53] and [73].
- 488 *Attorney General v Barker* [2000] 2 F.C.R. 1.
- 489 R. Fentiman, “*Abuse in Procedural Rights: The Position of English Law*”, and N. Andrews, “*Abuse of Process in English Civil Litigation*”, in M. Tarrufo (ed.), *Abuse of Procedural Rights: Comparative Standards of Procedural Fairness* (The Hague: Kluwer Law International, 1998) p.53 and p.65 respectively.
- 490 *Hunter v Chief Constable of West Midlands* [1982] AC 529; [1981] 3 All ER 727 at 729, HL. Also see *Cocker v Tempest* (1841) 7 M & W 502, 503–504, per Alderson B., “The power of each court over its own process is unlimited; it is a power incident to all courts, inferior as well as superior; were it not so, the court would be obliged to sit still and see its own process abused for the purpose of injustice”.
- 491 *Norglen Ltd (In Liquidation) v Reeds Rains Prudential Ltd* [1999] 2 AC 1; [1998] 1 All ER 218, HL.
- 492 See *Castanho v Brown & Root (UK) Ltd* [1980] 3 All ER 72; [1980] 1 W.L.R. 833, CA; and *Attorney General v Barker* [2000] 2 F.C.R. 1.
- 493 *Clark v University of Lincolnshire and Humberside* [2000] 3 All ER 752; [2000] 1 W.L.R. 1988 [38]–[39], CA.
- 494 *Ronex Properties Ltd v John Laing* [1983] QB 398; [1982] 3 All ER 961, CA.
- 495 For a summary of the principles applicable to an application under CPR 3.4(2)(a), see *MF Tel Sarl v Visa Europe Ltd* [2023] EWHC 1336 (Ch) [31]ff. On the relationship between CPR 3.4(2)(a) and CPR 3.4(2)(b), see *Desporte v Bull* [2021] EWHC 2370 (QB) [125]; *Allsop v Banner Jones Ltd* [2021] EWCA Civ 7; [2022] Ch 55 [6]–[7].
- 496 *Ashraf v Lester Dominic Solicitors (a Firm)* [2023] EWHC 2800 (Ch) [70].
- 497 *Orji v Nagra* [2023] EWCA Civ 1289.
- 498 *Orji v Nagra* [2023] EWCA Civ 1289 [58].
- 499 *Orji v Nagra* [2023] EWCA Civ 1289 [58].
- 500 *Orji v Nagra* [2023] EWCA Civ 1289 [56].
- 501 *McDonald v Excalibur & Keswick Groundworks Ltd* [2023] EWCA Civ 18; [2023] 1 W.L.R. 2139 [43].
- 502 *McDonald v Excalibur & Keswick Groundworks Ltd* [2023] EWCA Civ 18; [2023] 1 W.L.R. 2139 [49].
- 503 *McDonald v Excalibur & Keswick Groundworks Ltd* [2023] EWCA Civ 18; [2023] 1 W.L.R. 2139 [50].
- 504 *Orji v Nagra* [2023] EWCA Civ 1289 [55].
- 505 See for instance, *Jones v Longley* [2016] EWHC 1309 (Ch), where a litigant-in-person’s claim was struck out as an abuse of process or as otherwise likely to obstruct the just disposal of proceedings due to serious and wide-ranging failures to comply with rules and practice directions concerning pleading. And see *Ashraf v Lester Dominic Solicitors (a Firm)* [2023] EWHC 2800 (Ch), considered below at para.12.262.
- 506 See *Orji v Nagra* [2023] EWCA Civ 1289 [74].
- 507 *North British Housing Association Ltd v Matthews* [2004] EWCA Civ 1736; [2005] 2 All ER 667.
- 508 *Metropolitan Bank v Pooley* (1885) 10 App. Cas. 210, HL; and *Gillick v West Norfolk Health Authority* [1986] AC 112; [1985] 3 All ER 402, HL, per Lord Scarman.
- 509 *Logicrose Ltd v Southend United Football Club* [1988] 1 W.L.R. 1256, ChD.
- 510 *Raja v Van Hoogstraten* [2006] EWHC 1315 (Ch) [32].
- 511 *Ashraf v Lester Dominic Solicitors (a Firm)* [2023] EWHC 2800 (Ch); cf. PD 16 para.9.2: “A subsequent statement of case must not contradict or be inconsistent with an earlier one”.
- 512 *Ashmore v British Coal Corp* [1990] 2 QB 338; [1990] 2 All ER 981, CA.

- 513 *Bradford & Bingley Building Society v Seddon* [1999] 4 All ER 217; [1999] 1 W.L.R. 1482, CA; and *First National Bank Plc v Walker* [2001] 1 F.C.R. 21; [2001] 1 F.L.R. 505, CA.
- 514 *Habib Bank AG Zurich v Mindi Investment Ltd* (1987) 131 Sol Jo1455, *The Times*, 9 October 1987, CA; and *Halifax Plc v Chandler* [2001] EWCA Civ 1750; [2001] N.P.C. 189.
- 515 *Otkritie International Investment Management Ltd v Urumov* [2017] EWCA Civ 134.
- 516 *Otkritie International Investment Management Ltd v Urumov* [2017] EWCA Civ 134 [23]–[24].
- 517 *Bairstow v Queen's Moat Houses Plc* [2001] C.P. Rep. 59, QBD.
- 518 *Tejendrasingh v Metsons* [1997] E.M.L.R. 597, CA.
- 519 *Habib Bank Ltd v Jaffer* [2000] C.P.L.R. 438, CA.
- 520 *Jameel v Dow Jones and Co* [2005] EWCA Civ 75; [2005] QB 946 [54]. See also *Adelson v Anderson* [2011] EWHC 2497 (QB); *Various Claimants v MGN Ltd* [2020] EWHC 553 (Ch), where Mann J said that the court had power, taking CPR 3.1(2)(l) and 3.4(2)(b) together, to exclude discrete issues from consideration on proportionality grounds.
- 521 *Jameel v Dow Jones and Co* [2005] EWCA Civ 75; [2005] QB 946 as explained by *Mueen-Uddin v Secretary of State for the Home Department* [2024] UKSC 21; [2025] AC 945. *Jameel* abuse was refused in a collective action alleging breaches of data protection where, unlike *Jameel*, the defendant had no relevant ECHR art.10 right: *Farley v Paymaster (1836) Ltd* [2025] EWCA Civ 1117. See also Ch.1 Overriding Objective para.1.66.
- 522 *Johnson v Gore Wood & Co* [2002] 2 AC 1; [2001] 1 All ER 481 at 499, HL.
- 523 *Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd* [1998] 2 All ER 181; [1998] 1 W.L.R. 1426, CA. See also *Rochdale Metropolitan Borough Council, Test Valley Borough Council, Thurrock Council v Persons Unknown* [2021] EWHC 2648 (QB) [91]–[92].
- 524 *Nolan v Devonport* [2006] EWHC 2025 (QB): it is abuse of process to make an application merely to frustrate enforcement. See also *Ashby v Commonwealth of Australia (No.4)* [2012] F.C.A. 1411 where the Federal Court of Australia dismissed an action against the former speaker of the House of Representatives because it was advanced in order to damage the former speaker.
- 525 *Atha & Co Solicitors v Liddle* [2018] EWHC 1751 (QB); [2018] 1 W.L.R. 4953 [18]. In this case, however, delay in issuing the claim did not amount to an abuse of process.
- 526 *Carter Commercial Development v Bedford Borough Council* [2001] EWHC Admin 669; [2001] All ER (D) 388 (Jul).
- 527 See *Heaton v AXA Equity & Law Plc* [2001] Ch. 173; [2000] 4 All ER 673, CA, where the claimant was allowed to seek the determination of the court that he had been wronged by an alleged contract breaker, notwithstanding that he had suffered no loss.
- 528 *Metalloy Supplies Ltd (In Liquidation) v MA (UK) Ltd* [1997] 1 All ER 418; [1997] 1 W.L.R. 1613, CA; and *Abraham v Thompson* [1997] 4 All ER 362, CA, per Millett LJ. But if the benefit which might flow from success in the action is likely to be so disproportionately small by comparison with the enormous irrecoverable expenses of the defendants if they succeeded, it is an abuse, see *AB v John Wyeth and Brothers Ltd* [1997] P.I.Q.R. P385, CA.
- 529 *Balamoody v UK Central Council for Nursing Midwifery and Health Visiting* [2001] EWCA Civ 2097; [2002] I.C.R. 646; and *Oldfield v Surrey Social Services* [2001] All ER (D) 293 (Nov), ChD.
- 530 See RSC Ord.19 r.1; Ord.24 r.16(1); Ord.25 r.1(4); and Ord.34 r.2.
- 531 There was no difference in the criteria applicable to applications for extension and to applications for dismissal for want of prosecution: *Costellow v Somerset County Council* [1993] 1 All ER 952; [1993] 1 W.L.R. 256, CA.
- 532 In *Revici v Prentice Hall Inc* [1969] 1 All ER 772; [1969] 1 W.L.R. 157, CA, the Court of Appeal held that the time limit for appeal must be observed and that there would be no extension of time even though the plaintiff, who wished to appeal, offered to pay the costs and no prejudice to the defendant was caused. Further it was held that where no excuse for the delay has been offered, *prima facie* no indulgence should be granted.
- 533 *Ketteman v Hansel Properties Ltd* [1987] AC 189; [1988] 1 All ER 38, HL.
- 534 *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229; [1968] 1 All ER 543, CA. The Court of Appeal considered three cases in which applications were made for the action to be dismissed for want of prosecution. In two of the cases there was a delay of some seven years from the issue of the writ to the time when the application for dismissal was made, while the third case had been pending for nearly 20 years.
- 535 *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229 at 245; [1968] 1 All ER 543 at 546–547, CA.
- 536 *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229 at 259; [1968] 1 All ER 543 at 556, CA.
- 537 *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229 at 259; [1968] 1 All ER 543 at 556, CA. See also Salmon LJ at 253–254 and 561, respectively.
- 538 During the intervening years different shades of opinion were expressed in a number of Court of Appeal cases: *Rowe v Tregaskes* [1968] 3 All ER 447; [1968] 1 W.L.R. 1475, CA; *Slade & Kempton Ltd v N Kayman Ltd* [1969] 3 All ER 786; [1969] 1 W.L.R. 1285, CA; *Austin Securities Ltd v Northgate & English Stores* [1969] 2 All ER 753; [1969] 1 W.L.R.

- 529, CA; *Martin v Turner* [1970] 1 All ER 256; [1969] 2 Lloyd's Rep. 551, CA; *Sayle v Cooksey* [1969] 2 Lloyd's Rep. 618, CA; *Spriggs v Norrard Trawlers* [1969] 2 Lloyd's Rep. 627, CA; *City General Insurance v Robert Bradford* [1970] 1 Lloyd's Rep. 520, CA; *Longmoor v Gilbart-Smith* [1972] 1 Lloyd's Rep. 435, CA; *Vaughan v F Parham Ltd* [1972] 1 Lloyd's Rep. 519, CA; *William C Parker v F J. Ham & Sons* [1972] 3 All ER 1051; [1972] 1 W.L.R. 1583, CA; *Sweeney v Sir Robert McAlpine & Sons* [1974] 1 All ER 128; [1974] 1 W.L.R. 200, CA; *Thorpe v Alexander Forklift Trucks* [1975] 3 All ER 579; [1975] 1 W.L.R. 1459, CA; *Howe (Transport) Ltd v Avenall* [1976] 2 Lloyd's Rep. 667, CA; and *Pryer v Smith* [1977] 1 All ER 218; [1977] 1 W.L.R. 425, CA.
- 539 *Birkett v James* [1978] AC 297 at 318; [1977] 2 All ER 801 at 805, HL.
- 540 *Logicrose Ltd v Southend United Football Club Ltd* [1988] 1 W.L.R. 1256, ChD, held that even where a party had been guilty of deliberate suppression of a document he had been ordered to disclose, dismissal of that party's case would not be justified if he later produced the document. See also *Re Swaptronics Ltd, The Times*, 17 August 1998, ChD; *Arrow Nominees Inc v Blackledge* [2000] C.P. Rep. 59; *Tarling v Wabara* [2003] EWHC 450 (QB). On this view, no matter how many times and for how long a party obstructed the process, they would nevertheless be allowed to proceed if they recanted at last, and provided a fair trial was still possible. But it is doubtful whether this idea of "death-bed recantation" was ever sustainable; *Landauer v Comins & Co (a firm)*, The Times, 7 August 1991, CA; *Re Jokai Tea Holdings Ltd* [1993] 1 All ER 630, CA.
- 541 On the contrary, as the House of Lords made clear in *Department of Transport v Chris Smaller (Transport) Ltd* [1989] AC 1197 at 1207; [1989] 1 All ER 897 at 903, HL: "If there can be a fair trial and the defendant has suffered no prejudice, [striking out a claim] clearly cannot be to do justice between the parties before the court ... The only possible purpose of such an order would be as a disciplinary measure which by punishing the plaintiff will have a beneficent effect on the administration of justice by deterring others from similar delays". Clearly, the House of Lords did not consider such an objective legitimate if it was still possible to do justice on the merits.
- 542 *Trill v Sacher* [1993] 1 All ER 961; [1993] 1 W.L.R. 1379, CA.
- 543 In *Shtun v Zalejska* [1996] 3 All ER 411; [1996] 1 W.L.R. 1270, CA, 15 pages were devoted to the consideration of earlier authority and its impact on the case.
- 544 *Collins v CPS Fuels Ltd* [2001] EWCA Civ 1597 [52].
- 545 *Walsh v Misseldine* [2000] All ER (D) 261 [63].
- 546 The rule was first introduced by SI 1989/2426 r.13, and soon after was substituted by SI 1990/1764 r.14. For background see: Civil Justice Review Body, Consultation Paper No.6: General Issues (London: Lord Chancellor's Department, 1987), especially Ch.5.
- 547 CCR Ord.17 r.11(3)(d). This period could be extended under r.11(4).
- 548 *Rastin v British Steel Plc* [1994] 2 All ER 641; [1994] 1 W.L.R. 732, CA.
- 549 See *Bannister v SGB Ltd* [1997] 4 All ER 129; [1998] 1 W.L.R. 1123, CA, a comprehensive 46-page review of the effect of CCR Ord.17 r.11 and the discretionary jurisdiction to reinstate proceedings. Even this did not put an end to the need for appellate consideration of the regime: see *Graig Middleton & Co Ltd v Denderowicz* [1997] 4 All ER 181; [1998] 1 W.L.R. 1164, CA; *Figgett v Davies* [1998] 2 All ER 356; [1998] 1 W.L.R. 1184, CA; *Limb v Union Jack Removals Ltd (In Liquidation)* [1998] 2 All ER 513; [1998] 1 W.L.R. 1354, CA; *Cockerill v Tambrands Ltd* [1998] 3 All ER 97; [1998] 1 W.L.R. 1379, CA.
- 550 *Grovit v Doctor* [1997] 1 W.L.R. 640, CA; *Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd* [1998] 2 All ER 181; [1998] 1 W.L.R. 1426, CA; and *Alibrahim v Asturion Foundation* [2020] EWCA Civ 32.
- 551 *Grovit v Doctor* [1997] 1 W.L.R. 640, CA.
- 552 *Grovit v Doctor* [1997] 1 W.L.R. 640, 674G–674H, CA. See also *Rochdale Metropolitan Borough Council, Test Valley Borough Council, Thurrock Council v Persons Unknown* [2021] EWHC 2648 (QB) [91]–[92], where failure properly to progress a claim to a final hearing, after having obtained interim injunctions which bound unknown third parties, amounted to an abuse of process.
- 553 *Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd* [1998] 2 All ER 181; [1998] 1 W.L.R. 1426, CA. See also *Spooner v Webb, The Times*, 25 April 1997, CA.
- 554 *Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd* [1998] 2 All ER 181 at 191; [1998] 1 W.L.R. 1426 at 1436, CA. See also *Habib Bank Ltd v Jaffer* [2000] C.P.L.R. 438, CA.
- 555 *Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd* [1998] 2 All ER 181 at 191–192; [1998] 1 W.L.R. 1426 at 1436, CA. Failure to obtain the consent of other parties or of the court will not, however, of itself result in a finding that the claimant acted abusively: see *Alibrahim v Asturion Foundation* [2020] EWCA Civ 32 [52]–[53] and [61].
- 556 See *Birkett v James* [1978] AC 297 at 318; [1977] 2 All ER 801 at 805, HL.
- 557 *Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd* [1998] 2 All ER 181 at 188; [1998] 1 W.L.R. 1426 at 1432, CA.

- 558 *Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd* [1998] 2 All ER 181 at 191–192; [1998] 1 W.L.R. 1426 at 1436, CA. This approach was soon echoed, for example in *Choraria v Sethia* [1998] 07 L.S. Gaz. R. 31; *Miles v McGregor* [1998] EWCA Civ 58; *Lace Co-ordinates Ltd v NEM Insurance Co Ltd* [1998] EWCA Civ 1798; and *Co-operative Retail Services Ltd v Guardian Assurance* (CA, unreported, 28 July 1999). See also *Alibrahim v Asturion Foundation* [2020] EWCA Civ 32 [55].
- 559 *Alibrahim v Asturion Foundation* [2020] EWCA Civ 32; [2020] 1 W.L.R. 1627.
- 560 *Alibrahim v Asturion Foundation* [2020] EWCA Civ 32; [2020] 1 W.L.R. 1627 [64].
- 561 *Cable v Liverpool Victoria Insurance Co Ltd* [2020] EWCA Civ 1015; [2020] 4 W.L.R. 110 [72].
- 562 *Alibrahim v Asturion Foundation* [2020] EWCA Civ 32; [2020] 1 W.L.R. 1627 [61]. See also *Solland International Ltd v Clifford Harris & Co* [2015] EWHC 3295 (Ch); *Société Générale v Goldas Kuyumculuk Sanayi* [2017] EWHC 667 (Comm); and *Cable v Liverpool Victoria Insurance Co Ltd* [2020] EWCA Civ 1015; [2020] 4 W.L.R. 110.
- 563 *Ashworth v McKay Foods Ltd* [1996] 1 All ER 705; [1996] 1 W.L.R. 542, CA.
- 564 *Birkett v James* [1978] AC 297; [1977] 2 All ER 801, HL; *JSC BTA Bank v Ablyazov* [2010] EWHC 2219 (QB). In an extreme case, failure to comply with pre-action protocols may also amount to an abuse of process, since pre-action conduct is now built into the architecture of the CPR: *Cable v Liverpool Victoria Insurance Co Ltd* [2020] EWCA Civ 1015; [2020] 4 W.L.R. 110 [60].
- 565 *Cohort Construction (UK) Ltd v Julius Melchior* [2001] C.P. Rep 23, CA; and *Leizert v Kent Structural Engineering Ltd* [2002] EWHC 942 (QB) [10]; cf. *Cable v Liverpool Victoria Insurance Co Ltd* [2020] EWCA Civ 1015; [2020] 4 W.L.R. 110 [78]–[91].
- 566 *UCB Corporate Services Ltd v Halifax (SW) Ltd*, *The Times*, 6 December 1999, CA.
- 567 *Biguzzi v Rank Leisure* [1999] 1 W.L.R. 1926, CA.
- 568 *UCB Corporate Services Ltd v Halifax (SW) Ltd*, *The Times*, 6 December 1999, CA. In *Purdy v Cambran* [1999] C.P.L.R. 843, CA, the Court of Appeal explained the relevance of the former authorities on striking out for delay in the light of *Biguzzi v Rank Leisure* [1999] 1 W.L.R. 1926, CA. See also *Woodward v Finch* [1999] C.P.L.R. 699, CA; *Chapple v Williams* [1999] C.P.L.R. 731, CA; *Williamson v Metropolitan Police Commissioner* (13 December 1999, unreported, CA); *Walsh v Misseldine* [2000] All ER (D) 261, CA; and *Habib Bank Ltd v Jaffer* [2000] C.P.L.R. 438, CA.
- 569 See above, paras 12.16–12.17 in relation to CPR 3.6; for further discussion of the principle of res judicata as it applies to default judgments, see Ch.26 Finality of Litigation paras 26.108 ff.
- 570 See Ch.26 Finality of Litigation paras 26.104–26.105.
- 571 *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1; [2001] 1 All ER, HL; and *Wahab v Khan* [2011] EWHC 908 (Ch). See Ch.26 Finality of Litigation paras 26.107 and 26.132 ff.
- 572 *Securum Finance Ltd v Ashton* [2001] Ch. 291, CA.
- 573 *Securum Finance Ltd v Ashton* [2001] Ch. 291, CA, 310. See also *Kishore v Revenue and Customs Commissioners* [2021] EWCA Civ 1565 [27](ii).
- 574 *Collins v CPS Fuels Ltd* [2001] EWCA Civ 1597 [49].
- 575 *Wahab v Khan* [2011] EWHC 908 (Ch); *Barnett v Nigel Hall Menswear Ltd* [2013] EWHC 91 (QB).
- 576 *Securum Finance Ltd v Ashton* [2001] Ch. 291 at 310.
- 577 *Collins v CPS Fuels Ltd* [2001] EWCA Civ 1597.
- 578 See also *Shikari v Malik*, *The Times*, 20 May 1999, CA; *Co-operative Retail Services Ltd v Guardian Assurance* (CA, unreported, 28 July 1999); and *UCB Corporate Services Ltd v Halifax (SW) Ltd*, *The Times*, 6 December 1999, CA.
- 579 *Aktas v Adepta* [2010] EWCA Civ 1170; [2011] QB 894.
- 580 Although this is not to say that second actions will never amount to an abuse of process where the first action was not itself struck out as an abuse of process: *Harbour Castle Ltd v David Wilson Homes Ltd* [2019] EWCA Civ 505 [6].
- 581 *Aktas v Adepta* [2010] EWCA Civ 1170; [2011] QB 894 [48]–[52], [72] and [90], approving *Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd* [1998] 2 All ER 181; [1998] 1 W.L.R. 1426, CA, and *Securum Finance Ltd v Ashton* [2001] Ch. 291, CA. See also *Davies v Carillion Energy Services Ltd* [2017] EWHC 3206 (QB); [2018] 1 W.L.R. 1734 [52]–[55].
- 582 *Harbour Castle Ltd v David Wilson Homes Ltd* [2019] EWCA Civ 505 [9].
- 583 *Harbour Castle Ltd v David Wilson Homes Ltd* [2019] EWCA Civ 505 [6].
- 584 *Glauser International SA v Khan T/A Khan Design Consultants* [2002] EWCA Civ 368 [18].
- 585 CPR 52.18 (strike-out of permission to appeal); and *Otkritie International Investment Management Ltd v Urumov* [2017] EWCA Civ 134 (dismissal of appeal as an abuse of process).
- 586 *Wailes v Stapleton Construction and Commercial Services Ltd* [1997] 2 Lloyd's Rep. 112. On indemnity costs see *Cooper v P & O Stena Line Ltd* [1999] 1 Lloyd's Rep. 734 and see generally Ch.28 Costs paras 28.80 ff and 28.118 ff.

- 587 *McPhilemy v Times Newspapers (Costs) [2001] EWCA Civ 933*; and *Petrotrade Inc v Texaco Ltd [2001] 4 All ER 853; [2002] 1 W.L.R. 947, CA*.
- 588 For a discussion of wasted costs see Ch.28 Costs paras 28.260 ff.
- 589 The tort was enunciated in *Grainger v Hill (1838) 4 Bing. N.C. 212*. See also *Varawa v Smith (1911) 13 C.L.R. 35* at 91.
- 590 *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc [1990] 1 QB 391; [1989] 3 All ER 14, CA; Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd [2013] UKPC 17; [2014] AC 366* [149].
- 591 The 1977 American Restatement (Second) of Torts, s.682, defines the tort thus: “where one uses a legal process whether criminal or civil against another primarily to accomplish a purpose for which it is not designed”. However, in *Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd [2013] UKPC 17; [2014] AC 366*, Lord Sumption at [149] appeared to confine the tort to abuse of civil proceedings. Clerk & Lindsell on Torts, 24th edn (London: Sweet & Maxwell, 2023), at Ch.15, section 5 treats the *Grainger v Hill* tort under the heading “Abuse of Civil Process”. In *Morjaria v Mirza [2025] EWHC 1961 (Ch)*, Thomsell J stated that there “is no example of a case where the courts have found the existence of the tort of abuse of criminal process, and it appears that the current state of the law is such that there is no such tort”, and went on to state: “on the current state of the law, the tort of abuse of process does only apply to civil proceedings” [1305], [1310].
- 592 Halsbury’s Laws of England, 5th edn, Vol.97A (London: Lexis Nexis, 2021) para.343.
- 593 *Takhar v Gracefield Developments Ltd [2024] EWHC 1714 (Ch)* [527].
- 594 *Grainger v Hill (1838) 4 Bing. N.C. 212*.
- 595 *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc [1990] 1 QB 391; [1989] 3 All ER 14, CA*.
- 596 *Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd [2013] UKPC 17; [2014] AC 366*, Lord Sumption [149].
- 597 *Gilding v Eyre (1861) 10 C.B. (N.S.) 592; 142 ER 584*.
- 598 *Patel v Minerva Services Delaware, Inc [2024] EWHC 172 (Ch)* [41].
- 599 “The two torts may have sprung from the same tree, but they remain distinct, and on the present state of the authorities, they have not been assimilated”: *Patel v Minerva Services Delaware, Inc, [2024] EWHC 172* [23].
- 600 *Willers v Joyce (Re Gubay (Deceased) No.1) [2016] UKSC 43; [2018] AC 779*. See also J. Sorabji, “*Malicious prosecution and abuse of process: Willers v Joyce*” (2017) 36(4) *C.J.Q.* 387. A comparable approach is taken in South Africa, where the tort has also been held to encompass malicious prosecution of disciplinary proceedings: see C. Okpaluba, “*Does ‘prosecution’ in the law of malicious prosecution extend to malicious civil proceedings? A Commonwealth update (Part 2)*” (2017) 28(3) *Stellenbosch Law Review* 564. The Court of Appeal of Singapore, in a detailed judgment which fully traced the history of the development of the tort, refused to recognise that it extended to civil proceedings in *Lee Tat Development Pte Ltd v Management Corp Strata Title Plan No 301 [2018] SGCA 50*.
- 601 *Willers v Joyce (Re Gubay (Deceased) No.1) [2016] UKSC 43; [2018] AC 779* [53]–[56], per Lord Toulson; see also *Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd [2014] AC 366*, per Lord Kerr.
- 602 See *Willers v Joyce (Re Gubay (Deceased) No.1) [2016] UKSC 43; [2018] AC 779* [58], per Lord Toulson.
- 603 See *Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd [2014] AC 366*, per Lord Kerr.
- 604 *Patel v Minerva Services Delaware, Inc [2024] EWHC 172 (Ch)* [40].
- 605 *Willers v Joyce [2018] EWHC 3424 (Ch)*.

Court Response to Fraudulent Claims

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 12 - Case Management & Enforcing Party Compliance

Part II—Enforcing Party Compliance

Court Response to Fraudulent Claims

Power to strike out fraudulent claims as abuse of process

12.292 Fraudulent claims, or claims which are advanced by fraudulent devices, present the court with a choice between two courses of action. The court may choose to carry on with the adjudicative process, try to overcome the litigant's efforts to pervert the course of justice and establish the facts as best as it can. Alternatively, on discovering the deceit the court may decide to throw out the offending litigant's case on the grounds that by setting out to pervert the course of justice the litigant has forfeited the right to court adjudication on the merits. In the latter case, the court would strike out the whole claim for abuse of process, including any genuine claim that may have been included in the fraudulent one. Proceedings for contempt of court may also, subsequently, be brought against individuals who had brought fraudulent claims, or pursued claims in a fraudulent manner.⁶⁰⁶

12.293 Some Court of Appeal decisions favoured the forfeiture option but others rejected it.⁶⁰⁷ The most notable decision favouring forfeiture was *Arrow Nominees Inc v Blackledge*.⁶⁰⁸ In that case, concerning an unfair prejudice petition, the petitioner was found to have forged documents and then lied about the extent of the forgery, so that there remained a serious risk that other documents had also been forged. In overturning the trial judge's refusal to strike out the whole petition at the outset of the trial, the Court of Appeal held that where a litigant's conduct was such as to jeopardise the fairness of the trial so that "any judgment in favour of the litigant would have to be regarded as unsafe, or where [the conduct] amounts to such an abuse of the process of the court as to render further proceedings unsatisfactory", the court ought to strike out the litigant's whole case.⁶⁰⁹ In deciding whether the litigant's conduct had reached this threshold, the court should also have regard to the fact that "a fair trial is a trial which is conducted without an undue expenditure of time and money; and with a proper regard to the demands of other litigants upon the finite resources of the court".⁶¹⁰ Where the threshold was attained, strike-out of the litigant's whole case was justified because, as Chadwick LJ explained:

"A litigant who has demonstrated that he is determined to pursue proceedings with the object of preventing a fair trial has forfeited his right to take part in a trial. His object is inimical to the process which he purports to invoke."⁶¹¹

12.294 It is important to note that the Court of Appeal did not confine itself to saying that a fraudulent claim, or a claim advanced by fraudulent means, could only be struck out together with legitimate claims where it was impossible to determine reliably the legitimate claims. Rather, the whole case could be struck out wherever this was a proportionate response to the fraudulent party's conduct, not least because such a party had forfeited its right to call upon the court to adjudicate its claims. Interestingly, an analogous forfeiture principle had long been established in relation to insurance claims. According to this principle, where all or part of a claim brought under an insurance policy was fraudulent, or where fraudulent devices were used to promote a genuine claim, the insured could not recover in respect of any part of the claim—even those parts which were not fraudulent and which could still be fairly determined by the court. The reason for the rule was explained by Lord Hobhouse in *Manifest Shipping Co Ltd v Uni-Polaris Co Ltd*, where he said that the "fraudulent insured must not be allowed to think: if the fraud is successful, then I will gain; if it is unsuccessful, I will lose nothing".⁶¹²

- 12.295 However, another line of authority was of the view that a litigant should not be denied their entitlement on the merits no matter how fraudulent the claim, provided that the court was in a position to differentiate between true and false allegations.⁶¹³ The Court of Appeal in *Ul-Haq v Shah* held that the court's case management powers under the CPR did not empower it to strike out a litigant's whole case where they had advanced a false claim so as to deny them their legitimate claim, where the legitimate claim could still be reliably determined on the merits.⁶¹⁴ The corollary of this was that the strike-out power could not be exercised at the end of or after a trial on the merits.⁶¹⁵ Toulson LJ distinguished *Manifest Shipping Co Ltd* and other similar decisions on the basis that they were founded on "a special rule of insurance law".⁶¹⁶
- 12.296 Here, the Court of Appeal's view of the court's case management powers under the CPR was unduly narrow. It seemed to think that substantive rights must be vindicated if it is possible to hold a fair trial in relation to them, and that a trial is fair if the court is able to disentangle truth from falsity. However, this is unconvincing because as we have seen, it is not the case that substantive rights must always be adjudicated upon wherever it is practically possible to do so. It is well established that the conduct of a party in the course of legal proceedings may affect their right to access court adjudication. As Chadwick LJ explained in *Arrow Nominees*, by making false allegations or using fraudulent devices to advance a claim, a party may forfeit its right to call upon the court to adjudicate its case at all.⁶¹⁷ It would bring the administration of justice into disrepute if the court persisted to try a claim which was largely an attempt to pervert the course of justice, even where the court discovered its fraudulent character late in the proceedings and could still dispose of some of the issues on the merits.
- 12.297 Similarly, Toulson LJ's attempt to distinguish *Manifest Shipping Co Ltd* as expressing "a special rule of insurance law"⁶¹⁸ was unconvincing because the rule rested on policy reasons which applied equally to other fraudulent claims. This point can also be illustrated by reference to the maxim ex turpi causa non oritur action, which finds expression in other areas of substantive law. Where the ex turpi principle applies, the claimant is denied relief even though it has an underlying legitimate cause of action against the defendant, not for lack of a case on the merits, but due to public policy considerations.⁶¹⁹ Similarly, in equity, relief will be denied to a litigant that does not approach the court with "clean hands". Underpinning the approach in *Manifest Shipping Co Ltd*, the ex turpi principle and the clean hands doctrine are moral conceptions about the proper use of legal process, and an appreciation that sometimes dishonest or illegal conduct on the part of litigants must outweigh their substantive entitlement to a remedy, so as to avoid bringing the administration of justice into disrepute.⁶²⁰
- 12.298 In *Summers v Fairclough Homes*,⁶²¹ the Supreme Court overruled *Ul-Haq* as a matter of general principle. The claimant in *Summers* sued his employers for injury sustained at work and obtained judgment on liability with damages to be assessed. He submitted a schedule of loss in the sum of £838,616 on the basis that he was left with severe restrictions in his mobility as a result of the accident, and signed a witness statement to that effect. The defendants obtained surveillance evidence that showed that he was in fact able to move freely. The claimant subsequently served two further schedules of loss supported by statements of truth, still alleging some restriction of movement but claiming much reduced damages. The trial judge found that the evidence was sufficient to demonstrate to the criminal standard that the claimant had attempted to perpetrate a fraud, but awarded the claimant his proved actual loss of £88,716. The Supreme Court held that the court had jurisdiction to strike out a statement of case for abuse of process under CPR 3.4(2), or under its inherent jurisdiction, even after a trial in which the court had made a proper assessment of liability and quantum.⁶²² Lord Clarke stated:

"The language of the CPR supports the existence of a jurisdiction to strike out a claim for abuse of process even where to do so would defeat a substantive claim. The express words of CPR 3.4(2)(b) give the court power to strike out a statement of case on the ground that it is an abuse of the court's process. It is common ground that deliberately to make a false claim and to adduce false evidence is an abuse of process. It follows from the language of the rule that in such a case the court has power to strike out the statement of case. There is nothing in the rule itself to qualify the power. It does not limit the time when an application for such an order must be made. Nor does it restrict the circumstances in which it can be made."⁶²³

12.299 The Supreme Court rejected the claimant's argument that an ascertained claim for damages could only be denied where Parliament had authorised this. It was "for the court, not for Parliament, to protect the court's process. The power to strike out is not a power to punish but to protect the court's process".⁶²⁴ The Supreme Court thus accepted that the jurisdiction to strike out the entirety of a fraudulent litigant's case for abuse of process is founded on the public policy of protecting the integrity of the court's process. At the same time, the Supreme Court emphasised that the jurisdiction was discretionary, and that:

"in deciding whether or not to exercise the power the court must examine the circumstances of the case scrupulously in order to ensure that to strike out the claim is a proportionate means of achieving the aim of controlling the process of the court and deciding cases justly."⁶²⁵

12.300 Unfortunately, the guidance that the Supreme Court gave on how the discretion ought to be exercised undermines the usefulness of the jurisdiction in this context. It stated that while the power to strike out a statement of case for abuse of process may be exercised at any stage of a trial, the court "will only do so at the end of a trial in very exceptional circumstances".⁶²⁶ It agreed with the Court of Appeal's view in *Masood v Zahoor* that a court would only strike out at the end of a trial "if it were satisfied that the party's abuse of process was such that he had thereby forfeited the right to have his claim determined".⁶²⁷ But it found it "very difficult indeed to think of circumstances in which such a conclusion would be appropriate", though they might include "a case where there had been a massive attempt to deceive the court but the award of damages would be very small".⁶²⁸ The Supreme Court suggested that deterrence of dishonest claims was the principal objective,⁶²⁹ but that this could be achieved by other means, such as "ensuring that the dishonesty does not increase the award of damages, making orders for costs, reducing interest, proceedings for contempt and criminal proceedings".⁶³⁰ It also suggested that courts draw adverse inferences against fraudulent litigants.⁶³¹

12.301 No explanation was given why, having accepted that the power to strike out exists to protect the court's process and to maintain public respect in the administration of justice, the Supreme Court ended up considering deterrence as the main consideration in the exercise of the striking out jurisdiction. In any event, the approach articulated by the court hardly has a profoundly deterrent effect. Its view that striking out is justifiable where there was a massive attempt to defraud but only a small award of damages is mystifying. If the amount of damages is small, refusing to award them would not be a particularly painful sanction. There can be little doubt that ordinary persons would be surprised to learn that the larger the award of damages, the more likely the would-be cheat is to walk away with it.

12.302 There is another troubling aspect to *Summers*. The judge awarded the claimant interest on damages and costs, save for the costs that were generated by his false allegations. He did so because the defendants refused to negotiate a settlement with the claimant and declined to make a CPR 36 offer, which is unsurprising given that they were not taken in by his dishonesty. The reasoning is flawed. It is difficult to see why a defendant who has uncovered an attempted fraud should be in a worse position than one who has been taken in by it; put another way, there is no good reason why the intended victim of a fraud should be obliged to negotiate with the fraudster.⁶³² It is an affront to the public conception of justice and fair play to require defendants who have discovered that the claimant is bent on defrauding them to enter settlement negotiations with them. Yet the Supreme Court expressed no disapproval of the judge's reasoning, instead insisting that defendants who want costs protection in cases of dishonest exaggeration should make an offer to settle.⁶³³ This undermines the potential deterrent effect of adverse costs orders in this context, encouraging litigants to press deceitful or exaggerated claims safe in the knowledge that if their fraud is discovered they will at least be able to negotiate a settlement on the genuine aspects of the claim.

12.303 The Supreme Court's narrow approach to the exercise of the discretion to strike out appears to have taken root.⁶³⁴ The Court of Appeal's disappointing decision in *Alpha Rocks Solicitors v Alade*⁶³⁵ exemplifies an unwarranted narrow approach to the exercise of the discretion. In that case, the Court of Appeal overturned an interim decision striking out a claim for payment of fees by a firm of solicitors, in circumstances where the fees claimed were deliberately and fraudulently exaggerated and

fabricated documents were relied on. It was held that the court should be slow to take such a course early on in the proceedings, not just because the allegation of fraud might be contested and it was important to avoid holding unnecessary “mini-trials” at an interim stage,⁶³⁶ but also because this was the approach advocated by the Supreme Court in *Summers*.⁶³⁷ “The court is not easily affronted,” Vos LJ said, “and in my judgment the emphasis should be on the availability of fair trial of the issues between the parties”.⁶³⁸

- 12.304 There are numerous problems with this. First, it actually runs counter to *Summers* in extending the restrictive approach articulated in that case to strike out applications made at an early stage (as opposed to at trial). *Summers* expressly did not seek to constrain the approach to be taken where a strike-out application was made at an early stage, because “one of the objects to be achieved by striking out a claim is to stop proceedings and prevent the further waste of precious resources on proceedings which the claimant has forfeited the right to have determined.”⁶³⁹ Second, by privileging the issue of whether a “fair trial of the issues between the parties” was still possible, the Court of Appeal neglected considerations of resource allocation and fairness to other litigants, and disregarded the importance of the court stopping its process from falling into disrepute. If adopted more widely, the Court of Appeal’s reasoning in *Alpha Rocks Solicitors v Alade* would further emasculate the jurisdiction to strike out fraudulent claims for abuse of process.

Dismissal for fundamental dishonesty under statute

- 12.305 A number of the cases discussed above, including *Ul-Haq* and *Summers*, arose out of dishonest personal injury claims brought prior to the introduction of the *Criminal Justice and Courts Act 2015* (the CJCA 2015) s.57. By that provision, Parliament has provided a further means by which the court can protect the integrity of its process in the context of fraudulent personal injury claims (though the power to strike out for abuse of process still applies where a fraudulent claim is made other than for personal injury). It was introduced because of a concerning trend of claimants advancing false personal injury claims in order to defraud insurance companies. It was thought that the phenomenon was linked to the perverse incentives created by the pre-2013 conditional fee agreement (CFA) system, in which CFA success fees and after-the-event (ATE) insurance premiums were recoverable from the losing party. Although that CFA system was abolished following Jackson LJ’s recommendations,⁶⁴⁰ there continued to be numerous instances of fraudulent claims being brought.⁶⁴¹

- 12.306 The CJCA 2015, s.57 provides:

Section 57

“(1) This section applies where, in proceedings on a claim for damages in respect of personal injury (“the primary claim”)—

(a) the court finds that the claimant is entitled to damages in respect of the claim, but

(b) on an application by the defendant for the dismissal of the claim under this section, the court is satisfied on the balance of probabilities that the claimant has been fundamentally dishonest in relation to the primary claim or a related claim.

(2) The court must dismiss the primary claim, unless it is satisfied that the claimant would suffer substantial injustice if the claim were dismissed.

(3) The duty under subsection (2) includes the dismissal of any element of the primary claim in respect of which the claimant has not been dishonest.

(4) The court’s order dismissing the claim must record the amount of damages that the court would have awarded to the claimant in respect of the primary claim but for the dismissal of the claim.

(5) When assessing costs in the proceedings, a court which dismisses a claim under this section must deduct the amount recorded in accordance with subsection (4) from the amount which it would otherwise order the claimant to pay in respect of costs incurred by the defendant.

[...]

(8) In this section—

“claim” includes a counter-claim and, accordingly, “claimant” includes a counter-claimant and “defendant” includes a defendant to a counterclaim;

“personal injury” includes any disease and any other impairment of a person’s physical or mental condition;

“related claim” means a claim for damages in respect of personal injury which is made—

(a) in connection with the same incident or series of incidents in connection with which the primary claim is made, and

(b) by a person other than the person who made the primary claim.”

The concept of “fundamental dishonesty” in the CJCA 2015 s.57 was derived from the qualified one-way costs shifting (QOCS) regime applicable where personal injury claims are conducted under new-style CFAAs, introduced as part of the Jackson reforms.⁶⁴² Pursuant to the CJCA 2015 s.57, where the court determines that a personal injury claimant has been fundamentally dishonest in relation to all or part of their own claim or in relation to another person’s claim arising out of the same circumstances, it must generally dismiss the whole claim. Where the court dismisses a claim under s.57, this will ordinarily result in the claimant losing all their damages, even those that are not attributable to their dishonesty, save where they can show some substantial injustice consequent upon the loss of such damages.

12.307 As Julian Knowles J noted in *London Organising Committee of the Olympic and Paralympic Games (In Liquidation) v Sinfield*,⁶⁴³ the CJCA s.57 was introduced by Parliament in order to protect the administration of justice from being undermined by false personal injury claims.⁶⁴⁴ It represents an implicit rejection of the approach in Summers, whereby the Supreme Court expressed a preference for measures such as costs orders and contempt proceedings over outright dismissal of fraudulent claims as the proper means by which to police and deter such claims.⁶⁴⁵ Given Parliament’s intervention, where dishonesty is in issue in personal injury claims, the court ought to consider dismissal under s.57 in preference to the approach taken by the Supreme Court in *Summers*.

12.308 The proper approach to applications to dismiss under the CJCA 2015 s.57 is set out in *Sinfield* as follows:

“Firstly, [the judge should] consider whether the claimant is entitled to damages in respect of the claim. If he concludes that the claimant is not so entitled, that is the end of the matter, although the judge may have to go on to consider whether to disapply QOCS pursuant to CPR 44.16.

If the judge concludes that the claimant is entitled to damages, the judge must determine whether the defendant has proved to the civil standard that the claimant has been fundamentally dishonest in relation to the primary claim and/or a related claim [...]

If the judge is so satisfied then the judge must dismiss the claim including, by virtue of s.57(3), any element of the primary claim in respect of which the claimant has not been dishonest unless, in accordance with s.57(2), the judge is satisfied that the claimant would suffer substantial injustice if the claim were dismissed.”⁶⁴⁶

12. 309 In *Dorinel Cojanu v Essex Partnership University NHS Trust*, the court reviewed the authorities and concluded that in order for a claimant to be found fundamentally dishonest, five steps should be followed.⁶⁴⁷ The court should enquire first whether the s.57 defence has been raised;⁶⁴⁸ secondly, whether the defendant has proved dishonesty to the civil standard; thirdly, whether a finding of dishonesty is necessary; fourthly, whether the subject matter of the dishonesty is fundamental, in the sense that it relates to a matter fundamental, and not merely incidental or collateral, to the claim; and fifthly, whether the dishonesty has had a substantial effect on the presentation of the claim.⁶⁴⁹ Accordingly, a defendant must demonstrate on the balance of probabilities that the claimant was dishonest in respect of their primary claim or a related claim (for example, by feigning symptoms including to medical experts,⁶⁵⁰ otherwise inventing or exaggerating aspects of their claim such as claims for special damages,⁶⁵¹ procuring or manufacturing false evidence including witness testimony,⁶⁵² suppressing information which would undermine their claim,⁶⁵³ or corroborating another person's claim which they knew to be false).⁶⁵⁴ Dishonesty is to be assessed by reference to the test set out in *Ivey v Genting Casinos Limited (t/a Crockfords Club)*.⁶⁵⁵ The defendant must further establish that the claimant's dishonesty has "substantially affected the presentation of his case, either in respects of liability or quantum, in a way which potentially adversely affected the defendant in a significant way, judged in the context of the particular facts and circumstances of the litigation".⁶⁵⁶ The dishonesty will "substantially affect" the presentation of a claim where it "goes to the root" or "goes to the heart" of the claim.⁶⁵⁷ It has been suggested that a finding of fundamental dishonesty can be made even where the claimant abandoned the dishonesty prior to trial,⁶⁵⁸ though presumably this may have a bearing on whether the dishonesty can be considered to have "substantially affected" the presentation of the claim.
12. 310 It is clear that the courts have adopted a relatively unstinting approach to "substantial injustice" under the CJCA 2015 s.57(2), which, if made out, enables a fraudulent claimant to escape some of the consequences of their fundamental dishonesty.⁶⁵⁹ Although Knowles J in *Sinfield* was careful not to be "prescriptive" about the sorts of facts which might satisfy the s.57(2) test,⁶⁶⁰ the starting point is that Parliament intended that a finding of fundamental dishonesty would result in the claimant losing all their damages, even for those heads of claim that are not tainted by dishonesty. Deprivation of such genuine damages therefore does not constitute an injustice per se, even where the damages lost would be substantial.⁶⁶¹ Nor is it relevant that this would hand the defendant a windfall since this is the inevitable corollary of the scheme enacted by Parliament.⁶⁶²
12. 311 In *Williams-Henry v Associated British Ports Ltd*,⁶⁶³ Ritchie J set out eight factors that would be relevant to the exercise of the power under CJCA 2015 s.57(2): (1) the amount claimed dishonestly compared to the amount to be honestly awarded; (2) the scope and depth of the dishonesty found to have been practised; (3) the effect of the dishonesty on the construction of the claim and its defence by the defendant; (4) the scope and level of the claimant's assessed genuine disability; (5) the nature and culpability of the defendant's tortious conduct; (6) what the costs position would be if the claim were not dismissed; (7) whether the defendant has made any interim payments, if so, of what size, and whether the claimant would be able to repay them; and (8) what effect the dismissal would have on the claimant's life. The difficulty with such an approach is that it risks converting a simple statutory mechanism for deterring and punishing fraud into an at-large merits assessment of the justice of the case, and invites extensive satellite litigation to resolve what should be a straightforward question. Further, it is difficult to see why the nature of the dishonesty and its effect upon the presentation of the claim should figure prominently in the application of CJCA 2015 s.57(2), since the court would have already determined that it was sufficiently serious and fundamental to justify dismissing the claim as a whole. The better approach would be to focus more narrowly on the consequences of dismissal on the claimant,⁶⁶⁴ in particular whether their basic needs can only be met if some of the untainted damages are awarded, and possibly whether they have changed their position in reliance on an interim payment of genuine damages (taking into account of course that a fundamentally dishonest claimant should expect to be ordered to repay any and all interim payments that they have received).⁶⁶⁵

Footnotes

- 606 See for example *Liverpool Victoria Insurance Co Ltd v Yavuz* [2017] EWHC 3088 (QB); *Takhar v Gracefield Developments Ltd* [2024] EWHC 1714 (Ch) [526]–[527].
- 607 For discussion see A. Zuckerman, “Must a fraudulent litigant be allowed to think: if the fraud is successful, I will gain much; if it is not, I will still recover my legitimate claim?” (2011) 30 C.J.Q. 1.
- 608 *Arrow Nominees Inc v Blackledge* [2000] C.P. Rep. 59 (discussed in A. Zuckerman, “Access to justice for litigants who advance their case by forgery and perjury” (2008) 27 C.J.Q. 419). See also *Masood v Zahoor* [2009] EWCA Civ 650.
- 609 *Arrow Nominees Inc v Blackledge* [2000] C.P. Rep. 59 [54].
- 610 *Arrow Nominees Inc v Blackledge* [2000] C.P. Rep. 59 [55].
- 611 *Arrow Nominees Inc v Blackledge* [2000] C.P. Rep. 59 [54].
- 612 *Manifest Shipping Co Ltd v Uni-Polaris Co Ltd, The Star Sea* [2001] UKHL 1; [2001] 1 All ER 743 [62]. Similarly, in *Britton v Royal Insurance Co* (1866) 4 F&F 905 at 909, Willes J had explained that: “It would be most dangerous to permit parties to practise such frauds, and then, notwithstanding their falsehood and fraud, to recover the real value of the goods consumed. And if there is wilful falsehood and fraud in the claim, the insured forfeits all claim whatever upon the policy.”
- 613 *Ul-Haq v Shah* [2009] EWCA Civ 542; [2010] 1 All ER 73. See also *Widlake v BAA Ltd* [2009] EWCA Civ 1256; and *Hughes Jarvis Ltd v Searle* [2019] EWCA Civ 1.
- 614 *Ul-Haq v Shah* [2009] EWCA Civ 542; [2010] 1 All ER 73 [29]; see also Toulson LJ at [50].
- 615 *Ul-Haq v Shah* [2009] EWCA Civ 542; [2010] 1 All ER 73 [28]–[29]; see also Toulson LJ at [50].
- 616 *Ul-Haq v Shah* [2009] EWCA Civ 542; [2010] 1 All ER 73, per Toulson LJ at [37].
- 617 *Arrow Nominees Inc v Blackledge* [2000] C.P. Rep. 59 [54].
- 618 *Ul-Haq v Shah* [2009] EWCA Civ 542; [2010] 1 All ER 73, per Toulson LJ at [37].
- 619 *Patel v Mirza* [2016] UKSC 42.
- 620 Speaking extra-judicially in 2015, Lord Clarke queried whether this analogy with the ex turpi principle was apposite, given that that principle was hard-edged, and where it applied the court had no choice but to refuse the claimant a remedy: Lord Clarke, “What shall we do about fraudulent claims?”, William Miller Commercial Law Annual Lecture, Edinburgh Law School, 20 November 2015, [34]. However, following the Supreme Court’s recalibration of the ex turpi principle in *Patel v Mirza* [2016] UKSC 42, it can be seen that in both instances, the ultimate question is whether the claimant’s conduct is such an affront to the proper administration of justice as to outweigh the entitlement to a remedy. See in particular *Patel v Mirza* [2016] UKSC 42 [107]–[108].
- 621 *Summers v Fairclough Homes Ltd* [2012] UKSC 26; [2012] 1 W.L.R. 2004.
- 622 Though it still cannot do so where judgment has been finally entered: *Terry v BCS Corporate Acceptances Ltd* [2018] EWCA Civ 2422.
- 623 *Summers v Fairclough Homes Ltd* [2012] UKSC 26; [2012] 1 W.L.R. 2004 [41] per Lord Clarke. In affirming the existence of this power, the Supreme Court accepted the view advanced in A. Zuckerman, “Access to Justice for Litigants who Advance their Case by Forgery and Perjury” (2008) 27 C.J.Q. 419.
- 624 *Summers v Fairclough Homes Ltd* [2012] UKSC 26; [2012] 1 W.L.R. 2004 [45].
- 625 *Summers v Fairclough Homes Ltd* [2012] UKSC 26; [2012] 1 W.L.R. 2004 [48].
- 626 *Summers v Fairclough Homes Ltd* [2012] UKSC 26; [2012] 1 W.L.R. 2004 [36]. Citing *Summers*, the court in *Eurasian Natural Resources Corp Ltd v Dechert LLP* [2022] EWHC 1138 (Comm) [910] noted that “it will be rare for a court to strike out a case for abuse of process when it has in fact decided the case at trial in any event”.
- 627 *Masood v Zahoor* [2009] EWCA Civ 650; [2010] 1 W.L.R. 746 [72].
- 628 *Summers v Fairclough Homes Ltd* [2012] UKSC 26; [2012] 1 W.L.R. 2004 [49]. For commentary see: W. Norris, “Look out: I’ve got a power but I am not going to use it” (2012) 3 JPI Law 169; and C. Sephton, “Dishonest claims: Where now after *Summers v Fairclough*?” (2012) 4 JPI Law 238.
- 629 *Summers v Fairclough Homes Ltd* [2012] UKSC 26; [2012] 1 W.L.R. 2004 [50] ff.
- 630 *Summers v Fairclough Homes Ltd* [2012] UKSC 26; [2012] 1 W.L.R. 2004 [51].
- 631 *Summers v Fairclough Homes Ltd* [2012] UKSC 26; [2012] 1 W.L.R. 2004 [52], [61].
- 632 *Abbey v Gilligan* [2012] EWHC 3217 (QB), where the court held that advancing a groundless claim in order to extract a settlement amounted to attempted extortion and abuse of process.
- 633 The court acknowledged that a CPR 36 offer “is of no real assistance”, but saw no reason why a defendant should not make a Calderbank offer: *Summers v Fairclough Homes Ltd* [2012] UKSC 26; [2012] 1 W.L.R. 2004 [54]. Contrast *Widlake v BAA Ltd* [2009] EWCA Civ 1256. In that case, the claimant had exaggerated her loss in a personal injury claim by suppressing relevant information. The Court of Appeal held that where a personal injury claimant had exaggerated her claim but had still beaten the defendant’s CPR 36 offer, the right order in all the circumstances was to make no order

for costs. And see *Tuson v Murphy* [2018] EWCA Civ 1461; [2018] 4 Costs L.R. 733, where a claimant who dishonestly and misleadingly exaggerated her inability to work as a result of personal injury was not held liable for costs incurred prior to her acceptance of a CPR 36 offer. In that case, the defendant was fully aware of the true extent of the claimant's ability to work, and her claim was not such as to have been "grossly exaggerated".

634 See, e.g., *Hughes Jarvis Ltd v Searle* [2019] EWCA Civ 1; [2019] 1 W.L.R. 2934, where the Court of Appeal overturned a judge's decision to strike out under CPR 3.4(2)(b) in circumstances where a litigant giving testimony had flagrantly disregarded the judge's warning not to discuss his evidence with any other person. Compare *Joseph v Spiller* [2012] EWHC 2958 (QB), where Tugendhat J relied on *Summers* in denying a claimant who was otherwise entitled to succeed in a libel claim substantial damages on the basis that he had given untruthful evidence and had deliberately pursued a false claim for special damages.

635 *Alpha Rocks Solicitors v Alade* [2015] EWCA Civ 685; [2015] 1 W.L.R. 4534.

636 Although it is undoubtedly important to avoid wasteful and expensive "mini-trials" at an interim stage, it is notable that in this case the solicitors' claim was ultimately held to be "wholly without merit" and the bills presented were found to be "false in the most basic ways": *Alpha Rocks Solicitors v Alade* [2016] 4 Costs L.R. 657.

637 *Alpha Rocks Solicitors v Alade* [2015] EWCA Civ 685; [2015] 1 W.L.R. 4534 [21].

638 *Alpha Rocks Solicitors v Alade* [2015] EWCA Civ 685; [2015] 1 W.L.R. 4534 [22].

639 *Summers v Fairclough Homes Ltd* [2012] UKSC 26; [2012] 1 W.L.R. 2004 [62]. See also *Masood v Zahoor* [2009] EWCA Civ 650 [73].

640 Jackson, Final Report Executive Summary para.2.1.

641 See, for instance, *Liverpool Victoria Insurance Co Ltd v Yavuz* [2017] EWHC 3088 (QB); and *Gujra v Roath* [2018] EWHC 854 (QB); [2018] 1 W.L.R. 3208.

642 See *Howlett v Davies* [2017] EWCA Civ 1696; [2018] 1 W.L.R. 948 [16]. See the discussion of fundamental dishonesty in the QOCS context in Ch.28 Costs paras 28.179 ff.

643 *London Organising Committee of the Olympic and Paralympic Games (In Liquidation) v Sinfield* [2018] EWHC 51 (QB); [2018] PIQR P8.

644 *London Organising Committee of the Olympic and Paralympic Games (In Liquidation) v Sinfield* [2018] EWHC 51 (QB); [2018] PIQR P8 [53].

645 *Summers v Fairclough Homes Ltd* [2012] UKSC 26; [2012] 1 W.L.R. 2004 [50] ff.

646 *London Organising Committee of the Olympic and Paralympic Games (In Liquidation) v Sinfield* [2018] EWHC 51 (QB); [2018] PIQR P8 [64].

647 *Dorinel Cojanu v Essex Partnership University NHS Trust* [2022] EWHC 197 (QB) [47].

648 Although a defendant need not have formally pleaded fundamental dishonesty under CJCA 2015 s.57 in order to rely on it, it is always sensible to plead it: *Covey v Harris* [2021] EWHC 2211 (QB). However, there may well be cases where it is not practical or proper to expect defendants to allege fundamental dishonesty in advance of the trial: see *Mustard v Flower* [2021] EWHC 846 (QB). At minimum, a claimant must be given adequate warning of an allegation of fundamental dishonesty and the opportunity to deal with it; in the case of litigants in person, the court would ordinarily seek to ensure that the litigant understood the nature of the allegation: *Jenkinson v Robertson* [2022] EWHC 756 (Admin) [23].

649 *Dorinel Cojanu v Essex Partnership University NHS Trust* [2022] EWHC 197 (QB) [47].

650 See for example *Pinkus v Direct Line* [2018] EWHC 1671 (QB).

651 *London Organising Committee of the Olympic and Paralympic Games (In Liquidation) v Sinfield* [2018] EWHC 51 (QB); [2018] PIQR P8.

652 *London Organising Committee of the Olympic and Paralympic Games (In Liquidation) v Sinfield* [2018] EWHC 51 (QB); [2018] PIQR P8.

653 See for example *Razumas v Ministry of Justice* [2018] EWHC 215 (QB); and *Haider v DSM Demolition Ltd* [2019] EWHC 2712 (QB).

654 As was the case in *Ul-Haq v Shah* [2009] EWCA Civ 542; [2010] 1 All ER 73, for instance.

655 *Ivey v Genting Casinos Limited (t/a Crockfords Club)* [2017] UKSC 67; [2018] AC 391. In *Molodi v Cambridge Vibration Maintenance Service* [2018] EWHC 1288 (QB), the court considered that where a claimant's account was so hopelessly inconsistent that their evidence could not be regarded as reliable, the court should be reluctant to accept that the claim was genuine.

656 *London Organising Committee of the Olympic and Paralympic Games (In Liquidation) v Sinfield* [2018] EWHC 51 (QB); [2018] PIQR P8, [62].

657 *London Organising Committee of the Olympic and Paralympic Games (In Liquidation) v Sinfield* [2018] EWHC 51 (QB); [2018] PIQR P8, [63].

658 *Roberts v Kesson [2020] EWHC 521 (QB)*.

659 There have been no reported decisions in which the court acceded to a dishonest claimant's application under CJCA 2015 s.57(2). In *Williams-Henry v Associated British Ports Ltd [2024] EWHC 806 (KB); [2024] 4 W.L.R. 56* [206] Ritchie J found that the "substantial injustice" test in s.57(2) might have been met had he ordered repayment of a £75,000 interim payment. However, since the defendant did not seek repayment it was not strictly necessary for Ritchie J to decide the point.

660 *London Organising Committee of the Olympic and Paralympic Games (In Liquidation) v Sinfield [2018] EWHC 51 (QB); [2018] P.I.Q.R. P8*, [65]; cf. *Woodger v Hallas [2022] EWHC 1561 (QB)* [49].

661 *London Organising Committee of the Olympic and Paralympic Games (In Liquidation) v Sinfield [2018] EWHC 51 (QB); [2018] P.I.Q.R. P8* [65]; *Shaw v Wilde [2024] EWHC 1660 (KB)*.

662 *Iddon v Warner [2021] EWHC 587 (QB)* [101].

663 *Williams-Henry v Associated British Ports Ltd [2024] EWHC 806 (KB); [2024] 4 W.L.R. 56*.

664 Cf. *London Organising Committee of the Olympic and Paralympic Games (In Liquidation) v Sinfield [2018] EWHC 51 (QB); [2018] P.I.Q.R. P8* [65].

665 *Shaw v Wilde [2024] EWHC 1660 (KB)*; cf. *Iddon v Warner [2021] EWHC 587 (QB)*.

Contempt Inappropriate for Punishing Procedural Default

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 12 - Case Management & Enforcing Party Compliance

Part II—Enforcing Party Compliance

Contempt Inappropriate for Punishing Procedural Default

- 12.312 Contempt of court is considered in more detail in Ch.24. For present purposes, it suffices to note that committal for contempt is an inappropriate measure for enforcing most process requirements. A court may not commit a claimant for failing to comply with the deadline for serving the claim form, or a defendant for failing to file a defence. Nor may a party be visited with contempt proceedings for failing to fulfil most other process requirements, such as failing to provide a statement of truth or failing to file witness statements or expert reports. As explained earlier, the great majority of process requirements are electable; a party may choose not to comply and accept the consequence of default. For example, a claimant is free to allow the period of service to elapse without serving the claim form, and a defendant is free to sit back and decline contesting the claim. Similarly, a party is perfectly free not to serve witness statements and take the consequence of being unable to call the witnesses to testify ([CPR 32.10](#)). Process requirements such as these are merely conditions for participation in litigation or for taking a particular procedural step.
- 12.313 If a party is willing to incur the consequences of default there is nothing the court can or should do to positively compel compliance. The position was explained by Hobhouse LJ in *Prudential Assurance Co Ltd v Fountain Page Ltd*:

“It is said that many things in actions are done because a party is ordered or otherwise required to do them. They are required to deliver pleadings, swear and lodge affidavit evidence, call witnesses, or, in the present context, serve advance copies of the evidence upon which they propose to rely at the trial. In all these situations the practical sanction is similar to that which arises from a failure to give discovery or respond to other orders. The primary sanction that the court imposes is to strike out the claim or the defence. If a party fails to deliver a pleading or to lodge or adduce evidence he will fail to protect his rights and the other party’s claims or defences will prevail. The outcome for the litigant is, in practical terms, the same. However in legal terms this is not correct. There is distinction between orders, the breach of which is a contempt of court and those orders or rules which merely give rise to a default. The principle of *compulsion* applies to the former category only.”⁶⁶⁶

The fact that a rule or court order may require a party to perform a particular procedural step by a certain time, and that sanctions may be imposed either prospectively or retrospectively to incentivise compliance, does not alter the electable nature of the procedural duty. The party subject to such a rule or order continues to be free to elect to suffer the procedural consequence rather than comply. Since such procedural requirements are electable in this sense, the court has no jurisdiction to commit a litigant for contempt of court for failure to comply with them.

- 12.314 This principle is reflected in court decisions. “Whenever there is a reasonable alternative available instead of committal to prison, that alternative must be taken”, Lord Denning MR observed.⁶⁶⁷ The appropriate and proportionate response in such cases is to apply the consequences specified by the rules or by court orders for failure to comply. In extreme circumstances the court may even strike out a party’s statement of case ([CPR 3.4\(2\)\(c\)](#)), but it would be an abuse of power to commit the defaulting party to prison for contempt of court or impose a fine. Unless orders stipulate procedural consequences for default precisely because the court cannot fall back on committal for contempt.

Process duties compellable by contempt

- 12.315 There are, however, certain obligations that arise in the course of proceedings with which a person must comply. Process obligations that must be complied with on pain of contempt may be divided into two groups: obligations imposed on parties either before or during litigation,⁶⁶⁸ and obligations imposed on non-parties. In the course of litigation, the court may require non-parties to provide assistance in a number of ways. For example, witnesses may be summoned to testify during the trial, and a non-party may be ordered to disclose to a prospective claimant the identity of a wrongdoer or the whereabouts of missing property. Solicitors and barristers have various duties arising from their status as officers of the court. Contempt proceedings are available for enforcing all such obligations or for punishing non-compliance.
- 12.316 Parties, meanwhile, are duty-bound to comply with orders made in the course of litigation that are designed to protect substantive rights. Litigants cannot escape from such obligations by disengaging with proceedings. For instance, a defendant who is ordered not to pull down a disputed building pending proceedings must comply, as must a parent ordered not to take a child out of the jurisdiction. Such an order leaves no room for disobedience. Disobeying an interim injunction is just as serious as disobeying a permanent injunction. The “expression ‘coercive’ was sometimes used to describe mandatory orders to which there attached a sanction, whether explicit or implicit, such as committal for non-compliance”, Lord Bingham observed.⁶⁶⁹ The coercive process is employed in such circumstances in the normal way, as an instrument for protecting rights rather than as a means of compelling compliance with process requirements.
- 12.317 There is also a small group of process obligations enforceable by proceedings for contempt. Again, the main feature of these is that they are by nature compulsory, that is to say they leave no room for disobedience. A party who has been ordered to give disclosure by a certain date may decide not to do so and face the prospect of having their statement of case struck out. But a defendant against whom a search order has been made has no such option; they are bound to comply on pain of contempt.⁶⁷⁰ The same goes for a defendant who has been made subject to an asset-freezing order, which places an obligation on the defendant to refrain from dissipating assets and to disclose their value and location. Failure to comply with such an order would justify committal for contempt.⁶⁷¹
- 12.318 Contempt proceedings are also available where a party’s conduct goes beyond the mere failure to fulfil process requirement and amounts to subversion of the administration of justice. Thus, contempt proceedings are available where a party makes a false statement in a document verified by a statement of truth (CPR 32.14),⁶⁷² or makes a false disclosure statement (CPR 31.23).⁶⁷³ Contempt proceedings may also be appropriate for breach of the duty to disclose damaging documents that have come to the attention of a party after making the disclosure statement (CPR 31.11), because such failure is equivalent to making a false disclosure statement. A party who falsifies medical records may be prosecuted for forgery, while a party who lies on oath may be prosecuted for perjury.⁶⁷⁴ That said, the fact that contempt proceedings can be brought in relation to such conduct does not mean that they are inevitable. The Court of Appeal rejected the view that an application to commit for contempt is the only response to serious, flagrant and dishonest breaches of a court order; in appropriate circumstances, such conduct can also be dealt with by way of ordinary unless orders.⁶⁷⁵

Footnotes

666 *Prudential Assurance Co Ltd v Fountain Page Ltd* [1991] 3 All ER 878; [1991] 1 W.L.R. 756.

667 *Danchevsky v Danchevsky* [1974] 3 All ER 934, 937.

668 *Jet2Holidays Ltd v Hughes* [2019] EWCA Civ 1858.

- 669 *Gairy v A-G of Grenada* [2001] UKPC 30; [2002] 1 AC 167.
- 670 *Cobra Golf Ltd v Rata* [1998] Ch 109; [1997] 2 All ER 150; *Adam Phones Ltd v Goldschmidt* [1999] 4 All ER 486, Ch.
- 671 *JSC BTA Bank v Ablyazov* [2012] EWCA Civ 1411.
- 672 *Aviva Insurance Ltd v Randive* [2016] EWHC 3152 (QB). Where a party makes a false statement of truth, committal proceedings may be brought even where the party was not bound to serve the false document but did so voluntarily, and even where such a document was provided pre-action pursuant to a pre-action protocol: *Jet2Holidays Ltd v Hughes* [2019] EWCA Civ 1858.
- 673 *Ali v Esure Services Ltd* [2011] EWCA Civ 1582; *Havering LBC v Bowyer* [2012] EWHC 2237 (Admin).
- 674 See *Arrow Nominees Inc v Blackledge* [2000] C.P. Rep. 59; and *Douglas v Hello! Ltd* [2003] EWHC 55 (Ch); [2003] 1 All ER 1087, discussed at para.12.293 above.
- 675 *Lexi Holdings Plc v Luqman* [2007] EWCA Civ 1501.

Introduction

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 13 - Joining Claims and Parties

Introduction

13. 1 English law has a longstanding preference for completeness in adjudication. It finds expression in the [Senior Courts Act 1981 s.49\(2\)](#), which requires the court to “so exercise its jurisdiction in every cause or matter before it as to secure that, as far as possible, all matters in dispute between the parties are completely and finally determined, and all multiplicity of legal proceedings with respect to any of those matters is avoided”.¹ This preference is echoed in a number of [CPR](#) provisions. [CPR 1.4\(2\)\(i\)](#) requires the court to deal “with as many aspects of the case as it can on the same occasion”. [CPR 3.1\(2\)\(h\)–\(i\)](#) respectively empower the court to “consolidate proceedings” and “try two or more claims on the same occasion”. [CPR 7.3](#) provides that a single claim form may be used to start all claims which may be “conveniently disposed of in the same proceedings”. Similarly, the court has jurisdiction under [CPR 17](#) to permit amendments of statements of case to ensure that all issues between the parties are resolved.²
13. 2 Under the [Rules of the Supreme Court \(RSC\)](#), the court simply used its inherent powers to manage litigation involving many parties. However, in addition to the court’s inherent powers, and the overriding objective of disposing of cases justly and at proportionate cost ([CPR 1.1\(1\)](#)), there are now several distinct mechanisms by which multi-party litigation can be brought and managed. The bulk of these procedural tools are found in [CPR 19](#). In addition, legislation introduced in 2015 allows class actions in the sphere of competition law to proceed before the Competition Appeal Tribunal (CAT) on an opt-in or opt-out basis.³
13. 3 Cases involving numerous potential claimants or defendants may benefit from being litigated on a collective basis to enable litigants to pool their resources. At the same time, collective litigation may avoid multiplicity of proceedings involving the same issues, waste of court resources and conflicting decisions. As goods are produced and services provided on an ever-larger scale, and as major corporations assume an ever more significant role in modern economies and societies, collective redress procedures are becoming increasingly important. The gradual expansion and formalisation of such procedures in recent years is reflective of this.
13. 4 This chapter addresses the following procedural tools: the addition and substitution of parties pursuant to [CPR 19 s.I](#), save where a limitation period has expired⁴ ([13.5–13.11](#)); the court’s power to consolidate proceedings ([13.13–13.14](#)); derivative claims, which allow a member of an entity to bring proceedings on behalf of the entity ([13.15–13.28](#)); and collective proceedings in the various forms now permitted by English law: the representative action in [CPR 19 s.II](#) ([13.35–13.54](#)), the “group litigation” procedure in [CPR 19 s.III](#) ([13.55–13.82](#)) and class actions in the field of competition law ([13.83–13.123](#)). Finally, it addresses key issues that are relevant to all collective redress procedure including developments in litigation funding ([13.124–13.136](#)).

Footnotes

- ¹ As this provision makes clear, the other side of the coin is English law’s desire to ensure finality in litigation, as to which see [Ch.26](#) Finality of Litigation.
- ² Amendments are considered in [Ch.7](#) Statements of Case paras [7.47 ff.](#)
- ³ The [Competition Act 1998 s.47B](#), as amended by the [Consumer Rights Act 2015 s.81](#) and [Sch.8](#), together with the [Competition Appeal Tribunal Rules 2015 \(SI 2015/1648\)](#).

4 This is considered in Ch.7 Statements of Case paras 7.105 ff.

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Addition and Substitution of Parties

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Chapter 13 - Joining Claims and Parties

Addition and Substitution of Parties

General principles

13. 5 The court has extensive powers under CPR 19 to add or substitute parties. CPR 19.1 indicates that any number of claimants or defendants may be joined as parties to a claim. CPR 19.2 empowers the court to order the addition of new parties or the substitution of existing parties. The court may exercise its powers on the application of an existing party (CPR 19.4(2)(a)(i)), or on the application of the person who wishes to become a party (CPR 19.4(2)(a)(ii)). The court also has the power to remove, add or substitute parties on its own initiative (CPR 19.4(11)). The power to add or substitute a party is distinguishable from the power to allow an amendment of a statement of case in order to correct the name of a party, under CPR 17.4(3).⁵ The jurisdiction under both rules must be exercised in light of the overriding objective, and only insofar as the added party can still have a fair trial.⁶
13. 6 The court may order a person to be added as a new party if: (a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or (b) there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue (CPR 19.2(2)).⁷ Similarly, the court may order a new party to be substituted for an existing one if the existing party's interest or liability has passed to the new party, and it is desirable to substitute the new party so that the court can resolve the matters in dispute in the proceedings (CPR 19.2(4)). However, CPR 19.2(2) and (4) are permissive, not restrictive, and the court's power to add or substitute a party is not limited to the situations mentioned in the rule. The court may order the addition or substitution of a party whenever it considers it desirable to do so in the interest of good case management and use of court resources.⁸ Ultimately, decisions on joining new parties are guided by policy, and the two lodestars are: (i) enabling parties to be heard if their rights may be affected by a decision; and (ii) achieving the overriding objective.⁹ These considerations will sometimes sit in tension with one another.
13. 7 The procedure for adding a party may be used not only for resolving a dispute with a new party, but also to enable interested persons to make submissions as to the outcome of a dispute in which they are not directly involved. For example, in *Nottinghamshire County Council v Bottomley*¹⁰ a local authority was added as a party to a large personal injury claim in order to make representations as to the form of any settlement or judgment which was likely to affect its financial obligations to provide care for the claimant. Yet the mere fact that a prospective party has an interest in the outcome, even a very strong one such that it is "desirable" to add them, will not of itself justify joinder.¹¹ Thus, in a case where two parties wished to join litigation concerning the order of distribution of the assets of a former Lehman Brothers company, both of whom had an equally strong economic interest in the outcome, only one was joined on the ground that its intended arguments would bring a fresh and distinct perspective to proceedings. The proceedings were already complex, and the prospective parties had to justify their place at the table by explaining what they could bring to it.¹² Similarly, although the court has power under CPR 19.2 to join as a party someone who might in future be liable to a claim for contribution by one of the parties, the court has discretion in the matter and can refuse such an application if it risks complicating the proceedings and increasing costs.¹³
13. 8 The court may order a party to be substituted for an existing party if the interest of an existing party has passed to the proposed party and it is desirable to do so in order to resolve the dispute (CPR 19.2(4)).¹⁴ There is power to substitute a new party for

an existing party after judgment as well as before.¹⁵ The High Court considered the meaning of an “interest” passing from an existing party to a proposed party for the purposes of CPR 19.2(4) in *River Thames Society v First Secretary of State*.¹⁶ The claimant brought a claim challenging planning permission given by the Secretary of State for a company to redevelop the site of an old power station. The vice-chair of the River Thames Society, which had applied to quash the planning permission, applied to replace the society which wanted to withdraw from the proceedings. It was held that the concept of “passing an interest” cannot be stretched to include such a situation. However, the application could be granted based on the exercise of the court’s inherent jurisdiction. It held that the nature of the relation between the vice-chair and the Society was sufficient to claim an identity of interest between them.

- 13.9 Since participation in litigation is voluntary, a person can be added or substituted as a claimant only with their written consent (CPR 19.4(4)). If the presence of such a person is necessary but they refuse to consent to becoming a claimant, they must be joined as defendant.¹⁷ For example, where a claimant claims a remedy to which others are jointly entitled, the others must be joined as claimants or, if they refuse, they must be joined as defendants (CPR 19.3).
- 13.10 Applications to add or substitute parties must be made by notice in accordance with CPR 23 and must be supported by evidence which shows the connection of the proposed party to the proceedings (CPR 19.4(2)(b)). An application for an order under CPR 19.2(4) (substitution of a new party for an existing one where the existing party’s interest or liability has passed to the new party), however, may be made without notice (CPR 19.4(3)(a)). Where the court orders the addition or substitution of a new party, it will also make consequential orders about the service of amended statements of case to the new party and, where necessary, to all other parties (CPR 19.4(8)). A new defendant does not become a party to the proceedings until the amended claim form has been served on them (CPR 19.4(9)).
- 13.11 Lastly, the court may order a person to cease to be a party if their participation in the proceedings is no longer desirable (CPR 19.2(3)). Where the proceedings were not properly brought against a party wishing to drop out of the picture, there should be no difficulty. However, where the claim was properly brought against a party, but their interest has now passed to another, there may occasionally be circumstances in which it is nonetheless desirable that they remain in proceedings. Generally speaking, it will not be appropriate to keep a party in proceedings merely because they have relevant documents.¹⁸ Nor will a financial interest in the outcome of itself suffice, as with joinder of new parties.¹⁹ It may, however, be appropriate to keep a party in proceedings where it is desirable that they be bound by any order or judgment.²⁰

Adding or substituting a party after the expiry of the limitation period

- 13.12 This topic is considered in Ch.7 Statements of Case.

Footnotes

5 This is considered in Ch. 7 Statements of Case paras 7.82 ff.

6 *Kent v M&L Management & Legal Ltd and another* [2005] EWHC 2546 (Ch); [2005] All ER (D) 251 (Nov).

7 “In dispute” is taken to mean “in issue”: *Re Pablo Star Ltd* [2017] EWCA Civ 1768; [2018] 1 W.L.R. 738, CA.

8 *Hounslow LBC v Cumar* [2012] EWCA Civ 1426 [11].

9 *The Welsh Ministers v Price* [2017] EWCA Civ 1768; [2018] 1 W.L.R. 738. In that case, a company had been restored to the register subject to an undertaking that its future activities would be limited to pursuing copyright infringement proceedings against named third parties. The undertaking was breached, in that the company issued proceedings against other third parties, and it assigned the copyright to another company which issued further proceedings. The applicant

was the defendant in one of the actions brought by the assignee of the copyright. It applied to be added to the restoration proceedings, so that it could adduce evidence of the breaches of the undertaking and seek the revocation of the restoration order and assignment. The Court of Appeal accepted that CPR 19.2 should be given a wide interpretation, and that it could therefore allow for joinder where there was an issue that was not yet a live dispute in the proceedings (in this case, whether the restoration order should have been made and whether the assignment was valid). Further, it was not for the Registrar of Companies, which was the usual respondent to restoration proceedings, to police undertakings. Thus, in an appropriate case the court had power under CPR 19.2(2) to join a third party to restoration proceedings, to enable it to complain that the court had been misled when making the restoration order or that there had been a breach of undertaking. However, the circumstances would need to be exceptional and the alleged misconduct extreme, in view of the nature of restoration proceedings and to discourage opportunistic applications. There were no such exceptional circumstances in the instant case and joinder was refused. *Re Pablo Star Ltd* [2017] EWCA Civ 1768; [2018] 1 W.L.R. 738, CA; *The Welsh Ministers v Price* [2017] EWCA Civ 1768; [2018] 1 W.L.R. 738.

10 *Nottinghamshire County Council v Bottomley* [2010] EWCA Civ 756; [2010] Med L.R. 407.

11 *Re LB Holdings Intermediate 2 Ltd* [2018] EWHC 2017 (Ch).

12 *Re Lehman Brothers Holdings Intermediate 2 Ltd (In Administration)* [2018] EWHC 2017 (Ch). See also *Gazprom Export LLC v DDI Holdings* [2018] EWHC 3724 (Comm).

13 *Coal Mining Contractors v Davies* [2006] EWCA Civ 1360.

14 Or where it is desirable to remove an existing party and add a new one, even where there has been no passing of interest: *Hounslow LBC v Cumar* [2012] EWCA Civ 1426.

15 *Prescott v Dunwoody Sports Marketing* [2007] EWCA Civ 461; [2007] 1 W.L.R. 2343.

16 *River Thames Society v First Secretary of State* [2006] EWHC 2829 (Admin). Cf. *R (Johnson) v Secretary of State for Health* [2006] EWHC 288 (Admin).

17 The fact that a person may be made a defendant against their will does not mean that they are forced to participate in litigation. A defendant may withdraw from the process by making an admission or, indeed, by doing nothing and allowing a judgment to be given against them.

18 *Teva Pharma BV v Amgen Inc* [2013] EWHC 3711 (Pat); [2013] All ER (D) 317 (Nov) [41].

19 *Teva Pharma BV v Amgen Inc* [2013] EWHC 3711 (Pat); [2013] All ER (D) 317 (Nov) [42].

20 *Teva Pharma BV v Amgen Inc* [2013] EWHC 3711 (Pat); [2013] All ER (D) 317 (Nov).

Consolidating and Trying Together Different Proceedings

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Mainwork

Chapter 13 - Joining Claims and Parties

Consolidating and Trying Together Different Proceedings

13. 13 CPR 3.1(2)(h) gives the court the power to “consolidate proceedings” while CPR 3.1(2)(i) empowers the court to “try two or more claims on the same occasion”. Prior to the CPR, RSC Ord.4 r.9 dealt with consolidation and RSC Ord.15 r.4 dealt with the joinder of different parties in one action. All that was needed to consolidate different proceedings was the presence of some common question of law or fact, or that the issues arose out of the same transaction or that there was some other good reason. Different sets of proceedings could be consolidated even if different claimants and defendants were involved. In 1999, the White Book commented that the “circumstances in which actions may be consolidated are therefore generally similar to those in which parties may be joined in one action under Ord.15 r. 4”.²¹ According to the current White Book the “effect of the consolidation of proceedings is to combine two or more claims so that they will proceed thereafter as one claim”.²²
13. 14 Whether the court is considering consolidation or trying different claims on the same occasion, the aim is the same: to avoid wasting party and court resources in a multiplicity of proceedings that involve identical or similar issues, and to protect defendants from the cost and vexation of having to defend in separate proceedings against essentially the same allegations.²³ Under the CPR the court has various powers to achieve this aim by trying different claims together or by giving appropriate directions for the manner in which they should be disposed of, such as allowing one claim to go forward and staying all other claims giving rise to a similar issue (CPR 3.1(2)(f), (g), (i), (j)). It is therefore doubtful whether the distinction between consolidating proceedings and trying various claims together serves any purpose, other than giving rise to technical disputes. The Civil Procedure Rule Committee should therefore consider removing the reference to the arcane process of consolidation. The essence of the matter is that the court will order different claims to be tried together where there is substantial overlap between them or where trying them separately would create a risk of irreconcilable decisions.²⁴ These aims are more likely to be achieved where the order for consolidation is made at an early stage in the proceedings.²⁵

Footnotes

21 1999 WB 4.9.2.

22 2025 WB 3.1.9.

23 *Atos IT Services UK Ltd v Secretary of State for Business Energy and Industrial Strategy [2022] EWHC 787 (TCC)* [4].

24 *Law Debenture Trust Corp (Channel Islands) Ltd v Lexington Insurance Co [2001] EWHC 515 (Comm).*

25 *Harrington and Charles Trading Co Ltd (In Liquidation) v Mehta [2023] EWHC 998 (Ch).*

Derivative Claims

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Mainwork

Chapter 13 - Joining Claims and Parties

Derivative Claims

- 13. 15** As a matter of general principle, it is for a company or any other incorporated body, acting through its properly appointed officers and directors, to decide whether to sue and no one else can sue on its behalf.²⁶ There are a number of reasons for this. First, the company or other body corporate has a distinct legal personality, which ought generally to be respected. Second, the officers and directors are generally best placed to make such decisions, as they have the most intimate knowledge of the workings of a company, as well as obligations to act in its best interests. However, where a company or other body corporate is vested with a cause of action but its officers and directors decline to pursue the relief to which it is entitled, a member may bring proceedings on its behalf to enforce the remedy (a “derivative claim”).²⁷ Since such claims are an exception to the general rule, the circumstances in which they are permitted are strictly circumscribed. They will typically be available where, for example, a director has breached their duties towards the company and thereafter used their control over the company to prevent it seeking redress; but where there is no allegation of director wrongdoing, or the cause of action is against a third party as opposed to a company director, the use of derivative claims has traditionally been much more limited.²⁸
- 13. 16** There are now three principal types of derivative action since the [Companies Act 2006 \(the 2006 Act\)](#) came into force in October 2007.²⁹ The first, and most important, is the derivative claim brought pursuant to the [2006 Act Pt 11 Ch.1](#). This is a statutory procedure introduced following the recommendations of the Law Commission, to make it easier for members of a company to bring a derivative action. The Law Commission recommended that the statutory derivative claim procedure should replace the restrictive common law derivative action entirely,³⁰ and indeed a number of commentators thought that the [2006 Act](#) had the effect of abolishing the common law derivative claim.³¹ However, the [2006 Act](#) does not apply to multiple derivative claims, derivative claims in respect of overseas companies or derivative claims in respect of LLPs because they fall outside the definition of “derivative claim” in [s.260\(1\)](#). The Court of Appeal has since confirmed that “[t]he circumstances in which double and multiple derivative claims may be brought remain governed by the common law rules”.³² Indeed, the better view is that the [2006 Act s.260\(2\)](#) did not abolish these species of derivative claim, but simply prescribes the procedure to be followed in respect of any claim falling within [s.260\(1\)](#).³³
- 13. 17** The [2006 Act](#) derivative action was intended to improve upon the obscure, complex and restrictive common law procedure, and so continuation of the latter alongside the former is far from satisfactory. The courts have at least confirmed that the common law derivative claim can now be invoked only as a measure of last resort, where the statutory procedure is not available.³⁴ The third type of derivative action is that authorised by the court in an unfair prejudice petition under the [2006 Act s.994](#).³⁵ The differences in the ambit of the three main types of derivative action may be illustrated by considering the differing circumstances in which each of them can be brought with a view to claiming damages on behalf of a company for negligence by a third party, such as the company’s legal or financial adviser.
- 13. 18** The statutory derivative claim, created by the [2006 Act Pt 11 Ch.1](#), can be brought “only in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company”.³⁶ Thus, while a statutory derivative claim may be made against a third party (in addition to or even instead of the relevant director), it is *only* available where the cause of action against the third party arose out of a breach of duty by at least one of the company’s directors. This limitation was justified by the Law Commission on the basis that “allow[ing] shareholders to have involvement in whether claims should be brought against third parties in our view goes too far in encouraging excessive shareholder interference with management decisions. This is particularly important as we are proposing that derivative actions

are to be available in respect of breaches of directors' duties of skill and care".³⁷ Nevertheless, the [2006 Act Pt 11 Ch.1](#) liberalises the availability of derivative actions compared with the position at common law.

- 13. 19 At common law, negligence, default, breach of duty or breach of trust by a director was insufficient to ground a derivative action. Instead, what was required was actual fraud, or a breach of duty which conferred a personal benefit on the wrongdoer (known as the "fraud on the minority" exception to the rule in *Foss v Harbottle*).³⁸ Mere negligence or other breach of duty, without any corresponding benefit to the wrongdoer personally, would be insufficient for this purpose.³⁹ Thus, the circumstances in which a *third party* will face a multiple derivative claim, a derivative claim in respect of a LLP or a derivative claim in respect of an overseas company are likely to be limited, since these continue to be governed by the common law.⁴⁰
- 13. 20 By contrast, where civil proceedings are authorised to be brought in the name and on behalf of a company pursuant to the [2006 Act s.996\(2\)\(c\)](#), it is for the court to direct who may bring the claim, against whom and on what terms. Thus, such a derivative claim could be authorised to be brought in negligence against a third party irrespective of whether there was also negligence or breach of duty by one of the company's directors.⁴¹

Procedure to be followed in bringing a derivative claim

- 13. 21 [CPR 19.14](#) governs derivative claims other than those brought pursuant to an order under the [2006 Act s.996 \(CPR 19.14\(1\)\)](#). The derivative claimant may issue a claim form without court permission to enforce the entity's rights, making the entity for the benefit of which a remedy is sought a defendant to the claim (since no one can be made a claimant against their will) ([CPR 19.14\(3\)](#)). Thereafter, the claimant may take no further steps without court permission, other than those required by [19.15](#) or [19.17](#), or to make an urgent application for interim relief ([CPR 19.14\(4\)](#)).⁴²
- 13. 22 [CPR 19.15](#) gives effect to the requirements set out in the [2006 Act](#),⁴³ compelling the claimant to obtain court permission to carry on a derivative claim. The claimant must file an application notice under [CPR 23](#), seeking permission to continue together with the written evidence on which they rely in support ([CPR 19.15\(2\)](#)). The claimant must not make the company a respondent to the permission application ([CPR 19.15\(3\)](#)), but must notify the company of the claim and permission application as soon as reasonably practicable after the claim form is issued ([CPR 19.15\(4\)](#)), unless the claimant obtains court permission to delay giving notice on the grounds that it would frustrate part of the remedy being sought ([CPR 19.15\(7\)](#)).
- 13. 23 The [2006 Act s.261](#) contemplates two stages to the permission application. At the first stage the court will consider, on the basis of the claimant's evidence alone, whether there is a *prima facie* case for giving permission.⁴⁴ This rule is designed to reduce the burden on directors in defending unmeritorious cases.⁴⁵ The court has the power to dismiss the application at the first stage without a hearing, but if it does so the claimant may renew the application at an oral hearing. They must seek renewal within seven days of being notified of the court's decision and notify the company as soon as reasonably practical. Where the application proceeds to the second stage on the basis that it discloses a *prima facie* case for permission, the court will order that the company and any other appropriate party be made respondents to the permission application and give directions for the service on the company and any other appropriate party of the application notice and the claim form.⁴⁶
- 13. 24 The [2006 Act s.263](#) sets out the factors the court must take into account in deciding whether to give permission to continue a statutory derivative claim. Given that legal entities, like natural persons, are free to decide whether to press for their rights, persons who seek permission to bring derivative proceedings must satisfy the court that there are good reasons for allowing them to take matters into their own hands.⁴⁷ Historically a derivative claim could only be maintained in a very narrow set of circumstances. There are three complete bars to granting permission to continue a derivative claim, set out in [s.263\(2\)](#). [Section](#)

²⁶³ otherwise provides the court with a fairly wide discretion to decide whether it is in the best interests of the company for the litigation to be brought.⁴⁸ The court needs to balance the risk that the derivative claim may be motivated by self-serving objectives that are not in the company's interests against the risk that disallowing a derivative claim would deprive the company of the benefit of litigation which its own decision making process is unable to appreciate or initiate. The applicant for permission must therefore show that it is in the interests of the entity that the applicant should be allowed to sue on its behalf.⁴⁹ This may happen where company directors have improperly decided not to bring a claim, or where there is an attempt to conceal some impropriety. It may be necessary to show a reasonable suspicion of impropriety or that the company has been mismanaged or is otherwise unable or unwilling to look after its own interests.⁵⁰ The same holds true for derivative claims on behalf of other bodies.

13. 25 CPR 19.16 replicates the CPR 19.15 procedure, with some modifications, for applications for permission to continue a claim commenced by a company as a derivative claim, or to continue a derivative claim brought by another member of the company. The permission requirements for these claims are set out in the 2006 Act ss.262 and 264. They are designed to allow a member to take over a claim where the company or another member has pursued the claim in a manner which amounts to an abuse of process, or failed to prosecute the claim diligently, and it is appropriate for the member to continue the claim as a derivative claim.
13. 26 The derivative action is an exception to the rule that a cause of action vesting in a company should be pursued by the company. The court is therefore highly unlikely to exercise its discretion to allow any such claim by a majority shareholder, unless there are good reasons why they have not used their powers under the company's rules to procure the company to bring the claim.⁵¹ Since the claim is solely for the benefit of the entity in question, pursuant to CPR 19.19, the court may order the company, body or trade union to indemnify the claimant against any liability in respect of costs incurred in the claim.⁵²

Legal professional privilege and derivative claims

13. 27 The derivative action procedure is not without difficulty because, while the claim is entirely for the benefit of the corporate entity, the entity is a defendant to the proceedings. The consequences of this paradoxical situation are illustrated where a shareholder applies for permission to continue a derivative claim on behalf of a company, and seeks disclosure of company documents for use in pursuit of the claim.⁵³ Until recently, the so-called "shareholder rule" had long been applied, such that a company could not assert privilege against a shareholder in respect of company documents, provided they did not relate to hostile litigation between the shareholder and the company.⁵⁴ However, in *Aabar Holdings S.à.r.l. v Glencore plc*, Picken J held that there was no basis for the shareholder rule.⁵⁵ This was because the shareholder rule was based upon the proposition that a shareholder has a proprietary interest in a company's assets. This proposition is no longer tenable following *Salomon v Salomon*, which confirmed the separate legal personality of a company as distinct from its shareholders.⁵⁶ Picken J also rejected the alternative submission that following *Salomon v Salomon*, the shareholder principle could be justified on the basis of "joint interest privilege".⁵⁷ The judgment also considered how the shareholder rule should be applied in the event it did apply, concluding it applied to legal advice and litigation privilege, but not to without prejudice privilege.⁵⁸ Further, Picken J held that the shareholder rule would extend to privileged documents belonging to subsidiaries within the company's corporate group,⁵⁹ and, contrary to other recent High Court authority,⁶⁰ could in principle apply to unregistered shareholders.⁶¹ It remains to be seen whether *Aabar Holdings* will be upheld on appeal, or whether an alternative basis for the shareholder rule will be articulated.⁶² A better approach to applications for disclosure by shareholders is one which focusses on the motives of the shareholder applicant. In the United States, for example, the court will consider a range of factors including the bona fides of the shareholders in bringing the claim.⁶³

13. 28

A further, related, issue is that a shareholder bringing a derivative claim must satisfy the court that they are pursuing the claim bona fide for the benefit of the company for wrongs to the company for which no other remedy is available.⁶⁴ A derivative claimant who is pursuing litigation on behalf of a company is in effect its agent in the proceedings.⁶⁵

Footnotes

- ²⁶ *Foss v Harbottle (1843) 2 Hare 461.*
- ²⁷ Derivative claims under CPR 19.14 - CPR 19.20 consist only of claims in relation to companies, other bodies corporate and trade unions. However, “derivative action” is used sometimes to describe a claim brought by a beneficiary in respect of torts committed by third parties in respect of trust property: *Roberts v Gill & Co [2010] UKSC 22; [2011] 1 AC 240*.
- ²⁸ For a more detailed treatment of derivative claims generally, see V. Joffe et al, *Minority Shareholders: Law, Practice and Procedure*, 7th edn (Oxford: Oxford University Press, 2024) Ch.2.
- ²⁹ The 2006 Act itself provides for the bringing of a further form of derivative claim not under Pt 11 Ch.1: s.370(1) provides that any liability of a director under s.369 where a company has made a political donation or incurred political expenditure without the authorisation required by Pt 14 “is enforceable (a) in the case of a liability of a director of a company to that company, by proceedings brought under [s.370] in the name of the company by an authorised group of its members; (b) in the case of a liability of a director of a holding company to a subsidiary, by proceedings brought under [s.370] in the name of the subsidiary by—(i) an authorised group of members of the subsidiary, or (ii) an authorised group of members of the holding company.” The procedure in respect of such proceedings is set out in the 2006 Act s.371.
- ³⁰ Law Commission, *Shareholder Remedies* (London: HMSO, 1997), Law Com No.246 para.6.55.
- ³¹ See for example Lord Millett, “Multiple Derivative Actions”, *Gore-Browne on Companies Bulletin*, July 2010, pp.1–4; *A. Reisberg and D.D. Prentice, “Multiple Derivative Actions” (2009) 125 L.Q.R. 209, 212–13*. And see *Gore-Browne on Companies*, Issue 156 Ch.18 paras 1–2.
- ³² *Boston Trust Co Ltd v Verhoef [2021] EWCA Civ 1176; [2022] B.C.C. 1* [15]. See for example *Bhullar v Bhullar [2015] EWHC 1943 (Ch)*, an example of a multiple derivative claim brought since the introduction of the statutory procedure in Pt 11 of the 2006 Act; and *Harris v Microfusion 2003-2 LLP & Ors [2016] EWCA Civ 1212*, an example of a derivative claim brought in respect of a LLP.
- ³³ *Universal Project Management Ltd v Fort Gilkicker Ltd [2013] EWHC 348 (Ch); [2013] Ch 551*, citing with approval the article by D. Lightman, “Two Aspects of the Statutory Derivative Claim” [2011] L.M.C.L.Q. 142.
- ³⁴ *Tonstate Group Ltd v Wojakovski [2019] EWHC 857 (Ch)* [22]–[24].
- ³⁵ The 2006 Act s.996(2)(c).
- ³⁶ The 2006 Act s.260(3).
- ³⁷ Law Commission, *Shareholder Remedies* (London: HMSO, 1997), Law Com No.246 para.6.34.
- ³⁸ See *Harris v Microfusion 2003-2 LLP [2016] EWCA Civ 1212*.
- ³⁹ See *Pavlides v Jensen [1956] Ch 565*, approved by the Court of Appeal in *Heyting v Dupont [1964] 1 W.L.R. 843*.
- ⁴⁰ In addition, the circumstances in which it would be appropriate for a derivative claim to be brought in relation to an overseas company in the English courts rather than the courts of the place of the company’s incorporation are likely to be rare: see *Konamaneni v Rolls-Royce Industrial Power (India) Ltd [2002] 1 B.C.L.C. 336* and *Reeves v Sprecher [2007] 2 B.C.L.C. 614*.
- ⁴¹ As Lewison J pointed out in *Iesini v Westrip Holdings Ltd [2011] 1 B.C.L.C. 498; [2010] B.C.C. 420* [75] [81]–[83].
- ⁴² Note that in *Boston Trust Company Ltd v Szerelmey Ltd [2021] EWCA Civ 1176*, it was held that the court has power, in a common law derivative action, to grant conditional permission to continue. The derivative claimants did not have standing to bring the claim because they were not on the register of shareholders, so brought parallel proceedings to rectify the share register. The CA said the appropriate course was to adjourn the derivative permission application for a reasonable time to give the claimants the opportunity to have the register rectified.
- ⁴³ With CPR 19.17 mirroring those requirements for other types of derivative claim (such as those carried on in respect of other types of bodies corporate or trade unions), save for those authorised by the court under the 2006 Act s.996 following an unfair prejudice petition. Derivative claims on behalf of other bodies corporate raise the same questions of principle and practice so consistent treatment is desirable.
- ⁴⁴ The 2006 Act s.261(2).
- ⁴⁵ See HL Deb 9 May 2006 Vol.681 col.883.

- 46 The [2006 Act s.261\(3\)](#). For an analysis of the steps which the company can and should take in relation to an application for permission to continue a derivative claim, see *D. Lightman, “The role of the company at the permission stage in the statutory derivative claim”*, (2011) 30 C.J.Q. 23.
- 47 *Foss v Harbottle* (1843) 2 Hare 461; *Fraser v Oystertec Plc (Proposed Amendments)* [2004] EWHC 2225 (Ch); and *Portfolios of Distinction Ltd v Laird* [2004] EWHC 2071 (Ch); [2005] B.C.C. 216. For “fraud on the minority” as a reason, see *Estmanco (Kilner House) Ltd v Greater London Council* [1982] 1 All ER 437; [1982] 1 W.L.R. 2.
- 48 See V. Joffe et al, *Minority Shareholders: Law, Practice and Procedure*, 7th edn (Oxford: Oxford University Press, 2024) paras 2.51 ff.
- 49 For instance, the court will want to know why the majority shareholder has not used their voting powers in order to procure the company to bring the action: *Cinematic Finance Ltd v Ryder* [2010] EWHC 3387 (Ch); [2012] B.C.C. 797. In *Bamford v Harvey* [2013] Bus LR 589; [2013] B.C.C. 311, an application for permission to continue a derivative claim was dismissed where the shareholder had a contractual right to procure the company to start proceedings in its own name, although Roth J noted that wrongdoer control is not an absolute condition to a derivative claimant being given permission to continue a statutory derivative claim.
- 50 *Barrett v Duckett* [1995] 1 B.C.L.C. 243; [1995] B.C.C. 362; and *Smith v Croft (No.2)* [1988] Ch 114; [1987] 3 All ER 909.
- 51 *Cinematic Finance Ltd v Ryder* [2010] EWHC 3387 (Ch); [2012] B.C.C. 797.
- 52 For the considerations relevant to such an order, see *Smith v Croft* [1986] 2 All ER 551; [1986] 1 W.L.R. 580; *Iesini v Westrip Holdings Ltd* [2011] 1 B.C.L.C. 498; [2010] B.C.C. 420; *Wishart v Castlecroft Securities Ltd* [2010] B.C.C. 161; *Bhullar v Bhullar* [2016] 1 B.C.L.C. 106 and *Tonstate Group Ltd v Edward Wojakowski* [2019] EWHC 857 (Ch). *Harley Street Capital Ltd v Tchigirinsky (No.2)* [2005] EWHC 1897 (Ch); [2006] B.C.C. 209; *Aabar Holdings S.à.r.l. v Glencore plc* [2024] EWHC 3046 (Comm).
- 53 *Arrow Trading and Investments v Edwardian Group Ltd* [2005] 1 B.C.L.C. 696; [2004] B.C.C. 955; *Dawson-Damer v Taylor Wessing LLP* [2020] EWCA Civ 352.
- 54 See also doubt expressed in *Various Claimants and G4S Limited (formerly G4S PLC)* [2023] EWHC 2863 (Ch).
- 55 *Salomon v Salomon & Co Ltd* [1897] AC 22; *Aabar Holdings S.à.r.l. v Glencore plc* [2024] EWHC 3046 (Comm) [33].
- 56 *Aabar Holdings S.à.r.l. v Glencore plc* [2024] EWHC 3046 (Comm) [18], [106]-[118].
- 57 *Aabar Holdings S.à.r.l. v Glencore plc* [2024] EWHC 3046 (Comm) [119]-[130].
- 58 *Aabar Holdings S.à.r.l. v Glencore plc* [2024] EWHC 3046 (Comm) [159]-[167].
- 59 *Various Claimants v G4S Plc* [2023] EWHC 2863 (Ch). For further discussion, see [Ch.16 Legal Professional Privilege para.16.134](#).
- 60 *Aabar Holdings S.à.r.l. v Glencore plc* [2024] EWHC 3046 (Comm) [133]-[151].
- 61 The High Court granted permission to appeal, as well as a “leapfrog” certificate under [s.12 of the Administration of Justice Act 1969](#) to appeal directly to the Supreme Court. However, permission to appeal directly to the Supreme Court was refused, such that the appeal must first proceed before the Court of Appeal.
- 62 See *Garner v Wolfenbarger*, 430 F2d 1093 (5th Cir 1970).
- 63 *Barrett v Duckett* [1995] 1 B.C.L.C. 243; [1995] B.C.C. 362.
- 64 Hence the availability of an order indemnifying the derivative claimant in costs out of the company’s assets.

Collective Redress

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 13 - Joining Claims and Parties

Collective Redress

Introduction

- 13.29 In modern times much economic and social activity is conducted collectively. Companies represent shareholders who pursue collective aims. Trade unions are formed to pursue the collective interests of their members, as are many other voluntary organisations. The advantages of collective action have been increasingly appreciated in the field of litigation, too. Collective action facilitates access to justice for parties who have an actionable right but no means of prosecuting it alone. This is especially acute where individual claims are too small to be economically viable on their own. Power imbalances between opponents are common in cases of this kind, especially where the group comprises claimants suing defendant corporations, which are themselves collective entities with concomitant advantages stemming from their greater resources, economies of scale and access to knowledge and information. Indeed, as Lord Briggs remarked in *Mastercard Inc v Merricks*, this disparity “means that it will rarely, if ever, be a wise or proportionate use of limited resources for the consumer to litigate alone”.⁶⁶ By joining forces, a multitude of litigants may command sufficient resources to proceed and the cumulative value of their individual claims may make the litigation worthwhile. Individuals can pool resources and expertise, share the risks of litigation, obtain greater publicity and manoeuvre into a better negotiating position. Combining claims also avoids the waste, vexation and risk of inconsistent outcomes occasioned by multiplicity.
- 13.30 The normal CPR 7 procedure is ill-suited to collective action on this scale. Although there is no limit to the number of persons who can be claimants or defendants in a claim, and no impediment to numerous claimants or defendants suing or being sued together, in ordinary CPR 7 proceedings multiplicity of parties may hinder rather than promote the effective resolution of a dispute. It is virtually impossible for all the parties to exercise their right to participate in the proceedings, and yet the normal CPR 7 procedure contains no effective safeguards to protect the interests of “passive” parties, who take no active part in the proceeding either in the initial phases or at all. Moreover, the need for everyone to comply with all the procedural steps associated with the normal CPR 7 procedure would be burdensome in the extreme. It would be equally inefficient if each of a multitude of claimants with identical cases were required to establish their claims independently of each other, because it would require the court to deal with the same issues many times over.
- 13.31 A legal system needs purpose-built procedures to deal with mass harms in a way that is efficient and fair, and which maintains public confidence in the rule of law. Victims of mass harm must be able to obtain redress by means which are proportionate to the losses suffered by each person and the group as a whole. Defendants need protection from the cost and the vexation of having to defend in separate proceedings essentially the same allegations. Yet they also need to be able to scrutinise all the claims that are made to weed out unmeritorious cases. On its part, the court needs to save valuable public resources and avoid the waste involved in hearing the same issues many times over, and to avoid the risk of inconsistent judgments.
- 13.32 Procedures for collective redress in England date back to the Court of Chancery, where a claimant could bring a representative suit on behalf of a group whose members shared a common interest and a common grievance, provided that the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent.⁶⁷ In its modern form, the representative action is to be found in CPR 19.8.⁶⁸ Besides the representative action, however, English law has been slow to provide purpose-built collective redress procedures. This is all the more remarkable when one appreciates that class action rules in other jurisdictions,

in particular, r.23 of the United States' Federal Court Rules of Procedure, may be considered descendants of the representative rule; introduced for the purposes of building on the rule whilst addressing its structural weaknesses.⁶⁹

13. 33 Although prior to the CPR the court was able to make ad hoc arrangements for multi-party cases, such as mass tort actions,⁷⁰ a specific framework for managing multi-party litigation was lacking. Lord Woolf therefore recommended the introduction of a specially designed procedure for multi-party claims with a view to facilitating access to justice where large numbers of persons have been affected by another's conduct—the group litigation procedure, now enshrined in CPR 19 s.III.⁷¹ But it was not until the Consumer Rights Act 2015⁷² that a true class action procedure was introduced in the form of opt-in and opt-out collective proceedings in competition law cases.⁷³ These procedures are only available in respect of infringements of competition law, however, and thus are not akin to the generic class action procedures designed to handle multi-party claims arising out of similar or related circumstances which are available in other common law jurisdictions such as the US,⁷⁴ Australia⁷⁵ and Canada.⁷⁶ Without comprehensive class actions legislation, England and Wales is a notable outlier in the advanced common law world. Even New Zealand has taken initial steps towards the introduction of a class action procedure,⁷⁷ and in the interim, its courts have flexibility interpreted their representative proceedings rule so as to incorporate many of the powers and procedures that are a feature of class action statutes in other common law jurisdictions.⁷⁸
13. 34 This section starts at the beginning, with the descendant of Chancery's old rule, CPR 19.8 (13.35–13.54). Next, it considers the group litigation procedure under CPR 19 s.III (13.55–13.82), followed by collective proceedings under the Consumer Rights Act 2015 (13.83–13.123). Finally, it considers the litigation funding and strategy landscape (13.124–13.136). Notwithstanding the nascent state of class actions in English law, and the piecemeal character of the broader scheme for collective redress, a body of flexible, purposive jurisprudence is developing. The courts are slowly fronting up to what "com[ing] at justice" really requires.⁷⁹

The representative action

13. 35 The representative action is the oldest and most enduring procedure for obtaining collective redress in English law.⁸⁰ The rule was developed by the Court of Chancery to ensure that there was "complete justice and not by halves" for all interested parties.⁸¹ The representative rule first found statutory form in the former RSC, and is now reflected in CPR 19.8, which provides as follows:⁸²

Rule 19_8

"(1) Where more than one person has the same interest in a claim—

(a) the claim may be begun; or

(b) the court may order that the claim be continued,

by or against one or more of the persons who have the same interest as representatives of any other persons who have that interest.

(2) The court may direct that a person may not act as a representative.

(3) Any party may apply to the court for an order under paragraph (2).

(4) Unless the court otherwise directs any judgment or order given in a claim in which a party is acting as a representative under this rule—

- (a) is binding on all persons represented in the claim; but
 - (b) may only be enforced by or against a person who is not a party to the claim with the permission of the court.
- (5) This rule does not apply to a claim to which rule 19.9 applies.”

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Procedure for representative actions

13.36 Where more than one person has the “same interest” in a claim, one or more of those persons may bring a claim as a “representative” of any other persons who have that interest” ([CPR 19.8\(1\)](#)). No court permission is needed to commence a representative action, and a party may therefore appoint themselves as a representative claimant regardless of whether the persons represented have authorised them to do so.⁸⁴ It has been said that it is [CPR 19.8](#) which provides the claimant with the authorisation of the persons represented.⁸⁵ There is also no limit on the number of people who may be represented: the only condition is that the representative has “the same interest” in the claim as the person(s) represented, discussed below in [13.38]-[13.49].⁸⁶

13.37 The representative party is naturally a party to the representative proceedings, but the members of the group for whose benefit they are acting are not.⁸⁷ It follows, therefore, that a represented person cannot apply under [CPR 19.8\(3\)](#), which refers only to parties, for an order under [CPR 19.8\(2\)](#) that a person should not act as a representative. Applications for [CPR 19.8\(2\)](#) orders are often made by defendants on the basis that the “same interest” test has not been satisfied, and are often accompanied by a claim to strike-out the proceeding or for summary judgment.⁸⁸ [CPR 19.8\(2\)](#) could also foreseeably be used to replace a representative claimant on other grounds, for example, where the representative has behaved in a manner inconsistent with the interests of represented persons by running up costs.⁸⁹

[CPR 19.8](#) contains safeguards, some express and some developed through case law, to ensure that the interests of represented persons are protected. As will be seen below, the purpose of the same interest test is to ensure that the representative conducts the litigation in a manner which “will effectively promote and protect” the interests of represented persons.⁹⁰ The court has the final say as to whether a person can continue to act as a representative ([CPR 19.8\(2\)](#)). While [CPR 19.8](#) does not confer a right upon represented persons to opt out of the proceedings, it is always open to the judge managing the case to require notification of the proceedings to be issued, establish an opt-out or opt-in procedure, or hold that a judgment or order should not be binding on a represented person pursuant to the discretion in [CPR 19.8\(4\)](#). In the exercise of these discretionary powers, the court may be said to be performing a supervisory role.

13.38 A judgment given in representative proceedings is binding on all persons represented in the claim notwithstanding that they were not parties to it ([CPR 19.8\(4\)\(a\)](#)). This is, however, subject to another important safeguard: a judgment may be enforced by or against a represented person only with the court’s permission ([CPR 19.8\(4\)\(b\)](#)). A represented person may resist the court’s order by reference to circumstances peculiar to their own case, which would make it unjust to enforce the judgment on them. Notwithstanding this limitation, a judgment given in representative proceedings has considerable potential for binding persons who did not participate in the proceedings and may not even have known that they were taking place. For example, in *Howells v Dominion Insurance Co Ltd* the chair of a football club, an unincorporated association, brought a claim under an insurance policy taken out in respect of the clubhouse.⁹¹ The insurers counterclaimed for the return of monies paid under the policy, which they argued had been invalidated by non-disclosure. The defendant insurers obtained judgment on their counterclaim and sought to recover from members of the club who were not parties (i.e. from members other than the chair). Cox J held that the defendant could recover from club members notwithstanding that they may not have authorised the claim or even known of it.

The “same interest” requirement

13.39 The “same interest” test is the most important aspect of CPR 19.8. It is the “jurisdictional requirement” which must be satisfied in order for the claim to proceed.⁹² On its face, the phrase is capable of multiple meanings and the courts’ interpretation of it has varied, from extremely narrow to pragmatically broad.⁹³ For the most part, however, a narrow interpretation of the rules has prevailed, based on the statement of Lord Macnaghten in *Duke of Bedford v Ellis*:

“Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent”.⁹⁴

Accordingly, the rule was unable to be used in cases where many persons had individual substantive rights arising out of related circumstances but where their interests were not identical.⁹⁵ Much needed clarity as to the meaning of the test was provided by *Lloyd v Google*, where the Supreme Court conducted a detailed examination of the rule’s purpose, history and interpretation over time.⁹⁶ The court held that a “purposive”, “pragmatic” and “flexible” approach should be taken, in light of the overriding objective and the purpose of CPR 19.8 and its predecessors.⁹⁷

13.40 With the backing of a litigation funder, the claimant commenced a representative action against Google on behalf of himself and a class of more than four million people, seeking compensation pursuant to the *Data Protection Act 1998 (1998 Act) s.13* for “damage” suffered by reason of alleged contraventions of the *1998 Act*. The primary allegation was that Google had breached the *1998 Act s.4(4)* by tracking the activity of millions of Apple iPhone users and using the data collected in this way for commercial purposes without the users’ knowledge or consent. The claim came in the aftermath of civil penalty proceedings and consumer actions successfully brought against Google in the United States, and the claims of three individuals in England and Wales making the same allegation and claiming compensation under the *1998 Act* and at common law for misuse of private information.⁹⁸

13.41 The proper approach to the “same interest” test arose for determination on an application for permission to serve a claim form on Google LLC (a foreign corporation) outside of the jurisdiction. The claimant accepted he could not use the representative procedure to claim compensation on behalf of the class if the compensation recoverable by each user would have to be individually assessed.⁹⁹ This was for the simple reason that it cannot be said that two people have “the same interest” in claims requiring individual assessment. To overcome this issue, the claimant argued that individual assessment was unnecessary because compensation would be awarded under the *1998 Act* without needing to prove any loss as a result of the breach.¹⁰⁰ He sought to make “unusual and innovative use of the representative procedure” by arguing that if damages are available without proof of pecuniary loss or distress for the tort of misuse of private information, they should also be available for non-trivial infringements of the *1998 Act*. Accordingly, his case was focussed upon the “irreducible minimum harm” suffered by the “lowest common denominator” claimant.¹⁰¹

13.42 The Supreme Court held that the claim could not be brought in representative proceedings. It decided that damages under the *1998 Act s.13* could not be awarded without proof that a non-trivial contravention of the *1998 Act* had caused material damage or distress to the individual concerned.¹⁰² Accordingly, the claim could not proceed as a representative action in the manner in which it was framed.

13.43 Notwithstanding the failure of Mr Lloyd’s claim, *Lloyd v Google* provided a welcome endorsement of a liberal approach to the representative rule. Taking a purposive, pragmatic and flexible approach to the rule, all that is required to satisfy the “same interest” criterion is a common issue or issues such that the representative can be relied upon to conduct the litigation in a

manner which promotes and protects the interests of all class members.¹⁰³ Consequently, class members may have separate causes of action.¹⁰⁴ The only restriction is that there cannot be a conflict of interest between class members.¹⁰⁵

13. 44 The court drew a distinction between *conflicting* interests and merely *divergent* interests.¹⁰⁶ A divergence of interests is no obstacle: a claim may canvass issues which affect only some class members but which do not prejudice the position of others in the class.¹⁰⁷ This is a welcome change from the position in earlier cases such as *Emerald Supplies v British Airways*,¹⁰⁸ where the court conceived of the same interest requirement as necessitating perfect overlap between the interests of the representative parties and those they represent. A distinction needs to be drawn between cases where there are *conflicting* interests between class members and cases where there are merely *divergent* interests. Where there is a real conflict of interest between class members, it is inherently difficult to ensure that they are all adequately represented, since one class member's cause cannot be advanced without undermining that of another. By contrast, where the interests of class members merely diverge, the risk is that the representative party may not pursue vigorously lines of argument in which they have no direct interest. It was this concern that traditionally led to the restrictive application of the same interest requirement, since it was thought that class members would only be properly represented if their interests perfectly aligned with those of the representative party. But this concern is misplaced in the modern context. The approach taken in *Lloyd v Google* reflects the reality of how claims of this kind are advanced in the modern context. The reality nowadays is that proceedings brought to seek collective redress are not normally conducted and controlled by a single representative party, but rather are typically driven and funded by lawyers or commercial litigation funders with the representative party merely acting as a figurehead. In such cases, the risk of some members' interests not being adequately represented does not so much lie in the instructions that the representative party might give to their lawyers, but depends on the ability and willingness of the lawyers to pursue the interests of all those represented. There is therefore no obvious reason why a representative party would not be able to represent the interests of all members properly, even ones with interests that differ somewhat from their own, provided there is no true conflict and that they have competent lawyers. Lord Leggatt endorsed this passage from the previous edition of this work, when explaining how the same interest requirement should be interpreted purposively.¹⁰⁹
13. 45 Lord Leggatt explained that while it is not a bar to a representative claim that the relief sought consists of or includes damages or other monetary relief, there is an unavoidable tension between the representative rule and the compensatory principle, which governs the award of damages for civil wrongs in English law.¹¹⁰ The compensatory principle, which aims to put the claimant in the position they would have been in had the wrong not occurred, generally requires an individualised assessment of the relevant circumstances.¹¹¹ This assessment "cannot fairly or effectively be carried out without the participation in the proceedings of the individuals concerned" and the representative action is, therefore, "not a suitable vehicle for such an exercise".¹¹²
13. 46 Lord Leggatt proposed three key workarounds for representative claimants seeking to pursue damages claims under CPR 19.8. The first was "bifurcation" of common issues of liability and damage, to be decided via a representative claim, and issues requiring individual determination.¹¹³ Second was a "top down" approach to damages: in such cases, loss is assessed on a global basis. The court would determine an aggregate sum for the class as a whole without reference to losses suffered by individuals.¹¹⁴ Finally, Lord Leggatt suggested a "bottom up" assessment of damages: where there is a "common basis" upon which damages can be awarded (for example, where all class members were wrongly charged a fixed fee), damages may be awarded without the need for individual assessment".¹¹⁵
13. 47 These workarounds have been picked up in subsequent cases with mixed success. The "lowest common denominator" approach was tried and failed in another data and privacy class action, *Prismall v Google*.¹¹⁶ In a unanimous judgment, the Court of Appeal upheld the High Court's decision to strike out the proposed representative action, reflecting that representative actions as to data and privacy infringements are "always going to be very difficult to bring" because a claimant's individual circumstances will always be relevant to the question of whether there is a reasonable expectation of privacy.¹¹⁷ This has a flow-on effect upon the representative party's ability to satisfy the "same interest" test.¹¹⁸

13. 48 It is possible that the “lowest common denominator” approach could succeed if multiple representative claims were pursued in tandem, thereby effectively creating sub-classes for resolution. Indeed, in *Lloyd v Google*, Lord Leggatt reasoned that even if it was inconsistent with the “same interest” requirement for one person to represent two groups of people in relation to whom different issues arise, “any procedural objection could be overcome by bringing two (or more) representative claims, each with a separate representative claimant or defendant, and combining them in the same action”. However, the financial burden of such a process may counteract or outweigh the value of the claims. It also raises the question of why claimants would not merely utilise the group litigation order procedure instead, discussed below in [13.58]-[13.80]. More fundamentally, the “lowest common denominator” approach puts the onus on class members with claims exceeding this threshold to seek to be excluded from the action or accept less than their entitlement. The suggestion in both *Lloyd v Google* and *Prismall v Google* that “any claimant who wanted to claim for a higher level of damages would be free to leave the representative class and bring an individual claim” is probably unrealistic in most cases suitable for a representative action.¹¹⁹
13. 49 Bifurcation has also been adopted by representative claimants.¹²⁰ A bifurcated process was not proposed in *Lloyd v Google* or *Prismall v Google* for economic reasons, as the initial stage would have yielded no financial return.¹²¹ Generally speaking bifurcation is only likely to be viable where individual claims in a second stage trial would generate enough of a financial return to attract funding.

The court’s discretion and case management powers

13. 50 Following *Lloyd v Google*, there has been a divergence in approaches to the question of whether the court should facilitate the pursuit of claims on a representative basis. On one hand, in *Wirral Council v Indivior Plc*, the Court of Appeal rejected a bifurcated approach proposed by the claimant on the basis that the action “deprive[d] the Court of its case management powers to strike out speculative unmeritorious claims” and was “inimical to the overriding objective”.¹²² The overriding objective demanded that the claims be pursued by way of multi-party proceedings which had been brought at the same time as the representative action.¹²³ On the other, the Court of Appeal has held that “save in clear cases”, the court should be slow to bar a representative claimant from pursuing a bifurcated approach.¹²⁴ In *Commission Recovery v Marks & Clerk LLP*, it was “not an impediment” to the use of CPR 19.8 that “not all issues [could] be resolved on a class basis”.¹²⁵ The conflicting decisions suggest that the courts are still reluctant to embrace the purposive, pragmatic and flexible approach called for by Lord Leggatt in *Lloyd v Google*, at least where the proceedings can be brought using some other mechanism, but are willing to do so in cases like *Commission Recovery v Marks & Clerk LLP* where “[i]f the choice is [the representative action] or nothing, then better this”.¹²⁶

Statutory reform?

13. 51 The general view shared by commentators is that the representative action procedure has not been successful in facilitating multi-party litigation, due to its limited scope and technical requirements. The decision in *Lloyd v Google* is evidently an attempt to breathe more life into the procedure by stressing its flexibility and the power of the court to adopt the various management techniques and safeguards that are a feature class action legislation. In *Lloyd v Google* itself Lord Leggatt acknowledged that “while a detailed legislative framework would be preferable, its absence (outside the field of competition law) in this country is no reason to decline to apply, or to interpret restrictively, the representative rule which has long existed”.¹²⁷ This sentiment has been echoed in subsequent cases.¹²⁸
13. 52 A further benefit of introducing class action procedures through legislation is that it helps foster certainty for claimants and defendants. Admittedly even legislative change takes some time to translate into settled practice – the case law on class

action procedure in the [Competition Act 1998](#) is still very much in the exploratory and testing phase – but over time the approach to the legislative framework does become settled as Australian experience demonstrates. As it stands, the limits of the representative rule continue to be tested on a case-by-case basis, risking uncertainty as to how judgments are to be read together and applied. Relatedly, a generic legislative regime would avoid balkanisation and distortion of claims to fit within the particular framework – which in England and Wales are presently competition cases. There are examples of this happening already, with cases framed as competition cases when the underlying complaint is really one of breach of consumer protection laws.¹²⁹ If it necessary to change one's substantive complaint in order to “come at justice” then there is a flaw in the underlying procedure.

In the absence of legislative change, however, there is nothing preventing the courts from developing [CPR 19.8](#) practice to provide the flexibility and safeguards needed for the successful pursuit of collective redress. Indeed, *Lloyd v Google* reflects the view that [CPR 19.8](#) is a “class action rule” and “the ultimate descendant of the original class action rule”.¹³⁰ In reliance upon Australian authority, Lord Leggatt saw “the very simplicity of the representative rule” as “a strength, allowing it to be treated as “a flexible tool of convenience in the administration of justice”, capable of shapeshifting as and when justice requires.¹³¹ A comparable approach has had success in New Zealand, where its representative proceeding rule has been interpreted as broad enough to allow the court to regulate proceedings including by making opt-out orders,¹³² and, recently, to make common fund orders.¹³³

Costs and funding in representative actions

- 13.53** [CPR 19.8](#) does not make special provision for costs in representative proceedings. This may be taken as indicative of an intention that the court should generally follow the normal rule, namely that costs orders are made only against parties. This would exclude represented persons, even where the judgment may be enforced against them under [CPR 19.8\(4\)](#).¹³⁴ However, notwithstanding the general rule, in appropriate cases the court may undoubtedly order represented persons to pay the costs of the successful party, pursuant to its general jurisdiction to make costs orders against non-parties.¹³⁵ It is arguable that the court may order represented persons to contribute to the representative party’s costs¹³⁶ or, where the claim concerns trust property, that the representative party be indemnified from the trust fund. It is also possible for the court to make a pre-emptive costs order and determine some costs consequences in advance.¹³⁷
- 13.54** The issues attending the funding of representative actions are common with those concerning the funding of group litigation and class actions. Therefore, funding has been addressed on a global basis in paras [13.124–13.132](#) below.

Group Litigation

- 13.55** As we have seen, prior to the introduction of the [CPR](#), the court had to make ad hoc arrangements for multi-party cases which arose out of the same, similar or related circumstances and which did not qualify as representative actions. Judges had to deal with such cases “pragmatically, making decisions on a creative and improvised basis”,¹³⁸ and in doing so developed a range of managerial mechanisms which could be deployed on a case-by-case basis—including the appointment of lead solicitors, the setting of cut-off dates for joining group proceedings, the selection of test claims, cost-sharing orders and the settlement of claims by way of payment of a global damages sum. Against this background, Lord Woolf recommended that a purpose-built procedure incorporating many of these mechanisms be introduced, to provide a more expeditious, effective and economical means for managing multi-party claims arising out of the same, similar or related circumstances, which could not be adequately managed through the normal procedures.
- 13.56** The Final Report stipulated three objectives for group litigation procedures:

“to provide access to justice where large numbers of people are affected by wrongdoing, but their individual losses are so small that individual actions are economically unviable;

to provide expeditious, effective and proportionate methods of resolving cases, where individual damages are large enough to justify individual action, but where the number of claimants and the nature of the issues involved mean that the cases cannot be managed satisfactorily in accordance with normal procedures; and

to achieve a balance between normal party rights to pursue/defend cases individually, and the interests of a group of parties to litigate actions as a whole in an effective manner.”

- 13. 57** Group litigation rules were enacted in 2000 in what is now [CPR 19 s.III](#).¹³⁹ It caters for situations where a number of claims “give rise to common or related issues of fact or law” ([CPR 19.21](#)). This requirement is much broader than the “same interest” test discussed above. However, there nonetheless may be challenges establishing common or related issues where, for example, there are different contractual relationships between parties, or different fact-specific allegations are made.¹⁴⁰ The group litigation procedure achieves Lord Woolf’s three stated objectives by reducing the number of steps litigants with a common interest have to take individually to establish their rights, instead enabling them to be taken collectively.¹⁴¹ This means that irrespective of the number of individuals in the group each procedural step in the proceedings need only be taken once. This is of benefit not only to members of the group, but also those against whom proceedings are brought, particularly in a system which operates the cost-shifting principle. Critically, however, the procedure does not overcome the requirement that all claimants take active steps to commence their own claim.

Making a group litigation order

- 13. 58** The group litigation procedure is engaged only when the court makes a “group litigation order” (GLO). It may make such an order only where there are or are likely to be a number of claims giving rise to “common or related issues of fact or law”, referred to as “GLO issues” ([CPR 19.21](#)), relating to either claimants or defendants ([CPR 19.22\(1\)](#)).¹⁴² The GLOs which have been granted to date have concerned a wide range of claim types and sectors, for example: the VW NOx Emissions Group Litigation (product liability); British Airways Data Event Group Litigation (data breach); Lloyds/HBOS Litigation (financial services); Hillsborough Victims Litigation (negligence); and the Post Office Group Litigation (technology claims).

- 13. 59** A GLO may be made on the application of a party or on the court’s own initiative (PD 19B para.4). Given the demanding nature of the group litigation procedure and the management burden that it places on the court, a GLO requires the consent of the President of the King’s Bench Division, the Chancellor of the High Court, or the Head of Civil Justice, as appropriate (PD 19B paras.3.4-3.9). A court contemplating making a GLO must provide to the relevant senior judge a written explanation as to why it considers such an order to be desirable ([CPR 19.22\(2\)\(d\)](#); PD 19B para.3.4).

- 13. 60** An application for a GLO may be made at any time before or after any relevant claims have been issued and may be made by either a claimant or a defendant (PD 19B para.3.1). Where a party applies for a GLO, the following information should be provided to the court (PD 19B para.3.2): a summary of the nature of the litigation; the number and nature of claims already issued; the number of parties likely to be involved; the common issues of fact or law that are likely to arise in the litigation; and whether there are any matters that distinguish smaller groups of claims within the wider group.

- 13. 61** It must be stressed that the decision whether to make a GLO is an exercise in case management discretion.¹⁴³ The court may take into account a variety of considerations, including funding arrangements,¹⁴⁴ and whether “the substance of the

advantages”¹⁴⁵ of a GLO can be achieved by “the creative use of the court’s existing case management powers”.¹⁴⁶ The discretion is, of course, informed by the utmost goal of coming at justice.

13. 62 A GLO must ([CPR 19.22\(2\)](#)):

Rule 19_22:(2)

- “(a) contain directions about the establishment of a register (the ‘group register’) on which the claims managed under the GLO will be entered;
- “(b) specify the GLO issues which will identify the claims to be managed as a group under the GLO;
- “(c) specify the court (the ‘management court’) which will manage the claims on the group register ...”

There are additional provisions that a GLO may include. It may direct that all existing claims raising GLO issues should be transferred to the management court, stayed until further order and entered on the group register ([CPR 19.22\(3\)\(a\)](#)). It may also direct that all future claims which give rise to GLO issues should be started in the management court and entered on the group register ([CPR 19.22\(3\)\(b\)](#)). Where there are thought to be other claims outstanding, the court will normally give directions for publicising the GLO and any cut-off dates so that potential claimants may join ([CPR 19.22\(3\)\(c\)](#)). Curiously, although the rules refer to the court’s power to order that the existence of the GLO be publicised, they are silent as to what may constitute appropriate advertising (save for providing, at PD 19B para.11, that a copy of the GLO should be provided to the Senior Master and the Law Society), or who should pay for it.

The group register

13. 63 Registration of a claim on the group register is crucial, since only claims that have been entered on the register will be subject to the GLO and will benefit from the fruits of group litigation and share its burdens. Failure to join a group register prior to a cut-off date is a serious and significant breach of a court order.¹⁴⁷ In the VW NOx Emissions Group Litigation, a group of claimants’ claims were automatically struck out due to their failure to put their information on a group register by the cut-off date. The High Court refused their application for relief from this sanction as to do so would undermine the discipline of the litigation and render the cut-off date meaningless.¹⁴⁸

13. 64 [CPR 19.23](#) confines the effects of group litigation to claims that are on the group register. [CPR 19.23\(1\)–\(3\)](#), discussed below,¹⁴⁹ make provision for the application of judgments and orders to claims on the register, including those that enter the register after the judgment is given or the order is made. [CPR 19.23\(4\)](#) states that disclosure of any document relating to the GLO issues by a party to a claim on the register is disclosure of that document to all parties to all claims on the group register (including those entered on the register subsequently). Practice Direction 19B para.6.6 makes provision for a party to a claim on the group register to make document requests where a group register is maintained by the court (PD 19B para.6.6(1)) or, where the register is maintained by a solicitor, for any person to inspect it (PD 19B para.6.6(2)). The court will “normally” order that the register be established and maintained by the lead claimant solicitors (PD 19B para.6.5).

13. 65 The group register will not infrequently be a dynamic document; although some claimants’ cases will be entered on it from the outset of the group litigation, others will be added only later, and some may end up being removed from the register under [CPR 19.25](#) (see below). Any party may apply for the details of a claim to be added to the group register (PD 19B para.6.2). The only conditions that must be satisfied are that the claim has been issued (PD 19B para.6.1A) and that it gives rise to at least one of the GLO issues (PD 19B para.6.3). The requirement on every group member to issue a claim form reflects the fact that, unlike representative proceedings and class actions, the claims included within a GLO remain separate claims.¹⁵⁰ However, this does not entail that the claim form must be detailed, nor is there any requirement for particulars of claim to

have been served before the claim is entered on the group register. If each claimant had to produce a fully particularised statement of case prior to entry on the register, much duplication and expense would be involved, which would defeat the object of the whole exercise. To avoid this Lord Woolf went out of his way to stress that in “the context of a GLO, a claim form need be no more than the simplest of documents. It needs to be read together with the application to register and the register bearing in mind its place in the GLO process and the need to limit pre-registration costs so far as this is possible”.¹⁵¹ The managing judge will later give directions about the preparation and service of statements of case relating to both the GLO issues and individual claims.

- 13. 66** Beyond the requirements that the claim has been issued and gives rise to at least one of the GLO issues, neither the rules nor PD 19B specify what other conditions must be fulfilled in order for a claim to be entered on the group register. Ultimately, the decision whether to enter a claim on the group register is a case management one. PD 19B para.6.4 states that if the court “is not satisfied that a case can be conveniently case managed with the other cases on the group register, or if it is satisfied that the entry of the case on the [register] would adversely affect the case management of the other cases, [it] may refuse to allow details of the case to be entered on the [register], or order their removal from the [register] if already entered, although the case gives rise to one or more of the [GLO] issues”. As noted above, a claim may be removed from the register upon application to the management court by a party to that claim ([CPR 19.25\(1\)](#)). Where the court orders a claim to be removed from the register it may give directions about the future management of the claim ([CPR 19.25\(2\)](#)).

- 13. 67** In order to ensure the expeditious and orderly progress of the litigation, the court may impose cut-off dates after which no claim may join the group register ([CPR 19.24\(e\)](#)).¹⁵² Whether to impose a cut-off date, and when it should fall, will depend on the circumstances of the case. For example, where there are known to be a large number of claims outstanding, a longer period may be appropriate together with directions aimed at publicising the GLO. Equally, where the damage may take time to materialise, as in an industrial disease case or a claim concerning defective pharmaceutical products, a longer period may be necessary compared with a case where the damage was instant and obvious, as in litigation arising from a transport accident. Since the court will have taken these sorts of factors into account when setting the cut-off date, it is unlikely to look sympathetically upon any application to join the group register after it has expired. It is likely to treat the application as one to which [CPR 3.9](#) applies, and require an extremely good reason to justify going against the cut-off date and potentially disrupting the progress of the group litigation.¹⁵³

Case management

- 13. 68** The court’s general case management powers apply equally to group litigation, but are subject to the special provisions contained in [CPR 19](#) and PD 19B. Claims entered on the group register are automatically allocated, or reallocated, to the multi-track by virtue of PD 19B para.7, and the management of the group litigation will be entrusted to a “managing judge” at the management court who will deal with the litigation until its conclusion (PD 19B para.8). A master or district judge may be appointed to deal with procedural matters in accordance with the managing judge’s guidelines. Similarly, a costs judge may be appointed and invited to attend case management hearings. In a complex group action, a whole judicial team may be appointed at an early stage. At the same time, the management court may appoint the solicitors for one or more parties to be the lead solicitors for the claimant or the defendant group pursuant to [CPR 19.24\(c\)](#), although in practice the lead solicitors will often be selected by the parties themselves.

- 13. 69** The managing judge will normally help the parties define the GLO issues and may vary them as the litigation develops ([CPR 19.24\(a\)](#)). As noted above, the managing judge may also give directions about the details to be included in statements of case relating to both the GLO issues and individual claims ([CPR 19.24\(d\)](#); PD 19B paras.14.1-14.4). The managing judge may be required to strike a balance between the conflicting interests of claimants and defendants when giving directions concerning the details to be provided in the statements of case, and their timing. Claimants would generally prefer to limit the information that they provide before the GLO issues are decided, since it would defeat the object of expedition and economy if every claimant were required to serve full particulars of claim at this stage. However, defendants may well wish to have full information about all the claims in order to assess their general exposure. More detailed information about all the claims may

also assist the parties in mediation or settlement negotiations. The court may balance these interests by adopting creative, cost-effective methods of obtaining information about individual claims (for example, directing that questionnaires be used to capture such information (PD 19B para.14.3)).

13. 70 Ultimately, however, a party has autonomy as to how it formulates its claim. In *Alame v Shell*, the Court of Appeal overturned the primary judge's case management decision requiring the claimant to adopt a "global claim" approach to a claim for environmental damage.¹⁵⁴ The claimant had never adopted such an approach as a basis upon which they sought to prove causation.¹⁵⁵ Lord Justice Stuart-Smith reasoned that parties cannot be "forced into a straitjacket (or corner or cul-de-sac) of the judge's or their opponent's choosing" merely because of the type of procedure or number of persons involved.¹⁵⁶
13. 71 The management court is free to decide how the issues should be tried. CPR 19.24(b), discussed below, indicates that the management court may direct that one or more claims on the group register should proceed as test claims. Alternatively, it may direct that the group litigation should be broken down and that different cases should be tried separately; or it may direct separate trials for issues that are common to different sub-groups; or a staged approach to trials of the issues may be appropriate (PD 19B para.15.1).¹⁵⁷ The managing judge will generally hear the issues and any test claims, but individual issues may be tried at other courts (PD 19B para.15.2).

Test claims

13. 72 As already noted, the management court may direct that one or more claims on the group register shall proceed as test claims (CPR 19.24(b)). Neither the rules nor the practice direction define "test claims". The selection of test claims is a procedural device deployed to "concentrate the minds of the parties on the real issues in dispute" by "using a proportionate number of lead cases as the vehicles for addressing [these issues]".¹⁵⁸ Once test cases have been resolved, proof of injury to the other group claimants will still be required. Selecting appropriate test claims may not be an easy task. In practice, accurate and adequate representation may be difficult to achieve. Group members who do not consider that the chosen test claims adequately reflect their issues or protect their interests may apply to the court for appropriate relief.¹⁵⁹

Settlement

13. 73 The court has no power over the settlement of individual claims, but it has very considerable power over the settlement of the group litigation as a whole. It is common for the court to exercise its power to order a stay pursuant to CPR 3.1(2)(g) to allow the parties to participate in alternative dispute resolution, even prior to the making of a GLO, and even if one, or all parties oppose such a stay.¹⁶⁰ If a party to a test claim wishes to settle their claim, the court cannot prevent them from doing so, but it may order that another claim on the group register be substituted as the test claim (CPR 19.26(1)). This is indicative of the court's power to ensure that group litigation is conducted fairly to all those who may be affected by its outcome. For this reason, the court has jurisdiction to review any settlement proposal and disallow a settlement that it considers unfair or disadvantageous to some members of the group. Judicial approval of settlements in group litigation is not, however, a requirement under the CPR. Similarly, the rules are silent as to the court's power to employ novel damages assessment techniques, such as awarding aggregate damages to a successful group, calculating damages based on a hypothetical "average" claimant's loss multiplied by the number of claimants or using pro rata or proportional bases.¹⁶¹

Effect of judgments in group litigation

13. 74

As noted above, only claimants entered into the group register can benefit from, and be bound by, a judgment given in the group litigation. Accordingly, a judgment or order in a claim on the register in relation to one or more GLO issues is binding on the parties to all other claims that are on the register at the time of the judgment or order, “unless the court orders otherwise” (CPR 19.23(1)(a)). There is no express limit on the power to “order otherwise”,¹⁶² but the court must give effect to the overriding objective and the achievement of justice between parties.¹⁶³ The facts or circumstances underlying different claims on the group register may warrant a bespoke approach.¹⁶⁴ By way of example, in *AXA Sun Life plc v Commissioners of Inland Revenue*, the Court of Appeal concluded that the “particular” and “highly unusual” facts made it appropriate to “order otherwise” because, “by analogy with the principles applying to issue estoppel, there are special circumstances which would otherwise create injustice”.¹⁶⁵ Those circumstances included the fact that judgment was rendered after the defendant had conceded a point of law on the basis of a House of Lords authority which was later overturned by the Supreme Court. The Court of Appeal held that the defendant could not have anticipated the Supreme Court’s ruling, and that it did not follow that “what is now understood to be an error of law” in a test case should be applied to all other claims on the group register.¹⁶⁶ The Court of Appeal emphasised, however, that “[i]n the ordinary course” parties should expect to be bound by decisions on GLO issues.¹⁶⁷ The court may give directions as to the extent to which that judgment or order is binding on the parties to any claim that is subsequently entered on the register (CPR 19.23(1)(b)). Any party adversely affected by a judgment or order that is binding on them may seek permission to appeal (CPR 19.23(2)). But this ability is limited to parties who were on the register at the time the judgment was given or the order was made, otherwise the orderly progress of the group litigation could too easily be thrown into disarray. A party whose claim is entered on the register after the judgment or order is not entitled to appeal, or to seek to set it aside, even if the court has directed that the judgment or order should apply to such parties. Instead, their only recourse is to apply for an order that the judgment or order does not bind them (CPR 19.23(3)).

Costs and funding in group litigation

13. 75 The incidence of costs in group litigation may give rise to difficult problems. Such costs are discussed in more detail in Ch.28;¹⁶⁸ for present purposes it suffices to give a brief overview of the present arrangements, which are partially encapsulated in CPR 46.6.
13. 76 Those who engage in group litigation incur two kinds of costs: common costs and individual costs. Common costs include costs incurred in determining the GLO issues and hearing test claims, and costs incurred by the lead solicitors in administering the group litigation. Individual costs are the remaining costs specific to each claim. Individual costs are relatively straightforward, since they will be borne by the parties to the individual claim in more or less the normal way.¹⁶⁹ As regards common costs, the default position is that where the group is ordered to pay any or all of the common costs, each group litigant will be severally liable for an equal proportion of those common costs (CPR 46.6(3)). In addition, where a group litigant is the paying party, they will be severally liable for an equal proportion of the group’s common costs (CPR 46.6(4)). Thus, a group litigant cannot normally be made to pay more than their share of the common costs, even if some or all other members of the group are unable to pay their share. This has the effect of keeping costs down for individual group litigants, so as not to deter them from starting or participating in group litigation.¹⁷⁰
13. 77 However, this deceptively straightforward statement of principle obscures a number of difficulties in determining the distribution of common costs. First, it may be difficult to apportion liability as between the claimant group and the defendant, particularly where the group is only partially successful on the common issues, or where it wins on the common issues but some group members fail to establish their individual entitlements.¹⁷¹ Second, it is by no means clear that liability for common costs should be shared equally among group members where the group was partially successful on the common issues but some individual group members were unsuccessful in their own cases.¹⁷² Third, it will often be the case that different claims on the group register give rise to different common issues. If so, it may be that the costs of litigating those issues should only be borne by group members whose claims gave rise to them. Fourth, and importantly, in many group litigation situations the group membership changes materially over time, which gives rise to the question of how common costs should be apportioned as between group litigants who were on the group register for different periods of time. One is thus driven to agree with Mark Mildred’s conclusions that the problems engendered by the indemnity and costs-shifting

principles are compounded in group litigation, with the result that GLO costs orders may be complex, obscure and very expensive to administer.¹⁷³

13. 78 Individual litigants can be ordered to pay a share of any common costs incurred before they joined the group register, as well as those incurred after.¹⁷⁴ However, they may not be ordered to pay a share of any costs incurred after they left the group register (for example, because they discontinued or their individual case was settled) (CPR 46.6(6)–(7)). It has been held that the costs payable by claimants who withdraw from the litigation before its conclusion should be determined not when they discontinue their claim, as would normally be the case in individual proceedings,¹⁷⁵ but at the end of the group litigation.¹⁷⁶ Were it otherwise, a claimant who discontinues would have to pay a share of the defendant's costs of the common issues even if the defendant subsequently lost on those issues.

13. 79 There is a lot to be said for determining the incidence of the costs of common issues early, so that parties may plan or, indeed, decide whether they wish to continue with the litigation. In particular, it is important that the court should direct how the costs of co-ordinating lead actions and of maintaining the group register should be met.¹⁷⁷ Moreover, where the group membership can be expected to change materially over time it may be thought preferable to have certainty about the incidence of common costs at an early stage, even if this means that parties who join the group later are effectively free-riders. Such a conclusion was reached in the pre-CPR Creutzfeldt-Jakob Disease (CJD) group litigation,¹⁷⁸ where no cut-off dates could be set for joining the group as cases of CJD were still gradually emerging.¹⁷⁹ The managing judge preferred the certainty of providing for costs at the outset, even though the group membership could not be crystallised at that time, and calculated costs implications without reference to future claimants. He therefore refused to impose any liability for the group's common costs on future claimants.

13. 80 The potential quantum of costs in group litigation can also give rise to difficulty. There is a clear danger of costs getting out of hand and becoming disproportionate, not least due to the potential for a lack of effective oversight by group members and given the extra costs associated with the administration of group litigation.

13. 81 The court has extensive powers to determine the costs both in advance of the trial and after judgment. Some group litigation will be subject to the costs budgeting regime contained in CPR 3.12–3.18 and PD 3D,¹⁸⁰ but it has been emphasised that the court has ample powers to create a bespoke costs management arrangement for cases that require it, including complex group litigation.¹⁸¹ The court also has the power to make “costs capping orders” to limit the amount of future costs and disbursements which a party may recover pursuant to an order for costs subsequently made.¹⁸²

13. 82 As to the funding of group litigation, see para.13.124 ff below.

Collective Proceedings

Collective proceedings in the Competition Appeal Tribunal

13. 83 In 2015, the [Competition Act 1998 s.47B](#) was amended to introduce a new regime for delivering collective redress for breaches of competition law. The statutory scheme is supplemented by the [Competition Appeal Tribunal Rules 2015 \(the CAT Rules\)](#).¹⁸³ The present regime was introduced to remedy the well-documented deficiencies of the previous opt-in collective redress procedure, which was confined to “follow-on” claims on behalf of consumers and could only brought by authorised

NGOs, the consumer organisation Which? being the only entity to receive such authorisation.¹⁸⁴ The failure of the former s.47B procedure was made plain by the fact that just one action was commenced by Which?, against JJB Sports for anti-competitive conduct arising from its pricing of England and Manchester United replica football shirts.¹⁸⁵ A remarkable feature of the litigation was that despite widespread publicity only 130 people—fewer than 1 per cent of those affected—opted into the proceedings. Moreover, despite the EC ruling that British Airways and other airlines had violated EU competition laws by fixing the price of air freight services (thereby satisfying the requirement in s.47B(5) that an infringement of competition law had been established), Which? was not able to step into the breach left by the Court of Appeal's decision in *Emerald Supplies v British Airways*,¹⁸⁶ because that action covered claims by both consumers and businesses.

13. 84 Under the current s.47B procedure, collective claims can be brought before the CAT not just by a “specified body”, but by any person or body, who may or may not be a member of the class on whose behalf the proceedings are brought, provided that the CAT is satisfied that it would be “just and reasonable” for them to act as the class representative (s.47B(8)). Such claims may concern alleged infringements of competition law, and are no longer limited to “follow-on” actions where the breach is already established (s.47A(2)).¹⁸⁷ The claims need not be identical, or against the same defendants, but they must all raise the same, similar or related issues of fact or law.¹⁸⁸ Further, the represented class may comprise businesses as well as consumers (s.47B(10)). Most significantly, collective proceedings may be conducted on an opt-in or opt-out basis (s.47B(11)). The CAT may also award aggregate damages rather than assessing the amount owing to each represented person (s.47C(2)),¹⁸⁹ and it may order that such damages be paid on behalf of the represented persons to the class representative or such other person as it deems appropriate (and must do so if the proceedings are conducted on an opt-out basis) (s.47C(3)).

13. 85 Since the introduction of the new regime, more than sixty collective actions have been filed in the CAT. As will be seen below, many of the same issues have arisen in several actions. The CAT has developed, and continues to develop, case management techniques to manage claims effectively. The right to commence collective proceedings in s.47B(1) is subject to the **CAT Rules**, including the “modified version of the well-known overriding objective” in r. 41(1)-(2) requiring that cases be decided justly and at proportionate cost.¹⁹⁰

Commencement and certification

13. 86 A proposed class representative may make an application to commence collective proceedings under s.47B by filing a collective proceedings claim form (**CAT r.75(1)**) and seeking to have the class action certified by way of a collective proceedings order (**CPO**). In the “certification” process, as it is known, the CAT performs a “screening or gatekeeping role”;¹⁹¹ collective proceedings may not be pursued beyond the issue and service of a claim form without the CAT’s permission in the form of a **CPO**. The CAT may also revoke a **CPO** at any time or allow a strike-out or summary judgment application by one or more defendants.¹⁹²

13. 87 A **CPO** can only be made “after hearing the parties” (**CAT r.77(1)**). Following service of the collective proceedings claim form upon the defendant (**CAT r.76**; see also **CAT r.31**) and acknowledgment of service (**CAT r.76**), the CAT will hold a case management conference to give directions in relation to the application for a **CPO**. The defendant is not required to file a defence until after the application is determined (though if it fails to do so at that juncture, default judgment is obtainable against it), and it does not, by reason of opposing the application, lose its right to contest the CAT’s jurisdiction (**CAT r.76(12)**).¹⁹³

13. 88 The CAT may make a **CPO** only where, having heard the parties, it is satisfied that the proposed class representative is a person whom it could properly authorise to act as the class representative in accordance with **CAT r.78** (**CAT r.77(1)(a)**), and that the claims or parts of claims which are subject to the **CPO** are eligible for inclusion in collective proceedings in accordance with the certification criteria set out in **CAT r.79** (**CAT r.77(1)(b)**). These requirements are discussed further

below.¹⁹⁴ Where the CAT makes a CPO, it may give such consequential directions as it thinks fit, including directions for the filing and service of the order, pleadings and other documentation, and directions regarding any class member who is a child or protected party ([CAT r.77\(2\)](#)).

13. 89

[CAT r.80](#) sets out the content of a CPO. A CPO authorises the class representative to continue the collective proceedings on behalf of the represented class. Among other things, it must identify the class and any sub-classes ([CAT r.80\(1\)\(c\)](#)), describe the claims certified for inclusion in the collective proceedings ([CAT r.80\(1\)\(d\)](#)), state the remedy sought ([CAT r.80\(1\)\(e\)](#)) and identify whether the proceedings are opt-in or opt-out ([CAT r.80\(1\)\(f\)](#)). As to whether proceedings are to be opt-in or opt-out, [CAT r.79\(3\)](#) makes clear that the CAT will make a broad fact-sensitive assessment as to what would be the appropriate mode of proceeding. It may “take into account all matters it thinks fit” in deciding whether collective proceedings should be opt-in or opt-out, including the strength of the claims ([CAT r.79\(3\)\(a\)](#)) and the practicability of the proceedings being brought under opt-in principles in view, in particular, of the estimated amount of damages that individual class members might recover ([CAT r.79\(3\)\(b\)](#)). On the one hand, weaker claims are less likely to justify the time and resources that would need to be invested in large-scale opt-out collective proceedings; and on the other, where individual class members’ damages are likely to be small, opt-in collective proceedings are less likely to have satisfactory take-up so an opt-out class action may be preferable.

13. 90

In common with other class action procedures, the CPO must specify the dates by which and the manner in which class members are to opt in or opt out of the collective proceedings, as the case may be ([CAT r.80\(1\)\(h\)](#)).¹⁹⁵ It must also give directions for the publication of the CPO ([CAT r.80\(1\)\(i\)](#)). [CAT r.81\(2\)](#) sensibly requires that the notice to be given to class members must contain a readily comprehensible description of the claim, of the effect that any judgment on the issues common to the represented class will have and of the provisions in the CPO concerning the time by which and manner in which class members must opt in or opt out of the collective proceedings (as appropriate). Beyond this, however, the rules do not specify what may constitute appropriate advertising,¹⁹⁶ despite the importance of adequate notice being given to class members irrespective of whether the proceedings are opt-in or opt-out.¹⁹⁷ Instead, [CAT r.81\(1\)](#) leaves it to the CAT to specify the precise form of the notice and the manner in which it is to be communicated to class members.

13. 91

As we shall presently see, an important feature of the collective proceedings regime under the [Competition Act 1998 s.47B](#) is that a CPO is intended to be a living instrument, capable of variation or even revocation as the circumstances of the case change. Thus, the CAT is able to alter the description or identification of class members in the CPO if need be, though this power must no doubt be exercised so as to avoid frustrating the rights and expectations of existing class members. Moreover, if it is exercised, the rules recognise that new notification provisions and cut-off dates will need to be set ([CAT r.85\(4\)](#)). More fundamentally, the CAT is to keep under review whether the authorisation and certification criteria, discussed below, continue to be met ([CAT r.85\(2\)](#)). If they are not, it may take appropriate steps including substituting the class representative or other parties ([CAT r.85\(3\)](#)) or stopping the collective proceedings from continuing as such ([CAT r.85\(1\)](#)).

The certification criteria

13. 92

As already mentioned, in order to make a CPO the CAT must be satisfied that the proposed class representative is a person whom it could properly authorise to act as the class representative in accordance with [CAT r.78](#) ([CAT r.77\(1\)\(a\)](#)). Certification requires the CAT to be satisfied of two main criteria. First, the CAT must consider it “just and reasonable for the applicant to act as a class representative in the collective proceedings ([CAT r.78\(1\)](#)). In determining whether it is just and reasonable, [CAT r.78\(2\)](#) sets out several criteria for the Tribunal to consider, namely whether the proposed representative:

- “(a)would fairly and adequately act in the interests of the class members;
- “(b)does not have, in relation to the common issues for the class members, a material interest that is in conflict with the interests of class members;

- (c)if there is more than one applicant seeking approval to act as the class representative in respect of the same claims, would be the most suitable;
- (d)will be able to pay the defendant's recoverable costs if ordered to do so; and
- (e)where an interim injunction is sought, will be able to satisfy any undertaking as to damages required by the Tribunal."

[CAT r.78\(3\)](#) gives further guidance on what the CAT should consider when assessing whether the proposed representative would act fairly and adequately in the interests of class members. The Tribunal is required to take into account "all the circumstances", including:

- "(a)whether the proposed class representative is a member of the class, and if so, its suitability to manage the proceedings;
- (b)if the proposed class representative is not a member of the class, whether it is a pre-existing body and the nature and functions of that body;
- (c)whether the proposed class representative has prepared a plan for the collective proceedings that satisfactorily includes—
 - (i)a method for bringing the proceedings on behalf of represented persons and for notifying represented persons of the progress of the proceedings; and
 - (ii)a procedure for governance and consultation which takes into account the size and nature of the class; and
 - (iii)any estimate of and details of arrangements as to costs, fees or disbursements which the Tribunal orders that the proposed class representative shall provide."¹⁹⁸

13. 93 The CAT gave guidance on when a proposed class representative will be judged to be able to adequately represent the interests of class members in *Riefa v Apple Inc.*¹⁹⁹ The claim, initiated by Christine Riefa, a legal academic, sought to commence opt-out collective proceedings against Apple and Amazon. Professor Riefa was the sole member and director of the company set up to act as the PCR. The claim alleged Apple and Amazon had entered into anti-competitive agreements, which purportedly led to inflated prices for Apple products sold in the UK by limiting the number of UK resellers of Apple products on Amazon Marketplace.

13. 94 In particular it held that a proposed class representative must be in a position to independently scrutinise and robustly challenge proposed litigation funding terms. The CAT held that in the present case, the proposed funding terms included terms and confidentiality provisions that were potentially inimical to the class, and that Professor Reifa did not fully understand the provisions, was overly reliant on legal advice, and had indicated that she would not want to take a contrary position to that of her funder. The lack of a consultative committee to provide additional support and scrutiny was also a significant shortcoming of the proposed class representative. While such procedural suggestions for strengthening litigation management in the interests of the class are eminently sensible, to deny certification on the grounds that the proposed class representative was reliant on their legal advice sets an unfortunate precedent. Taken at face value the decision precludes large swathes of the population from acting as a class representative, and even someone with sophisticated understanding of the law—Professor Reifa was a legal academic—may not meet the threshold. Imposing heightened requirements on class representatives necessarily increases the barriers to justice for ordinary victims of mass harm.

13. 95 Second, the CAT must be persuaded that the claims or parts of claims which are subject to the CPO are eligible for inclusion in collective proceedings, in accordance with the certification criteria set out in [CAT r.79](#) ([CAT r.77\(1\)\(a\)](#)), namely that the claims:

“(a)are brought on behalf of an identifiable class of persons;
 (b)raise common issues; and
 (c)are suitable to be brought in collective proceedings.”

13. 96 The condition in [CAT r.79\(1\)\(a\)](#) underlines the importance of having a clearly and accurately defined class. Such definition should capture all those who have a claim against the defendant according to the facts relied on in the collective proceedings claim form, and exclude all those who do not. It should also be capable of easy and certain application and not admit of interpretation, though there is no requirement that all the members of the class be *identified* as opposed to *identifiable*. In this way, the definition should facilitate the process of notifying the existence of the CPO to class members, as well as determining who (subject to completion of the process of opting in or opting out) is bound by any judgment on the common issues.

13. 97 The conditions in [CAT r.79\(1\)\(b\)–\(c\)](#), meanwhile, are derived from the [Competition Act 1998 s.47B\(6\)](#). The term “common issues” refers to “the same, similar or related issues of fact or law”; this is unlikely to give rise to significant difficulty. The requirement that the claims which are the subject matter of the proposed CPO must be “suitable to be brought in collective proceedings” is somewhat more opaque. [CAT r.79\(2\)](#) emphasises that the assessment of suitability is a broad and flexible one in which the CAT is to “take into account all matters it thinks fit”, including seven listed factors, namely:

- whether collective proceedings are an appropriate means for the fair and efficient resolution of the common issues;
- the costs and the benefits of continuing the collective proceedings;
- whether any separate proceedings making claims of the same or a similar nature have already been commenced by members of the class;
- the size and the nature of the class;
- whether it is possible to determine in respect of any person whether that person is or is not a member of the class;
- whether the claims are suitable for an aggregate award of damages; and
- the availability of alternative dispute resolution and any other means of resolving the dispute.

Merricks v Mastercard & the Suitability Criterion for Certification

13. 98 The suitability criterion in [CAT r.79\(1\)\(c\)](#) and the factors listed in [CAT r.79\(2\)](#) were considered by the Supreme Court in *Merricks v MasterCard*. *Merricks v Mastercard* was a follow-on action based on the EC’s decision that the multilateral interchange fees (MIF) set by Mastercard Inc, together with two other Mastercard companies, were anti-competitive and in breach of the Treaty on the Functioning of the European Union art.101.²⁰⁰ The MIF were charged between banks in relation to transactions involving the use of Mastercard’s payment processing system, but the entirety of the cost of the MIF was passed by the banks onto retailers participating in the scheme. Consequently, the level at which the MIF were set inflated the service charge which retailers had to pay to their banks as a fee for operating the Mastercard system. Mr Merricks, the former head of the Financial Ombudsman Service, sought to bring collective proceedings on behalf of consumers who purchased goods and services from affected retailers (i.e. those using the Mastercard system) during the infringement period, 1992 to 2008, on the grounds that those retailers passed some or all of the cost of the MIF onto consumers in the form of increased prices. An estimated 46.2 million individuals were caught by the class definition. The damages sought on behalf of the class were aggregate damages in the sum of approximately £14 billion, being the total amount of overcharge said to have been incurred by the whole class. On average, therefore, the damages sought were roughly £300 per class member. The action was ultimately settled for a small fraction of this amount with the CAT’s approval and against the objections of the funder who funded much of the claim.²⁰¹

13. 99 *Merricks v Mastercard* is a pertinent example of a case which could only feasibly be pursued by way of an opt-out class action. The prospective recovery would be too small to make single claims viable and, in any event, it is scarcely imaginable that any individual could produce in a proportionate manner, if at all, evidence of their retail expenditure between 1992 and 2008, let alone evidence of what element of that expenditure was unlawful overcharge. For the same reasons, and because of the sheer size of the class, the group litigation procedure in CPR 19 s.III would not assist in vindicating the rights of the affected consumers.²⁰² It is also unclear whether the claims could have been pursued by way of the representative rule in CPR 19.8, given the range of approaches taken to that rule even after the Supreme Court's guidance in *Lloyd v Google*.
13. 100 The CAT refused to grant a CPO on the grounds that the claims of the class members were "not suitable to be brought in collective proceedings" as required by the Competition Act 1998 s.47B(6) and CAT r.71(1)(c). In particular, it considered that the claims to be certified were not "suitable for an aggregate award of damages" (CAT r.71(2)(f)) for two interlocking reasons. First, at a class level, the claims were not suitable for an award of aggregate damages. Although the CAT did not take issue with the claimant's proposed methodology for estimating aggregate damages in theory, it was not persuaded that there was sufficient data available for it to be applied.²⁰³ Second, at an individual level, the proposal for distribution of any aggregate award did not reflect individual losses, and so did not respond to the compensatory principle.²⁰⁴ The CAT later refused permission to appeal because it considered that the Competition Act conferred no right to appeal a refusal of a CPO,²⁰⁵ a finding that was subsequently overturned by the Court of Appeal.²⁰⁶
13. 101 On the substantive appeal, the Court of Appeal overturned the CAT's decision on the basis that the CAT had erred in its approach to both of the issues set out above.²⁰⁷ A further appeal by Mastercard was dismissed by the Supreme Court in a split 2 – 2 with Lord Kerr having tragically died after the hearing of the appeal but before judgment was given. Prior to his death, Lord Kerr had agreed that the appeal should be dismissed for the reasons given in the draft judgment by Lord Briggs, with which Lord Thomas had also agreed.²⁰⁸
13. 102 There were a number of issues that were not challenged before the Supreme Court or where the Supreme Court was unanimous in its approach. Mastercard had not challenged the Court of Appeal's conclusion that the merchant pass-on issue was a common issue. The Supreme Court concluded that the CAT did not err by questioning Mr Merricks' experts and allowing cross-examination by counsel for Mastercard; the CAT's questioning was non-adversarial and clarificatory, and the cross-examination was limited and closely supervised.²⁰⁹ Although the approach taken by the CAT should be a "rare occurrence", it was justified in this case of "unprecedented size and complexity".²¹⁰ Most significantly, the Court unanimously held that, by providing for aggregate awards of damages without assessment of individual loss, the Act had "radically" modified the substantive law and operation of the compensatory principle.²¹¹ For the majority, the only requirement, implied by judicial supervision of distribution, is that it is "just, in the sense of being fair and reasonable".²¹² For Lord Sales and Lord Leggatt, s.47C also modified the substantive law by "permit[ting] liability to be established on a class-wide basis without the need for individual members of the class to prove that they have suffered loss, even though this would otherwise be an essential element of their claim".²¹³
13. 103 The main issue on which the majority and minority parted ways, was as to the "suitability" requirement in the certification criteria. All members of the Supreme Court,²¹⁴ the Court of Appeal²¹⁵ and the CAT²¹⁶ considered the decision of the Supreme Court of Canada in *Pro-Sys Consultants Ltd v Microsoft Corp* as persuasive, albeit acknowledging that the corresponding certification test in the Canadian class action regime uses the term "preferable" rather than "suitable".²¹⁷ In *Microsoft*, Rothstein J set out a low-threshold approach to certification.²¹⁸
13. 104 Lord Briggs' approach is punctuated by a focus on access to justice. At the outset, his Lordship made general remarks as to the nature of collective proceedings as a "special form of civil procedure" designed to vindicate private rights where

ordinary individual civil claims are inadequate.²¹⁹ However, crucially, the claims which may be pursued by way of collective proceeding are all, in theory, capable of pursuit by ordinary means.²²⁰ It follows, therefore, that it should not “lightly be assumed” that the regime for collective actions would impose restrictions which would not apply to the claims if pursued individually.²²¹

- 13. 105** As a result, his Lordship surveyed the principles applicable to individual claims, and considered whether their application to collective proceedings had been modified by the Act. A “broad axe” or “broad brush” approach to damages was applicable in competition cases, and its application had not been modified by the Competition Act.²²² In a standard action, difficulties in quantification would not deprive an individual of a trial. It is often the case that there is an element of “guesswork” in the calculation of damages in ordinary civil claims, as well as:

“occasions where the court has to quantify or value some right or species of property and does not allow itself to be put off by forensic difficulties, however severe ... In none of these cases does the court throw up its hands and bring the proceedings to an end before trial because the necessary evidence is exiguous, difficult to interpret or of questionable reliability”.²²³

- 13. 106** “Suitable” in [s.47B of the Act](#) and [r.79\(2\)\(f\)](#) is a relative rather than abstract concept,²²⁴ informed by the purpose of the collective proceedings regime, which is to provide a route for redress where standard individual proceedings are unsuitable.²²⁵ *[S]uitable* means suitable to be brought in collective rather than individual proceedings, and suitable for an award of aggregate rather than individual damages.²²⁶ The latter definition is likely easily met in the present case, because an award of aggregate damages “radically dissolves” the disadvantages of pursuing a multitude of individual claims, which is often burdensome and disproportionate to the size of the claims.²²⁷

- 13. 107** His Lordship was also clear that certification “is not about, and does not involve, a merits test”.²²⁸ The CAT has a separate power to strike out a claim or grant summary judgment ([CAT rr.41, 43, 89\(4\)](#)) and the strength of the case is only an express consideration when deciding between opt-in and opt-out collective proceedings ([CAT r.79\(3\)](#)). When applying the suitability test to the facts of specific cases, the CAT should conduct a value judgment in which various factors, including, but not limited to, those listed in [r.79\(2\) of the CAT Rules](#).²²⁹ The CAT had failed to do so.²³⁰

- 13. 108** By contrast, Lord Sales and Lord Leggatt concluded that the CAT was correct to conclude that the class of claims was not suitable for an award of aggregate damages and therefore not suitable to be brought in collective proceedings.²³¹ Their Lordships emphasised the risk of “misuse” of class action procedures::

“The ability to bring proceedings on behalf of what may be a very large class of persons without obtaining their active consent and to recover damages without the need to show individual loss presents risks of the kind already mentioned, as well as giving rise to substantial administrative burdens and litigation costs. The risk that the enormous leveraging effect which such a class action device creates may be used oppressively or unfairly is exacerbated by the opportunities that it provides for profit.

Their Lordships emphasised the CAT’s gatekeeping function, characterising certification as a “substantive” exercise, a “strict judicial” safeguard against the “oppressive” or “unfair” use of collective proceedings “in terrorem to extract a substantial settlement payment without a proper basis”.²³²

- 13. 109** For the minority, “suitable” was an absolute, meaning “suitable to be grouped together and determined collectively”.²³³ Their Lordships, echoing the decision of the CAT, held that demonstrating that individuals will face difficulties pursuing

claims individually is not sufficient to justify allowing their claims to be brought together. Certification is a “safeguard”, as collective proceedings “confer substantial legal advantages on claimants and burdens on defendants which are capable of being exploited opportunistically”.²³⁴ Their Lordships stressed that the suitability test is not relative: demonstrating that an individual claim would be burdensome or impossible does not without more establish that a collective proceeding is appropriate.²³⁵

13. 110 It is submitted that the majority was correct in its approach. To descend into a detailed and exacting interrogation of the proposed class representative’s case on aggregate damages at the certification stage is at odds with the proper construction of the Competition Act and [CAT Rules](#), unfair, and likely to lead to much wastage of time and costs. The collective proceedings regime is intended to allow true aggregate awards unconstrained by slavish adherence to the compensatory measure of loss, both at the stage of calculating the aggregate award and at the stage of distributing it to class members. What matters is that the right to compensation for breaches of the substantive law is vindicated, and the court must do its best to calculate losses and distribute damages in a way that is just, which necessarily includes considerations of proportionality.

13. 111 Were it otherwise, the new collective proceedings system would be unable to cater for those claims to which it is arguably best-suited, namely claims based on widespread wrongdoing where the losses to individual class members are small and inherently difficult to assess. It would also effectively allow the CAT to rewrite the substantive law by creating a zone of tolerated non-compliance through the exercise of a procedural discretion. The minority’s concerns as to the dangers of opportunism by litigation funders and representative claimants are, with respect, misdirected, as discussed below at paras [13.124–13.132](#).

13. 112 The impact of *Mastercard v Merricks* is readily discernible in CAT practice. The majority of claims that have reached the certification stage following the Supreme Court’s decision have been certified.²³⁶

Opting in and opting out of collective proceedings

13. 113 Once a CPO has been made and notified to people falling within the definition of the class, such persons may exercise their right to opt in or out of the proceedings, as the case may be. In the context of considering carriage disputes between opt-in and opt-out claims in relation to the same subject matter, the Court of Appeal has noted that there is no legislative preference for either opt-in or opt-out.²³⁷

13. 114 Where the proceedings have been certified as opt-out proceedings, there are two important qualifications to the scope and effect of the CPO. First, persons who are not resident within the UK at the time of the “domicile date” specified by the CAT in the CPO ([CAT r.80\(1\)\(g\)](#))²³⁸ are not automatically included within the represented class in an opt-out class action, but rather must opt into the proceedings ([Competition Act 1998 s.47B\(1\)\(b\); CAT r.82\(1\)\(b\)\(ii\)](#)).²³⁹ The rationale underpinning this approach is that it ensures that the CAT is validly exercising personal jurisdiction over such class members, since by proactively opting into collective proceedings, they have unquestionably submitted to the jurisdiction of the CAT. The same may not be said of class members who are domiciled abroad and may know nothing of the class action, but are bound by the CAT’s judgment merely by reason of not having opted out. In such circumstances the CAT’s judgment may not be recognised by a foreign court, thus exposing the defendant to a risk of further litigation and even double recovery.²⁴⁰

13. 115 Certainly, where a class comprised partly of foreign members is diffuse and individuals falling within it are not readily identifiable, the difficulties involved in notifying the foreign members of the CPO may make it undesirable for them to be subject to opt-out principles. On the other hand, this will not be so in every case, and a blanket requirement for foreign class members to opt into what are otherwise opt-out collective proceedings defeats the purpose of the opt-out system, by raising the spectre of parallel or future proceedings by such persons. This criticism carries particular weight in a class action regime concerned with competition law, given the potential for anti-competitive conduct to have cross-border ramifications.

13. 116 Experience shows that the CAT is alive to these concerns. A practice of split opt-in and opt-out actions has also emerged where the CAT has considered it appropriate for the claims of proposed class members domiciled in the UK to proceed on an opt-out basis, and the claims of persons domiciled outside of the UK to be opt-in.²⁴¹
13. 117 The second qualification is that a person who has already brought a claim that raises one or more of the common issues set out in the CPO may not be a represented person, unless they have discontinued or applied to stay it by the cut-off date for opting in or out, as the case may be ([CAT r.82\(4\)](#)). The purpose of this requirement is to avoid the risk of parallel proceedings and inconsistent judgments concerning the same class member.
13. 118 As noted above, the CPO must set a cut-off date after which the class becomes closed and no one can join opt-in proceedings or leave opt-out proceedings ([CAT r.80\(1\)\(h\)](#)).²⁴² A person who fails to join or leave the class (as the case may be) by the cut-off date may only do so with the CAT's permission ([CAT r.82\(2\)](#)). In deciding whether to grant permission, the CAT is required to consider "whether the delay was caused by the fault of that class member" and "whether the defendant would suffer substantial prejudice if permission were granted" ([CAT r.82\(3\)](#)). It remains to be seen how the CAT will apply these provisions in practice, but given that the rationale underpinning the setting of cut-off dates is similar for both group litigation and class actions, it is to be expected that the CAT will adopt a strict approach to latecomers (or late-leavers), as the court has done in relation to group litigation.²⁴³
13. 119 Interestingly, as observed above, [CAT r.80\(1\)\(h\)](#) provides that the CPO must not only specify the cut-off date but also the "manner in which" a class member is to opt in or out, without purporting to restrict the range of methods for opting in or out which the CAT may select. Yet the [Competition Act 1998 ss.47B\(10\)–\(11\)](#) contemplate that class members must opt in or out by "notifying the [class] representative". It would therefore seem that notwithstanding the apparently unfettered language of [CAT r.80\(1\)\(h\)](#), the CAT's ability to specify how class members are to go about opting in or out is delimited by the statutory requirement that this is to be done by notification to the class representative.²⁴⁴ It is a shame that the rules are not clearer on this point, since it is the process of opting in or out which enables individual class members to assert their autonomy in respect of collective proceedings. It is important that there are no disputes over the validity or effect of the process for opting in or out specified by the CAT, otherwise class members who genuinely wished to participate in opt-in collective proceedings, but whose attempt to opt in turned out to be invalid, may find themselves denied the fruit of a favourable judgment; and class members who sought to withdraw from opt-out collective proceedings may find themselves bound by a judgment which they wanted no part in.

Settling collective proceedings

13. 120 Pursuant to [s.49A of the Competition Act](#), where a CPO has been made in opt-out collective proceedings, the CAT must approve any proposed settlement. The application must be jointly made by the representative claimant and all defendants as wish to be bound by the proposed settlement and its terms ([s.49A\(2\)-\(4\)](#)). The CAT may make an order approving a proposed settlement "only if satisfied that its terms are just and reasonable". Once approved by the CAT, a collective settlement is binding on all persons falling within the class of persons described in the CPO, subject to certain limitations in [s.49A\(9\)-\(10\)](#). Further detail is provided in the [CAT Rules](#) (in particular [r.94](#)) and the CAT Guide to Proceedings 2015 (CAT Guide).²⁴⁵ The factors to be taken into account in considering whether a collective settlement is "just and reasonable" include: the amount of the settlement and any related provisions as to the payment of costs, fees and disbursements; the number or estimated number of persons likely to be entitled to a share of the settlement; the likelihood of judgment being obtained for an amount in excess of the settlement amount; the duration and cost of any trial; any opinion by an independent expert and legal representative; the views of any represented person or class member; and the provisions regarding the disposition of any unclaimed balance of the settlement ([CAT r.94\(9\)](#)). The CAT has approved a small number of proposed settlements, including, as noted above, the proposed settlement in the [Merricks](#) proceeding.²⁴⁶ Notably, in advance of and during the hearing of a settlement approval

application, the CAT has encouraged parties to modify their proposed settlement to account for issues raised by the CAT.²⁴⁷ This is consistent with practice in other jurisdictions.²⁴⁸

Recent experience

13. 121 The CAT has developed several case management techniques worthy of mention. The first relates to carriage disputes. As noted above, the CAT has considered several carriage disputes between competing actions and adopted an approach resembling the approach in other class action regimes.²⁴⁹ Resolving a carriage dispute involves a “multi-factorial assessment”.²⁵⁰ There is no exhaustive list of factors, and the significance of each factor depends on the circumstances of the case.²⁵¹ Second, and relatedly, where appropriate, the CAT has taken the approach of determining carriage disputes prior to certification.²⁵² This avoids the costs and delay of a “rolled-up” approach, and reflects the spirit of r.4 of the [CAT Rules](#). Third, the CAT has adopted innovative techniques to address collective actions which are related, though not competing. In 2022, the CAT issued a practice direction in relation to so-called “umbrella proceedings”. The President of the CAT may make an “umbrella proceedings order” to designate “ubiquitous” matters which cut across several otherwise unrelated proceedings to be case managed and heard together.²⁵³ This is a sophisticated method of addressing the reality that several collective claims may arise out of the same or similar wrongdoing. The first “umbrella proceeding” hearings took place in 2024, including the “Merchant Interchange Fee Umbrella Proceedings”, which included Mr Merricks’ claim against Mastercard, and other damages claims against Visa arising from a similar factual matrix.²⁵⁴ Fourth, the CAT has taken a pragmatic approach to narrowing issues in the course of case management. As noted above, parties have modified their proposed settlement applications following suggestions by the CAT during case management and the hearing.²⁵⁵ In a similar vein, the CAT has also required proposed representative applicants to return to the drawing board before certifying a claim. In *Gormsen v Meta Platforms Inc*, the CAT initially refused to certify the claim, but permitted it to proceed following “a root-and-branch re-evaluation”.²⁵⁶ These techniques save court time and resources and prioritise access to justice for group members with valid claims.

Notwithstanding certain imperfections in the drafting of the [Competition Act 1998 s.47B](#) and the supporting [CAT Rules](#), the collective proceedings regime is a true class action procedure. Following *Mastercard v Merricks*,²⁵⁷ the certification process facilitates rather than stymies the pursuit of opt-out class actions for meritorious claims which could not otherwise be pursued via the mechanisms in [CPR 19.8](#) or [CPR 19 s.III](#). The principal limitation of the [s.47B](#) regime, of course, is that it is available only in respect of competition law breaches, and is not a generic class action procedure of the kind found in other common law jurisdictions.²⁵⁸ It is suggested that much would be gained by the introduction of a class action procedure akin to that found in [s.47B](#), to cater for mass harms arising outside the sphere of competition law. In this connection, we note that the Government is currently conducting a review of the regime. A pertinent example is the proliferation of actions concerning alleged data protection and privacy breaches (for example, *Lloyd v Google* and *Prismall v Google*) which have failed to meet the “same interest” test in [CPR 19.8](#), and those which claimants have tried to shoehorn into the competition law regime.²⁵⁹ These claims are precisely the kind that Lord Woolf asserted should be accommodated by legislative reform, arising where large numbers of persons have allegedly been affected by wrongful conduct, but the loss suffered by each person is small.²⁶⁰

Costs and funding in collective actions

13. 122 Costs may be awarded to or against the class representative but may not be awarded to or against a represented person who is not the class representative, with two exceptions ([CAT r.98\(1\)](#)). The first is where the CAT has approved the appointment of a class representative for a sub-class. In those circumstances, the costs associated with the determination of the common issues for the sub-class may be awarded to or against that person, and not the class representative for the whole class ([CAT r.98\(1\)\(a\)](#)). Second, costs associated with the determination of individual issues in accordance with r. 88(2)(c) may be awarded to or against the relevant individual represented persons ([CAT r. 98\(1\)\(b\)](#)). Further, where a class member makes an application, costs may be awarded to or against that class member whether or not they are a represented person under a CPO ([CAT r.98\(2\)](#)).

13. 123 As noted above, when determining whether to authorise a person to act as a class representative, the CAT must consider whether the person would be able to pay the defendant's recoverable costs if ordered to do so ([CAT r.78\(2\)\(d\)](#)).²⁶¹ The CAT Guide also provides that the CAT will have regard to the proposed class representative's "financial resources, including any relevant fee arrangements with its lawyers, third party funders or insurers".²⁶² To date, every opt-out collective action commenced in the CAT has been funded by a third-party funder.²⁶³ However, the funding environment was severely impacted by the decision of the Supreme Court in *R (PACCAR Inc) v Competition Appeal Tribunal*.²⁶⁴ The ramifications of *PACCAR* stretch beyond collective proceedings and affect all funded litigation; they are therefore discussed below.

Litigation funding

13. 124 A representative claimant takes on significant risk when pursuing a claim on behalf of a class of claimants. Most representative actions, group litigation and collective proceedings will only go ahead if there is some form of funding available, to cover the representative claimant's costs and their potential liability for the defendant's costs. Several funding models are available, including: conditional fee arrangements between a claimant and a legal representative (commonly known as "no win no fee" agreements); damages-based agreements (DBAs) (an alternative fee arrangement between a claimant and a legal representative or funder, whereunder the successful client pays the legal representative or funder a percentage of any damages received);²⁶⁵ and third-party litigation funding.²⁶⁶ Third-party litigation funding involves commercial parties with no connection to a dispute financing the costs of legal fees and expenses in return for payment, such as a multiple of the funding given, or a share of the damages awarded where the claim is successful.²⁶⁷ Another mode of ensuring costs can be covered is legal expenses insurance, which may be taken out "before the event" (that is, before specific litigation), or "after the event" (ATE), which is taken out after a dispute has arisen, and covers some or all of the party's liability in the event of an unsuccessful case. It is common for funding options to be used in tandem (for example, third-party funding and ATE insurance).
13. 125 The importance of third-party litigation funding is well recognised.²⁶⁸ It promotes access to justice by giving a prospective representative claimant the resources to pursue a claim. In this way, it is entirely consistent with the fundamental rationale behind the aggregation of claims. Litigation funding also plays an important role in protecting defendants against unmeritorious litigation because funders commonly offer the group representative an indemnity against the risk of having to pay adverse costs, and often provide the security for costs where the court orders the group representative to provide it.
13. 126 Crucial to the viability of litigation funding is the mechanism by which litigation funders are paid in the event that the claim is successful. The Court of Appeal considered whether the CAT has the power to make a "common fund order"(CFO) in *Gutmann v Apple*.²⁶⁹ A CFO provides for all members of a represented class in a class action to pay a funder from the judgment damages or settlement amount, regardless of whether the class member was party to a litigation funding agreement. The Court of Appeal emphatically confirmed that payment of the funder's fees and lawyer's fees from damages prior to payment of the class is 'clearly permitted' under the [Competition Act 1998 s.47C\(3\)](#), and there is "absolutely nothing wrong" with a Proposed Class Representative agreeing to a LFA in those terms.²⁷⁰ The court held that [s.47C\(3\)\(a\)](#) and [\(b\)](#) confer unrestricted powers on the CAT, and do not prescribe what the Class Representative (or a third party) must do with the damages which are paid to them on behalf of the class. Those powers are not fettered by [s.47C\(6\)](#), which deals with a separate issue, namely what happens to residual unclaimed damages. The supervisory jurisdiction of the CAT will ensure that what is paid to funders and lawyers is not excessive, and that costs and expenses are dealt with fairly and proportionately in accordance with the principles of justice.
13. 127 It is presently unknown whether a funder is able to take any part of a client's financial benefit upon judgment or settlement in a [CPR 19.8](#) claim. As explained, [CPR 19.8](#) is "a creature of court rule, not a legislative enactment that can change the substantive law in any material way".²⁷¹ There are fewer complications under the GLO regime, whereunder a litigation funding agreement

must be entered into between the funder and each group member. The funder therefore has a contractual entitlement to be paid by each group member. It is submitted that English courts should be empowered to make CFOs in the same way the CAT can do so in a competition class action. The Civil Justice Council recommended in its Review of Litigation Funding that the rules on funding in collective redress actions across class actions, representative proceedings and group litigation should be harmonised.²⁷² This is consistent with their supervisory jurisdiction and the underlying aims of collective redress procedures more broadly.

13. 128 Litigation funding is subject to significant criticism, although much of it is misplaced. Common criticisms include that funders exploit vulnerable consumers through high success fees or other unfair terms. The funder's 75% success fee in the Post Office Group Litigation has been seized upon as an example. However, a closer look reveals that the actual figure was lower given that the 75% included legal costs that were not recoverable from the Post Office. The funder also took a significant "haircut" on its own expected return in order to achieve a settlement.²⁷³ Alan Bates, the lead claimant in the group litigation, defended the funder's success fee on the basis that the litigation would not have been possible without the funder's involvement.²⁷⁴ The fairness of a funding arrangement must be assessed in its full context. Another criticism is that litigation funding encourages unmeritorious actions: this claim is disproven by Professor Mulheron's empirical study, which indicated that funders take on a very small percentage of cases, and have high success rates, no doubt owing to the rigorous screening requirements that funders follow when deciding whether or not to fund a case. Funding cannot, therefore, be said to operate unfairly upon defendants: if anything, funding strengthens the defendant's position by providing them with an alternative means of recovering any costs won. It is also said that funders may wrongfully gain control of a funded claim, threatening the integrity of the proceedings. For the reasons explained below in [13.131]-[Error! Reference source not found.], this concern is, again, without foundation.
13. 129 The funding landscape suffered a major blow in the 2023 Supreme Court decision in *PACCAR*. By a 4-1 majority, the Supreme Court ruled that a litigation funding agreement (LFA) that calculated the funder's payment in the event of success by reference to a percentage of the damages recovered by the funded party in the litigation fell within the scope of legislation governing damages-based agreements (DBAs).²⁷⁵ The ramifications of *PACCAR* have been far reaching.²⁷⁶ The decision immediately rendered the vast majority of litigation funding agreements unenforceable, against public policy, and champertous, as they did not comply with DBA legislation.²⁷⁷
13. 130 The extent of the problem was immediately recognised by Parliament. There was cross-party support to reverse the decision, culminating in the Litigation Funding Agreements (Enforceability) Bill. However, the Bill did not survive the "wash up" prior to the dissolution of Parliament before the July 2024 General Election. The greatest testament to the indispensable role of litigation funding in facilitating access to justice is that in virtually all ongoing cases where there was a LFA in place, those agreements were voluntarily renegotiated by funders and funded litigants to make them *PACCAR* compliant by recalculating success fees as a multiple of funds invested as opposed to a percentage of the damages recovered. Interim guidance has been provided by the CAT, upheld by the Court of Appeal in a consolidated appeal, to the effect that where a funder's fee is primarily based upon a multiple of the funding provided, this will not constitute a DBA, even where the funder's fees were expressly capped by reference to damages recovered.²⁷⁸
13. 131 However, to rely on the litigation funding market and the courts to find cracks in *PACCAR* is not sound public policy, and there is a risk that the temporary solution found by the market may increase costs to consumers given that success fees are no longer fixed as a proportion of the damages recovered. In addition, renegotiation of funding agreements was not an option for cases that had already been resolved prior to *PACCAR*. For all cases, but especially those that have already been concluded, there is a need to restore the parties to the legal position upon which parties contracted—namely, that LFAs were not DBAs and not subject to the DBA Regulations. It is submitted that the Government should resurrect the defunct Bill as an urgent priority.
13. 132 Furthermore, in a system that has chosen private funding of civil justice rather than public funding (legal aid) models, courts and regulators must ensure that litigation funding rules for class actions, which perform a crucial role in facilitating access to justice, make class actions commercially viable to fund, and fairly distribute the cost of funding such actions. This position is fortified by the fact that commercial litigation funding is concentrated on litigation "where the case for public funding is lowest

(commercial litigation between sophisticated commercial parties) and/or the cost of public funding is highest (collective redress actions)²⁷⁹. This is borne out by Professor Rachael Mulheron's recent review of litigation funding for the Legal Services Board, which found that only a small number of cases obtain commercial litigation funding.²⁸⁰ The majority of these cases are collective redress claims, and many of them could not have been brought at all if commercial litigation funding was not available (for example, the Post Office Group Litigation).²⁸¹ Against this background, the Government should exercise caution when considering regulating commercial litigation funding. The certification procedures for class actions, the courts powers to order security for costs and costs against litigation funders, as well as the power of approval over collective settlements are sufficient to facilitate the achievement of collective redress in line with the overriding objective.

Litigation strategy & conflicts of interest

13. 133 While the interests of funders, class representatives and the class will be aligned in commencing a collective action, there are risks these interests will diverge over the life of a claim, particularly at the settlement stage. The irony is that litigation services based on success fees involve the smallest conflict with the client (at least where disbursements are covered by the success fee and not separately payable) because both the client and the provider have an interest in maximising the return to the client, but even in this context there will be situations where the likely costs of maximising the return to the client exceed the amount the provider could recover through the success fee. This leads to the well-known dynamic where a funder or lawyer wishes to settle to draw a line under their investment and crystallise their return, whereas the client wishes to push on to obtain more compensation. Conversely, as the *Merrick v Mastercard*²⁸² class action settlement graphically demonstrated, there are scenarios where it is in the interests of a funded client to settle (sometimes to avoid adverse costs liability) while the funder wishes to continue with the claim in order to receive a higher return on their investment. In *Mastercard v Merricks* the funder described the proposed settlement as "low and premature". The funder was granted permission to intervene on the settlement approval application and made extensive submissions as to the alleged weaknesses of the settlement, however these were rejected by the CAT, in part due to series of interim rulings that significantly weakened the underlying claims of the class.²⁸³ The decision is now subject to judicial review by the funder not in relation to the settlement amount, but the distribution of settlement funds including the amounts ultimately paid to the funder.
13. 134 To address such conflicts, the court may appoint an independent contradictor. The role of a contradictor is not formally to represent any person, but "to put forward all reasonably arguable competing positions on behalf of, and for the benefit of, group members".²⁸⁴ In Australia, the appointment of contradictors has proved effective in relation to the determination of critical issues (particularly during the settlement approval process), including the pelvic mesh actions referred to above.²⁸⁵ The contradictor's role should be distinguished from that of an amicus curiae: the latter generally fulfils a "strictly limited, clearly defined role", whereas the former is engaged by the court to ensure there is a "real contest between conflicting interests where the outcome will be a res judicata".²⁸⁶
13. 135 By and large, fears as to litigation funding are directed towards the wrong question. The relevant question cannot be whether third-party funding is appropriate: the logic of collective action is that aggregation provides someone with sufficient (financial) incentives to take forward claims that make no sense to pursue individually. The procedure cannot work without such incentives. As the Court of Appeal explained in *London & South Eastern Railway Ltd v Gutmann*, to enable mass consumer actions to proceed at all "invariably necessitate[s] the assistance of third-party funders".²⁸⁷ Funders will legitimately seek a return upon their investment and are not prohibited from having rights of control over a proceeding.²⁸⁸ The real question is as to the extent of the funder's control, balanced against the control of the parties, their legal representatives and, above all, the court. A funder is "forbidden from having a degree of control which would be likely to undermine or corrupt the process of justice".²⁸⁹ However, the involvement of third-party funders may assist the court in performing its supervisory function. A funder may be said to "monitor" the representative claimant in view of the funder's "interests that align, albeit imperfectly, with those of the represented class".²⁹⁰ The presence of this further perspective can only assist the court in conducting proceedings justly, and in line with the overriding objective.²⁹¹ In cases where the views of funders and class representatives diverge, the reasons for

that divergence can also provide tribunals and courts with additional information about the merits and demerits of particular settlement proposals.

13. 136 In its Review of Litigation Funding the Civil Justice Council proposed a new “light touch” regulatory framework for litigation funding.²⁹² The CJC rejected the imposition of caps on litigation funding but proposed a two-tier regulatory framework, with heightened regulatory requirements in the case of consumer and collective actions, designed to avoid conflicts of interest between funders and funded parties. Much of the detail of this proposed regulatory framework is still to be worked out however, and at the time of writing the Government had not yet provided its formal response.²⁹³

Footnotes

66 *Mastercard Inc v Merricks [2020] UKSC 51* [1].

67 *Duke of Bedford v Ellis [1901] AC 1*, 7.

68 CPR 19.8 was formerly CPR 19.6 but was re-numbered (with no material alteration) in 2023.

69 J. Sorabji, “*The Hidden Class Action in English Civil Procedure*” (2009) 28(4) *C.J.Q.* 498.

70 *Davies v Eli Lilly & Co [1987] 1 All ER 801; [1987] 1 W.L.R. 428, CA.*

71 Lord Woolf, Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales (London: HMSO, 1996) (hereinafter “Woolf, Final Report”) Ch.17.

72 Amending the *Competition Act 1998* s.47B.

73 See also the *Competition Appeal Tribunal Rules 2015 (SI 2015/1648)*.

74 Under the Federal Rules of Civil Procedure (FRCP) r.23 in the federal courts; in addition, most states have enacted class action procedures modelled on r.23.

75 At a federal level, under the Federal Court of Australia Act 1976 (Cth) Pt IVA and the Federal Court Rules 2011 (Cth) Div.9.3. At the state level, see for example the Civil Procedure Act 2005 (NSW) Pt 10; and the Supreme Court Act 1986 (Vic) Pt 4A. Both of these state systems are modelled on the federal procedure.

76 Nine out of 10 provinces have formal class actions procedures, the exception being Prince Edward Island. Since 2002, the Federal Court of Canada has permitted class actions under the Federal Court Rules Pt 5.1.

77 See the recommendations of the New Zealand Law Commission, *Class Actions and Litigation Funding* (Wellington: Law Commission, 2022), NZLC R147.

78 See, for example, *Southern Response Earthquake Services Ltd v Ross [2020] NZSC 126; [2021] 1 NZLR 117*; r.4.24 of the High Court Rules 2016.

79 *Lloyd v Google LLC [2021] UKSC 50; [2022] AC 1217* [67].

80 The history of the rule was surveyed by the Supreme Court in *Lloyd v Google LLC [2021] UKSC 50; [2022] AC 1217* [34]ff.

81 *Knight v Knight (1734) 3 P. Wms. 331, 334; 24 ER 1088.*

82 While the terms “representative action” and “representative rule” do not appear in the *CPR*, they remain in use for historical reasons and reasons of convenience.

83 For discussion of the rule see: J. Seymour, “*Representative Procedures and the Future of Multi-Party Actions*” (1999) 62M.L.R. 564; and R. Mulheron, “*From Representative Rule to Class Action: Steps Rather Than Leaps*” (2005) 24 *C.J.Q.* 424.

84 *Independiente Ltd v Music Trading On-Line (HK) Ltd [2003] EWHC 470 (Ch)* [32].

85 *Independiente Ltd v Music Trading On-Line (HK) Ltd [2003] EWHC 470 (Ch)* [32].

86 *Lloyd v Google LLC [2021] UKSC 50; [2022] AC 1217* [69].

87 *Ventouris v Mountain [1990] 1 W.L.R. 1370; [1990] 3 All ER 157*; reversed in *Ventouris v Mountain (The Italia Express) (No.1) [1991] 1 W.L.R. 607, CA*, on different grounds.

88 See, for example, *Commission Recovery Ltd v Marks & Clerk LLP [2024] EWCA Civ 9; Getty Images (US) Inc v Stability AI Ltd [2025] EWHC 38 (Ch)*.

89 Compare the position in Australia, for example: Vince Morabito, ‘*Replacing inadequate class representatives in federal class actions: quo vadis?*’ (2015) 38(1) *University of New South Wales Law Journal* 146.

90 *Lloyd v Google LLC [2021] UKSC 50; [2022] AC 1217* [71].

- 91 *Howells v Dominion Insurance Co Ltd [2005] EWHC 552 (Admin)*. For discussion of this case see *J. Seymour*,
 “*Independiente Ltd v Music Trading On-Line (HK) Ltd: ‘A little knowledge is a dangerous thing’?*” (2005) 24 C.J.Q. 16.
- 92 *Lloyd v Google LLC [2021] UKSC 50; [2022] AC 1217* [69]; *Commission Recovery Ltd v Marks & Clerk LLP & Long
 Acre Renewals (A firm) [2024] EWCA Civ 9* [29].
- 93 Compare *Knight Steamship Co. Ltd [1910] 2 KB 1021, 1039* with *Independiente Ltd v Music Trading On-Line (HK)
 Ltd [2003] EWHC 470 (Ch)*.
- 94 *Duke of Bedford v Ellis [1901] AC 1, 8*.
- 95 See, for example, *Emerald Supplies Ltd and another v British Airways Plc [2010] EWCA Civ 1284; [2010] All ER
 (D) 200 (Nov)*; and Jackson LJ, Review of Civil Litigation Costs: Final Report (London: HMSO, 2010) (hereinafter
 “Jackson LJ, Final Report”) p.330.
- 96 *Lloyd v Google LLC [2021] UKSC 50; [2022] AC 1217* [69]; *Commission Recovery Ltd v Marks & Clerk LLP & Long
 Acre Renewals (A firm) [2024] EWCA Civ 9* [29].
- 97 *Lloyd v Google LLC [2021] UKSC 50; [2022] AC 1217*.
- 98 *Lloyd v Google LLC [2021] UKSC 50; [2022] AC 1217* [2]; *Vidal-Hall v Google Inc [2016] QB 1003*.
- 99 *Lloyd v Google LLC [2021] UKSC 50; [2022] AC 1217* [5].
- 100 *Lloyd v Google LLC [2021] UKSC 50; [2022] AC 1217* [5].
- 101 *Lloyd v Google LLC [2021] UKSC 50; [2022] AC 1217* [86].
- 102 *Lloyd v Google LLC [2021] UKSC 50; [2022] AC 1217* [138].
- 103 *Lloyd v Google LLC [2021] UKSC 50; [2022] AC 1217* [71].
- 104 *David Jones v Cory Bros & Co Ltd (1921) 56 LJ 302* and *Prudential Assurance Co Ltd v Newman Industries Ltd [1981]
 Ch 229*.
- 105 *Lloyd v Google LLC [2021] UKSC 50; [2022] AC 1217* [72].
- 106 Citing Zuckerman on Civil Procedure: Principles of Practice (2021), para.13.40.
- 107 *Lloyd v Google LLC [2021] UKSC 50; [2022] AC 1217* [72].
- 108 *Emerald Supplies Ltd and another v British Airways Plc [2010] EWCA Civ 1284; [2011] Ch 345*.
- 109 *Lloyd v Google LLC [2021] UKSC 50; [2022] AC 1217* [72].
- 110 *Lloyd v Google LLC [2021] UKSC 50; [2022] AC 1217* [80].
- 111 *Lloyd v Google LLC [2021] UKSC 50; [2022] AC 1217* [80].
- 112 *Lloyd v Google LLC [2021] UKSC 50; [2022] AC 1217* [80].
- 113 *Lloyd v Google LLC [2021] UKSC 50; [2022] AC 1217* [81].
- 114 *Lloyd v Google LLC [2021] UKSC 50; [2022] AC 1217* [82].
- 115 *Lloyd v Google LLC [2021] UKSC 50; [2022] AC 1217* [82].
- 116 *Prismall v Google UK Ltd [2024] EWCA Civ 1516*.
- 117 *Prismall v Google UK Ltd [2024] EWCA Civ 1516* [66].
- 118 *Prismall v Google UK Ltd [2024] EWCA Civ 1516* [66].
- 119 *Prismall v Google UK Ltd [2024] EWCA Civ 1516* [22].
- 120 *Barclays Bank UK Plc v Terry [2023] EWHC 2726 (Ch)*.
- 121 *Prismall v Google UK Ltd [2024] EWCA Civ 1516* [116]; *Lloyd v Google LLC [2021] UKSC 50; [2022] AC 1217* [85].
- 122 *Wirral Council (as Administering Authority of Merseyside Pension Fund) v Indivior Plc [2025] EWCA Civ 40* [142].
- 123 *Wirral Council (as Administering Authority of Merseyside Pension Fund) v Indivior Plc [2025] EWCA Civ 40* [143].
- 124 *Commission Recovery v Marks & Clerk LLP [2024] EWCA Civ 9* [73]–[74].
- 125 *Commission Recovery v Marks & Clerk LLP [2024] EWCA Civ 9* [59]. Permission to appeal to the Supreme Court was
 refused on the basis that the proposed appeal did not raise an arguable question of law.
- 126 *Commission Recovery v Marks & Clerk LLP [2023] EWHC 398 (Comm)* [81].
- 127 *Lloyd v Google LLC [2021] UKSC 50; [2022] AC 1217* [68].
- 128 *Commission Recovery Limited v Marks & Clerk LLP [2023] EWHC 398 (Comm); [2023] 2 All ER (Comm) 949* [91].
- 129 See, for example, *Gormsen v Meta [2023] CAT 10* [30].
- 130 J. Sorabji, “*The Hidden Class Action in English Civil Procedure*” (2009) 28(4) C.J.Q. 498.
- 131 *Lloyd v Google LLC [2021] UKSC 50; [2022] AC 1217*, [68].
- 132 *Southern Response Earthquake Services Ltd v Ross [2020] NZSC 126; [2021] 1 NZLR 117*.

- 133 *Simons v ANZ Bank Ltd* [2024] NZCA 330; [2024] NZCCLR 219 as affirmed in *ANZ Bank Ltd v Simons* [2024] NZSC 186. Note, however, that the Law Commission has recommended the introduction of a statutory scheme, as noted above at para.13.33.
- 134 *Howells v Dominion Insurance Co Ltd* [2005] EWHC 552 (Admin).
- 135 *Aiden Shipping Co Ltd v Interbulk Ltd, The Vimeira* [1986] AC 965; [1986] 2 All ER 409, *HL*, discussed in Ch.28 Costs para.28.205.
- 136 *Bank of America National Trust and Saving Association v Taylor* [1992] 1 Lloyd's Rep. 484.
- 137 See *McDonald v Horn* [1995] 1 All ER 961, *CA*; *Re AXA Equity and Law Life Assurance Society Plc* [2001] 2 B.C.L.C. 447; *Re British Airways Pension Schemes* [2000] Pens. L.R. 311, *Ch*; and cf. Ch.28 Costs paras 28.234 ff.
- 138 Woolf, Final Report, Ch.17 para.13.
- 139 Civil Procedure (Amendment) Rules 2000 (SI 2000/221); for background see Lord Chancellor's Department, Multi-Party Situations: Draft Rules and Practice Direction: A Consultation Paper (London: HMSO, 1999).
- 140 See, for example *Hobson v Ashton Morton Slack Solicitors* [2006] EWHC 1134 (QB).
- 141 *Boake Allen Ltd v Revenue and Customs Commissioners* [2007] UKHL 25 [31].
- 142 HM Courts & Tribunals Service maintains a website listing all of the GLOs that have been made since CPR 19 s.III came into force: <https://www.gov.uk/guidance/group-litigation-orders> [Accessed 18 March 2025].
- 143 *Schmitt v Depuy International Ltd* [2016] EWHC 638 (QB); the court refused to make a GLO notwithstanding the presence of common issues and a sufficient number of claimants, because on the facts neither the claimants nor the court would derive enough benefit from the group litigation procedure to make it worthwhile. See also *Austin v Miller Argent (South Wales) Ltd* [2011] EWCA Civ 928; [2011] Env. L.R. 32.
- 144 *Austin v Miller Argent (South Wales) Ltd* [2011] EWCA Civ 928; the court refused to make a GLO because of the inadequacy of the funding arrangements of the lead claimants and doubts about the seriousness of other claimants.
- 145 *Edward Moon v Link Fund Solutions* [2022] EWHC 3344 (Ch) [79].
- 146 *David Hammon v University College London* [2024] EWHC 1744 (KB) [45].
- 147 *PIP Breast Implant Litigation* [2014] EWHC 1641 (QB); *Kimathi v The Foreign & Commonwealth Office* [2017] EWHC 939 (QB).
- 148 *Baker v Volkswagen Aktiengesellschaft* [2022] EWHC 810 (QB).
- 149 See below, para.13.74.
- 150 In unusual circumstances where the court dispensed with the need for each claimant to issue a claim form, their claims were treated as issued and they were treated as having been joined as parties on the date when their claims were added to the group register: *Kimathi v The Foreign & Commonwealth Office* [2016] EWHC 3005 (QB). Accordingly, the claim of a claimant who had died before his name was added to the group register was a nullity and fell to be struck out.
- 151 *Boake Allen Ltd v Revenue and Customs Commissioners* [2007] UKHL 25 [33]. See also *Europcar UK Ltd v Revenue and Customs Commissioners* [2008] EWHC 1363 (Ch).
- 152 Note that the imposition of a cut-off date has no bearing on limitation, and if a claimant misses the cut-off date they may still issue separate proceedings provided they are within the limitation period: *T (formerly H) v Nugent Care Society (formerly Catholic Social Services)* [2004] EWCA Civ 51; [2004] 1 W.L.R. 1129.
- 153 *Holloway v Transform Medical Group (CS) Ltd* [2014] EWHC 1641 (QB) and *Kimathi v Foreign and Commonwealth Office* [2017] EWHC 939 (QB). See also *Hutson v Tata Steel UK Ltd* [2019] EWHC 143 (QB), where Turner J confirmed that he would treat an application to extend the deadline for joining the group register as an application for relief from sanctions (although in deciding whether to grant relief, his approach was arguably excessively lenient).
- 154 The “global claims” approach originates in construction litigation and allows causation to be proven “when loss is caused by multiple events, for all of which the defendant is responsible, but it is impossible or impracticable to identify separately the loss caused by each of those events”: *Alame v Shell* [2024] EWCA Civ 1500 [94].
- 155 *Alame v Shell* [2024] EWCA Civ 1500 [17].
- 156 *Alame v Shell* [2024] EWCA Civ 1500 [75].
- 157 *Municipio de Mariana v BHP Group (UK) Ltd* [2022] EWCA Civ 951; [2023] 1 All ER 611 [139].
- 158 *Alame v Shell* [2024] EWCA Civ 1500 [85].
- 159 See for example *Nash v Eli Lilly & Co Ltd* [1993] 4 All ER 383, *CA* (nine lead actions chosen; two claimants succeeded in showing that their cases should have been chosen as lead actions also); *AB v John Wyeth & Brother Ltd* [1992] 12 BMLR 50, *CA* (a large group of Halcion claimants failed to meet cut-off dates. It was argued that the 40 Halcion claimants who did meet the cut-off date were inadequately representative to provide suitable lead actions. The Court of Appeal permitted the late-comers to form a separate group).
- 160 *Grenfell Tower Litigation* [2022] EWHC 2006 (QB); *Hamon v University College London* [2023] EWHC 1812 (KB). In *Hamon v University College London* [2023] EWHC 1812 (KB) [72], Senior Master Fontaine explained that stays of

- a substantial length of time had proved successful in a series of group litigation, including the Grenfell Tower Litigation and the Hillsborough Victims Litigation.
- 161 For criticism of these omissions from the CPR scheme, see M. Mildred, “Group Actions” in G. Howells (ed.), *The Law of Product Liability* (London: Butterworths, 2001) p.375, cited in R. Mulheron, *The Class Action in Common Law Systems: A Comparative Perspective* (Oxford: Hart Publishing, 2004) p.102.
- 162 *AXA Sun Life plc v Commissioners of Inland Revenue* [2024] EWCA Civ 1430 [52].
- 163 *AXA Sun Life plc v Commissioners of Inland Revenue* [2024] EWCA Civ 1430 [52].
- 164 *AXA Sun Life plc v Commissioners of Inland Revenue* [2024] EWCA Civ 1430 [52], [54].
- 165 *AXA Sun Life plc v Commissioners of Inland Revenue* [2024] EWCA Civ 1430 [69].
- 166 *AXA Sun Life plc v Commissioners of Inland Revenue* [2024] EWCA Civ 1430 [82].
- 167 *AXA Sun Life plc v Commissioners of Inland Revenue* [2024] EWCA Civ 1430 [85].
- 168 See Ch.28 Costs paras 28.164 ff.
- 169 *AB v Liverpool City Council (costs)* [2003] EWHC 1539 (QB).
- 170 *AB v Liverpool City Council (costs)* [2003] EWHC 1539 (QB).
- 171 See for example *Nationwide Building Society v Various Solicitors (No.4)* [1999] CPLR 606; and more recently *Atlasjet Havacilik Anonim Sirketi v Kupeli* [2018] EWCA Civ 1264; and *Bates v The Post Office (No.5: Common Issues Costs)* [2019] EWHC 1373 (QB).
- 172 See for example *Ochwat v Watson Burton* [2000] C.P. Rep. 45, where it was held that, on the facts of that case, no distinction should be drawn between the members of a claimant group which was ordered to pay 75 per cent of the defendant’s costs.
- 173 M. Mildred, “Cost-Sharing in Group Litigation: Preserving Access to Justice” (2002) 65 M.L.R. 597; see also M. Goldberg, “Counting the Cost of Group Actions” (2002) 152 N.L.J. 437.
- 174 2025 WB 46.6.1.
- 175 See generally Ch.14 Discontinuance and Stays paras 14.12 ff.
- 176 *Afrika v Cape Plc* [2001] EWCA Civ 2017; [2002] 1 W.L.R. 2274.
- 177 Although the group litigants may agree between themselves how to apportion their common costs, this does not exclude the court’s discretion over such costs and it may reach a different conclusion: *BCCI SA v Ali (No.5)* [2000] 2 Costs L.R. 243.
- 178 The *Creutzfeldt-Jakob Disease Litigation Group B Plaintiffs v UK Medical Research Council* [2000] Lloyd’s Rep. Med. 161; (1998) 41 BMLR 157.
- 179 See above, para.13.63, in relation to cut-off dates.
- 180 Discussed in Ch28 Costs paras 28.102 ff.
- 181 *Sharp v Blank* [2017] EWHC 3390 (Ch).
- 182 CPR 3.19 and PD 3E, discussed further in Ch.28.
- 183 The *Competition Appeal Tribunal Rules 2015* (SI 2015/1648).
- 184 That the procedure was not fit for purpose was acknowledged by the Government and one of the stated policy reasons for introducing the new regime: Department for Business, Innovation and Skills, *Private Action in Competition Law: A Consultation on Options for Reform* (London: BIS, April 2012) p.27. See also the government’s response to the consultation: Department for Business, Innovation and Skills, *Private Action in Competition Law: A Consultation on Options for Reform—government response* (London: BIS, January 2013).
- 185 The claim was settled: see Which? “JJB to make payments to consumers for replica football shirts”, Press Release, 9 January 2008.
- 186 *Emerald Supplies Ltd v British Airways Plc* [2010] EWCA Civ 1284, see para.13.44 above.
- 187 Where the action is a follow-on action, the bodies that can make a finding that UK or EU competition law has been infringed are: the Competition and Markets Authority (CMA), established by the *Enterprise and Regulatory Reform Act 2013*; the CAT; and the European Commission ([s.47A\(6\)](#)). Note that in *Gibson v Pride Mobility Products Ltd* [2017] CAT 9, the CAT clarified that any follow-on action must concern only the infringing behaviour which was the subject of the original infringement decision, and could not seek to rely on the infringement decision as proof of different but related conduct. Thus, a finding of specific infringements by the defendant manufacturer in respect of particular models of mobility scooter could not found a class action based upon wider-ranging allegations of infringing conduct involving all of its models of mobility scooter.
- 188 *Mastercard Inc v Merricks* [2020] UKSC 51; [2021] 3 All ER 285 [3].

- 189 In contrast to the position in Australia, where the court is not to make an award of aggregate damages unless a reasonably accurate assessment can be made of the total amount to which group members will be entitled under the judgment: s.33Z(3) of the Federal Court of Australia Act 1976.
- 190 *Mastercard Inc v Merricks* [2020] UKSC 51; [2021] 3 All ER 285 [25].
- 191 *Mastercard Inc v Merricks* [2020] UKSC 51; [2021] 3 All ER 285 [4].
- 192 See, comparably, s.33M of the Federal Court of Australia Act 1976.
- 193 Cf. the position in ordinary civil litigation, discussed in Ch.6 Defendant's Response paras 6.41–6.44.
- 194 See below, paras 13.92 ff.
- 195 See below, paras 13.118 ff, for discussion of the time and process by which putative class members must opt in or out.
- 196 Nor do they specify who should pay for it, although CAT r.81(1) provides that it is for the class representative to give notice.
- 197 See discussion above at paras 13.89 ff.
- 198 Where there is a subclass, CAT r.78(4) applies the same criteria to any person whom the CAT is considering whether to authorise as a representative of the subclass.
- 199 *Christine Riefa Class Representative Ltd v Apple Inc* [2025] CAT 5.
- 200 EC, Press Release, 19 December 2007 (IP/07/1959). The EC adopted its decision in 2007 but it became final in 2014 after being unsuccessfully appealed by the Mastercard entities.
- 201 *Merricks v Mastercard Inc* [2025] CAT 28.
- 202 See above, paras 13.55 ff.
- 203 *Merricks v Mastercard Inc* [2017] CAT 16 [75]–[78].
- 204 *Merricks v Mastercard Inc* [2017] CAT 16 [88].
- 205 *Merricks v Mastercard Inc* [2017] CAT 21; [2018] Comp. A.R. 49.
- 206 *Merricks v Mastercard Inc* [2018] EWCA Civ 2527 [27].
- 207 *Merricks v Mastercard Inc* [2019] EWCA Civ 674; [2019] Bus LR 3025.
- 208 As President of the Supreme Court, Lord Reed re-constituted the panel pursuant to the Constitutional Reform Act 2005 s.43(4) to consist of Lord Briggs, Lord Sales, Lord Leggatt and Lord Thomas. Lord Sales and Lord Leggatt delivered a combined separate judgment, disagreeing with Lord Briggs' reasoning in part. Notwithstanding their disagreement, their Lordships explained in their joint judgment that “[a]s well as being hugely wasteful of resources”, it “would not be a just outcome” to have the case re-argued. Their Lordships therefore agreed that the appeal should be dismissed, but nevertheless set out their reasons at [83] why they would have allowed Mastercard's appeal.
- 209 *Mastercard Inc v Merricks* [2020] UKSC 51; [2021] 3 All ER 285 [79].
- 210 *Mastercard Inc v Merricks* [2020] UKSC 51; [2021] 3 All ER 285 [80], [150].
- 211 *Mastercard Inc v Merricks* [2020] UKSC 51; [2021] 3 All ER 285 [58], [76]–[77], [93]–[94].
- 212 *Mastercard Inc v Merricks* [2020] UKSC 51; [2021] 3 All ER 285 [58].
- 213 *Mastercard Inc v Merricks* [2020] UKSC 51; [2021] 3 All ER 285 [95], citing R. Mulheron, “Revisiting the Class Action Certification Matrix in *Merricks v Mastercard Inc*” (2019) 30 King's Law Journal 396, 412–417.
- 214 *Mastercard Inc v Merricks* [2020] UKSC 51; [2021] 3 All ER 285 [42], [153].
- 215 *Merricks v Mastercard Inc* [2019] EWCA Civ 674; [2019] Bus LR 3025, [41]–[44].
- 216 *Merricks v Mastercard Inc* [2017] CAT 16 [58], [78].
- 217 *Pro-Sys Consultants Ltd v Microsoft Corp* [2013] SCC 57.
- 218 *Pro-Sys Consultants Ltd v Microsoft Corp* [2013] SCC 57.
- 219 *Mastercard Inc v Merricks* [2020] UKSC 51; [2021] 3 All ER 285 [45].
- 220 *Mastercard Inc v Merricks* [2020] UKSC 51; [2021] 3 All ER 285 [45].
- 221 *Mastercard Inc v Merricks* [2020] UKSC 51; [2021] 3 All ER 285 [45].
- 222 *Mastercard Inc v Merricks* [2020] UKSC 51; [2021] 3 All ER 285 [51]–[52]; *ASDA Stores Ltd v Mastercard Inc* [2017] EWHC 93 (Comm).
- 223 *Mastercard Inc v Merricks* [2020] UKSC 51; [2021] 3 All ER 285 [50].
- 224 *Mastercard Inc v Merricks* [2020] UKSC 51; [2021] 3 All ER 285 [56].
- 225 *Mastercard Inc v Merricks* [2020] UKSC 51; [2021] 3 All ER 285 [58].
- 226 *Mastercard Inc v Merricks* [2020] UKSC 51; [2021] 3 All ER 285 [56].
- 227 *Mastercard Inc v Merricks* [2020] UKSC 51; [2021] 3 All ER 285 [57].
- 228 *Mastercard Inc v Merricks* [2020] UKSC 51; [2021] 3 All ER 285 [59].

- 229 *Mastercard Inc v Merricks* [2020] UKSC 51; [2021] 3 All ER 285 [61], [63]-[64].
 230 *Mastercard Inc v Merricks* [2020] UKSC 51; [2021] 3 All ER 285 [61], [63]-[64].
 231 *Mastercard Inc v Merricks* [2020] UKSC 51; [2021] 3 All ER 285 [83].
 232 *Mastercard Inc v Merricks* [2020] UKSC 51; [2021] 3 All ER 285 [86], [90], [98], [154].
 233 *Mastercard Inc v Merricks* [2020] UKSC 51; [2021] 3 All ER 285 [116].
 234 *Mastercard Inc v Merricks* [2020] UKSC 51; [2021] 3 All ER 285 [118].
 235 *Mastercard Inc v Merricks* [2020] UKSC 51; [2021] 3 All ER 285 [124].
 236 Including, for example, *Michael O'Higgins FX Class Representative Limited v Barclays Bank PLC* (case number: 1329/7/7/19); *Julie Hunter v Amazon.com, Inc.* (case number: 1568/7/7/22); *Ad Tech Collective Action LLP v Alphabet Inc and Google LLC* (case numbers: 1572/7/7/22, 1582/7/7/23); *Evans v Barclays Bank plc* (case number: 1336/7/7/19). Cf. a string of recent cases where certification has been refused e.g. *David Rowntree v Performing Right Society* (case number 1534/7/7/24).
- 237 *BT Group PLC v Le Patourel* [2022] EWCA Civ 593 [60]-[68].
 238 As to the approach taken to determine the “domicile date”, see *Merricks v Mastercard Incorporated* [2022] CAT 13.
 239 For commentary see *R. Mulheron*, “Joining the UK’s class action as a non-resident: a legislative drafting conundrum” (2020) 39(1) C.J.Q. 69.
 240 See for example Civil Justice Council, Explanatory Notes to the Draft Court Rules for Collective Proceedings (London: Judicial Office, November 2009) s.5, p.11.
 241 *Consumers’ Association v Qualcomm Incorporated* [2022] CAT 20; *Elizabeth Helen Coll v Alphabet Inc* [2022] CAT 39.
 242 See above, para.13.90.
 243 See above, para.13.63 ff.
 244 This view is also supported by the fact that CAT r.83 requires the class representative to maintain a register of class members who have opted in or out (as the case may be), which suggests that the rule-maker contemplated that the process of opting in or out would be by way of notification to the class representative. But see Professor Mulheron’s argument that the collective proceedings regime should cater for a wider range of ways of opting in than just notification to the class representative—for example by entering into a litigation funding agreement with the third-party funder of the action; by registering on the website of the class representative’s lawyer; by becoming a member of an industry body with a pre-existing interest and activity in the area the subject of the litigation; or by reason of the effect of an exclusive jurisdiction clause: *R. Mulheron*, “Joining the UK’s class action as a non-resident: a legislative drafting conundrum” (2020) 39(1) C.J.Q. 69.
 245 CAT Guide, [6.125].
 246 *McLaren v MOL (Europe Africa) Limited* [2023] CAT 75; *Gutmann v First MTR South Western Trains Limited* [2024] CAT 32; *Merricks v Mastercard Inc* [2025] CAT 28.
 247 *Gutmann v First MTR South Western Trains Limited* [2024] CAT 32, [20].
 248 *Botsman v Bolitho* [2018] VSCA 278; (2018) 57 VR 68, [198]-[203].
 249 In *Bira Trading Limited v Amazon.com, Inc* [2025] CAT 6, the CAT referred to the position in Australia (see *Wigmans v AMP Ltd* [2021] HCA 7; (2021) 270 CLR 623; *Perera v GetSwift Ltd* [2018] FCAFC 202; (2018) 263 FCR 92), Canada (see, by way of example, s.13.1.(4) of the Ontario Class Proceedings Act 1992).
 250 *Bira Trading Limited v Amazon.com, Inc* [2025] CAT 6 [39]; *UK Trucks Claim Ltd v Stellantis NV* [2022] CAT 25 [100]; *Evans v Barclays Bank PLC* [2022] CAT 16 [139].
 251 *Bira Trading Limited v Amazon.com, Inc* [2025] CAT 6 [39].
 252 *Bira Trading Limited v Amazon.com, Inc* [2025] CAT 6; *Pollack v Alphabet Inc* [2023] CAT 34.
 253 Competition Appeal Tribunal, Practice Direction 2/2022, ‘Umbrella Proceedings’.
 254 Case number: 1517/11/7/22 (UM).
 255 *Gutmann v First MTR South Western Trains Limited* [2024] CAT 32 [20].
 256 *Gormsen v Meta* [2023] CAT 10, [58]; *Gormsen v Meta Platforms Inc* [2024] CAT 11 [5].
 257 *Merricks v Mastercard* [2019] EWCA Civ 674; [2019] Bus LR 3025.
 258 See above, paras 13.33 and 13.83 ff for discussion.
 259 *Gormsen v Meta* [2023] CAT 10.
 260 Woolf, Final Report, Ch.17, para.2.
 261 See, for example, *Kent v Apple* [2021] CAT 37.
 262 CAT Guide, [6.33].

- 263 *R. Mulheron, "The Funding of the United Kingdom's Class Action at a Cross-Roads" (2023) King's Law Journal 1–27.*
- 264 *R. (PACCAR Inc) v Competition Appeal Tribunal [2023] UKSC 28; [2023] 4 All ER 675.*
- 265 DBAs are heavily regulated: see the [Damages Based Agreements Regulations 2013](#).
- 266 For a comprehensive review of the history of litigation funding in England, and a review of relevant literature and empirical data, see R. Mulheron, A Review of Litigation Funding in England and Wales, (A Report for the Legal Services Board, 2024).
- 267 For a detailed explanation of the topic and its development over time, see Civil Justice Council, 'Review of Litigation Funding: Interim Report and Consultation' (31 October 2024), <https://www.judiciary.uk/wp-content/uploads/2024/10/CJC-Review-of-Litigation-Funding-Interim-Report.pdf>.
- 268 *Mastercard Incorporated v Merricks [2020] UKSC 51* [73]; *Le Patourel v BT Group plc [2022] EWCA Civ 593* [29]; *O'Higgins v Barclays Bank plc [2020] EWCA 876* [129]; *Consumers Association v Qualcomm [2022] CAT 20* [100] and *UK Trucks Claim Limited v Stellantis [2022] CAT 25* [110].
- 269 *Gutmann v Apple Inc [2025] EWCA Civ 459.*
- 270 *Gutmann v Apple Inc [2025] EWCA Civ 459* [75], [78].
- 271 R. Mulheron, A Review of Litigation Funding in England & Wales: A Legal Literature Review and Empirical Study (A Report for the Legal Services Board, 28 March 2024), p.20, <https://legalservicesboard.org.uk/wp-content/uploads/2024/05/A-review-of-litigation-funding.pdf>.
- 272 CJC Review of Litigation Funding (June 2025), Recommendation 26: <https://www.judiciary.uk/related-offices-and-bodies/advisory-bodies/cjc/current-work/third-party-funding/>.
- 273 A. Bates, "Our Post Office victory is being twisted by those who don't want to see its like again", The Guardian, (10 May 2024).
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- 275 S.58AA of the Courts and Legal Services Act 1990. S.47C(8) of the Competition Act also contains a prohibition on DBAs in opt-out collective proceedings.
- 276 *A. Higgins, A. Zuckerman and R. Nayer, "Facilitating Access to Justice for Victims of Mass Harm" (2025) 44(1) Civil Justice Quarterly 13.*
- 277 Rachael Mulheron, A Review of Litigation Funding in England & Wales: A Legal Literature Review and Empirical Study (A Report for the Legal Services Board, 28 March 2024), Ch. 1, <https://legalservicesboard.org.uk/wp-content/uploads/2024/05/A-review-of-litigation-funding.pdf>. See, for example, *Therium Litigation Funding v Bugsby Property [2023] EWHC 2627 (Comm)*.
- 278 *Commercial and Interregional Card Claims Limited v Mastercard Incorporated [2024] CAT 3; Kent v Apple Inc. [2024] CAT 5; Gutmann v Apple Inc. [2024] CAT 18; Mark McLaren Class Representative Limited v MOL (Europe Africa) Ltd [2024] CAT 47; Sony v Alex Neill Class Representative Ltd [2025] EWCA Civ 841.*
- 279 *A. Higgins, A. Zuckerman and R. Nayer, "Facilitating Access to Justice for Victims of Mass Harm" (2025) 44(1) C.J.Q. 1, 4;* R. Mulheron, A Review of Litigation Funding in England & Wales: A Legal Literature Review and Empirical Study (A Report for the Legal Services Board, 28 March 2024), pp. 21-25, <https://legalservicesboard.org.uk/wp-content/uploads/2024/05/A-review-of-litigation-funding.pdf>.
- 280 R. Mulheron, A Review of Litigation Funding in England & Wales: A Legal Literature Review and Empirical Study (A Report for the Legal Services Board, 28 March 2024), Executive Summary, <https://legalservicesboard.org.uk/wp-content/uploads/2024/05/A-review-of-litigation-funding.pdf>.
- 281 A. Bates, "Why I wouldn't beat the Post Office today", Financial Times (12 January 2024).
- 282 See also *Alex Neill Class Representative Ltd v Sony Interactive Entertainment Europe Ltd [2023] CAT 73* and *First MTR South Western Trains Ltd v Gutmann [2022] EWCA Civ 1077.*
- 283 *Merricks v Mastercard [2025] CAT 28*
- 284 *Gill v Ethicon Sàrl (No 10) [2023] FCA 228* [42].
- 285 *Gill v Ethicon Sàrl (No 10) [2023] FCA 228; Davaria Pty Ltd v 7-Eleven Stores Pty Ltd (No 11) [2022] FCA 331.* See generally J. Kirk, 'The Case for Contradictors in Approving Class Action Settlements' (2018) 92 Australian Law Journal 716.
- 286 *Bolitho v Banksia Securities Ltd (No 6) [2019] VSC 653; (2019) 63 VR 291* [110].
- 287 *London & South Eastern Railway Ltd v Gutmann [2022] EWCA Civ 1077* [83].
- 288 *London & South Eastern Railway Ltd v Gutmann [2022] EWCA Civ 1077* [83].
- 289 *Akhmedova v Akhmedov [2020] EWHC 1526 (Fam)* [60].
- 290 *Samuel Issacharoff, 'Litigation funding and the problem of agency cost in representative actions' (2014) 63(2) Depaul Law Review 561, 585.*

- 291 In *Williams & Kersten Pty Ltd v National Australia Bank Limited (No 3) [2023] FCA 1328*, the funder intervened to raise concerns as to the applicant's ability to represent the interests of group members.
- 292 CJC Review of Litigation Funding (June 2025), <https://www.judiciary.uk/related-offices-and-bodies/advisory-bodies/cjc/current-work/third-party-funding/>.
- 293 For discussion and criticism see *A Higgins, R Nayer and A Zuckerman, "The CJC's Report on Litigation Funding: a Mixed Bag of Much Needed, Problematic and Potentially Disastrous Recommendations"* (2025) 44(4) *C.J.Q.* 219.

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Discontinuance under CPR 38

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 14 - Discontinuance and Stays

Discontinuance under CPR 38

Introduction

14. 1 Civil litigation is, at least in theory, a voluntary process. A party is formally free to choose to disengage from the process by settling, or simply giving in—though it may not like the consequences of its choice.¹ Accordingly, [CPR 38.2\(1\)](#) states that “At any time, a claimant may discontinue all or part of a claim against one or more defendants.” The balance of [CPR 38](#) sets out the procedure by which the claimant does so, and the consequences of that choice.² ([CPR 38](#) does not apply to withdrawing an appeal, for which special rules apply).³
14. 2 There are many reasons why a claimant may wish to discontinue their action. The parties may have decided to settle their differences; additional evidence or authorities may have come to light that render the claim much less likely to succeed; the claimant may have run out of funds or willpower to see the claim through; or the defendant may not have the funds to pay the claim, even if the claim succeeds. In all such circumstances it is in all parties’ interests, and the interests of preserving scarce judicial resources, to bring proceedings to an end promptly while minimising further time and costs.
14. 3 Under the pre-[CPR](#) system, a claimant was able to remain inactive in the hope that the defendant would allow the claim to peter out quietly. This is no longer possible. Under the [CPR](#) the courts must ensure that claims proceed in a timely way to their conclusion. Therefore, a claimant who wishes to disengage must take active steps to bring the litigation to an end.
14. 4 The [CPR 38](#) discontinuance regime applies only where a claimant discontinues “all or part of a claim” ([CPR 38.1\(1\)](#)). Discontinuing all of a claim means abandoning the claim in its entirety—i.e. *all* the alleged causes of action and all of the relief sought – while discontinuing *part* of a claim means abandoning one or more alleged causes of action while pursuing others included in the claim,⁴ or abandoning pursuit of a cause of action as against one defendant while pursuing other defendants. Having said that, a claimant may come under the discontinuance regime even without expressly stating their intention to discontinue, if amendments to their particulars of claim effectively amount to an abandonment of a cause of action initially advanced, or initially advanced against a particular defendant.⁵ [CPR 17.1\(4\)](#) provides that permission is not required for amendments to give effect to a discontinuance.
14. 5 Discontinuance of a cause of action must be distinguished from abandoning a particular remedy in respect of that cause of action, while maintaining that cause of action but pursuing other remedies for it. [CPR 38.1\(2\)](#) provides that a claimant who “subsequently abandons their claim to one or more of the remedies but continues with their claim for the other remedies” does not come under the [CPR 38](#) discontinuance regime.⁶ As [CPR 38.1](#) makes clear, “The procedure for amending a statement of case, set out in [Part 17](#), applies where a claimant abandons a claim for a particular remedy but wishes to continue with his claim for other remedies”. Such a claimant will normally have to pay the costs that the defendant incurred in respect of the abandoned part of the claim⁷ (unless the defendant has agreed otherwise, perhaps in return for the claimant’s concession on this point). Instead of adopting these routes, a claimant could, of course, declare at the trial that it is abandoning its claim for a

particular remedy, but this is likely to result in even greater adverse costs for putting the opponent to the unnecessary trouble of preparing that part of the case.

- 14.6** The rules draw a distinction between discontinuance that does and does not require court permission. The requirement of permission is primarily intended to bring the matter before the court so that it may make any necessary consequential orders, and in particular deal with any interim injunctions, undertakings or payments made prior to discontinuance. However, the court retains discretion to refuse permission for discontinuance and instead dismiss the claim on the merits.⁸ A claimant who disengages from the process without obtaining the required permission cannot be forced to continue to litigate; nobody will drag them to court against their will. However, the claimant would run the risk of adverse costs consequences, which may well be more burdensome than those attached to seeking permission for discontinuance.

How a claim is discontinued

- 14.7** A claimant discontinues by filing a notice of discontinuance and serving a copy on every party to the proceedings ([CPR 38.3\(1\)](#)).⁹ Where permission is not required, discontinuance against any defendant takes effect on the date when notice of the discontinuance is served on them ([CPR 38.5\(1\)](#)), and (subject to the defendant's right to apply to set aside discontinuance) the claim is brought to an end against them at that date ([CPR 38.5\(2\)](#)). Where permission is required, the court's order will provide for the date on which discontinuance takes place.¹⁰ However, discontinuance does not affect any costs proceedings, which may take place subsequently ([CPR 38.5\(3\)](#)), and in which (as explained below) the defendant would normally recover their costs.¹¹ Nor does discontinuance affect the possibility of contempt proceedings arising from the claim before it was discontinued (such as if the claim was fraudulently made).¹²

When discontinuance requires court permission or party consent

- 14.8** The claimant's right to discontinue is subject to further requirements in three exceptional situations. Each exception is driven by the [CPR](#)'s desire to protect other parties to the litigation.
- 14.9** *Interim injunctions/undertakings:* First, [CPR 38.2\(2\)\(a\)](#) states that a claimant must obtain the permission of the court if they wish to discontinue all or part of a claim in relation to which (i) the court has granted an interim injunction, or (ii) any party has given an undertaking to the court. However, the requirement for permission is read narrowly – it applies only in respect of defendants against whom an interim injunction has been obtained (not other defendants)¹³ and then only in respect of causes of action included in the subject matter of the injunction or undertaking (not other causes of action).¹⁴ Further, permission is only required where the injunction is still in force, not when it has expired or been set aside.¹⁵ Unlike the other two exceptions set out below, the defendant's consent in writing is not sufficient. The reason is that, whatever the parties agree between themselves, an injunction is a court order which can only be discharged by the court, and the undertaking is formally made to the court and can only be released by the court.
- 14.10** *Interim payments:* Where the claimant has received an interim payment in relation to a claim, the claimant may discontinue that claim if the defendant who made the interim payment consents in writing ([CPR 38.2\(2\)\(b\)](#), usually after receiving a refund of the interim payment) or with the court's permission ([CPR 38.2\(2\)\(b\)\(ii\)](#)). Court permission will normally include repayment of the interim payment.¹⁶
- 14.11**

Multiple claimants: Where there is more than one claimant, a claimant may not discontinue unless every other claimant consents in writing ([CPR 38.2\(2\)\(c\)\(i\)](#)), or the court gives permission ([CPR 38.2\(2\)\(c\)\(ii\)](#)).

Costs consequences of discontinuance

- 14. 12 Unless the court orders otherwise, a claimant who discontinues is liable for the costs of any defendant affected by the discontinuance, up to the date on which notice of discontinuance was served on the defendant ([CPR 38.6\(1\)](#)). This normal practice is treated as a “presumption”.¹⁷ On the multi-track the defendant’s costs are deemed to be on the standard basis following discontinuance, unless the court orders otherwise.¹⁸
- 14. 13 The theoretical justification for this normal practice is that discontinuance is normally regarded as an acknowledgement that the claim (i) is likely to fail and (ii) therefore should never have been brought. However, this justification will not apply in every case. A claimant may have perfectly legitimate reasons for abandoning a claim even though it is very likely to succeed – for example, because the claimant has insufficient funds to continue, or the defendant has insufficient resources to pay a damages award. Further, it does not follow from the fact that the claim is likely to fail that it should not have been brought in the first place. It may well only have become apparent that the claim is likely to fail after it has been brought, through the process of disclosure and the exchange of witness evidence. However, the rules do not provide for the court to investigate whether the claim is likely to fail and whether it should have been brought in the first place, because that would itself involve a determination of the merits of the claim – precisely what discontinuance seeks to cut short.
- 14. 14 As to which costs discontinuance affects, an order that a claimant who discontinued proceedings should pay the defendant’s costs of the claim does not, of itself, override earlier costs orders made in favour of the claimant.¹⁹ The discontinuance of a claim also does not affect any proceedings to deal with a question of costs (including proceedings to recover indemnity costs), even if those proceedings were only commenced after the date of discontinuance.²⁰ If proceedings are discontinued only in part, the claimant is liable at this stage only for the costs relating to the discontinued part ([CPR 38.6\(2\)\(a\)](#)), but unless the court orders otherwise, these costs must not be assessed until the conclusion of the rest of proceedings ([CPR 38.6\(2\)\(b\)](#)). However, when a claimant has discontinued the entire claim against a particular defendant, that defendant is entitled to costs there and then, notwithstanding that the claimant is pursuing claims against other defendants²¹ whose costs may have to be addressed at a later date.
- 14. 15 As to the basis for assessing costs, as a result of [CPR 44.9\(1\)\(c\)](#), a costs order following service of a notice of discontinuance is by default deemed to be on the standard basis. However, [CPR 38.6\(1\)](#) gives the court power to order otherwise, which includes the power to order costs on the indemnity basis if there are exceptional circumstances. Thus, indemnity costs may be ordered where there has been conduct or circumstances which took the case outside the ordinary and reasonable conduct of proceedings, as where a claimant pressed on with a fraudulent²² or hopeless claim,²³ or unnecessarily delayed the resolution of the case. In particular, indemnity costs may be appropriate where a claimant made serious allegations of fraud and dishonesty and then abandoned those allegations without explanation, thereby depriving the defendant of any opportunity to vindicate its reputation.²⁴
- 14. 16 The starting position is always that the discontinuing claimant must pay the costs; the claimant bears the burden of showing a justification for departure from that default position,²⁵ which requires cogent reasons.²⁶ The normal practice is unlikely to be departed from other than in unusual circumstances.²⁷ However, the court retains jurisdiction to make no order as to costs,²⁸ or may even order the defendant to pay the claimant’s costs.²⁹
- 14. 17

In *Brookes v HSBC Plc*,³⁰ Moore-Bick LJ drew attention to six principal considerations, derived from the case law by HHJ Waksman QC, which were pertinent to the exercise of discretion under CPR 38.6(1):

Rule 38.6:(1)

“(1) when a claimant discontinues the proceedings, there is a presumption by reason of CPR 38.6 that the defendant should recover his costs; the burden is on the claimant to show a good reason for departing from that position;

(2) the fact that the claimant would or might well have succeeded at trial is not itself a sufficient reason for doing so;

(3) however, if it is plain that the claim would have failed, that is an additional factor in favour of applying the presumption;

(4) the mere fact that the claimant’s decision to discontinue may have been motivated by practical, pragmatic or financial reasons as opposed to a lack of confidence in the merits of the case will not suffice to displace the presumption;

(5) if the claimant is to succeed in displacing the presumption he will usually need to show a change of circumstances to which he has not himself contributed;

(6) however, no change in circumstances is likely to suffice unless it has been brought about by some form of unreasonable conduct on the part of the defendant which in all the circumstances provides a good reason for departing from the rule.”

14. 18 Moore-Bick LJ stressed that the court was unlikely to be persuaded to depart from the default position save in unusual circumstances. This is because, he went on to explain:

“A claimant who commences proceedings takes upon himself the risk of the litigation. If he succeeds he can expect to recover his costs, but if he fails or abandons the claim at whatever stage in the process, it is normally unjust to make the defendant bear the costs of proceedings which were forced upon him and which the claimant is unable or unwilling to carry through to judgment ... There may be cases in which it can be said that the defendant has brought the litigation on himself, but even that is unlikely to justify a departure from the rule if the claimant discontinues in circumstances which amount to a failure of the claim.”³¹

14. 19 Although the six considerations identified above as pertinent to the exercise of discretion under CPR 38.6(1) have been judicially endorsed on a number of occasions, they must not be taken as exhaustive. Discontinuance may take place in an infinite variety of circumstances and the court should be able to decide what is just in the particular case; further, the guidelines are open-textured and will be applied to cases on their particular facts. It is perhaps because of this that some of the authorities in this area are somewhat difficult to reconcile.

14. 20 *Likelihood of success against the defendant not a sufficient reason:* As Moore-Bick LJ makes clear, the claimant showing that they might or even would have succeeded at trial is not sufficient reason to depart from the presumption. Determining such an argument would effectively require a trial of the dispute on the merits, which is precisely what discontinuance is intended to cut short. However, there is some internal tension in the guidelines themselves on this point. On the one hand, guideline (2) holds “it is not the function of the court to attempt to decide whether or not the claim would have succeeded”, but guideline (3) says that if “it is plain to the court that the claim would have failed at trial that must be a relevant factor against disapplying the presumption”. One would have thought that if the merits of the claim are relevant to the decision under CPR 38.6, they should count in favour of the claimant as well as in favour of the defendant.

14. 21 *Aversion of loss may be sufficient reason:* Suppose that a claimant sues a defendant because it anticipates a loss will very likely be suffered, but discontinues after it becomes clear the loss will not be suffered. For example, in *Dhillon v Siddiqui*,³² the claimant sued the defendant for negligent tax advice that had led to it incurring significant tax liability. For reasons that are not clear on the judgment, the tax authorities declined to exact the tax liability in question and the claimant discontinued the claim and applied for a costs order against the defendant. Norris J held that this aversion of loss was sufficient reason to depart from the general principle – since it had been reasonable for the claimant to take proceedings against the defendant, and since the latter's defence would have been unsustainable, the defendant should pay the claimant's costs.
14. 22 *Satisfaction of the claimant's demands by another defendant not sufficient reason:* Suppose a claimant sues D1 and D2 in respect of the same damage, and D1 pays the full value of the claim. The claimant now has no claim against D2, because the claimant cannot recover twice for the same loss; pursuing D2 to trial would not only fail, but likely lead to an adverse costs award on the basis that it is unreasonable and disproportionate. It might be thought that this change of circumstances amounts to a perfectly good reason for discontinuing against D2, and not wasting the parties' or court's resources any further. But in *Messih v McMillan Williams*,³³ the Court of Appeal rejected that argument: "The claimant's natural desire to settle his claim against [D1] on terms that they paid the claim in full should not be allowed ... to override the entitlement of [D2] to be paid their costs when the claimant chose no longer to pursue them", Patten LJ concluded.³⁴ A claimant would be better-advised to include D2 in any settlement with D1 in which D1 also pays D2's costs.
14. 23 *Satisfaction of the claimant's demands by the same party may be sufficient reason, depending on the reasonableness of the parties' conduct:* Suppose that the claimant sues a defendant, and the defendant voluntarily satisfies the claimant's demands (for example, by paying the claim or entering into an undertaking). The claimant would be well-advised to ensure that any settlement agreement provides for the costs position. Otherwise, in assessing whether the default presumption should be departed from, it is not sufficient that the claimant has obtained all they wanted from the proceedings.³⁵ Rather, the question is whether the claimant has acted unreasonably in bringing proceedings prematurely, or the defendant has acted unreasonably (for example, by not properly responding to pre-action correspondence).³⁶
14. 24 *Material change in the defendant's economic circumstances may be sufficient reason, but not if the claimant should have known about it before commencing proceedings:* In *Everton v World Professional Billiards and Snooker Association (Promotions)*,³⁷ Gray J held that it was unjust to order a claimant to pay the defendant's costs where the claimant discontinued because the defendant had become bankrupt. On the other hand, in *Walker v Walker*,³⁸ the Court of Appeal held that there will be no justification for departing from the default presumption where the claimant should have known from the start the claim would not be economically viable. As Chadwick LJ observed, "the assets available for execution at the time when the claim was started were not £292,000; they were £292,000 less the costs of pursuing and resisting the claim, liabilities which would have to be met before the assets could be available to satisfy this claim of £500,000".³⁹ On this view, before commencing proceedings a claimant must consider not only whether the defendant has sufficient assets to meet the claim, but also by how much the defendant's assets will have been reduced as a result of the proceedings that the claimant is contemplating. This is unfair, seeing that claimants do not normally have access to information about the defendant's resources, let alone the cost of their legal representation. In situations of the kind faced by the liquidator in this case, defendants who are short of funds do not normally pay up without being seriously pressed. The decision in *Walker v Walker* gives debtors the means of resisting such pressure. For a debtor can intimate to their creditor that they would prefer to see their available resources expended on legal fees rather than meet the creditor's claim. It would take a brave claimant to press their claim, however justified, when defendants have been dealt such a strong hand.
14. 25 It is suggested that the current line of authorities has invested far too much force in the presumption that the discontinuing claimant must pay costs. Bringing proceedings is risky enough as it is. There is no reason why claimants should be put to even greater risk by holding that discontinuance will be attended with costs "save in unusual circumstances".⁴⁰ The better approach, it is suggested, would be to take the words of CPR 38.6(1), "Unless the court orders otherwise", at face value. They suggest that

the court has a wide discretion as to who should bear the costs in the event of discontinuance.⁴¹ There is no justification for providing defendants with greater protection than is afforded by a general presumption that the discontinuing claimant should normally pay the defendant's costs, subject to considering all the circumstances of the case to determine whether to disapply that otherwise sensible presumption.

- 14.26 Where a claimant has partly discontinued proceedings, and the claimant has become liable to pay those costs (either by agreement or by the court's order deviating from the usual position under [CPR 38.6](#)), and the claimant has failed to pay costs within 14 days, the court may stay the remainder of proceedings until the costs are paid ([CPR 38.8](#)).
- 14.27 In personal injury claims, claims under the [Fatal Accidents Act 1976](#) or claims which arise out of death or personal injury and survive for the benefit of an estate by virtue of the [Law Reform \(Miscellaneous Provisions\) Act 1934 s.1\(1\)](#), [CPR 38.6](#) must be read in conjunction with [CPR 44.13 to 44.16](#), which limit the enforceability of costs orders against claimants (the qualified one-way costs shifting or "QOCS" regime). Although a claimant will lose the benefit of QOCS where, under [CPR 44.15](#), the claim is struck out as disclosing no reasonable grounds for bringing the claim or the proceedings are an abuse of process, that will not be the case where a notice of discontinuance is served and the proceedings are not reinstated.⁴² However, discontinuance does not prevent the court from disapplying QOCS protection under [CPR 44.16](#), so as to render the costs order against the claimant enforceable. PD 44 para.12.4(c) expressly recognises that dishonest personal injury claimants should not necessarily be able to preserve their QOCS protection by serving a notice of discontinuance. Accordingly, it provides that where a discontinued personal injury claim is said to have been fundamentally dishonest, the court may determine the issue of fundamental dishonesty notwithstanding that the notice of discontinuance has not been set aside. It has been held that exceptional circumstances are not required in order for the court to exercise its discretion under PD 44 para.12.4(c); rather, the court should weigh all the circumstances in accordance with the overriding objective.⁴³ In doing so, the court will bear in mind, on the one hand, that further court resources will be expended on a claim that is no longer being pursued, if the discretion to determine the issue of fundamental dishonesty is exercised; and on the other, the public interest in identifying fundamentally dishonest claims and in requiring claimants who bring them to bear the costs.⁴⁴ Relevant considerations may include the strength of the defendant's case, the stage at which the claim was discontinued, any explanation offered for the discontinuance and the amount of costs incurred by the defendant at the point of discontinuance.⁴⁵

Setting aside discontinuance

- 14.28 A defendant would normally recover costs following discontinuance,⁴⁶ but this may not be enough to protect their interests. For instance, discontinuance does not result in a decision on the merits so as to give rise to any res judicata or estoppel,⁴⁷ so that a claimant is left free, at least in theory, to bring fresh proceedings on the same cause of action (subject to the requirement for permission pursuant to [CPR 38.7](#) and the doctrine of abuse of process, as explained further below). A defendant who has fought the claim may well wish to obtain not only their costs but also the benefit of a binding decision so that they may never again be troubled with that particular cause of action. They can do so by requesting that the court dismiss the claim, rather than allow it to be discontinued.⁴⁸
- 14.29 Therefore, discontinuance is not entirely irreversible, even where court permission is not required. The court has an inherent jurisdiction to set aside a notice of discontinuance that amounts to an abuse of process, as where it has been served in order to obtain an unjust collateral advantage.⁴⁹ Further, CPR 38.4(1) allows the defendant to apply, within 28 days of the service of the notice of discontinuance, to have the notice set aside.⁵⁰ The [CPR 38.4\(1\)](#) discretion is broader and more fact sensitive—establishing an abuse of process is a powerful factor in favour of granting the application to set aside, but is neither necessary⁵¹ nor sufficient.⁵² A useful test is whether permission to discontinue would have been granted unconditionally if permission had been required.⁵³

- 14.30 Examples of situations where a notice of discontinuance has been set aside include where the purpose of discontinuance was:
- (1)to proceed with the same claim abroad, while keeping open the possibility of renewing the claim in England in the event that the foreign proceedings failed;
 - (2)to deny the defendant the opportunity to counterclaim, having earlier given the defendant the impression that there would be such opportunity;⁵⁴ or
 - (3)to allow the claimant to re-assert sovereign immunity, where it had waived sovereign immunity in order to bring its claim.⁵⁵

On the other hand, examples of situations where a notice of discontinuance has not been set aside include:

- (1)where the discontinuance has been filed to avoid more serious costs consequences – which is, after all, one of the legitimate purposes of discontinuance;⁵⁶
- (2)simply because the discontinuance has been filed to avoid a determination of the merits – [CPR 38.7](#) and the doctrine of abuse of process providing the defendant with sufficient protection in this case;⁵⁷ and
- (3)where the claimant is willing to offer an undertaking to prevent prejudice to the defendant – for example, that it will not raise a particular point that would have been decided against it by the court if proceedings continued.⁵⁸

It is not a relevant consideration that the claim could usefully be tried as a test case.⁵⁹

Renewing the claim after discontinuance

- 14.31 To ensure that defendants are not unreasonably troubled by fresh claims after discontinuance, such claims can only be brought with the court's permission. [CPR 38.7\(1\)](#) provides that if the discontinuance takes place after the defendant has filed a defence, the claimant requires court permission in order to bring a fresh claim against the same defendant arising out of the same facts or substantially the same as those relating to the discontinued claim. The rule seeks to give defendants peace from litigation not only in respect of the same cause of action, but also in respect of any other cause of action that is founded on facts that are substantially the same as those on which the discontinued claim was based. This reflects the more general principle that a claimant should bring all causes of action arising from the same event in one action.⁶⁰ Such an application must be included in the new claim form,⁶¹ and the claim will only proceed if the application is granted. A claim that is discontinued before the defendant has filed a defence does not require permission for renewal because the defendant has not been troubled. However, quite apart from [CPR 38.7](#), such a claim may be struck out as abuse of process if the circumstances justify it.⁶²
- 14.32 Given that defendants are entitled to protection from being repeatedly troubled by identical claims, permission to bring fresh proceedings will only be given where strong countervailing considerations of justice demand it. That said, the rule does not impose a requirement of exceptionality; rather, the question is whether the claimant had given sufficient explanation for seeking reinstatement “to overcome its natural disinclination to permit a party to re-introduce”.⁶³ Whether sufficient explanation has been provided is fact-sensitive, but could include (for example) that the previous claim was discontinued due to undue pressure or misrepresentations by the defendant; or that new evidence or precedent has emerged; or that the previous claim was discontinued due to lack of funds, especially where the defendant drove up the cost of litigation in order to deter the claimant from maintaining the claim.

Footnotes

- 1 For discussion of party autonomy see [Ch.12 Case Management Pt I paras 12.8 ff.](#)
- 2 Where a defendant wishes to bring proceedings to an end unilaterally, the equivalent of a “discontinuance” is an admission of the whole or part of the claimant’s case pursuant to CPR 14.2. The two regimes are quite different, which is in some ways surprising, considering they each involve a party unilaterally surrendering all or part of its position, and the parties’ configuration as claimant and defendant can be to some extent arbitrary. For example, if there is a dispute as to whether a sum of money was due under a contract, which party is the claimant may depend on the timing of whether the money has already been paid when the claim is brought—the payee may claim for breach of contract if it has not been paid, while the payer may claim for restitution if it has been paid but was not in fact due.
- 3 [Tendring District Council v AB \[2024\] EWCA Civ 1248](#) [33].
- 4 [Kazakhstan Kagazy Plc v Zhunus \[2016\] EWHC 2363 \(Comm\); \[2017\] 1 W.L.R. 467](#) [24]. Note also [Galazi v Christoforou \[2019\] EWHC 670 \(Ch\)](#) [44], in which Chief Master Marsh’s interpretation was consistent with that in *Kazakhstan Kagazy Plc v Zhunus*, notwithstanding his criticism of [Kazakhstan](#).
- 5 [Galazi v Christoforou \[2019\] EWHC 670 \(Ch\)](#) [48].
- 6 See also [Galazi v Christoforou \[2019\] EWHC 670 \(Ch\)](#) [44]. The same is true of abandoning a claim for an interim remedy: [Otto v Inner Mongolia Happy Lamb Catering Management Co Ltd \[2023\] EWHC 2920 \(Ch\)](#) [14]–[15].
- 7 For the principles relating to amendment see [Ch.7 Statements of Case paras 7.47 ff.](#)
- 8 [Vale SA v Steinmetz \[2022\] EWHC 343 \(Comm\)](#) [6].
- 9 See further [Jarvis Plc v PricewaterhouseCoopers \[2001\] B.C.C. 670](#) [15]. A notice of discontinuance must be in Form N279 unless the Court permits otherwise: [CPR 38.3\(5\)](#). The notice must also state that it has been served on every other party to the proceedings ([CPR 38.3\(2\)](#)) and a copy of any necessary consent must be attached ([CPR 38.3\(4\)](#)). Where discontinuance disposes of the whole of the claim for which a trial (or “window”) date has been fixed, the parties must notify the listing officer immediately: [CPR 39.10\(1\)](#).
- 10 2025 WB 38.5.2.
- 11 See further below, paras [14.12 ff.](#)
- 12 [Zurich Insurance Plc v Romaine \[2019\] EWCA Civ 851; \[2019\] 1 W.L.R. 5224](#) [50].
- 13 [Astaldi SpA v Generali-Kent Sigorta AS \(25 June 2002, unreported, H.H. Judge Michael Dean QC\); I.R. Scott, “Discontinuing Claims and Staying Counterclaims” \(2003\) 22 C.J.Q. 6.](#)
- 14 [Kazakhstan Kagazy Plc v Zhunus \[2016\] EWHC 2363 \(Comm\); \[2017\] 1 W.L.R. 467](#) [26].
- 15 [Kazakhstan Kagazy Plc v Zhunus \[2016\] EWHC 2363 \(Comm\); \[2017\] 1 W.L.R. 467](#) [28].
- 16 As contemplated in [Castanho v Brown and Root \(UK\) \[1981\] AC 557, 577.](#)
- 17 [Teasdale v HSBC Bank Plc \[2010\] EWHC 612 \(QB\); \[2010\] 4 Costs L.R. 543](#) [7].
- 18 CPR 44.9(1)(c). In small claims track cases [CPR 27.14](#) restricts the costs recoverable, and fixed recoverable costs generally apply on the fast and intermediate tracks: [CPR 45](#).
- 19 [Dar Al Arkan Real Estate Co v Al Refai \[2015\] EWHC 1793 \(Comm\).](#)
- 20 [Hoist UK Ltd v Reid Lifting Ltd \[2010\] EWHC 1922 \(Ch\); \[2011\] Costs L.R. 36](#) [9].
- 21 [BAE Systems Pension Funds Trustees Ltd v Bowmer and Kirkland Ltd \[2018\] EWHC 1222 \(TCC\).](#)
- 22 [Clutterbuck v HSBC Plc \[2015\] EWHC 3233 \(Ch\).](#)
- 23 [Atlantic Bar and Grill Ltd v Posthouse Hotels Ltd \[2000\] C.P. Rep. 32; Naskaris v Ans Plc \[2002\] EWHC 1782 \(Ch\), Ch; Three Rivers DC v Bank of England \(Indemnity Costs\) \[2006\] EWHC 816 \(Comm\), QB; and Mireskandari v Law Society \[2009\] EWHC 2224 \(Ch\).](#)
- 24 [PJSC Aeroflot - Russian Airlines v Leeds \[2018\] EWHC 1735 \(Ch\).](#)
- 25 [Fresenius Kabi Deutschland GmbH v Carefusion 303 Inc \[2011\] EWCA Civ 1288.](#)
- 26 [Ashany v Eco-Bat Technologies Ltd \[2018\] EWCA Civ 1066.](#)
- 27 [Brooks v HSBC Bank Plc \[2011\] EWCA 354; \[2012\] 3 Costs LO 285](#) [9].
- 28 [RTZ Pension Property Trust Ltd v ARC Property Developments Ltd \[1999\] 1 All ER 532, CA.](#)
- 29 [JT Stratford & Son Ltd v Lindley \[1964\] 3 All ER 102.](#) And see, for example, [Sims v Carruthers, \(Manchester County Court, unreported, 20 September 2013\).](#)

- 30 *Brookes v HSBC Plc* [2011] EWCA Civ 354; [2012] 3 Costs LO 285 [6]. See HHJ Waksman QC's decision in *Teasdale v HSBC Bank Plc* [2010] EWHC 612 (QB); [2010] 4 All ER 630 [7].
- 31 *Brookes v HSBC Plc* [2011] EWCA Civ 354 [10]. See also *Ashany v Eco-Bat Technologies Ltd* [2018] EWCA Civ 1066.
- 32 *Dhillon v Siddiqui* [2010] EWHC 1400 (Ch).
- 33 *Messih v McMillan Williams* [2010] EWCA Civ 844.
- 34 *Messih v McMillan Williams* [2010] EWCA Civ 844 [33].
- 35 *Nelson's Yard Management Co v Eziefula* [2013] EWCA Civ 235.
- 36 *Nelson's Yard Management Co v Eziefula* [2013] EWCA Civ 235.
- 37 *Everton v World Professional Billiards and Snooker Association (Promotions) Ltd (unreported)* 13 December 2001, Gray J.
- 38 *Walker v Walker* [2005] EWCA Civ 247; [2005] 1 All ER 272.
- 39 *Walker v Walker* [2005] EWCA Civ 247; [2005] 1 All ER 272 [26].
- 40 As Moore-Bick LJ put it in *Brookes v HSBC Bank Plc* [2011] EWCA Civ 354 [10]. See also *Ashany v Eco-Bat Technologies Ltd* [2018] EWCA Civ 1066.
- 41 *Britannia Life Association of Scotland v Smith* [1995] C.L.Y. 3968, CA.
- 42 2025 WB 38.6.3.
- 43 *Alpha Insurance A/S v Roche* [2018] EWHC 1342 (QB) [16]–[17].
- 44 *Alpha Insurance A/S v Roche* [2018] EWHC 1342 (QB) [18].
- 45 *Alpha Insurance A/S v Roche* [2018] EWHC 1342 (QB) [24] ff.
- 46 CPR 38.6.
- 47 *Ward (acting as liquidator of Brady Property Developments Ltd) v Hutt* [2018] EWHC 77 (Ch); [2018] 1 W.L.R. 1789 [50]. Res judicata is discussed in Ch.26 Finality of Litigation.
- 48 *Vale SA v Steinmetz* [2022] EWHC 343 (Comm) [6].
- 49 *Castanho v Brown and Root (UK)* [1981] AC 557 (HL) 571; *Media CAT Ltd v Adams* [2011] EWPCC 6; [2011] FSR 28 [61]–[67].
- 50 The CPR 38.7 requirement to obtain permission in order to bring fresh proceedings (discussed below at paras 14.31 ff) thus complements the CPR 38.4 power to set aside a notice of discontinuance. By these mechanisms, the court may protect defendants from being harassed with fresh claims after discontinuance. See *Silkstone v Tatnall* [2011] EWCA Civ 801; [2012] 1 W.L.R. 400 [31]. See also *Hague Plant Ltd v Hague* [2014] EWCA Civ 1609; [2015] C.P. Rep. 14 [61]. Where the claimant has mistakenly served the notice of discontinuance, the proper route to set it aside is through an application under CPR 3.10 to correct the error, which will not be subject to the requirements of CPR 38.5(2): *Toplain Ltd v Orange Retail Ltd* [2012] EWHC 4254 (Ch) [9].
- 51 *High Commissioner for Pakistan v National Westminster Bank* [2015] EWHC 55 (Ch) [46].
- 52 *Ernst & Young v Butte Mining Plc* [1996] 2 All ER 623 (Ch) 639.
- 53 *Shetlam Rail Co (Proprietary) Ltd v Mirambo Holdings Ltd* [2008] EWHC 829 (Comm); [2009] 1 All ER 84 [35].
- 54 *Ernst & Young v Butte Mining Plc* [1996] 2 All ER 623 (Ch) 638–639.
- 55 *High Commissioner for Pakistan in the United Kingdom v National Westminster Bank* [2015] EWHC 55 (Ch) [83].
- 56 *Mabb v English* [2017] EWHC 3616 (QB); [2018] 1 Costs L.R. 1 [33], in which the claimant discontinued in order to avoid the prospect of the defendant succeeding in its strike-out application, which would have had the effect of automatically disapplying enforceability of costs orders (QOCS) protection under CPR 44.15 (see para.14.27). Note, however, that discontinuance cannot prevent the court from ordering that QOCS protection be disapplied under CPR 44.16, even where the notice of discontinuance is not set aside: PD 44 para.12.4(c); and see para.14.27.
- 57 *Khan v Governor of The Mount Prison* [2020] EWHC 1367 (Admin); [2020] Costs L.R. 1137 [108].
- 58 *Shetlam Rail Co (Proprietary) Ltd v Mirambo Holdings Ltd* [2008] EWHC 829 (Comm), [2009] 1 All ER 84 [33]–[38].
- 59 *Faulkner v Secretary of State for Energy and Industrial Strategy (QBD, unreported, 6 February 2020).*
- 60 See *Johnson v Gore Wood & Co* [2002] 2 AC 1; [2001] 1 All ER 481, HL; and see the discussion in Ch.26 Finality of Litigation.
- 61 CPR 38.7(2).
- 62 *King v Kings Solutions Group Ltd* [2020] EWHC 2861 (Ch) [113], not following *Ward v Hutt* [2018] EWHC 77 (Ch); [2018] 1 W.L.R. 1789 [53] on this point.

- 63 *Hague Plant Ltd v Hague [2014] EWCA Civ 1609* [61]. The different approach adopted in *Western Power Distribution (South Wales) Plc v South West Water Ltd [2020] EWHC 3747 (TCC)*, of requiring the defendant to show it is manifestly unfair for the claim to proceed, has not been followed in subsequent authorities and is wrong.

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Stay of Proceedings

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 14 - Discontinuance and Stays

Stay of Proceedings

Jurisdiction to stay proceedings

- 14.33 The court has inherent and wide-ranging jurisdiction to stay proceedings, which had been exercised long before the CPR and is recognised by the Senior Courts Act 1981 s.49(3).⁶⁴ In addition, CPR 3.1(2)(g) expressly grants the court power to “stay the whole or part of any proceedings either generally or until a specified date or event”. As set out below, some statutory provisions and CPR rules expressly refer to stays in certain circumstances, but the jurisdiction to stay proceedings is not limited to such circumstances, but may be exercised whenever the court deems it just. A stay may be ordered on the application of a party to the proceedings or any other person, or at the court’s own initiative (Senior Courts Act 1981 s.49(3) and CPR 3.3(1)). Where the court has decided to stay proceedings on its own initiative without a hearing, any party affected by the order may apply to have it set aside (CPR 3.3(5)).

The nature of a stay of proceedings

- 14.34 “A stay”, the CPR Glossary states, “imposes a halt on proceedings, apart from taking any steps allowed by the Rules or the terms of the stay.” A stay may be temporary (until a defined date or event, such as a further order of the court) or permanent (which effectively brings proceedings to an end, even though they have not been formally discontinued). Where a stay has been ordered for a definite period of time, it will come automatically to an end at the expiry of the period, unless the court lifts it earlier.⁶⁵

- 14.35 A stay of proceedings suspends their progress, so that no further step may be taken while the stay is in place. Coulson LJ explained:

“... a stay operates to ‘halt’ or ‘freeze’ the proceedings. In general terms, no steps in the action, by either side, are required or permitted during the period of the stay. When the stay is lifted, or the stay expires, the position as between the parties should be the same as it was at the moment that the stay was imposed. The parties (and the court) pick up where they left off at the time of the imposition of the stay.”⁶⁶

- 14.36 Once proceedings have been stayed any deadline, such as the time for service, is suspended and would start to run again only once the stay has expired or has been lifted.⁶⁷ Accordingly, stayed proceedings continue to subsist and could be revived on the fulfilment of a condition or by permission of the court.⁶⁸ However, a stay of proceedings ordered by the lower court does not preclude an appeal against the order imposing the stay.⁶⁹ Thus a stayed claim is to be distinguished from a claim that has been discontinued or dismissed and which is incapable of being revived.

Stay distinguished from adjournment of a hearing or extension of deadlines

- 14.37 CPR 3.1(2)(a) provides that the court may “extend... the time for compliance with any rule, practice direction or court order”, and CPR 3.1(2)(b) provides that the court may “adjourn or bring forward a hearing”. Although the consequences of an extension of time or adjournment of a hearing may sometimes be similar to the consequences of a stay, there are important differences between the two concepts.⁷⁰ An extension of time only extends the particular procedural deadline, rather than suspending all of the deadlines in proceedings. Similarly, an adjournment of a particular hearing does not suspend other procedural deadlines. Where an extension or adjournment is granted, that presupposes that the proceedings will continue, leading to a conclusion of the proceedings, whether by court decision, discontinuance, settlement or, indeed, by a stay of proceedings. For example, where the parties intend to proceed to trial, but further evidence is required, it may be appropriate to extend the deadline for evidence or to adjourn the trial to a later date. A stay by contrast suspends other procedural deadlines and brings the progress of the litigation to a halt, which may well be permanent or at least indefinite. Where a stay has been imposed, an application would normally have to be made to court to lift the stay and allow the proceedings to continue, and set fresh deadlines for procedural steps going forward.

The wide-ranging uses of the power to stay

- 14.38 The power of bringing proceedings to a halt, while keeping open the possibility of their revival at some later stage, is a useful case management tool that can be applied in a wide variety of circumstances. As set out below, some statutory provisions and CPR rules expressly refer to stays in certain circumstances, but the jurisdiction to stay proceedings is not limited to such circumstances, but may be exercised whenever the court deems it just. A stay sought under a statutory provision will be governed by the objectives that the statute seeks to achieve.⁷¹ The use of a stay as a management tool will be guided by the overriding objective.⁷²
- 14.39 *Stay as a dispute resolution tool:* A stay is commonly ordered for the purposes of allowing the parties time – for example, time to take steps to comply with the pre-action protocol,⁷³ or to consider and negotiate settlement, or to engage in alternative dispute resolution such as mediation or arbitration. In one case, a two-year stay was ordered in an attempt to bring finality to a long-standing dispute by allowing the parties to negotiate a settlement, after which the parties would be debarred from bringing any further claims. The argument that this amounted to a civil restraint order was rejected and the stay was maintained.⁷⁴
- 14.40 *Stay to encourage procedural compliance or prompt progression of the claim:* Where a party is in default of a procedural obligation (for example, missing a deadline to provide disclosure or witness statements), one response the court may adopt is to stay proceedings until the procedural obligation is fulfilled, to encourage its prompt fulfilment. (This response is more likely to be adopted when it is the claimant rather than the defendant which is in procedural default, because the defendant is less likely to object to putting off final judgment and the evil day of payment). However, a stay will not be ordered automatically simply because the claimant has not paid an outstanding costs order; some element of procedural default or abuse would be normally required,⁷⁵ and consideration will be given to the claimant’s ECHR art.6 rights. As an alternative, the court may in such cases require the claimant to make a payment into court under CPR 3.1(3) or to make a payment on account of costs under its inherent power, or exercise its power to order payment on account of costs where detailed assessment has been ordered: CPR 44.2(8).
- 14.41 In a similar vein, CPR 15.11(1) provides that where six months have expired since the end of the period for filing a defence and no defendant has served or filed an admission or filed a defence or counterclaim, and the claimant has not entered or applied

for default judgment, no-one has applied for summary judgment and the defendant has not applied to strike-out the claim, the claim shall be stayed. CPR 15.11(2) states that the court has the discretion to lift the stay, but the application must include an explanation for the delay in proceeding with or responding to the claim.

- 14.42 *Stay while points of law or fact are clarified:* Where the proceedings may be affected by other proceedings, it may be appropriate to stay the proceedings while the other proceedings progress. For example, it may be that the other proceedings will determine a point of law which can be relied on in the main proceedings (especially if the determination is being made on appeal or above the main proceedings in the judicial hierarchy),⁷⁶ or that liability in the main proceedings may factually depend on the outcome in the other proceedings (such as where the main proceedings are to recover an indemnity for the damages in the other proceedings).⁷⁷ However, it is unlikely that the court will stay proceedings in order to allow a party to benefit from a change in legislation;⁷⁸ to the extent Parliament wishes such an exemption to have (effectively) retroactive effect, it must provide for that in the legislation itself.
- 14.43 *Stay as a refusal to exercise jurisdiction, in favour of an alternative forum:* The Arbitration Act 1996 s.9 empowers the court to stay proceedings brought in contravention of an arbitration agreement. Further, the court has inherent jurisdiction to stay proceedings brought in contravention of an exclusive jurisdiction agreement in favour of a foreign court, or where there the foreign court is otherwise the clearly or distinctly more appropriate forum pursuant to the principles of *forum non conveniens*.⁷⁹
- 14.44 *Stay to give effect to compromise:* The parties may wish to compromise their dispute by entering into a *Tomlin* order, which stays proceedings on terms set out in a confidential schedule. The advantage of a *Tomlin* order (rather than simply discontinuing proceedings by agreement) is that it allows proceedings to be revived in certain circumstances – for example, if the conditions of compromise in the confidential schedule are not met, or to enforce the terms of the compromise without needing to bring further proceedings.
- 14.45 *Stay to bring proceedings to an end:* Proceedings may be permanently stayed (such that they do not continue further) due to an abuse of process,⁸⁰ or simply to prevent a hopeless case from being pursued (although the more usual resolution would be strike-out or summary judgment).
- 14.46 *Stay of execution of judgment:* Finally, a stay may be imposed not of the claim itself, but on its consequential effects, such as a stay of execution of judgment – for example, to allow a party time to comply with the court's order. Special rules apply to the stay of money judgments⁸¹ or for stays pending determination of permission to appeal or the appeal itself.⁸²

Footnotes

- 64 This provision applies to County Court proceedings by virtue of the County Courts Act 1984 s.76; and *Gore v Van Der Lann* [1967] 2 QB 31; [1967] 1 All ER 360.
- 65 *Kamoka v Security Service* [2015] EWHC 60 (QB).
- 66 *Grant v Dawn Meats* (UK) [2018] EWCA Civ 2212 [18].
- 67 *Grant v Dawn Meats* (UK) [2018] EWCA Civ 2212 [18]. Note that a stay imposed other than by the agreement of the parties automatically discharges any interim injunction (save for freezing injunctions), unless the court orders otherwise: CPR 25.10(1); and 2025 WB 25.10.1.
- 68 *Minister of Foreign Affairs, Trade and Industry v Vehicles and Supplies Ltd* [1991] 1 W.L.R. 550 at 556; [1991] 4 All ER 65 at 71.
- 69 *Aoun v Bahri* [2002] EWCA Civ 1141 [20]–[23].
- 70 As to adjournment of hearings, see 2025 WB 3.1.3.

- 71 *Shackleton v Swift [1913] 2 KB 304* at 312.
- 72 See *Al-Naimi v Islamic Press Agency Inc [2000] 1 Lloyd's Rep. 522*.
- 73 See eg Practice Direction on Pre-Action Conduct and Protocols, para.15.
- 74 *Phillips v Symes [2006] EWHC 1721 (Ch)*.
- 75 *Society of Lloyd's v Jaffray [1999] 1 All ER (Comm) 354, QB*.
- 76 *Johns v Solent SD Ltd [2008] EWCA Civ 790*, where a ruling from the CJEU was anticipated; see also *Interflora Inc v Marks & Spencer Plc [2009] EWHC 1095 (Ch)* [93]. Several cases were stayed while the Court of Appeal considered the correct approach to the exercise of the power to make a periodical payments order under the *Damages Act 1996* s.2(1) in *Tameside and Glossop Acute Services NHS Trust v Thompstone [2008] EWCA Civ 5; [2008] 1 W.L.R. 2207*.
- 77 *Woods v Duncan [1946] AC 401*.
- 78 *Willow Wren Canal Carrying Co v British Transport Commission [1956] 1 All ER 567; [1956] 1 W.L.R. 213*.
- 79 For a full treatment of the principles, see Dicey, Morris & Collins on the Conflict of Laws (16th ed, 2022), Ch.12.
- 80 *Grovewood Holdings Plc v James Capel and Co Ltd [1995] Ch 80; [1994] 4 All ER 417*; and *Abraham v Thompson [1997] 4 All ER 362, CA*.
- 81 See CPR 83.7.
- 82 See **CPR 52.16** and **Ch.25** Enforcement. Either the lower court or the appeal court may grant such a stay. If the stay is sought from the appeal court the application for it, supported by evidence, should be made or included in the application to the appeal court for permission: see for example PD 52B para.4.3; see also PD 52C para.3(2)(c). The court will not order a stay unless satisfied, by cogent evidence, that there is a real risk of injustice if it is not granted: *Hammond Suddard Solicitors v Agrichem International Holdings Ltd [2001] EWCA Civ 1915; [2001] All ER (D) 258*.

Introduction

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Mainwork

Chapter 15 - Disclosure

Introduction

The aims of the disclosure process

15. 1 One of the more distinctive features of the English system of litigation has been the disclosure process, whereby litigants are able to see each other's documents in advance of the trial.¹ The modern history of the law of civil procedure is in a large measure the history of the evolution of discovery from its Chancery origins.² Although the CPR have introduced a few notable changes to disclosure, the basic objective remains the same as before: to afford litigants access to relevant documentary materials in the possession of their opponents or in the hands of non-parties.
15. 2 Access to relevant documentary material that is in the hands of other parties to the dispute promotes equality of arms and contributes to the ascertainment of truth in a number of ways. Mutual disclosure of information helps reduce information inequality and iron out resource inequality. Individuals suing large enterprises rarely have independent means to find out all the relevant information about the activities of these enterprises. An individual, or a group of individuals, suing a tobacco company for health damage will not normally have the means of proving negligence unless they can have access to the internal documents held by the manufacturer. Similarly, individuals who sue in respect of an air disaster will hardly ever be able to prove design faults without access to the manufacturer's design documentation. Litigant access to all relevant materials in the hands of opponents or others is necessary to ensure that the court is in possession of all pertinent evidence, to enable it to determine the true facts.³
15. 3 Consequently, in England and Wales, the availability of disclosure to litigants is regarded as an essential component of the right to fair trial. As a Master of the Rolls once stated:

“Every defendant is bound to discover all the facts within his knowledge and to produce all documents in his possession which are material to the case of the plaintiff. However disagreeable it may be to make the disclosure, however contrary to his personal interests, however fatal to the claim upon which he may have insisted, he is required and compelled, under the most solemn sanction, to set forth all he knows, believes, or thinks in relation to the matter in question.”⁴

Therefore, destruction of documents before proceedings have commenced may amount to a common law offence of an attempt to pervert the course of justice.⁵ After commencement of proceedings, destruction of disclosable material may amount to contempt of court, as well as to a common law offence.⁶

15. 4 Quite apart from contributing to the fairness of the trial and to ensuring rectitude of outcomes, pre-trial disclosure also has other advantages. It increases the prospects of settlement by enabling litigants to make an early and well-informed assessment of their respective chances of success in the litigation. This is because the more complete the information on which each party makes their assessment, the more likely it is that the parties will come to a similar conclusion, and the more likely it is that they will settle without litigation. Even if the parties do not settle, disclosure should, at least in principle, improve efficiency by helping the parties to narrow the issues in dispute and by reducing the likelihood of parties being taken by surprise. Disclosure

is thus one component of the modern English “cards on the table approach”.⁷ Other notable aspects of this approach are the requirements of the pre-action protocols and of pre-trial exchange of witness statements and expert reports.

The problem of excessive disclosure and attempts at reform

- 15. 5** The advantages of discovery have been plain for a long time. But before Lord Woolf’s reports it had been insufficiently appreciated that there could be too much disclosure as well as too little. Prior to the [CPR](#), disclosure, or discovery as it was then known, could be very laborious and very costly without producing worthwhile results. Parties were expected to disclose to each other all the documents in their possession or control that related to any matter in question between them.⁸ Even a tenuous relationship between documents and issues would be sufficient to justify a disclosure order because the definition of relevance for the purpose of disclosure was very wide. Discovery was demanded not only of documents with a direct bearing on the issues, but also of every document that:

“it is reasonable to suppose, contains information which may—not which must—either directly or indirectly enable the party [seeking discovery] either to advance his own case or to damage the case of his adversary. A document can properly be said to contain information which may enable the party [seeking discovery] either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences.”⁹

- 15. 6** This was known as the [Peruvian Guano](#) test, after the case in which it was stated. Under this test, discovery extended to documents with only a tangential connection to the issues. It stands to reason that the broader the definition of relevance for the purpose of disclosure, the larger the range of documents that would come within its ambit. It is also clear that the further we move away from documents with a direct connection to the issues, the less likely it is that the documents will make a substantial contribution to the resolution of the issues. Where the documentary pool is large, a point will come in the disclosure process beyond which the benefits of any extra disclosure will be outweighed by the disadvantages of high costs and an increased risk of confusion. This is especially the case with the proliferation of electronically stored material.

- 15. 7** In his reports, Lord Woolf singled out discovery as a major contributor to excessive costs and to delay.¹⁰ In some cases, the broad relevance test combined with photocopying technology and the economic incentives of hourly fees payable for legal services combined to stimulate the disclosure of vast quantities of documentation, much of which might have been of only peripheral relevance and on occasion of no help whatsoever to either side. Richer parties were able to use the threat of extensive and expensive discovery to gain a tactical advantage over poorer opponents. Satellite litigation involving disputes over the scope and conduct of discovery were not uncommon and drained resources. Large bodies of documentary material tended to increase costs by creating opportunities to call evidence or to cross-examine witnesses about matters that were not central to the issues in the case. Far from clarifying the facts, an excess of documents may tend to complicate and confuse the issues and undermine the court’s ability to get to the truth. It is therefore not only in the interests of economy that the disclosure process needs to be controlled, but also in the interest of ascertaining the truth.

- 15. 8** The aim of the disclosure arrangements under the [CPR](#) was to avoid the waste and excesses of the previous system without losing the principal advantages that mutual disclosure of documents is meant to produce. The principal innovation was the replacement of the [Peruvian Guano](#) test with a much more restrictive general test for disclosure, namely that a document would be disclosable if it would adversely affect the disclosing party’s case or that of another party, or would support another party’s case. This test is known as the “standard disclosure” test.¹¹

- 15. 9**

Despite this, the disclosure regime introduced by the **CPR** did little to reduce the excessive costs, or the scale and complexity of disclosure. This was partly due to the increase in the volume of electronically stored information, and partly to the wasteful way in which the disclosure rules were utilised by the parties and indeed the court. In his review of civil litigation costs, Jackson LJ noted that the disclosure rules gave rise to problems and “generated excessive costs”; and that the strong steer in the **CPR** towards utilising standard disclosure had often led to solicitors disclosing “everything that might be relevant”.¹² Accordingly, he recommended that for most multi-track cases, standard disclosure should not operate as a default or “one-size-fits-all” test, with the court and parties instead being required to choose the form of disclosure that most suited the needs of the case.¹³ This became known as the “menu option”.¹⁴

- 15.10** In spite of Jackson LJ’s reforms, there continued to be a pervasive sense that disclosure was productive of waste and high costs, particularly in commercial litigation, where the proliferation of electronically stored information was felt most acutely. In response to complaints by users of (what are now) the Business and Property Courts,¹⁵ a working group was established in 2016 to review the disclosure regime and make recommendations as to how the problems might be resolved. The working group identified several key defects in the **CPR** regime, including the fact that judges and lawyers alike had failed to utilise the wide range of disclosure orders available beyond standard disclosure,¹⁶ and that disclosure was not sufficiently focused on the issues in the case. The result was a unanimous view that there was a need for a “wholesale cultural change” in the disclosure regime.¹⁷ A pilot scheme was introduced on 1 January 2019 (PD 51U), which, with amendments, was made permanent from 1 October 2022 by PD 57AD. PD 57AD applies only to the Business and Property Courts.¹⁸ Given the intention to effect wholesale cultural change to the disclosure rules, PD 57AD must be intended to be read as a self-contained code, which means that authorities dealing with previous rules will be of limited relevance (although authorities on the pilot scheme will, in most cases, continue to be relevant to PD 57AD, as PD 57AD is in substantially the same form as PD 51U).¹⁹
- 15.11** The **CPR** arrangements were designed to achieve a satisfactory accommodation between the need to secure access to all the relevant evidence in the interest of the determination of truth, on the one hand, and, on the other hand, the need to avoid wasteful, costly and oppressive processes. The working group concluded that the **CPR** arrangements prioritised the former over the latter. PD 57AD therefore aims to redress the balance in favour of costs-saving by providing a more flexible, issues-based disclosure regime which is intended to be “driven by reasonableness and proportionality”.²⁰ However, the tensions between these different needs cannot be completely resolved by rules. A continuing effort is required by both judges and legal representatives, in order to ensure that a correct balance is kept and that PD 57AD achieves the hoped-for improvements. To this end, the court has considerable flexibility in defining the scope of disclosure and managing the process. There is an emphasis on the court adopting a robust and proactive role in making orders for disclosure as part of its duty to actively manage cases. Depending on the circumstances of an individual dispute, it may direct narrower or broader disclosure, as a whole or in relation to specific issues. The court’s discretion in relation to disclosure must be exercised in line with the overriding objective and in accordance with the principles of procedural fairness.

Two disclosure regimes

- 15.12** For cases in the Business and Property Courts, with some exceptions,²¹ the disclosure process is broadly as follows. A party is required to provide initial disclosure with its statement of case, which consists of a list of the key documents on which it relies with their electronic copies, and the key documents required to enable the defendant to understand the case it has to meet.²² The parties must then, before the first case management conference, work together to agree a list of issues for disclosure,²³ establish whether any further disclosure (known as “extended disclosure”) is required and, if so, identify which of the five models of extended disclosure should apply to each issue.²⁴ The framework within which these points are decided is the joint completion of a disclosure review document (DRD),²⁵ which replaces the electronic documents questionnaire. PD 57AD also sets out expressly the duties on the parties and their legal representatives under the disclosure rules. This includes an important duty to disclose “known adverse documents”, regardless of any disclosure order made.²⁶ PD 57AD adopts rigorous measures

to secure compliance, with express sanctions for failure to comply with the rules.²⁷ Lastly, a party does not have to wait until the trial to secure the delivery of documents by non-parties. A litigant may demand from any person who would be obliged to produce documents at the trial to do so in advance.²⁸

- 15.13 Outside the Business and Property Courts disclosure is governed by [CPR 31](#), which applies to fast track, intermediate track and multi-track proceedings where PD 57AD does not apply. Parties to proceedings in the multi-track (excluding those involving personal injury claims) are required to exchange reports regarding what documents each party has and information regarding where and how those documents are stored.²⁹ The parties are also required to attempt to agree to a proposal for disclosure that is consistent with the overriding objective.³⁰ These preparatory steps are taken before the first case management conference. [CPR 27.2](#) provides for strictly limited disclosure in the small claims track.
- 15.14 There are, therefore, two disclosure regimes running in parallel, with the majority of commercial disputes being governed by PD 57AD. The remainder of this chapter will therefore deal with these regimes separately. However, a number of elements of the disclosure process remain common to both regimes. For example, mutual disclosure is likely to be given earlier than in the past, because compliance with pre-action protocols calls for meaningful pre-action exchanges between prospective parties, including the principal documents relevant to the dispute. Thus, prospective parties who have fulfilled the requirements of the relevant pre-action protocol (or who, in the absence of a protocol, have adequately co-operated) will already have disclosed to each other the key documents before the commencement of proceedings. As we shall see, the rules of PD 57AD go further, in that a party is obliged to disclose the key documents on which it relies, and those which are necessary to enable the other parties to understand the case they have to meet, when it serves any statement of case.
- 15.15 Moreover, PD 57AD leaves unchanged certain aspects of the pre-existing disclosure system, which therefore remain applicable under both regimes. In [CPR 31](#), for example, there is substantial scope to obtain pre-action compulsory disclosure from prospective parties and even from non-parties; these rules are preserved in PD 57AD.³¹ Where there is a real prospect of litigation, potential parties may seek an order compelling potential adversaries to disclose directly relevant documents so as to enable them to assess the advisability of litigation. In certain circumstances the victim of a wrong may obtain from a non-party disclosure of the identity of the wrongdoer or other information that is crucial to their ability to bring proceedings in order to vindicate their rights.³² It also goes without saying that the various privileges which, in broad terms, render documents immune from disclosure, apply in the same way under both regimes, although each regime provides its own procedure for claiming privilege.³³
- 15.16 More generally, under both [CPR 31](#) and PD 57AD, the court must assist litigants to compel the attendance of witnesses and the production of relevant documents, in order to afford them meaningful access to justice.³⁴ Just as a court cannot, generally speaking, legitimately refuse a litigant's request to summon a witness who is in possession of relevant information about an issue in the case, so it cannot legitimately refuse an order requiring a party to disclose all directly relevant documents in their possession. Exceptions may on occasion be made and litigants may sometimes be denied access to certain evidence, but such exceptions need strong justification and must not be wider than is absolutely necessary in order to give effect to countervailing considerations of justice.
- 15.17 This chapter focuses on the rules on disclosure, but it must be borne in mind that the [CPR](#) contains a number of additional rules that seek to facilitate the exchange of information between the parties and thereby level the playing field. For example, [CPR 18.1](#) allows the court to order a party to (a) clarify any matter which is in dispute in the proceedings or (b) give additional information in relation to any such matter, whether or not the matter is contained or referred to in a statement of case.³⁵ Furthermore [CPR 35.9](#), which appears in the rules dealing with experts and assessors, furnishes the court with a power to direct a party to provide information where a party has access to information which is not reasonably available to another party.³⁶ The court may direct the party who has access to the information to (a) prepare and file a document recording the information; and (b) serve a copy of that document on the other party. In addition, while the [CPR](#) provide the principal means of obtaining documentary disclosure, there are others too. For example, in supervising the administration of trusts the court may order the disclosure of trust documents

to beneficiaries (or even to the objects of mere powers).³⁷ The present chapter is, however, limited to disclosure under the CPR and under the court's inherent jurisdiction.

Footnotes

- ¹ *W. Brazil*, “The Adversary Character of Civil Discovery” (1978) 31 *Vand. L.R.* 1295; and *M. Frankel*, “The Search for Truth Continued: More Disclosure, Less Privilege” (1982) 54 *U. Col. L.R.* 51. For a detailed account of the English system, see C. Hollander, Documentary Evidence, 15th edn (London: Sweet & Maxwell, 2024).
- ² See *F. James*, “Discovery” (1929) 38 *Yale L.J.* 846; G. Ragland, Discovery Before Trial (Chicago: Callaghan & Co, 1932) pp.13–17; P. Tillers (ed.), Wigmore on Evidence (Boston: Little, Brown 1983) s.1845; and *R.W. Millar*, “The Mechanism of Fact Discovery: A Study of Comparative Civil Procedure IV” (1937) 32 *Ill. L.R.* 424.
- ³ For the importance that English procedure attaches to access to evidence, see the discussion in Ch.3 Fair Trial paras 3.203 ff.
- ⁴ *Flight v Robinson* [1844] 8 *Beav* 22, 33–34. See also *Myers v Elman* [1940] *AC* 282, *HL* and *Mozambique v Credit Suisse International* [2023] *EWHC* 514 (*Comm*) [9]–[10].
- ⁵ *British American Tobacco Australia Services Ltd v Cowell* [2002] *V.S.C.A.* 197 (*Court of Appeal of Victoria*).
- ⁶ *Arrow Nominees Inc v Blackledge* [2000] *C.P. Rep.* 59, *CA*; and *Douglas v Hello! Ltd (No.3)* [2003] *EWHC* 55; [2003] 1 *All ER* 1087 [86]. For perversion of the course of justice see M. Lucraft (ed.), Archbold Criminal Pleading, Evidence and Practice 2026, (London: Sweet & Maxwell, 2025), Ch.29 and in particular *R v Rafique* [1993] *QB* 843.
- ⁷ *Davies v Eli Lilly* [1987] 1 *W.L.R.* 428, 432, *CA*.
- ⁸ RSC Ord.24 and CCR Ord.14. The term “documents” was broadly interpreted to include anything on which information is recorded. It therefore included, and still does, video recordings and computer data. See *Grant v South Western & Country Pty Ltd* [1975] *Ch* 185; [1974] 2 *All ER* 465, *ChD*; *Alliance & Leicester Building Society v Ghahremani* [1992] *N.L.J.R.* 313; and *Derby & Co Ltd v Weldon (No.9)* [1991] 2 *All ER* 901; [1991] 1 *W.L.R.* 652, *ChD*.
- ⁹ *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 *QBD* 55 at 63, *CA*.
- ¹⁰ Lord Woolf, Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales (London: HMSO 1996) (hereinafter “Woolf, Interim Report”) pp.164–180; and Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales (London: HMSO 1996) (hereinafter “Woolf, Final Report”) pp.124–130.
- ¹¹ Discussed below at paras 15.79 ff. *Peruvian Guano* disclosure can still be ordered in exceptional cases: CPR 31.5(7) (d) and PD 57AD, para.15.43.
- ¹² Jackson LJ, Review of Civil Litigation Costs: Final Report (London: HMSO 2010) (hereinafter “Jackson, Final Report”) pp.364 and 368.
- ¹³ Jackson, Final Report, Ch.37 paras 3.13–3.14.
- ¹⁴ See further below, paras 15.74–15.75 ff.
- ¹⁵ That is, the Commercial Court, the Technology and Construction Court, the Circuit Commercial Court and the Admiralty Court. These specialist jurisdictions became collectively known as the Business and Property Courts in 2017. See further the Advisory Note on the Business and Property Courts published by Sir Geoffrey Vos C on 13 October 2017, available at: <https://www.judiciary.uk/wp-content/uploads/2020/08/bpc-advisory-note-13-oct2017-1.pdf> [Accessed 30 December 2024].
- ¹⁶ See the views of the working group in its press announcement of 31 July 2018, available at: <https://www.judiciary.uk/wp-content/uploads/2018/07/press-annoucement-disclosure-pilot-approved-by-cprc.pdf> [Accessed 30 December 2024], at para.4; see also Jackson LJ, Review of Civil Litigation Costs: Supplemental Report (London: HMSO 2017) pp.35–36.
- ¹⁷ Disclosure Working Group, “Proposed Disclosure Pilot Briefing Note”, available at: <https://www.judiciary.uk/wp-content/uploads/2017/11/dwg-guidance-note-2-nov-2017.pdf> [Accessed 30 December 2024] para.5.
- ¹⁸ PD 57AD applies to the Business and Property Courts in London, Manchester, Birmingham, Leeds, Bristol, Cardiff, Newcastle and Liverpool: PD 57AD para.1.2. Some claims, such as competition claims, fall outside the scope of PD 57AD (PD 57AD para.1.4) unless otherwise ordered, for which see *Ryder Ltd v MAN SE* [2020] *CAT* 3.
- ¹⁹ See for example *Conversant Wireless Licensing SARL v Huawei Technologies Co Ltd* [2020] *EWHC* 256 (*Pat*), in which it was held that the court's power to vary or revoke an order under CPR 3.1(7) gave way to the specific provisions of PD 51U, given it contained separate rules on varying an order for extended disclosure (at para.18).
- ²⁰ *UTB LLC v Sheffield United Ltd* [2019] *EWHC* 914 (*Ch*).

- 21 PD 57AD para.1.4.
- 22 PD 57AD para.5.1. Initial disclosure is discussed below at paras [15.31](#) ff.
- 23 These are intended to be very different to the issues for trial: see below, paras [15.40](#) ff.
- 24 Co-operation is at the heart of the pilot scheme; using PD 57AD as a stick with which to beat one's opponents will lead to adverse costs orders: *McParland & Partners Ltd v Whitehead [2020] EWHC 298 (Ch)* [54].
- 25 The DRD is discussed below at paras [15.59](#) ff.
- 26 PD 57AD para.3.1(2). See below, paras [15.22–15.25](#).
- 27 PD 57AD para.20.1.
- 28 The position is thus the same for both regimes: PD 57AD para.31.17 and [CPR 31.17](#).
- 29 [CPR 31.5\(3\)](#).
- 30 [CPR 31.5\(5\)](#).
- 31 See [CPR 31.16](#) and PD 57AD para.31.16, and [CPR 31.17](#) and PD 57AD para.31.17, respectively. Pre-action disclosure is discussed below at paras [15.159](#) ff, and non-party disclosure is discussed at paras [15.183](#) ff.
- 32 That is, a *Norwich Pharmacal* order, following *Norwich Pharmacal Co v Customs and Excise Comrs [1974] AC 133; [1973] 2 All ER 943, HL*. These orders are discussed below at paras [15.203](#) ff.
- 33 These are discussed in the following chapters: [Ch.16 Legal Professional Privilege](#); [Ch.17 Without Prejudice](#); [Ch.18 Self-Incrimination](#); and [Ch.19 Public Interest Immunity and Closed Material Procedure](#). See paras [15.51](#) ff below for discussion of the procedure for claiming privilege under the disclosure pilot; see paras [15.52–15.54](#) and [15.101](#) ff below in relation to withholding inspection under the [CPR 31](#) system.
- 34 See [Ch.3 Fair Trial](#) paras [3.203](#) ff.
- 35 See [Ch.7 Statements of Case](#) paras [7.34](#) ff for discussion.
- 36 See [Ch.21 Experts](#) paras [21.64–21.65](#).
- 37 *Schmidt v Rosewood Trust Ltd [2003] UKPC 26; [2003] 2 AC 709; Alhamrani v Russa Management Ltd [2004–05] 7 I.T.E.L.R. 308 (Court of Appeal of Jersey); Broere v Mourant & Co (Trustees) Ltd [2004] WTLR 1417 (Court of Appeal of Jersey)*; and *Breakspear v Ackland [2008] EWHC 220 (Ch); [2009] Ch 32*. For discussion see C. Hollander, *Documentary Evidence*, 15th edn (London: Sweet & Maxwell, 2024) Ch.5.

Disclosure under PD 57AD

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Mainwork

Chapter 15 - Disclosure

Disclosure under PD 57AD

Application of PD 57AD

15. 18 PD 57AD came into effect on 1 October 2022 and replaced the pilot scheme in PD 51U, which was in substantially the same form. It applies to both existing and new proceedings³⁸ in the Business and Property Courts in London, Birmingham, Bristol, Cardiff, Leeds, Liverpool, Manchester and Newcastle; it does not apply in the county court (PD 57AD para.1.2). Several exceptions to this general rule are set out in PD 57AD para.1.4. The pilot scheme does not apply to:

- (1)competition claims as defined in Practice Direction 31C³⁹;
- (2)Public Procurement claims;
- (3)claims within the Intellectual Property and Enterprise Court;
- (4)claims within the Admiralty Court;
- (5)claims within the Shorter and Flexible Trials Schemes;
- (6)claims within a fixed costs regime or a capped costs regime; or
- (7)claims proceeding under Part 8.⁴⁰

It has been confirmed that PD 57AD applies in the Insolvency and Companies List, albeit that PD 57AD does not apply directly to Part 8 claims and petitions and Insolvency Act applications are not “statements of case” for the purpose of PD 57AD.⁴¹

Duties of parties and their representatives

15. 19 One of the objectives of PD 57AD is to expressly set out the duties owed by both the litigants and their legal representatives in relation to disclosure. Many of these duties are not new creations, but were previously found only in a large body of case law and, for multi-track cases, in PD 31B.⁴² PD 57AD aims to simplify matters by setting out each of the relevant duties in a single, comprehensive list. These duties reinforce the obligation under CPR 1.3 for the parties and their legal representatives to help the court further the overriding objective by acting with “a high degree of realism and co-operation.”⁴³ The duties set out below are continuing duties: they continue to apply either until the conclusion of proceedings (including any appeal) or until “it is clear there will be no proceedings”.⁴⁴

The parties’ duties

15. 20

The duties owed by the parties themselves are set out at PD 57AD para.3.1. The scope of this provision is broad. Duties are not only owed by those who know that they are a party to proceedings which have *already* been commenced; they are also owed by those who know that they *may* become a party to proceedings which have been commenced or may be commenced. The significance of this lies primarily in the first duty owed by the parties, namely the duty to take reasonable steps to preserve documents in a party's control that may be relevant to any issue in the proceedings.⁴⁵ Under PD 57AD, even those who are not yet party to proceedings, but who know that they may be at a future date, are subject to the duty of preservation. The aim is to prevent the destruction of potentially relevant documents before proceedings have commenced and the disclosure process comes within the remit of the court's case management powers.

- 15. 21** The practice direction provides guidance as to the preservation of documents, where the duty to preserve is engaged. Any document deletion or destruction processes must be suspended for the duration of proceedings, and employees and former employees must be notified of this.⁴⁶ Reasonable steps must also be taken to prevent third parties from deleting or destroying relevant documents.⁴⁷ The parties must confirm in writing when serving their statements of case that such steps have been taken.⁴⁸ The obligation to notify former employees and third parties of the need to preserve documents is potentially wide-ranging and may raise difficult issues of confidentiality where a party does not want to disclose to third parties that it is contemplating litigation, or else is the subject of a contemplated claim.

- 15. 22** The parties owe five further duties. The next is the duty to disclose "known adverse documents", regardless of any disclosure order made, once proceedings have commenced.⁴⁹ Known adverse documents are documents (other than privileged documents) that a party is actually aware of which (a) are or were previously within its control and (b) are adverse.⁵⁰ This duty is highly important in practice, and was subject to much debate before the introduction of the pilot scheme. The duty is wider than the equivalent obligation under CPR 31.⁵¹ In particular, under CPR 31.6, only an order for standard disclosure requires a party to disclose adverse documents. PD 57AD goes further, in that the obligation to disclose known adverse documents is triggered not by a court order, but merely by the initiation of proceedings.

- 15. 23** The approach in PD 57AD to known adverse documents is commendable for its robust promulgation of the "cards on the table" approach, but it lacks clarity in some respects. Most significantly, it is not entirely clear what a party must do to discharge its obligation to supply known adverse documents. PD 57AD para.2.8 specifies that known adverse documents are those of which a party is aware "without undertaking any further search for documents than it has already undertaken or caused to be undertaken". Yet it would be unprincipled if a corporate party could deny that its knowledge was the same as that of its officers and employees. Similarly, it could give rise to inconsistency and perverse incentives if the scope of the duty was simply tied to whatever search a party has chosen to undertake previously. For these reasons, PD 57AD para.2.9 adds:

"For this purpose a company or organisation is 'aware' if any person with accountability or responsibility within the company or organisation for the events or the circumstances which are the subject of the case, or for the conduct of the proceedings, is aware. For this purpose it is also necessary to take reasonable steps to check the position with any person who has had such accountability or responsibility but who has since left the company or organisation."

- 15. 24** The question thus arises what is meant by "reasonable steps to check". In *Castle Water Ltd v Thames Water Utilities Ltd*, Stuart-Smith J emphasised that "there is a clear distinction between carrying out checks and carrying out searches".⁵² However, the duty to disclose known adverse documents would be "emasculated" if the party (where it is a company or other organisation) only had to ask questions of "the leaders or controlling mind of [the] organisation", and if the questions so asked were merely "generalised questions which fail to identify the issues to which the adverse documents may relate".⁵³ Similarly, although PD 57AD para.3.4 states that "where there is a known adverse document but it has not been located, the duty to disclose the document is met by that fact being disclosed", this cannot be taken to mean that there is no obligation at all to look for adverse documents of which the party is aware.⁵⁴

15.25 Another important question is by when known adverse documents must be disclosed. The rules provide deadlines for the disclosure of known adverse documents (subject of course to the parties' continuing duty to disclose known adverse documents thereafter),⁵⁵ but do not provide guidance on when and if such documents should be disclosed at any point before the relevant deadline. It therefore appears that the rules permit a party to delay disclosing known adverse documents until the last possible moment, despite the emphasis on the "cards on the table" approach, although it has been held that the court has jurisdiction to make an order for earlier disclosure if it is in the interests of justice and in furtherance of the overriding objective to do so.⁵⁶ Given that in almost all cases the deadline for disclosing known adverse documents will fall after the first case management conference, it would have been more consistent with the cultural change sought to impose on the parties an obligation to disclose known adverse documents alongside their key documents at the initial disclosure stage.

15.26 The remaining four duties are that the parties must: comply with any disclosure order; undertake any search in a responsible and conscientious manner to fulfil the stated purpose of the search; act honestly in relation to the process of giving disclosure and reviewing the other side's documents; and use reasonable efforts to avoid providing documents which have no relevance to the issues for disclosure. The aim of these duties is to ensure the preservation and production of the most relevant documents, while simultaneously avoiding the pitfalls of excessive disclosure. In this way, the duties attendant upon the parties should help to fulfil the central aim: the production of the most relevant documents in a sensible and timeous manner so as to contribute to the ascertainment of truth at proportionate cost.

15.27 In *Mozambique v Credit Suisse International*, when dealing with a submission that extended disclosure searches needed to be made by a party's solicitors, Knowles J said:

"There is no doubt at all that that is the expectation; but I do consider there will be exceptions. Where a litigant self represents is one necessary example. But even where there are solicitors I cannot rule out that, in a particular case, a party will be able to show that its disclosure duties were met in one or other particular, by a means other than by the solicitors undertaking the searching. Similarly, the solicitors in a particular case may be able to show that their own disclosure duties are met even when they did not do the searching itself. This might involve searches undertaken by others and might involve the solicitors making a different contribution, by way of oversight, supervision, training, checking, challenge and the like. This might especially be the case where the situation involves acute considerations of proportionality and reasonableness. But the more the departure or adjustment from the expectation that searches will be undertaken by a party's solicitors, the more the Court needs to be told about it, and in some detail so that alternatives can be considered".⁵⁷

The representatives' duties

15.28 The practice direction also expressly sets out the duties of the parties' legal representatives. The duties apply to legal representatives "who have the conduct of litigation" on behalf of those who are, or who know they may be, a party to proceedings. As with the duties of the parties, the duties imposed on the legal representatives are owed to the court and continue until the conclusion of proceedings or until it is clear that there will be no proceedings.

15.29 Legal representatives are subject to the following duties. First and foremost, they must take reasonable steps to preserve documents within their control that may be relevant to any issue in the proceedings, and they must advise and assist the party to comply with its own disclosure duties.⁵⁸ This includes a duty to notify their client of the need to preserve documents; and to obtain written confirmation that their client has taken the requisite steps to preserve documents.⁵⁹ They must also act honestly in relation to the process of giving disclosure and reviewing documents, as well as undertaking a review to ensure that any claim of privilege is properly made and that the reason for the claim to privilege is sufficiently explained.⁶⁰ Finally,

legal representatives are under an express duty to liaise and co-operate with the other side's legal representatives so as to promote the reliable, efficient and cost-effective conduct of disclosure, including through the use of technology.⁶¹

Certificate of compliance

- 15.30** The parties and their legal representatives are reminded of their duties under PD 57AD para.3 by the requirement to file a "certificate of compliance" not less than two days before the case management conference.⁶² Legal advisers must confirm, among other things, that they have advised their client as to the duties attendant upon them under PD 57AD para.3. Unrepresented parties must themselves confirm that they understand the duties which apply to them.

Initial disclosure

- 15.31** It is no longer correct to say that a party does not have an automatic right to disclosure and that the extent of disclosure depends entirely on court orders. Two elements of the PD 57AD depart from this position. First, a party is required to list and serve the "key documents" on which it has relied in support of its statement of case and which are necessary to enable the other parties to understand the claim or defence they have to meet at the same time as serving its statement of case.⁶³ This is known as "initial disclosure". Second, each party is under a duty to disclose, regardless of any order for disclosure made, documents which are known to be in that party's control and adverse to its case.⁶⁴ Subject to those exceptions, however, litigants and non-parties come under a duty of disclosure only if, and to the extent that, the court has made an order directing disclosure.
- 15.32** Initial disclosure is the first of two stages of the disclosure process under PD 57AD. The aim is for the parties to have sight of the key documents at an early stage in proceedings, thus helping the parties understand the strength of their respective cases and facilitating settlement. It also helps the parties to formulate their defence and reply (if applicable), and to identify the issues for disclosure and work out which further documents, if any, they will need under an order for extended disclosure. In this sense, the requirements of initial disclosure can be said to dovetail with the objectives of the pre-action protocols. Given the focus on key documents, it is intended that some cases will be able to proceed without further orders for disclosure after statements of case have been served and all key documents have been exchanged.
- 15.33** Initial disclosure requires a party to disclose, with its statement of case, a list of and copies of the key documents on which it has relied in support of its claims or defences in its statement of case and the key documents that are necessary to enable the other parties to understand the case they have to meet (PD 57AD para.5.1). Documents which are "necessary to enable the other party to understand the case they have to meet" do not include documents which are merely necessary to enable them to evaluate the disclosing party's case and to assess their prospects of success.⁶⁵ Importantly, initial disclosure does not require a party to disclose any adverse documents with its statement of case. This limitation was subject to much debate by the Disclosure Working Group, but it was thought that a party will be prevented from sitting on adverse documents by virtue of its duty to disclose those documents regardless of any order for disclosure made (PD 57AD para.3.1(2)). However, as discussed above, the fact that adverse documents do not need to be disclosed until after the first case management conference undermines the practice direction's attempt to introduce a strengthened "cards on the table" approach to disclosure, and potentially provides the parties with an opportunity for tactical game-playing in choosing when and how to disclose known adverse documents.
- 15.34** Initial disclosure is subject to a number of exceptions. Importantly, it will not apply where it would involve the provision of more than about 200 documents or 1,000 pages (whichever is the larger),⁶⁶ or such higher but reasonable figure as the parties may agree (PD 57AD para.5.3(3)).⁶⁷ It is therefore principally aimed at improving the disclosure process in moderate-sized claims; in large, complex litigation, it may be unsuitable, because even the key documents are voluminous.⁶⁸ However, even where

a party has complied with its obligation to give initial disclosure (or the obligation does not apply because of the volume of documents/pages), the court may order (further) disclosure under PD 57AD, para.5.11, where doing so is necessary to enable the other party to understand the claim or defence they have to meet or to formulate a defence or a reply.⁶⁹ Further, initial disclosure will not apply where the parties have agreed to dispense with it (PD 57AD para.5.3(1)). However, the parties must record their respective reasons for agreeing to dispense with initial disclosure so that the court may review these and make an order setting aside such an agreement if it considers that initial disclosure is likely to provide significant benefits and the costs of providing it are unlikely to be disproportionate to such benefits (PD 57AD para.5.8). Initial disclosure is also not required where the court has ordered that it is not required (PD 57AD para.5.3(2)). Where the statement of case is to be served out of the jurisdiction on a defendant, initial disclosure does not need to be provided unless and until the defendant files an acknowledgement of service that does not contest the jurisdiction, or files a further acknowledgement of service under CPR 11(7)(b) (PD 57AD para.5.6).

- 15.35 In order to limit the costs incurred in complying with initial disclosure, no party is required to carry out a search for any documents beyond any search it has already undertaken for the purpose of proceedings (PD 57AD para.5.4(1)). Complaints about an opponent's compliance with the initial disclosure process will usually be dealt with at the first case management conference, although an application may be brought in exceptional circumstances to raise the complaint at an earlier stage (PD 57AD para.5.12). It is also worth noting that a "significant failure" to comply with the obligation to provide initial disclosure may damage a party's ability to request extended disclosure at a later date and may result in an adverse costs order (PD 57AD para.5.13). The practice direction's emphasis on reasonableness, proportionality and party co-operation suggests that the court will not hesitate to make an adverse costs order in appropriate cases.⁷⁰

Extended disclosure

Extended disclosure only by court order

- 15.36 One problem with the CPR 31 disclosure regime identified by the working group was the reluctance of parties and the court to make use of the full range of disclosure orders now found in CPR 31.5(7). As mentioned above, prior to 2013 standard disclosure had been the default disclosure order. The position changed from 1 April 2013, when CPR 31 was amended to introduce a "menu option" for non-personal injury multi-track cases, following recommendations made by Jackson LJ.⁷¹ In essence, the position under CPR 31.5(7) is that there is no default option or starting point; instead, there are a range of possible orders of which the court may make use. However, as the working group pointed out, standard disclosure remained in practice the default order for most cases.⁷² PD 57AD seeks to rectify this by removing the concept of standard disclosure in its current form altogether. Under the practice direction, there is no assumption that there will be any form of disclosure beyond initial disclosure, still less a default or standard disclosure order (PD 57AD para.8.2). Instead, if the parties require disclosure of documents beyond those exchanged through initial disclosure, they must make a request for extended disclosure.⁷³ The court will then consider whether to order one of five models of extended disclosure, either for the entire claim or in relation to each discrete issue for disclosure (PD 57AD para.8.3).

Procedure for requesting extended disclosure—general principles

- 15.37 The parties must indicate in writing whether they are likely to request extended disclosure within 28 days of the final statement of case (PD 57AD para.7.1). Requests for extended disclosure will usually be determined at the first case management conference, although they may be dealt with at another hearing or without a hearing (PD 57AD para.6.8).

- 15.38

If a request for extended disclosure is to be made at the case management conference, the claimant must prepare a draft list of issues for disclosure and serve this on all other parties within 42 days of the final statement of case (PD 57AD para.7.2). The proposed issues for disclosure should be set out in the DRD s.1A.⁷⁴ As already mentioned, the parties will then be expected to agree the list of issues for disclosure and to identify which require further disclosure. Any request for extended disclosure must specify which of the five models of extended disclosure is sought in relation to each issue for disclosure (PD 57AD para.6.5). This must be accompanied by an estimate of the likely costs of giving the disclosure proposed, and the likely volume of documents involved, to assist the court in considering the reasonableness and proportionality of the proposals.⁷⁵

- 15.39** A number of threshold requirements must be met before the court will make an order for extended disclosure. First, the court must be satisfied that such an order is appropriate in order to resolve fairly one or more of the issues for disclosure (PD 57AD para.6.3). Second, such an order must be reasonable and proportionate, having regard to the overriding objective and seven listed factors, including the nature and complexity of the issues, the number of documents involved and the likelihood of documents existing that will have probative value in supporting or undermining a party's claim or defence (but the last of these factors does not impose a threshold test of relevance)⁷⁶ (PD 57AD para.6.4). The party requesting extended disclosure bears the burden of persuading the court of each of these matters, and in particular of proving that what is sought is appropriate, reasonable and proportionate (PD 57AD para.6.5).

Issues for disclosure

- 15.40** One significant difference between the disclosure regime under PD 57AD and [CPR 31](#) is the move towards issue-based disclosure. As we have seen, it is a requirement that the parties at least attempt to agree a draft list of issues for disclosure before the first case management conference.⁷⁷ Orders for extended disclosure are then framed around these issues, such that there may be different models of extended disclosure for different issues, in order to ensure that any extended disclosure ordered goes no wider than strictly necessary.⁷⁸ At the same time, given that the aim of issue-based disclosure is to reduce costs by limiting the extent of any searches required and reducing the volume of documents to be disclosed, the issues for disclosure may be grouped,⁷⁹ and the court is unlikely to order that different models be used for the same set of documents.⁸⁰

- 15.41** It should be stressed that the list of issues for disclosure is different from a list of issues for trial. The aim is for the parties to identify the key issues in the dispute which the parties consider will need to be determined by the court by reference to contemporaneous documents in order for there to be a fair resolution of the proceedings.⁸¹ Consequently, as Master Kaye has explained, the list will "not extend to every issue which is disputed in the statements of case by denial or non-admission."⁸² Similarly, in *McParland & Partners Ltd v Whitehead* Sir Geoffrey Vos C gave guidance on how to identify the issues for disclosure:

"Issues for Disclosure are issues to which undisclosed documentation in the hands of one or more of the parties is likely to be relevant and important for the fair resolution of the claim. In many cases, the Issues for Disclosure need not be numerous. They will almost never be legal issues, and they will not include factual issues that are already capable of being fairly resolved from the documents available on initial disclosure."⁸³

Unduly granular or complex lists of issues for disclosure should be avoided, Sir Geoffrey Vos C stressed. In that case, the parties had identified 16 issues for disclosure (and could not agree on the appropriate model for seven of those issues), where Sir Geoffrey Vos C considered that in reality there were only three.

- 15.42** By narrowing the issues for disclosure before the case management conference, the parties can, in theory, avoid unnecessary costs by identifying the key areas of disagreement and having those resolved at an early stage. PD 57AD aims to contribute to a reduction in satellite litigation over disclosure. However, in practice, the obligation to seek to agree issues for disclosure, and which model of extended disclosure to request for each issue, is likely to front-load the costs of litigation and provide scope

for satellite litigation early in the dispute. Seeking to agree issues for disclosure is likely to prove a fertile ground for dispute as each party seeks to define the issues in a way that is more favourable to their own case. Legal representatives charging out at hourly rates could also spend many hours fine-tuning their proposals in relation to the issues for disclosure, thus reducing the scope for overall costs savings. Indeed, the Chancellor of the High Court has noted that “some parties to litigation in all areas of the Business and Property Courts have sought to use [PD 57AD] as a stick with which to beat their opponents”.⁸⁴

Models of extended disclosure

15. 43

As we have seen, the court has a wide discretion as to which order for extended disclosure it makes. The aim is to provide a flexible disclosure regime whereby the court can tailor the type of disclosure ordered to the importance of individual issues, as well as the overall effect on the costs of the litigation. PD 57AD identifies five “models” which the court may use to order disclosure, although it appears that it may order a bespoke model in exceptional circumstances⁸⁵:

- (1) Model A is an order for no, or no further, disclosure (disclosure is confined to known adverse documents).
- (2) Model B, “Limited Disclosure”, essentially mirrors initial disclosure. It requires a party to disclose the key documents on which they have relied, or which are necessary to enable the other parties to understand the case they have to meet, to the extent that these documents have not been exchanged pursuant to initial disclosure. Again, no search is required.
- (3) Model C, “Request-led Search-based Disclosure”, requires a party to conduct a search for particular documents or narrow classes of documents which were requested by the other side in Section 1B of the DRD.⁸⁶ A party may also propose Model C be used in respect of documents which it may propose searching for and disclosing. If the parties cannot agree to Model C, the court will order a search for the documents requested if it is reasonable and proportionate to do so.
- (4) Model D, “Narrow Search-based Disclosure”, broadly mirrors standard disclosure under CPR 31. The party subject to the order must disclose documents which are likely to support or undermine its own case or that of another party. A reasonable and proportionate search must be undertaken. The order must specify whether searches for and disclosure of narrative documents (that is, documents relevant only to the background or context) is required.
- (5) Finally, Model E, “Wide Search-based Disclosure”, requires disclosure of the same class of documents as Model D, plus documents which may lead to a train of enquiry which may then result in the identification of other documents for disclosure. This model therefore reflects the *Peruvian Guano* test,⁸⁷ and as a result is only to be ordered in an exceptional case.⁸⁸ Factors relevant to the decision to order Model E disclosure include the value of the claim, whether the claim is in fraud or alleges a conspiracy, whether documentary evidence is unavailable (e.g. because a mobile device containing documents has been lost) and whether there is evidence that discussions have been taken “offline”.⁸⁹ Unlike in Model D, the default position is that narrative documents are to be disclosed, unless the court orders otherwise.

15. 44

It is important to note that PD 57AD expressly sets out the principles which the court must bear in mind when choosing disclosure models. The court should not take the parties’ agreed model (if indeed an agreement has been reached) at face value. Indeed, it is explicitly stated that there is no presumption in any case that a party is entitled to extended disclosure, less still the more extensive Model D and Model E disclosure orders (PD 57AD para.8.2).⁹⁰ Instead, it should be proactive in assessing which model of disclosure is appropriate for each discrete issue for disclosure or (if appropriate) for the case as a whole. The fundamental yardstick is what is appropriate in order to fairly dispose of the case (PD 57AD para.6.3). Reasonableness and proportionality are the key criteria,⁹¹ having regard to the overriding objective and the factors set out in PD 57AD para.6.4. In *Ventra Investments Ltd v Bank of Scotland*,⁹² it was emphasised that no matter what the size or complexity of the litigation, each request for extended disclosure must be identified with precision and clearly justified. At the same time, PD 57AD is not intended to deprive parties of access to the “central documents” in the case; accordingly, a pragmatic approach to the scope of disclosure is called for, especially where there is significant asymmetry in access to information.

15. 45 The court has a wide jurisdiction as to the manner in which searches and disclosure are to be carried out. The court may limit the temporal, geographical or subject-matter scope of any searches (PD 57AD para.9.6). It may also require disclosure and any associated searches to be carried out in a specified manner, and there is a renewed emphasis on the use of technology under the pilot scheme. For example, the court may order the use of particular software or analytical tools; or that data sampling be used; or that a staged approach should be adopted in relation to disclosure of electronic documents (PD 57AD para.9.7). Finally, any order for extended disclosure will not affect the continuing duty to disclose known adverse documents (PD 57AD para.9.1–9.3).

Compliance with and variation of extended disclosure orders

15. 46 PD 57AD also sets out the manner in which an order for extended disclosure is to be complied with. There is a three-stage process under PD 57AD para.12.1. First, a disclosure certificate must be signed and served by the party giving disclosure. The disclosure certificate is contained in PD 57AD Appendix 4 and requires the signing party to confirm that they have: taken reasonable steps to preserve documents in their control; disclosed all known adverse documents; undertaken any search in a responsible and conscientious manner; acted honestly in relation to the disclosure process; used reasonable efforts to avoid providing irrelevant documents; and produced electronic documents in their native format and hard-copy documents by scan or photocopy. Any documents which are being withheld must be described, and the grounds for doing so must be set out. The confirmation that all known adverse documents have been disclosed must be supported by a statement of truth.⁹³ Second, the disclosing party must serve an extended disclosure list of documents.⁹⁴ Finally, the documents must be produced; or, if production is not possible, an explanation must be given as to the circumstances and date on which the document ceased to exist.⁹⁵ Until each of these steps is satisfied, an order for extended disclosure will not have been complied with.⁹⁶ If a party does not disclose a document in the time contemplated by the order for extended disclosure, they will be unable to rely on it without the permission of the court or the agreement of the other side.⁹⁷

15. 47 Express provision is made in PD 57AD for the consequences of inadequate compliance.⁹⁸ Where a party has or may have failed to adequately comply with an order for extended disclosure, the court may make such further order as appropriate. A general suspicion that there may have been a shortcoming in relation to disclosure is insufficient; the applicant must show that it is likely that further documents exist.⁹⁹ The test is not the balance of probabilities; “likely” for the purposes of para.17 and in para 6.4(3) means that there “may well” be further documents.¹⁰⁰ The disclosure statement by PD 57AD para.12.1(1) is generally treated as conclusive at the interim stage of proceedings, but the court may go behind its statement of truth where there are sufficient grounds, such as an admission that the party has erroneously represented the documents, or has misconceived their character, or other evidence before the court shows the statement of truth is incorrect or incomplete.¹⁰¹ The applicant must also satisfy the court that making an order is reasonable and proportionate (as defined in para.6.4); thus para.17 contemplates a two-stage process.¹⁰² Five examples of potential orders are given in PD 57AD para.17.1; the court may order a party to:

- (1)serve a further, or revised, disclosure certificate;
- (2)undertake further steps, including further or more extended searches, to ensure compliance with an order for extended disclosure¹⁰³;
- (3)provide a further or improved extended disclosure list of documents;
- (4)produce documents; or
- (5)make a witness statement explaining any matter relating to disclosure.

15. 48 Neither litigants nor the court can plan the course of litigation with a high degree of precision. It is therefore important that the court retains flexibility in its overall management of the disclosure process. Therefore, while PD 57AD para.17 deals with

failures to comply with an order for extended disclosure, PD 57AD para.18 sets out how the parties can vary an order for extended disclosure or obtain a further order for disclosure of specific documents. The court can make an order at any stage varying an order for extended disclosure (PD 57AD para.18.1); it has been held that court has the power to vary a disclosure order that did not provide for extended disclosure.¹⁰⁴ The party seeking the order must demonstrate that the variation is necessary for the just disposal of the proceedings and is reasonable and proportionate; and must provide a witness statement explaining the circumstances in which the original order was made and why that order should be varied (PD 57AD paras 18.2–18.3). It is important that the witness statement explains why the court decided to make the original order, so that it can then consider whether the purpose of the original order has been met or needs to be supplanted. This is a threshold condition for making an order and failure to comply will lead to the application being refused.¹⁰⁵

15. 49

One question which arises under PD 57AD is whether there is a distinction of substance between PD 57AD paras 17 and 18, and in what circumstances an application should be brought under one or the other paragraph. Both broadly deal with the court's power to vary orders for extended disclosure. In *Ventra Investments Ltd v Bank of Scotland*,¹⁰⁶ there was a dispute between the parties as to whether an application for further disclosure should be dealt with under para.17 or 18. The judge held that any difference between the approaches required under these two provisions was on the facts at most a difference in emphasis: the test under PD 57AD para.17 is that the order sought “is reasonable and proportionate”, and the test under PD 57AD para.18 is that variation of the original order is “necessary for the just disposal of proceedings and is reasonable and proportionate”.¹⁰⁷ Further in *Agents' Mutual Ltd v Gascoigne Halman Ltd*,¹⁰⁸ a similar dispute arose as to whether the application for specific disclosure was properly brought under para.17 or 18. Marcus Smith J held that:

“The difference between these two provisions is easy to see:

(1)[PD 57AD para.17] deals with the case where an extended disclosure order has not, or may not have been, adequately complied with. Because of the question of non-compliance, the test that must be met for the granting of an order under [PD 57AD para.17] is that the order be ‘appropriate’, which requires the applicant to satisfy the court that making an order is ‘reasonable and proportionate’.

(2)By contrast, [PD 57AD para.18] deals with the case where—even though there has been compliance with an order for extended disclosure—the order previously made is sought to be varied. In such a case, the applicant must show not merely that making the order is ‘reasonable and proportionate’, but also that varying the original order ‘is necessary for the just disposal of the proceedings’. Unsurprisingly, it is harder to obtain an order under [PD 57AD para.18] than under [PD 57AD para.17].”

It therefore appears that there is a conceptual difference between PD 57AD paras 17 and 18, though it is unlikely that the court would find that an order for further extended disclosure is reasonable and proportionate, but not necessary for the just disposal of the proceedings.¹⁰⁹ Finally, it is worth noting that PD 57AD para.18 is not subject to the same limitations as apply to the court's general power to vary or revoke an order under CPR 3.1(7).¹¹⁰

15. 50

Before deciding whether to incur the costs of bringing an application under either PD 57AD para.17 or 18, a party who wishes to discuss the scope of an order for extended disclosure should consider whether it would be more appropriate to request a more informal disclosure guidance hearing under PD 57AD para.11, which is likely to prove more cost-effective.¹¹¹ The parties may seek informal guidance from the court on the scope of, or the implementation of an order for, extended disclosure, in the form of a disclosure guidance hearing.¹¹² The preconditions for making an application¹¹³ for such a hearing are that there is a significant difference of approach between the parties, the parties require guidance from the court in order to address the point of difference between them without a formal determination and the point is suitable for guidance to be provided either on the papers or, other than in substantial claims, within the maximum hearing length and maximum time for pre-reading provided in PD 57AD para.11.2.¹¹⁴ The court will record its guidance in a short note, although it retains its power to make an order where appropriate.¹¹⁵ Several aspects of this regime are intended to avoid unnecessary cost. First, disclosure guidance hearings are limited to 30 minutes of reading time and 60 minutes for the hearing itself.¹¹⁶ Second, the court will

usually expect the legal representative with conduct of the disclosure exercise to represent the respective parties at the hearing; there is no need to go to the expense of using leading counsel. Finally, the default order for costs is that costs be in the case.¹¹⁷

Production of documents and the right to withhold production

- 15.51** The practice direction provides two types of exception to disclosure: one implicit and one explicit. The first, implicit, exception concerns documents which are no longer in a party's control.¹¹⁸ "Control" is defined in PD 57AD Appendix 1 as including "documents: (a) which are or were in a party's physical possession; (b) in respect of which a party has or has had a right to possession; or (c) in respect of which a party has or has had a right to inspect or take copies." Known adverse documents must be disclosed only to the extent that a party is actually aware that they are or were previously within its control¹¹⁹; and if a document is not in a party's possession, they can comply with an order for extended disclosure by describing the document and explaining the circumstances in which the document left its possession.¹²⁰ As the definition of "control" in PD 57AD is the same as the definition in CPR 31.8(2)¹²¹, the issue of "control" is considered more fully at paras.15.67–15.71 below.
- 15.52** The second, explicit, exception consists of documents which a party has a right or duty to withhold from production.¹²² This generally occurs where a document or class of documents is protected by privilege. Interestingly, PD 57AD does not replicate CPR 31.3(2), which allows a party to withhold inspection of documents where it would be disproportionate to the issues in the case to permit inspection. Presumably this provision was considered redundant in light of the limited, issue-based approach to extended disclosure under the practice direction. It is therefore doubtful whether this manner of avoiding production survives under PD 57AD para.14. A party concerned that production of documents would involve disproportionate use of resources is probably best placed to raise those issues in a disclosure guidance hearing, or in an application to vary the order for extended disclosure.
- 15.53** As noted above, PD 57AD does not affect the substantive rules concerning legal professional privilege.¹²³ However, it does provide for the procedure pursuant to which claims to privilege are to be made. A person is entitled to exercise a right or duty to withhold production of documents without any application to the court, provided that the document to be withheld is described, and that the grounds on which such a right or duty is being exercised is explained in the disclosure certificate.¹²⁴ It is for the party wishing to challenge the withholding of documents to apply to the court by way of application notice and supporting evidence.¹²⁵
- 15.54** Provision is also made in the practice direction for matters of confidentiality and redaction. The court is given broad powers to limit disclosure of confidential material to a limited class of persons, or else upon such terms or subject to such conditions as it thinks fit.¹²⁶ Further, a party may redact confidential data from parts of a document, provided that such data is also irrelevant to any issue in the proceedings.¹²⁷ A party may also redact parts of a document on the basis that the redacted data is privileged.¹²⁸ Any redaction must be explained and accompanied with a confirmation that a legal representative with control of the disclosure process has reviewed the redaction.¹²⁹ The court will ordinarily be satisfied by a statement from the responsible solicitor that the redaction in question has been properly made, but heavy redaction of a very large number of documents justifies the court adopting greater vigilance to ensure that the right to redact is not being abused or too liberally interpreted.¹³⁰ Challenges to redactions are made by way of application notice and witness statement.¹³¹ Presumably, the court will exercise these powers in much the same way as it currently does in respect of disclosure under CPR 31.¹³²
- 15.55** As set out in more detail below,¹³³ there are occasions on which a party accidentally produces a document which is protected by privilege, and was therefore not intended to be viewed by the other side. The practice direction, like CPR 31, prohibits a party which receives an inadvertently disclosed privileged document from using that document without the court's permission.¹³⁴

If a party is told or suspects that a document has been inadvertently disclosed, they are obliged to refrain from reading the document, and must promptly inform the other side of the disclosure.¹³⁵

Copies of documents referred to in evidence

- 15.56** The practice direction contains provisions which deal with documents mentioned in another party's evidence. Copies of documents which have not already been provided by way of disclosure may be requested if they are mentioned in a statement of case, a witness statement, a witness summary, an affidavit or an expert's report.¹³⁶ Such documents, when requested, should be provided unless the request is unreasonable or a right to withhold production is claimed.¹³⁷ An order requiring production must also be reasonable and proportionate.¹³⁸
- 15.57** The equivalent provision under CPR 31 is CPR 31.14, which provides no definition of the phrase "mentioned in". PD 57AD, on the other hand, states that a document is mentioned "where it is referred to, cited in whole or in part or there is a direct allusion to it".¹³⁹ This broadly reflects the test under CPR 31.14, whereby a document is "mentioned" if there is a "direct allusion" to it, which is "not intended to be a difficult test", although the reference must be direct or specific.¹⁴⁰ Authorities on CPR 31.14 have been applied to applications under PD 57AD, para.21.¹⁴¹
- 15.58** A further difference between PD57AD and CPR 31.14 lies in the treatment of expert reports. Under PD 57AD, a document mentioned in an expert report is treated as having been disclosed, and a party is able to request a copy of such a document without more. CPR 31 provides a more stringent test, whereby a party must apply for an order for inspection of a document mentioned in an expert's report, rather than being entitled to production of the document as of right. Documents which relate to the expert's instructions (as opposed to their report) are dealt with by a separate rule. CPR 35.10(4) states that the court will not order disclosure of any specific document in relation to an expert's instructions unless it is satisfied that there are reasonable grounds to consider the statement of instructions to be inaccurate or incomplete.¹⁴²

Disclosure review document

- 15.59** The vehicle through which much of the disclosure process takes place under PD 57AD is the DRD. Completion of the DRD is intended to fulfil several objectives. First, using a single document which is completed by each party should structure and guide discussions over the scope of disclosure. This is intended to encourage co-operation between the parties, which is the cornerstone of PD 57AD. Second, it ensures that the court has a single, chronological record of the parties' positions on disclosure. Having any areas of difficulty or dispute recorded will, in theory, enable the court to resolve those issues more efficiently. On the other hand, as we have seen above, the joint completion of the DRD provides an opportunity for litigants to engage in costly and time-consuming arguments about the issues for disclosure and the appropriate models of extended disclosure.¹⁴³ DRDs have the potential of contributing to the front-loading of costs, although the intention is that they will lead to an overall reduction in costs.
- 15.60** The DRD will only need to be completed where at least one party is seeking an order for extended disclosure under Models C, D or E.¹⁴⁴ In practice, this will occur where initial disclosure is inadequate, or where initial disclosure was not given. The DRD itself is split into four distinct parts. Section 1A requires the parties to fill in the issues for disclosure; identify whether the issues are agreed; and propose a model of extended disclosure for each issue. Section 1B, which only requires completion if one party seeks an order for Model C extended disclosure, contains space for a party to make a request for documents or a narrow category of documents which are likely to be directly relevant. The purpose of these two sections is to provide the court with a concise summary of the parties' positions in relation to extended disclosure. Section 2 requires a party to describe

the document landscape where a request is made for search-based extended disclosure (i.e. Models C, D or E). The purpose of Section 2 is to provide the court with information about the data held by each party and set out how the parties propose to search that data. Finally, the explanatory notes to the DRD contain guidance for the carrying out of the disclosure exercise. In particular, the explanatory notes encourage the parties to seek to agree the methodology for any disclosure process, including methods for collecting, excluding and producing disclosable documents. The parties should keep a record of this methodology, in order to explain it to the court if necessary.

- 15.61 PD 57AD confirms that the court retains all its case management powers in relation to disclosure, and may make full use of the sanctions available to it.¹⁴⁵ If a party fails to comply with its obligations under the practice direction, the court may (for example) make an adverse costs order, or make any further disclosure conditional on any such matter as the court specifies.¹⁴⁶ Failure to co-operate in the process of completing the DRD is singled out in particular as an example of failure to comply with obligations under the practice direction,¹⁴⁷ and in response the court may adjourn the case management conference with adverse costs against the defaulting party, or refuse its application for extended disclosure altogether.¹⁴⁸

Footnotes

38 *UTB LLC v Sheffield United Ltd [2019] EWHC 914 (Ch)*. However, it shall not disturb an order for disclosure made prior to 1 January 2019 or before proceedings were transferred to a Business and Property Court unless that order is varied or set aside.

39 But see *Ryder Ltd v MAN SE [2020] CAT 3*, in which it was held that the principles underpinning PD 57AD may nevertheless be taken into account in competition proceedings.

40 But see PD 57AD, para.1.12: “A party seeking an order for disclosure in a Part 8 claim shall serve and file a List of Issues for Disclosure in relation to which disclosure is sought and the Models that are to be adopted for each issue. The court may adapt the provisions of this Practice Direction in such manner as may be appropriate when making an order for disclosure in a Part 8 claim.” This paragraph did not appear in the pilot scheme (PD 51U).

41 See “Practice Note on Disclosure in the Insolvency and Companies List (Chd)” issued by Briggs J on 6 October 2022, available at <https://www.judiciary.uk/guidance-and-resources/practice-note-on-disclosure-in-the-insolvency-and-companies-list-chd/> [Accessed 31 December 2024].

42 See e.g. *Hedrich v Standard Bank London Ltd [2008] EWCA Civ 905* [14].

43 *McGann v Bisping [2017] EWHC 2951 (Comm)* [23]. The general duty under CPR 1.3 is discussed in Ch.1 The Overriding Objective, at paras 1.92 ff.

44 PD 57AD para.3.3.

45 PD 57AD para.4.

46 PD 57AD para.4.2(1)–(2) and 4.3.

47 PD 57AD para.4.2(3).

48 PD 57AD para.4.5.

49 If the location of such a document is not known, the duty is met by stating to the other side that the document cannot be found: PD 57AD para.3.4.

50 PD 57AD para.2.8. A document is “adverse” if it or any information it contains contradicts or materially damages the disclosing party’s contention or version of events on an issue in dispute, or supports the contention or version of events of an opposing party on an issue in dispute, whether or not that issue is one of the agreed issues for disclosure: PD 57AD para.2.7.

51 See below, paras 15.79 ff.

52 *Castle Water Ltd v Thames Water Utilities Ltd [2020] EWHC 1374 (TCC)* [11].

53 *Castle Water Ltd v Thames Water Utilities Ltd [2020] EWHC 1374 (TCC)* [10], applied in *Qatar v Banque Havilland SA [2021] EWHC 2172 (Comm)* [238]–[240].

54 *Castle Water Ltd v Thames Water Utilities Ltd [2020] EWHC 1374 (TCC)* [11].

55 Where an order for Model B, C, D or E extended disclosure is made, known adverse documents must be disclosed at the time ordered for the extended disclosure. In any other case, the parties must within 60 days of the first case management conference provide a disclosure certificate confirming that all known adverse documents have been disclosed: PD 57AD

paras 3.1(2) and 9.1–9.2. As to the continuing duty to disclose known adverse documents thereafter, Stuart-Smith J confirmed in *Castle Water Ltd v Thames Water Utilities Ltd [2020] EWHC 1374 (TCC)* [13], that the approach to be taken is essentially similar to the traditional approach to the continuing obligation of a party to disclose relevant documents of which they become aware. In other words, provided the party has taken “reasonable steps to check” at the outset, there is no need to repeat or revisit those checks, unless circumstances change (for example, a party’s case changes materially).

56 *Anan Kasei Co Ltd v Neo Chemicals and Oxides (Europe) Ltd [2020] EWHC 3701 (Pat)* [14].

57 *Mozambique v Credit Suisse International [2023] EWHC 514 (Comm)* [35].

58 PD 57AD para.3.2(1)–(2).

59 PD 57AD para.4.4.

60 PD 57AD para.3.2(4)–(5).

61 PD 57AD para.3.2(3).

62 PD 57AD para.10.8; the certificate is in the form found at PD 57AD Appendix 3.

63 PD 57AD para.5.1. *CargoLogicAir Ltd v WWTAI AirOpCo I Bermuda Ltd [2024] EWHC 508 (Comm)* is an example of a decision holding that a contract is a “key” document because it was relied upon by the counter-claimant and without it, the counter-defendant would only be able to plead a non-admission in response to the relevant paragraph of the statement of case: see [44].

64 PD 57AD para.3.1(2).

65 *Breitenbach v Canaccord Genuity Financial Planning Ltd [2020] EWHC 1355 (Ch)*.

66 These calculations do not include documents which have already been provided to the other party or are known to be in the other party’s possession: PD 57AD paras.5.3(3) and 5.4(2)(b). Given that many key documents are often exchanged during pre-action correspondence, and that key documents such as contracts are often already in the possession of both parties, there may be fewer cases than initially supposed in which the 1,000 page or 200 document limit is reached.

67 The first draft of the pilot scheme set this limit at 500 pages. The sensible extension to 1,000 pages was no doubt prompted by the realities of modern commercial litigation, in which individual documents such as contracts can extend to many hundreds of pages.

68 Disclosure Working Group, “Proposed Disclosure Pilot Briefing Note”, available at: <https://www.judiciary.uk/wp-content/uploads/2017/11/dwg-guidance-note-2-nov-2017.pdf> [Accessed 14 March 2020] para.11(vi).

69 See *MW High Tech Projects UK Ltd v Greenhalgh [2022] EWHC 2000 (TCC)*, where further disclosure under para.5.11 was ordered in circumstances where: (i) the claimant’s initial disclosure was essentially of only the transaction documents (not those documents showing the claimant’s decision-making process or why projects went wrong) and (ii) the defendants, as former directors, did not have possession of the material documents: [88]–[93].

70 See *McParland & Partners Ltd v Whitehead [2020] EWHC 298 (Ch)* [54].

71 Jackson, Interim Report p.398; and Final Report pp.276 and 370.

72 See above, para.15.10. It did not help that PD 31A para.1.1 provided that the “normal order for disclosure” will be an order for standard disclosure. Paragraph 1.1 was deleted with effect from 1 October 2025.

73 PD 57AD para.6.1. Note that requests for extended disclosure are not made by way of an application notice.

74 The DRD is discussed further below, at paras 15.59 ff.

75 PD 57AD para.22.1.

76 *AmTrust Specialty Ltd v Endurance Worldwide Insurance Ltd [2025] EWCA Civ 755; [2025] Bus. L.R. 1526* [25]: “... other factors together with the overriding objective may mean that disclosure should be ordered of documents which the judge may think it is unlikely will ultimately make a difference to the determination of the issue at trial but where taking a view would involve prejudging that issue”.

77 PD 57AD para.7.10.

78 PD 57AD para.8.3.

79 PD 57AD para.6.6.

80 PD 57AD para.8.3.

81 PD 57AD para.7.6.

82 *Kings Security Systems Ltd v King [2019] EWHC 3620 (Ch)* [19].

83 *McParland & Partners Ltd v Whitehead [2020] EWHC 298 (Ch)* [46]–[47].

84 *McParland & Partners Ltd v Whitehead [2020] EWHC 298 (Ch)* [54].

85 Disclosure Working Group, “Proposed Disclosure Pilot Briefing Note”, available at: <https://www.judiciary.uk/wp-content/uploads/2017/11/dwg-guidance-note-2-nov-2017.pdf> [Accessed 7 November 2025] para.12(vii). PD 57AD

- para.8.1 records that “Extended Disclosure *may* take the form of one or more of the Disclosure Models set out below” (emphasis added); there is no obligation to use one of the five models, although exceptions will invariably be rare.
- [86] “[M]odel C requests should be limited in number, focused in scope, and concise”: *Eli Lilly & Co v Teva Pharmaceutical Industries Ltd [2023] EWHC 68 (Ch)* [102].
- [87] *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co (1882) 11 QBD 55, CA*. See above, paras 15.5–15.6.
- [88] *Kelly v Baker [2021] EWHC 964 (Comm)* [16].
- [89] *Qatar v Banque Havilland SA [2021] EWHC 2172 (Comm)* [229(2)] and [231] and *Ras Al Khaimah IA v Azima [2022] EWHC 1295 (Ch)* [70].
- [90] In *Bouygues (UK) Ltd v Sharpfibre Ltd [2020] EWHC 1309 (TCC)*, the judge refused a request for disclosure of narrative documents, holding that such documents would only be ordered under Models D or E where: (i) there is “a real (as opposed to a fanciful) prospect that in connection with a particular issue a document exists which is relevant only to the background or context of material facts or events, and not directly to the [issue for disclosure], but which would none the less be sufficiently important to the parties’ cases that it merits searches, analysis and the other costs of disclosure”; and (ii) there is “no real likelihood that such a document will emerge as a result of the disclosure exercise in respect of any other [issue for disclosure]” (at [40]). The judge considered that in practice, such disclosure would probably only be appropriate in fraud claims.
- [91] See *Bin Obaidi v Al-Hezaimi [2019] EWHC 1953 (Ch)* [43].
- [92] *Ventra Investments Ltd v Bank of Scotland [2019] EWHC 2058 (Comm)*.
- [93] PD 57AD para.12.1(1). Further, a person who signs or causes to be signed a false disclosure certificate is liable to have proceedings for contempt of court brought against them: PD 57AD para.23.1. See below, para.15.90 for the position in relation to disclosure statements under CPR 31. Committal for contempt of court generally is discussed in Ch.24 Enforcement.
- [94] PD 57AD para.12.1(2).
- [95] PD 57AD paras 12.1(3) and 12.3.
- [96] PD 57AD para.12.2.
- [97] PD 57AD para.12.5.
- [98] Note that a failure to adequately comply with the obligation to provide initial disclosure is dealt with in PD 57AD para.5.12–5.13.
- [99] *Sheeran v Chokri [2021] EWHC 3553 (Ch)* [5]–[6]. It has also been said that an applicant “should generally seek to identify with precision (and by reference to the DRD) the alleged failures of compliance with the existing order for Extended Disclosure. Furthermore, where a party seeks further or more extended searches so as to ensure compliance, that party should generally indicate what the proposed searches should entail, for example by reference to search terms, date ranges or custodians”: *Irwell Riverside Developments Ltd v Arcadis Consulting (UK) Ltd [2023] EWHC 2864 (TCC)* [14].
- [100] *The Public Institution for Social Security v Al-Wazzan [2024] EWHC 480 (Comm)* [17].
- [101] *The Public Institution for Social Security v Al-Wazzan [2024] EWHC 480 (Comm)* [20]–[21], applying *West London Pipeline & Storage Ltd v Total UK Ltd [2008] EWHC 1729 (Comm)*.
- [102] PD 57AD, para.17.2 and *Sheeran v Chokri [2021] EWHC 3553 (Ch)* [4].
- [103] In *JD Classics Ltd (In Administration) v Hood [2021] EWHC 3193 (Comm)*, the court made a post-disclosure “imaging order”, requiring the defendant, a litigant in person, to provide all his personal electronic devices and computers to an independent court appointed expert and supervising lawyer to assist him in discharging his disclosure obligations.
- [104] *Sandoz AG v Bayer Intellectual Property GmbH [2023] EWHC 3276 (Pat)* [29].
- [105] *Brake v Lowes [2020] EWHC 538 (Ch); Invest Bank PSC v El-Husseini [2024] EWHC 996 (Comm)* [29].
- [106] *Ventra Investments Ltd v Bank of Scotland [2019] EWHC 2058 (Comm)*, approved with respect to PD 57AD in *Invest Bank PSC v El-Husseini [2024] EWHC 996 (Comm)* [22].
- [107] *Ventra Investments Ltd v Bank of Scotland [2019] EWHC 2058 (Comm)* [35].
- [108] *Agents’ Mutual Ltd v Gascoigne Halman Ltd [2019] EWHC 3104 (Ch)*.
- [109] *Vannin Capital PCC v RBOS Shareholders Action Group Ltd [2019] EWHC 1617 (Ch)*. In *Brearley v Higgs & Sons [2020] EWHC 376 (Ch)*, it was suggested that the test under what is now PD 57AD para.18.2 is similar to the test for specific disclosure under *Portman Building Society v Royal Insurance Plc [1998] PNLR 672*.
- [110] That is to say, the principles discussed in Ch.12 Case Management Pt I paras 12.68 ff do not apply. See *Invest Bank PSC v El-Husseini [2024] EWHC 996 (Comm)* [24]–[25].
- [111] *Vannin Capital PCC v RBOS Shareholders Action Group Ltd [2019] EWHC 1617 (Ch)* [4].

- 112 PD 57AD para.11.1.
- 113 Disclosure guidance hearings are requested by way of application notice. Written evidence is not normally required, although the application notice should contain a statement confirming compliance with PD 57AD para.11.1 (PD 57AD para.11.2).
- 114 PD 57AD para.11.1(1)–11.1(3). In most circumstances a disclosure guidance hearing is likely to be requested after the first case management conference, because it is at that stage that an order for extended disclosure will have been made.
- 115 PD 57AD para.11.4.
- 116 PD 57AD para.11.2.
- 117 PD 57AD para.11.5.
- 118 See *Various Airfinance Leasing Companies v Saudi Arabian Airlines Corp [2021] EWHC 2904 (Comm)* [18]–[20].
- 119 PD 57AD para.2.8. The definition of “disclose” is also predicated on a document being or previously having been in a party’s control: see PD 57AD Appendix 1.
- 120 PD 57AD para.12.3. It is not clear why the term “possession” is used here instead of “control”, nor whether there is intended to be any difference between these two terms in this context.
- 121 *Berkeley Square Holdings Ltd v Lancer Property Assets Management Ltd [2021] EWHC 849 (Ch)* [27].
- 122 PD 57AD para.14.
- 123 See above, para.15.15.
- 124 PD 57AD para.14.1.
- 125 PD 57AD para.14.2.
- 126 PD 57AD para.15.
- 127 PD 57AD para.16.1(1).
- 128 PD 57AD para.16.1(2).
- 129 *Eurasian Natural Resources Corp Ltd v Dechert LLP [2020] EWHC 1002 (Comm)* [91]–[92].
- 130 *WH Holding Ltd v E20 Stadium LLP [2018] EWHC 2578 (Ch)* [37].
- 131 PD 57AD para.16.2.
- 132 See the discussion below at paras 15.130 ff.
- 133 See below, paras 15.124 ff.
- 134 PD 57AD para.19.1. The same principles apply under para.19 PD 57AD and CPR 31.20: see *New Lottery Co Ltd v Gambling Commission [2025] EWHC 1058 (TCC)* [42] and the authorities cited therein.
- 135 PD 57AD para.19.2.
- 136 PD 57AD para.21.1.
- 137 PD 57AD para.21.2.
- 138 PD 57AD para.21.4.
- 139 PD 57AD para.21.3.
- 140 *Expandable Ltd v Rubin [2008] EWCA Civ 59* [23]–[24] per Rix LJ. For discussion of the position under CPR 31.14, see below paras 15.97 ff.
- 141 See e.g. *Sandoz AG v Bayer Intellectual Property GmbH [2023] EWHC 3276 (Pat)* [17].
- 142 This aspect is discussed in more detail in Ch.21 Experts paras 21.69–21.79.
- 143 See above, para.15.42.
- 144 PD 57AD, para.10.1 and Appendix 2, explanatory notes at para.4.
- 145 PD 57AD para.20.1.
- 146 PD 57AD para.20.2. See *Reeds Carpeting Contractors Ltd v Cairns [2023] EWHC 2713 (Comm)* as an example of a case where the defendants’ case narrowly survived being struck out after very substantial failings in their disclosure.
- 147 PD 57AD para.20.2(3). See *McParland & Partners Ltd v Whitehead [2020] EWHC 298 (Ch)* on the duty to co-operate.
- 148 PD 57AD para.10.3.

Disclosure and Inspection under CPR 31

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 15 - Disclosure

Disclosure and Inspection under CPR 31

- 15.62 The disclosure regime outside of PD 57AD is governed by [CPR 31](#). It consists of two stages. The first, “disclosure”, requires simply stating that a “document” (or in certain circumstances, a “copy” of a document) exists or has existed ([CPR 31.2](#)). The second, “inspection”, involves allowing the party to whom a document has been disclosed an opportunity to examine it ([CPR 31.3\(1\)](#)). It is necessary to be aware that the term “disclosure” is used in the [CPR](#) and elsewhere in two different senses. The term is sometimes confined to the process of notifying other parties of the existence of a document—i.e. disclosure in the narrow sense. But “disclosure” is also sometimes used to refer to the whole process of revealing the existence of documents and allowing access to them (as is the case with PD 57AD). ¹⁴⁹

Disclosure

Meaning of “document” and “copy”

- 15.63 Disclosure in the modern sense relates to documents (and in some circumstances, copies of documents), not to other forms of information such as information held in the mind of a witness, or real evidence. The terms “document” and “copy” are defined by the rules. Under [CPR 31.4](#), a “document” is anything in which information of any description is recorded. Thus, this definition is wide enough to capture information recorded in audio or computer devices. ¹⁵⁰ Documents held in an electronic storage device (such as a hard disk drive) will normally be treated as individual documents; the storage device itself is unlikely to be treated as a single document. ¹⁵¹
- 15.64 The term “copy” is defined in [CPR 31.4](#) as meaning “in relation to a document … anything onto which information recorded in the document has been copied, by whatever means and whether directly or indirectly”. This definition embraces several types of copy. A copy may be a photographic representation of an original document, such as a photocopy of a handwritten letter. A copy can be a copy of a copy. A computer printout of a document created on a word processor may be said to be a copy of the electronic data stored in the computer, even though the paper copy represents the product of this data rather than its mirror image.
- 15.65 Where there is more than one specimen of the same document, the party is generally required to disclose only one of them ([CPR 31.9\(1\)](#)). A party should normally list originals in the list of documents (discussed below). Where copies have been listed, the party receiving disclosure would be able to seek inspection of the original, if they have a legitimate reason for doing so. There may well be circumstances in which it would be appropriate to order inspection of the computer which generated disclosed documents in order to establish their authenticity.
- 15.66 While the general rule is that only one specimen of the same document need be disclosed, the party must also disclose any copy that contain a modification, obliteration or other marking or feature on which a party intends to rely; or which adversely affects their own case or another party’s case or supports another party’s case ([CPR 31.9\(2\)](#)). This provision deals with

situations where a particular version or a particular photocopy contains some special markings, such as a stamp of the date of receipt, or where a letter received by fax bears the fax machine markings, or where a document has been circulated for comment and it contains remarks.

Disclosure is limited to documents which are or have been in a party's control

15. 67 The next precondition for disclosure is the “control” criterion. A party’s duty to disclose documents is limited to documents which are or have been in their control ([CPR 31.8\(1\)](#)). Where a party lacks control, the court does not have the power to make an order requiring the party to exercise best endeavours to obtain, or to request a third party to provide, documents.¹⁵² A party is regarded as having (or as having had) a document in his control if:

- (a)the document is or was in their physical possession;
- (b)they have or have had a right to possession of it; or
- (c)they have or have had a right to inspect or take copies of it.¹⁵³

Accordingly, the rules call for the disclosure not just of documents that are in the possession of the party giving disclosure, but also documents that were in their possession in the past, documents that they have had a right to possess, regardless of whether they exercised this right, or documents which they have had a right to inspect or copy. However, the definition of “control” is extensive and is not confined to those common forms of control in paragraphs (a), (b) and (c).¹⁵⁴

15. 68 As paragraphs (b) and (c) make clear, a party is obliged to give disclosure even of documents that are in the possession of another, provided they have a right to inspect and take copies. Citizens have a right to inspect a variety of documents in the hands of public and private authorities.¹⁵⁵ Does this mean that whenever there is such a right a litigant comes under an obligation of disclosure? It may be argued that the principle of equality of arms demands that where one party has a right to obtain information contained in a document, they should be obliged to disclose it to other parties if it is relevant to the determination of an issue in legal proceedings, unless there are some special reasons for making an exception. On this view, the duty of disclosure may extend to documents that a party may inspect on application to some public authority.¹⁵⁶

15. 69 A further problem is whether companies have an obligation to disclose documents belonging to subsidiaries, to parent companies or to other companies in the same group. It was decided before the [CPR](#) that it is a question of fact whether the documents of a subsidiary company are within the power of its parent company. The matter was articulated in *Lonrho Ltd v Shell Petroleum Co Ltd*:

“[H]ere on the established facts a company is so utterly subservient or sub-ordinated to the will and the wishes of some other person (whether an individual or a parent company) that compliance with that other person’s demands can be regarded as assured. Each case must depend on its own facts and also upon the nature, degree and context of the control it is sought to exercise.”¹⁵⁷

On this view a subsidiary’s documents were considered to be in the control of the parent company if it was utterly subservient to the will and wishes of the parent company; effectively its alter ego.¹⁵⁸ Another example would be a “one-man company” where one individual is the owner of all the shares in the company.¹⁵⁹ Similarly, Hoffmann LJ observed that the limitation of disclosure to documents in the hands of the company actually sued may lead to injustice where companies in the same group are effectively involved in running a joint business.¹⁶⁰ The outcome may therefore turn on the particular shareholding arrangements on the articles of association and the like, although it is not necessary to show a legally enforceable right of access.¹⁶¹ In a case where the subsidiary is located in a foreign jurisdiction, consideration must also be had to the local laws governing the subsidiary and access by parents to that subsidiary’s documents.¹⁶² While the *Lonrho* test was formulated under the RSC, it continues to be equally applicable to disclosure under [CPR 31](#)¹⁶³ and PD 57AD.¹⁶⁴

15. 70 The test for control requires both a legal analysis of the relationship between different companies and a factual examination of their relationship.¹⁶⁵ That analysis is one of substance rather than form. This was demonstrated in *North Shore Ventures Ltd v Anstead Holdings Inc*.¹⁶⁶ Floyd J ordered that judgment debtors produce documents regarding the administration of trusts of which the judgment debtors were formerly discretionary beneficiaries. It was found that there was an “understanding or arrangement” that the trustees, who had physical possession of the documents in question, were “sheltering” the assets of the judgment debtors. The judgment debtors contended that they had no control over the documents. On appeal, Toulson LJ held that the judgment debtors had a right to possession of the documents. CPR 31.8(2)(b) covered situations where the nature of the relationship between the litigant and the third party was that of an agent and principal, and a “puppet master in the handling of money entrusted to him for the specific purpose of defeating the claim of a creditor”.¹⁶⁷ While the order was made under CPR 71.2(b), “control” in that provision has the same meaning as that under CPR 31.8.

15. 71 The issue of control has been considered in relation to parent companies and subsidiaries,¹⁶⁸ employers and employees (particularly the personal devices or email accounts of employees),¹⁶⁹ contractors and sub-contractors,¹⁷⁰ and a public pension scheme and a range of government and non-governmental third parties.¹⁷¹ The authorities were reviewed in *Public Institution for Social Security v Al-Wazzan*,¹⁷² where Jacobs J approved the following summary from *Various Airfinance Leasing Companies v Saudi Arabian Airlines Corp*:

“Insofar as a document is in the physical possession of a third party, meaning a person who is not a party to the action, that document is in the control of a party to the action not only where the party has a legally enforceable right to obtain access to such a document, but also where there is a standing or continuing practical arrangement between the party and the third party whereby the third party allows the party access to the document, even if the party has no legally enforceable right of such access... However, in order to establish that there is such a standing or continuing arrangement or even a specific, time-limited arrangement, whereby a third party allows a party to the action access to the document which the third party has in its possession, it is not generally sufficient to demonstrate that there is a close legal or commercial relationship between the party and third party, such as parent and subsidiary companies or employer and employee relationships; something more is required; there must be more specific and compelling evidence of such an arrangement ...”

Disclosure is by court order

15. 72 Under CPR 31 a party does not have an automatic right to disclosure. Therefore, litigants and non-parties come under a duty of disclosure only if, and to the extent that, the court has made an order directing disclosure. This effectively provides the court with the means to supervise and control the extent of disclosure in each case.¹⁷³ In the fast track, disclosure directions are normally given upon allocation (CPR 28.2–3); and in the multi-track, disclosure is typically ordered at the first case management conference, though directions may be given earlier (CPR 29.2).

15. 73 The disclosure process is essentially in the control of the court. CPR 31.5 sets out the procedure which is to be followed in respect of disclosure. As noted above, the default order for disclosure for proceedings in the multi-track and fast track was previously standard disclosure under CPR 31.5, though the court had the power to increase or restrict the ambit of disclosure, or to dispense with it altogether. This continues to be the case in relation to fast-track claims and multi-track claims for personal injuries. CPR 31.5(1) provides that in such cases: (a) an order to give disclosure is an order to give standard disclosure unless the court directs otherwise; (b) the court may dispense with or limit standard disclosure; and (c) the parties may agree in writing to dispense with or to limit standard disclosure.¹⁷⁴

15. 74

The position is now different, however, in respect of non-personal injury multi-track cases. In his review of civil litigation costs, Jackson LJ recommended that in such cases, the default order be replaced with what he termed a “menu option”.¹⁷⁵ This recommendation was implemented on 1 April 2013 by way of an amendment to [CPR 31.5](#). The procedure is set out in [CPR 31.5\(3\)–\(8\)](#), and is more involved than the previous approach but still designed to make litigation less costly. [CPR 31.5\(3\)](#) requires that not less than 14 days prior to the first case management conference, each party must file a report setting out briefly what documents exist that are relevant to the matters in issue in the case. It has to state the location of those documents, including information about electronic documents. It has to provide an estimate of the costs which would be involved in giving standard disclosure in the case and set out what directions for disclosure are being sought. Each report must be verified by a statement of truth. Pursuant to [CPR 31.5\(5\)](#), after filing and serving the reports, and not less than seven days before the first case management conference, the parties must seek to agree appropriate disclosure directions. The possible range of disclosure orders includes: an order dispensing with disclosure; an order that a party should disclose documents on which it relies and request specific documents from the other party; an order for disclosure on an issue-by-issue basis; an order for standard disclosure; an order similar to that which applied previously under the *Peruvian Guano* test¹⁷⁶; or any other order that the court considers appropriate. It is important to note that there is no longer a “starting point” or a default disclosure option, and the court should not simply take the parties’ proposal at face value. Instead, having reviewed the parties’ proposed disclosure directions, the court will select an order from the list of choices in [CPR 31.5\(7\)](#).

15. 75

It was hoped that this approach would encourage the parties and the court to consider, usually before the first case management conference, the most appropriate mode of disclosure.¹⁷⁷ As Jackson LJ explained, the process under [CPR 31.5\(3\)–\(8\)](#) is designed to ensure that “the parties and the court will consider in each case whether the costs of standard disclosure are justified or whether some more limited, or extensive, disclosure is appropriate in the circumstances of the particular case”.¹⁷⁸ The intention was that the court would then be able to make disclosure orders closely adapted to the needs of the case before it, so that no unnecessary cost or time was expended. However, as already mentioned, it is apparent that these aims have not been fully realised.¹⁷⁹

15. 76

The court has the power to give directions as to how the disclosure is to be given ([CPR 31.5\(8\)](#)). These directions can cover a diverse range of matters including the extent of the searches to be carried out (for example, whether searches are to be limited in respect of particular periods or particular custodians), the manner in which the disclosure list and statement are to be given and the format of the documents that are disclosed. The court may order that disclosure be carried out in stages, and set further requirements in respect of documents that once existed but which no longer exist.

15. 77

Once a court has made a disclosure order, it may vary the order as might be required in the circumstances. For example, in *Serious Organised Crime Agency v Namli*,¹⁸⁰ the court varied a standard disclosure order so as to allow the Serious Organised Crime Agency to withhold intelligence reports that adversely affected the defendant’s case but on which it did not wish to rely. In this way, the court obviated the need for an application for public interest immunity under [CPR 31.19](#). The parties too have considerable freedom to agree to dispense with disclosure or limit it ([CPR 31.5\(1\)](#)), though they obviously cannot agree to extend the ambit of disclosure ordered by the court. Such agreement should be in writing.

15. 78

The process of disclosure proper does not apply in the small-claims track ([CPR 27.2\(1\)\(b\)](#) and [CPR 31.1\(2\)](#)). Instead, the court will give standard directions requiring each party to serve on the other, at least 14 days before the hearing, copies of all documents upon which that party intends to rely (PD 27 Appendix B). Parties to judicial review proceedings are exempted from a duty to disclose material, unless they wish to rely on it as evidence or unless the court decides otherwise.¹⁸¹

Standard disclosure

The meaning of standard disclosure

15. 79

The approach to standard disclosure merits special attention, since as we have seen it remains the normal order for a wide class of litigation (namely, fast-track and multi-track personal injury claims), and will often be ordered in other cases too. The documents that must be disclosed under a standard disclosure order are set out in [CPR 31.6](#):

Rule 31_6

“Standard disclosure requires a party to disclose only—

- (a) the documents on which he relies; and
- (b) the documents which—
 - (i) adversely affect his own case;
 - (ii) adversely affect another party’s case; or
 - (iii) support another party’s case; and
- (c) the documents which he is required to disclose by a relevant practice direction.”

We may refer to documents that fall into these categories as “disclosable documents”.

15. 80

In *Serious Organised Crime Agency v Namli*,¹⁸² the Court of Appeal rejected an attempt to limit the words in [CPR 31.6\(b\)\(ii\)](#). It was argued there that, in a two-party case, documents that adversely affect only the disclosing party’s case need not be disclosed if the disclosing party does not wish to rely on them. Speaking for the court Burnton LJ rejected this interpretation, noting that (in contrast to para.(a), which refers to documents “on which [the disclosing party] relies”) the wording in para.(b) is unqualified. It was therefore impossible to read [CPR 31.6\(b\)\(ii\)](#) so as to limit the obligation to documents which adversely affect another party’s case as against some other party. However, the court may still impose such limitation in the exercise of its power under [CPR 31.5](#) to limit disclosure.

15. 81

Refusing to exempt from the duty of disclosure documents that only adversely affect the disclosing party’s case makes good sense, because such exemption would have been easily open to abuse. The decision whether it is fair and proportionate to exempt such evidence from disclosure is best left to the court. In *Serious Organised Crime Agency v Namli* the court held that the Serious Organised Crime Agency did not have to disclose intelligence reports which only undermined the Agency’s case but which they did not propose to use.

Standard disclosure—a test of evidential usefulness

15. 82

Prior to the [CPR](#), the relevance test, known as the *Peruvian Guano* test, was very broad and included all documents which had either a direct bearing on the issues or which had an indirect bearing in the sense that they could lead to a train of enquiry that could produce relevant information.¹⁸³ The [CPR](#) approach to disclosure is based on proportionality. It combines relevance with probative usefulness, relative to cost and effort. Disclosure is intended to be limited, by and large, to documents that are likely to assist the determination of the issues and to leave out documents that are unlikely to be useful for deciding the issues. Thus, a party need only disclose those documents that they can identify or locate by making a reasonable search ([CPR 31.7\(1\)](#)). Failure to conduct a reasonable search may result in adverse costs consequences under [CPR 44.2](#).¹⁸⁴ Where an unless order is made requiring a party to carry out a reasonable search, legal representatives should take care to ensure compliance with the provisions of [CPR 31.7\(2\)](#); the court will not hesitate to hold that the order has been breached if [CPR 31.7\(2\)](#) is not conscientiously complied with.¹⁸⁵ Further, the court has jurisdiction to order an independent review of a party’s disclosure methodology if a party has failed to comply with an order for standard

disclosure. Such an order is unusual, and will require strong grounds; a single, though significant, failure to comply is not normally sufficient.¹⁸⁶

15. 83

A number of factors are listed as relevant to deciding the reasonableness of a search, including: the number of documents involved; the nature and complexity of the proceedings; the ease and expense of document retrieval; and the contribution that documents found as a result of search are likely to make to the determination of the issues ([CPR 31.7\(2\)](#)). Thus, the notion of proportionality is built into the very definition of standard disclosure, which boils down to a test of evidential usefulness.¹⁸⁷ The concept of proportionality is more important now than it has ever been, with the ever-increasing amount of electronically stored information.¹⁸⁸ In the final resort, it is for the court, not the disclosing party, to determine evidential usefulness. Therefore, any decision by the party giving disclosure to limit its scope must be transparent so that the opponent may object and the court may review it. Where a party has not searched for a category or class of document on the grounds that to do so would be unreasonable, they must state this in their disclosure statement and identify the category or class of document ([CPR 31.7\(3\)](#)). It is for the court to decide whether a search will be reasonable. The court must exercise its discretion in this regard in accordance with the overriding objective. Every goal of the overriding objective listed in [CPR 1.1\(2\)](#) may have a bearing on the court's decision, but they may point in different directions. Thus, the aim of ensuring that the parties are on an equal footing may require that a party should have access to all the relevant documents in the opponent's possession. But imposing such an extensive obligation may involve great expense, may impede expedition and may be disproportionate to the amount of money involved, to the importance of the case and its complexity and to the financial position of the parties.

15. 84

Most cases involve limited amounts of documents and their connection to the issues will normally be clear. The [CPR](#) system makes considerable demands on practitioners and the court in multi-track claims, especially in complex commercial litigation or in group litigation, such as mass tort cases. As already noted, [CPR 31.5\(2\)–\(8\)](#) require parties to exercise discrimination in the identification of documents and in carrying out searches by reference to evidential usefulness and cost efficiency. Mere relevance is no longer sufficient reason for insisting on disclosure.¹⁸⁹ It is necessary to consider, for instance, the contribution that disclosure of certain classes of documents is likely to make to the determination of the issues. The usefulness of searching for particular classes of documents might depend to a considerable extent on the state of the rest of the evidence. Since disclosure decisions have to be given early in the pre-trial process, practitioners might find it difficult to make more than a very rough assessment of usefulness at an early stage.

15. 85

To overcome such problems, [CPR 31.13](#) empowers the court to direct that disclosure or inspection should take place in stages.¹⁹⁰ Where the pool of potentially relevant documents is very large, the court may adopt a gradual approach to disclosure by ordering limited disclosure in the first instance, and assessing the need for further disclosure efforts in the light of the results. The possibility of staggered disclosure is particularly useful in split trial cases.¹⁹¹ Where the court has directed that the issue of liability should be decided first, it may order that disclosure should be limited to this issue in the first instance. At the same time, it may also direct some limited disclosure with regard to quantum, if it is thought desirable to give the defendant some idea about the amounts at stake. In any event, a defendant will often be able to require some disclosure on quantum by saying that they wish to consider the possibility of making a payment into court.

15. 86

In addition, where it was not obvious at the outset that a particular document would be relevant, the harm done by failure to disclose it in the list of documents may not be permanent. This is because, as we shall presently see, the duty of disclosure is a continuing duty ([CPR 31.11](#)).¹⁹² If in the course of litigation a party realises that a document, which they had not considered pertinent, is likely to support another party's case, they are under an obligation to bring the document to the other party's attention. For this reason, supplementary lists of documents are far from uncommon.

The disclosure list

15. 87

CPR 31.10 sets out the procedure for giving standard disclosure. Each party must serve on every other party a list of disclosable documents.¹⁹³ The list must provide a concise and sensibly organised description of every document (PD 31A para.3).¹⁹⁴ It must indicate which documents are no longer within the party's control and must explain what happened to them. If the party claims to be entitled to withhold some documents from inspection, they must still disclose their existence in the list of documents, but they may indicate that they wish to withhold certain documents from inspection.¹⁹⁵

15.88 A distinction must be drawn between the description of documents to which a right to withhold inspection is claimed and the description of other documents.¹⁹⁶ Insofar as the former are concerned, the description does not have to reveal anything about their actual content; indeed, to do so would defeat the asserted right to withhold them from inspection. The purpose of the description of such documents is merely to identify them as belonging to a category of documents that may or must be suppressed.¹⁹⁷ Thus, when claiming legal professional privilege it is sufficient to refer to documents in some such compendious way as "correspondence between the party and his solicitors for the purpose of obtaining legal advice".¹⁹⁸ The purpose of describing documents to which no immunity from inspection is claimed is quite different: it is to enable the party receiving disclosure to decide whether they are of sufficient interest to warrant inspection. Therefore, the description needs to be fairly informative about the nature or content of the documents. On the other hand, this does not mean that the list should contain elaborate descriptions of documents or summaries of their content.¹⁹⁹

15.89 The parties are allowed to agree to dispense with the list of documents (or indeed with the disclosure statement, discussed below); such an agreement should be made in writing (CPR 31.10(8)). On its part, the court has the power to dispense with the list of documents (CPR 31.5(8)(b)). Such an order might be made where a party has a large number of hard-copy documents of limited probative value and the costs of listing those documents would be disproportionate. In the case of electronically stored information, the parties should be able to generate disclosure lists using appropriate disclosure software.

Disclosure statement

15.90 The disclosure list must include a disclosure statement by the party disclosing the documents (CPR 31.10(5)). Its content is set out in CPR 31.10(6). The disclosing party²⁰⁰ must:

- (a) set out the extent of the search that has been made to locate documents which they are required to disclose;
- (b) certify that they understand the duty to disclose documents; and
- (c) certify that to the best of their knowledge they have carried out that duty.

PD 31A para.4.2 adds that the disclosing party must expressly state that they believe that the search carried out was reasonable in all the circumstances. If the party making the disclosure statement is a company, firm, association or other organisation, the statement must also identify the person making the statement, and explain why they are considered an appropriate person to make the statement (CPR 31.10(7)). A person who makes, or causes to be made, a false disclosure statement without an honest belief in its truth is liable to proceedings for contempt of court (CPR 31.23(1)).²⁰¹

Timing of disclosure and the continuing duty of disclosure

15.91 Generally, service of the disclosure lists will take place after the parties have filed and served their statements of case but before they have exchanged witness statements.²⁰² For example, in the fast track, disclosure typically takes place four weeks from the date on which directions are given, while witness statements will be exchanged after 10 weeks.²⁰³ The rationale for disclosure preceding the exchange of witness statements is that it avoids parties being ambushed with material documents after they have served their witness evidence²⁰⁴; and it promotes greater efficiency. One problem with having disclosure

after the exchange of witness evidence is that the parties receiving disclosure may seek to serve additional witness evidence, either to respond to documents which are damaging to their case, or to utilise documents which are beneficial to their case.²⁰⁵ The service of such additional evidence may also prompt other parties to the litigation to serve yet more evidence in response, leading to much wastage of time and resources.

- 15.92 It is important to note, however, that the duty of disclosure continues even after service of the disclosure list. Once a duty of disclosure has arisen it “continues until the proceedings are concluded”, so that if relevant documents come to the party’s notice at a later stage in the proceedings, including appeal, the party must immediately notify every other party ([CPR 31.11](#)).²⁰⁶ If, having received an expert report stating a particular conclusion, the party receives a later report suggesting a different conclusion, the later report must also be disclosed because the duty of disclosure is a continuous one.²⁰⁷

- 15.93 Both solicitors and counsel (as officers of the court) bear a heavy responsibility to ensure that their clients fully comply with these duties.²⁰⁸ They must make their clients appreciate from the start their obligation to make full and honest disclosure, to avoid suppressing documents and to preserve documents from loss or destruction.²⁰⁹ Where a solicitor becomes aware that a client refuses to comply with their disclosure duties, they may be duty-bound to withdraw, or even to notify the court.²¹⁰ Barristers are similarly required to cease to act for a client who refuses to authorise them to make some disclosure to the court which their duty to the court requires them to make, although they may not reveal to the court the existence or content of the document in question.²¹¹

Inspection

Facilitating inspection

- 15.94 As a general rule, the party to whom the existence of documents has been disclosed under [CPR 31](#) has a right to inspect them ([CPR 31.3\(1\)](#)). A party wishing to exercise the right of inspection must give the disclosing party notice of their intention to inspect the documents. The latter must permit inspection not more than seven days after receipt of the notice. The obligation to facilitate inspection implies an obligation to facilitate the means necessary to carry out inspection, such as the use of computers or other equipment. Inspection will normally take place at the office of the disclosing party’s solicitors, but the court may order that inspection should be at a different place. The party asking for inspection may request copies to be supplied, provided they offer to pay reasonable costs. Such a request must be complied with within seven days of receiving notice of it ([CPR 31.15](#)). In the case of electronic disclosure, it is common for inspection to coincide with the delivery of the list of documents. The documents will generally be electronic copies of the disclosed documents.²¹²

- 15.95 Disclosure must be given of the present or past existence of relevant documents, though of course inspection can only be given of documents that are in the party’s present possession or control. *Control* means, as we have seen, not just physical possession but also a right to possession ([CPR 31.8\(2\)](#)). Accordingly, a party may have to facilitate the inspection of documents that they have a right to obtain from another, such as up-to-date bank statements relating to their account. Where a party refuses to disclose a document or facilitate its inspection, the court may exercise its general powers to enforce compliance, including by issuing an unless order or striking out the party’s statement of case.²¹³

- 15.96 A party who discloses a document on the basis that inspection will be given only in redacted form is not precluded from arguing that they were under no obligation to allow inspection of that which had been covered up. Furthermore, a document

might contain parts which were material to the matters disputed and others which were irrelevant. Disclosing the document as a whole could not be taken to amount to a concession or admission that every item in the document was relevant.²¹⁴

Inspection of documents mentioned in statements of case

15. 97

In addition to documents disclosed in a disclosure list, [CPR 31.14\(1\)](#) states that a party may inspect a document mentioned in a statement of case, in a witness statement, in a witness summary or in an affidavit. The test of “mentioned” was as general as could be and the test was not intended to be a difficult one.²¹⁵ For a document to be “mentioned” it need not be relied on or referred to in any particular way or for any particular purpose. Rix LJ observed, a “party deploying[a] document by its mention should in principle be prepared to be required to permit its inspection, and the other party should be entitled to its inspection. What in such circumstances is the virtue of coyness?”²¹⁶ For the rule to bite there must be express and specific mention of the document in one of these documents.²¹⁷ The fact that the existence of a document could be inferred, or that the document was quoted, may not be enough and the party seeking inspection may have to apply for specific disclosure.²¹⁸

15. 98

However, it has been held that [CPR 31.14\(1\)](#) does not override legal professional privilege and mention of a document does not automatically amount to waiver.²¹⁹ When a party mentions a document under cross-examination the opponent does not obtain an immediate right to seek the disclosure of that document, particularly when such disclosure is sought to challenge the credibility of the party.²²⁰ Mention of a document under [CPR 31.14](#) does not preclude objection to inspection on the grounds set out in [CPR 31.3](#), including on the grounds of proportionality.²²¹ Indeed, a mentioned document may be withheld if it is shown to be irrelevant.²²² However, the party who mentioned it may struggle to plead irrelevance, especially where the party sought to derive some benefit from the mention.

15. 99

The principles governing whether a document could be inspected under [CPR 31.14](#) were reviewed by the Court of Appeal in *National Crime Agency v Abacha*.²²³ Gross LJ confirmed that the mere fact that a document is “mentioned” in one of the documents specified in [CPR 31.14\(1\)](#) does not automatically entitle the other party to inspect it; the court retains a discretionary jurisdiction to refuse inspection. Although the general rule is that documents which fall within the remit of [CPR 31.14\(1\)](#) may be inspected by the other party, that rule is subject to [CPR](#)-based limits. Thus, a party may oppose inspection on the basis that it would be disproportionate to the issues in the case. Whether the document will be necessary to dispose fairly of the case will be a relevant consideration but is not a freestanding requirement.

15. 100

Special provision is made in relation to experts. An expert report must state the substance of all material instructions which formed the basis of the report, whether oral or written ([CPR 35.10\(3\)](#)). Such instructions cease to be privileged, but the court will not order the disclosure of specific instructions, including specific documents, unless it is satisfied that there are reasonable grounds to consider the statement to be inaccurate or incomplete ([CPR 35.10\(4\)](#)). This rule is intended to create a refutable presumption that the expert’s summary of their instructions is reliable and credible, so as to avoid satellite litigation over such matters. It is doubtful, however, whether it achieves anything other than to undermine the “cards on the table” approach, as well as the ability of other parties and the court to police expert witnesses’ compliance with their overriding duty to the court.²²⁴

Exceptions to inspection

15. 101

Under [CPR 31](#) there are three types of exceptions to the right of inspection, as distinguished from the obligation of disclosure. The first concerns documents that are no longer in the control of the disclosing party.²²⁵ The second consists of documents which the disclosing party has a right or duty to withhold from inspection. A right to withhold a document from inspection

exists where a party is entitled to legal professional privilege, for example. A duty to withhold a document may exist in order to protect the public interest.²²⁶ These exceptions will be considered in the next four chapters. The third exception arises where a party objects to inspection where it considers that inspection would be disproportionate to the needs of the case ([CPR 31.3\(2\)](#)).

15. 102 Where the volume of documents disclosed under standard disclosure is extensive, obliging the disclosing party to enable the opponent to inspect all of them may be disproportionate. Accordingly, [CPR 31.3\(2\)](#) allows a party, who considers that it would be disproportionate to permit inspection, to withhold inspection of a category or class of documents. This provision reflects the general obligation under [CPR 1.1\(2\)\(c\)](#) to conduct litigation in a proportionate manner. All the party needs to do is to state in their disclosure list that inspection will not be allowed on the grounds that it would be disproportionate ([CPR 31.3\(2\)\(b\)](#)). Nothing more is required by way of particularity at this stage.

15. 103 Significantly, as a general rule, the party withholding inspection of a disclosed document does not need to apply to court for permission to do so ([PD 31A para.6.1](#)).²²⁷ Instead, as we have seen, they may simply state in their disclosure list that they have a right or duty to withhold inspection, and the grounds on which they claim that right or duty.²²⁸ It is then for the party who wishes to inspect such documents to apply to court.

15. 104 [CPR 31.19\(5\)](#) provides that a party may apply to the court to decide whether a claim of a right to withhold inspection should be upheld. The burden is on the respondent—i.e. the party seeking to withhold inspection—to establish that their claim to privilege is well-founded. However, the court will be reluctant to go behind a disclosure list, unless it is framed in an unsatisfactory way or where there is reliable objective evidence to show that it is wrong.²²⁹ If this is the case, the court has four options open to it: (i) it may conclude that the respondent has not discharged the burden of showing that they are entitled to withhold inspection, and so order inspection; (ii) it may order the disclosing party to produce a further disclosure list or an affidavit to address the unsatisfactory aspects of the first list; (iii) it may order cross-examination of the maker of the disclosure list; or (iv) it may inspect the documents in question to see for itself whether the claim is well-founded.²³⁰ The last two options have sometimes been characterised as measures of last resort, however it has more recently been recognised that the court's power to cross-examine the deponent or inspect a document is a matter of general discretion to be exercised in accordance with the overriding objective.²³¹

15. 105 There are circumstances in which a person who is not a party to the proceedings may object to inspection of a document. In *IPCom GmbH & Co KG v HTC Europe Co Ltd*,²³² an order for inspection had been granted in a patent dispute, pursuant to which the patentee was entitled to inspect the source code of two products used in the manufacture of mobile phones. Two third parties (the manufacturers of the products) applied to overturn the order for specific disclosure. Roth J held that they had standing to do so. Where a non-party seeks to contend that inspection of a document ordered against a party will involve disclosure of its confidential business secrets, [CPR 40.9](#) is broad enough to allow a non-party to apply to the court to set aside the order on that basis, notwithstanding the provisions of [CPR 31.19](#).²³³ This is therefore an exception to the usual procedure for asserting a right or duty to withhold documents from inspection which falls outside the scope of [CPR 31](#).

Failure to give disclosure or inspection

15. 106 As we have seen, where a party fails or refuses to comply with its duty to disclose a document or facilitate inspection, the court may exercise its general case management powers to enforce compliance.²³⁴ It has also been observed that a party who seeks to deliberately or dishonestly frustrate the disclosure process by destroying or concealing documents, or by signing a false disclosure statement, may face more severe penalties still, including committal for contempt of court.²³⁵ These measures seek

to ensure that parties resist any temptation to evade compliance with their disclosure obligations in order to suppress documents which their opponent may find useful.

15. 107 Where it is the defaulting party who would seek to rely on the document, [CPR 31.21](#) applies.²³⁶ This rule provides that a party may not rely on any document that they fail to disclose or in respect of which they fail to permit inspection unless the court gives permission. This provision gives expression to the general principle that a party may not rely on evidence without giving adequate advance notice to the opponent. But the court has the power to make an exception to the general principle and allow a party to rely on such documents. Given the importance of the principle of prior notice, the court must keep any departure from this principle to the bare minimum. Thus, the court will not normally permit a defendant in a personal injury case to withhold from the claimant until the trial video evidence suggesting that the claimant's injuries are not as serious as the claimant alleges,²³⁷ although it may permit such evidence to be adduced where it was necessary to delay disclosure of it until after the exchange of witness statements in order to establish the claimant's fraud.²³⁸ Permission to withhold disclosure until as late as the trial will thus only be given where there are powerful countervailing considerations of justice, as where there is a risk that disclosure any earlier would enable the opponent to falsify evidence.

Specific disclosure or inspection

15. 108 Normally, a direction to give standard disclosure, or any additional disclosure directions that the court has made upon allocation or at a case management conference, will bring to light all disclosable documents. But there will be situations where there are grounds to doubt whether all the necessary searches have been made or whether all the disclosable documents have been set out in the list of documents. Equally, a party may doubt whether their opponent's claim to privilege, or assertion that it would be disproportionate to permit inspection of a particular class of documents, is well-founded. In such situations a more probing process may be necessary in order to ensure full compliance with the duty of disclosure or inspection.

15. 109 [CPR 31.12](#) empowers the court to make an order for specific disclosure or specific inspection.²³⁹ An order for specific disclosure is an order that a party must do one or more of the following things:
- (a)disclose documents or classes of documents specified in the order;
 - (b)carry out a search to the extent stated in the order;
 - (c)disclose any documents located as a result of that search;
 - (d)permit inspection of documents that the disclosing party has stated (in accordance with [CPR 31.3\(2\)](#)) that they will withhold on the grounds that it would be disproportionate to do so.

Notably, the rule describes what specific disclosure orders may direct a party to do, but says nothing about the circumstances in which such orders may be made or their purpose. This is one of the manifestations of the court's untrammelled discretion in relation to disclosure.

15. 110 It must be stressed that an order for specific disclosure does not necessarily extend disclosure beyond standard disclosure. In the exercise of its discretion, the court may order disclosure that is more limited than standard disclosure and it may equally stipulate wider disclosure. Accordingly, the power to order specific disclosure is not so much a power to order disclosure that is different from standard disclosure, as it is a power that enables the court to address special problems that may arise. For example, an order for specific disclosure may be made early in defamation proceedings so as to enable a claimant to decide whether to accept an offer of amends or persist with the action.²⁴⁰ An application for specific disclosure may be made at any time,²⁴¹ but the lateness of an application may be indicative of lack of necessity.²⁴²

15. 111

Orders of specific disclosure may be used to police compliance with standard disclosure directions. An order for specific disclosure may be made, for example, where the court has concluded that the party from whom disclosure is sought has failed to comply adequately with their disclosure obligations, whether by failing to make reasonable searches, by suppressing documents or by failing to facilitate inspection. Thus, for instance, the court may direct a party to clarify why a relevant bank statement has not been disclosed, to disclose the whereabouts of a document that has been referred to in a disclosed letter or to make a particular document search. Specific disclosure may be necessary in cases where the party cannot be relied upon to carry out their disclosure duties conscientiously. However, the court has other powers too to enforce compliance with disclosure obligations, such as making a search order²⁴³ or striking out a statement of case.²⁴⁴

- 15.112** In some cases, the power will be exercised to order more far-reaching disclosure than standard disclosure. Where a claim involves serious fraud allegations, it may be desirable to order very wide disclosure, up to *Peruvian Guano* level,²⁴⁵ in order to ensure that all possible investigations are made. Where a party is suspected of questionable practices, it may be desirable to relieve the party's solicitors of the responsibility of discriminating between significant and insignificant documents, and impose detailed disclosure obligations on the party in question. The court may order specific disclosure of documents relating only to credibility, but this will only be done in exceptional circumstances.²⁴⁶ In judicial review cases, a distinction must be drawn between applications for permission and the substantive judicial review application. In the former case, specific disclosure will only be granted where it is necessary in order to resolve the permission application (and not the substantive dispute) fairly and justly.²⁴⁷
- 15.113** A party who applies for specific disclosure must convince the court of the necessity of such a step. They must, therefore, set out in their application not only the specific order they seek but also the grounds for their dissatisfaction with the disclosure already given and reasons for believing that the order sought would yield better results (PD 31A para.5). If necessary, the application must be supported by evidence. On its part, the court must always have regard to the overriding objective and, in particular, the need to maintain proportionality.

Footnotes

- 149** PD 57AD para.2.1. See also *Reeds Carpeting Contractors Ltd v Martin Cairns [2023] EWHC 2713 (Comm)* [32] (“... The purist might think that the production of the list of documents under CPR 31 is the act of disclosure, in the sense of disclosing the existence of documents. ‘Inspection’ is the later process pursuant to which the documents of which the existence has been disclosed are produced to the opposing party. On the other hand, PD 57AD appears to use ‘disclosure’ as an umbrella term for the whole process from Initial Disclosure, through the process for obtaining Extended Disclosure, as far as the production of documents that are on the Extended Disclosure List...”).
- 150** 2025 WB 31.4.1.
- 151** *Phaestos Ltd v Ho [2012] EWHC 2756 (QB)* [27].
- 152** *McLaren Indy LLC v Alpa Racing USA LLC [2025] EWHC 1825 (Comm)* [22]–[27].
- 153** CPR 31.8(2); see C. Hollander, *Documentary Evidence*, 15th edn (London: Sweet & Maxwell, 2024) para.7-19ff.
- 154** *North Shore Ventures Ltd v Anstead Holdings Inc [2012] EWCA Civ 11* [40].
- 155** See for example the *Access to Health Records Act 1990* s.3; the *Trade Union and Labour Relations (Consolidation) Act 1992* s.30; and, most significantly, the *Data Protection Act 2018* s.45.
- 156** Interestingly, there appears to be no reported case in this jurisdiction dealing with this proposition (i.e. as regards citizens); though see *Palmdale Insurance (In Liquidation) v L Grollo & Co Pty Ltd [1987] VR 8 (Supreme Court of Victoria)*. It may be observed that as a matter of practice, personal claimants routinely give disclosure of copies of their medical records, which they may never have seen let alone had possession of. This causes little difficulty, since a patient’s right to their medical records is to all intents and purposes indefeasible (cf. *Lonrho Ltd v Shell Petroleum Co Ltd [1980] QB 358, 375, CA*). On the other hand, more difficult questions may arise where the litigant’s right to possession is not unfettered (as may sometimes be the case under the *Data Protection Act 2018*—for example, where the public authority is entitled to refuse disclosure in order to protect public security or the rights of others). Likewise, difficult issues may arise where the litigant has previously been granted inspection, but has no right to possession or inspection,

- and did not in fact take possession of any copies: see C. Hollander, *Documentary Evidence*, 15th edn (London: Sweet & Maxwell, 2024).
- 157 As expressed by Shaw LJ in the Court of Appeal, *Lonrho Ltd v Shell Petroleum Co Ltd [1980] QB 358, 376, CA*. For the appeal to the House of Lords see: *Lonrho Ltd v Shell Petroleum Co Ltd [1980] 1 W.L.R. 627, HL*.
- 158 *B v B (Matrimonial Proceedings: Discovery) [1978] Fam 181.*
- 159 *Lonrho Ltd v Shell Petroleum Co Ltd [1980] 1 QB 358, 371, CA.*
- 160 *Unilever v Chefaro [1994] F.S.R. 135, CA.*
- 161 *Public Institution for Social Security v Al-Wazzan [2024] EWHC 480 (Comm)* [23].
- 162 *Lonrho Ltd v Shell Petroleum Co Ltd [1980] 1 W.L.R. 627, 634, HL.*
- 163 *Three Rivers District Council v Bank of England (Disclosure) (No.4) [2002] EWCA Civ 1182; [2002] 4 All ER 881.*
See also *Schlumberger Holdings Ltd v Electromagnetic Geoservices [2008] EWHC 56 (Pat)* [39]; *Thunder Air Ltd v Hilmarsson [2008] EWHC 355 (Ch)*.
- 164 See eg *Berkeley Square Holdings Ltd v Lancer Property Assets Management Ltd [2021] EWHC 849 (Ch)* [27].
- 165 C. Hollander, *Documentary Evidence*, 15th edn (London: Sweet & Maxwell, 2024) para.7-19–7-28, especially 7-27.
- 166 *North Shore Ventures Ltd v Anstead Holdings Inc [2012] EWCA Civ 11* [40].
- 167 *North Shore Ventures Ltd v Anstead Holdings Inc [2012] EWCA Civ 11* [40].
- 168 E.g. *Ardila Investments NV v ENRC NV [2015] EWHC 3761 (Comm)*; and *Pipia v BGEO Group Ltd [2020] EWHC 402 (Comm)*.
- 169 E.g. *Various Airfinance Leasing Companies v Saudi Arabian Airlines Corp [2021] EWHC 2904 (Comm)*; *Republic of Mozambique v Credit Suisse International [2022] EWHC 3054 (Comm)*; and *Phones 4U Ltd (In Administration) v EE Ltd [2021] EWCA Civ 116*.
- 170 *Mornington 2000 LLP (t/a Sterilab Services) v Secretary of State for Health and Social Care [2024] EWHC 1708 (TCC)*.
- 171 *Public Institution for Social Security v Al-Wazzan [2024] EWHC 480 (Comm)*.
- 172 *Public Institution for Social Security v Al-Wazzan [2024] EWHC 480 (Comm)* [22]–[36].
- 173 In jurisdictions such as Australia, a party that provides discovery without a court order is not entitled to the costs or disbursements for the discovery: see Australian Federal Court Rules 2011 r.20.12.
- 174 The ambit of standard disclosure is discussed below, at paras 15.79 ff.
- 175 Jackson, Interim Report p.398 and Final Report pp.276 and 370.
- 176 *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co [1882] 11 QBD 55, CA*. See above, paras 15.5–15.6.
- 177 Jackson, Final Report p.267, although see the comments above concerning the general failure of parties and the court to make the most of the full “menu” at para.15.10.
- 178 See Jackson LJ’s preface to the Special Supplement of the 2013 White Book.
- 179 See above, para.15.10.
- 180 *Serious Organised Crime Agency v Namli [2011] EWCA Civ 1411.*
- 181 See CPR 54.16 and PD 54A para.11.2. In *Tweed v Parades Commission for Northern Ireland [2006] UKHL 53; [2007] AC 650*, the House of Lords held that where the proportionality of a decision or action is in issue, it may be appropriate to require disclosure of documents referred to by the decision-maker, and courts should take a flexible and non-prescriptive approach to disclosure in judicial review claims. This is also true in cases concerning disputed breaches of human rights: *R (Al-Sweady) v Secretary of State for Defence [2009] EWHC 2387 (Admin)*. Indeed, there is a discernible trend towards greater use of disclosure and evidence, including expert evidence, in judicial review claims generally: see for example *R (A) v The Chief Constable of Kent Constabulary [2013] EWCA Civ 1706*, [58]; *R (Howard League for Penal Reform) v The Lord Chancellor [2017] EWCA Civ 244*; and *R (Kiarie) v Secretary of State for the Home Department [2017] UKSC 42* [47].
- 182 *Serious Organised Crime Agency v Namli [2011] EWCA Civ 1411.*
- 183 *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co [1882] 11 QBD 55* at 63, CA. See above, paras 15.5–15.6.
- 184 See for example *Earles v Barclays Bank Plc [2009] EWHC 2500 (QB)* [68]–[77].
- 185 See for example *Re Atrium Training Services Ltd (In Liquidation) [2014] EWCA Civ 1299*, where joint liquidators were held to have breached their obligation to carry out a reasonable search, having promised to disclose documents in their possession in light of six successive disclosure deadlines.
- 186 *Vilca v Xstrata Ltd [2016] EWHC 1824 (QB)*.

- 187 See also PD 31 para.2A, which suggests that proportionality may dictate that search be limited to documents coming into existence before, or after, a certain date or to documents falling into a particular category. For discussion see C. Hollander, *Documentary Evidence*, 15th edn (London: Sweet & Maxwell, 2024) para.9-14.
- 188 *Digicel (St Lucia) Ltd v Cable & Wireless Plc [2008] EWHC 2522 (Ch)* [46].
- 189 *A. Higgins*, “*Open door disclosure in civil procedure*” (2012) 16 *International Journal of Evidence and Proof* 298.
- 190 See for example *Montpellier Estates Ltd v Leeds City Council [2012] EWHC 1343 (QB)*.
- 191 See 2025 WB 31.13.1.
- 192 *North Shore Ventures v Anstead Holdings Ltd [2012] EWCA Civ 11*, [42]; and *Montpellier Estates Ltd v Leeds City Council [2012] EWHC 1343 (QB)*. The continuing duty of disclosure is discussed below, at paras 15.91–15.92.
- 193 The conduct of the disclosure process may only be taken out of a party’s hands where there is “a paramount need to prevent a denial of justice to [the other side]”: *CBS Butler Ltd v Brown [2013] EWHC 3944 (QB)* [38], where the claimant had applied for the defendants’ disclosure to be undertaken by the claimant’s expert.
- 194 PD 31A para.3.1; where there is a large number of documents falling into a certain category, they may be listed as a category. For discussion of what is required of a disclosure list, see C. Hollander, *Documentary Evidence*, 15th edn (London: Sweet & Maxwell, 2024) para.9-15; see also *Dinsdale Moorland Services Ltd v Evans [2014] EWHC 2 (Ch)*.
- 195 The grounds on which a party may withhold inspection, namely: (i) where a document is no longer in their control, (ii) where they assert an immunity from inspection based on (for example) legal professional privilege and (iii) where they consider that inspection of a particular category or class of document, are addressed below at paras 15.101 ff.
- 196 2025 WB 31.10.3.
- 197 *Gardner v Irvin (1879) 4 Ex. D. 49*.
- 198 See *Derby & Co Ltd v Weldon (No.7) [1990] 3 All ER 161; [1990] 1 W.L.R. 1156, ChD*.
- 199 C.f. *Dinsdale Moorland Services Ltd v Evans [2014] EWHC 2 (Ch)*.
- 200 The disclosure statement must normally be signed by the disclosing party personally: *Prince Abdulaziz v Apex Global Management Ltd [2014] UKSC 64; [2014] 1 W.L.R. 4495* [12]–[13].
- 201 See further the discussion of contempt of court in Ch.24 Enforcement.
- 202 Note that the position is similar under PD 57AD in relation to extended disclosure, but that initial disclosure takes place alongside the pleadings phase: see above paras 15.31 ff.
- 203 See PD 28 para.3.12.
- 204 *Watford Petroleum Ltd v Interoil Trading SA [2003] EWCA Civ 1417* [41].
- 205 *Watford Petroleum Ltd v Interoil Trading SA [2003] EWCA Civ 1417* [40].
- 206 *Vernon v Bosley (No.2) [1999] QB 18; [1997] 1 All ER 614, CA*; and see 2025 WB 31.11.1.
- 207 PD 31A para3.3. In this respect the CPR confirm the ruling in *Vernon v Bosley (No.2) [1999] QB 18; [1997] 1 All ER 614, CA*.
- 208 2025 WB 31.10.6.
- 209 PD 31A para.4.4. See also: *Woods v Martins Bank Ltd [1959] 1 QB 55; [1958] 3 All ER 166, QBD*; and *Rockwell Machine Tool Co Ltd v E P Barrus (Concessionaires) Ltd [1968] 2 All ER 98; [1968] 1 W.L.R. 693, ChD*.
- 210 *Myers v Elman [1940] AC 282, HL*.
- 211 BSB Handbook (Version 4.8, May 2024), gC13.
- 212 For discussion of electronic disclosure, see below paras 15.114 ff.
- 213 See for example the discussion of unless orders in Ch.12 Case Management Pt I paras 12.85 ff; and of the consequences of non-compliance in Pt II paras 12.176 ff.
- 214 *Webster v Ridgeway Foundation School Governors [2009] EWHC 1140 (QB)*.
- 215 *Expandable Ltd v Rubin [2008] EWCA Civ 59*.
- 216 *Expandable Ltd v Rubin [2008] EWCA Civ 59* [24]. See also *Tweed v Parades Commission for Northern Ireland [2006] UKHL 53; [2007] AC 650* [33].
- 217 *Dubai Bank Ltd v Galadari (No.3) [1990] 1 W.L.R. 731, CA*.
- 218 *Rigg v Associated Newspapers Ltd [2003] EWHC 710 (QB); [2003] All ER (D) 97*.
- 219 *Expandable Ltd v Rubin [2008] EWCA Civ 59* (where a covering letter from the respondent’s solicitor had been “mentioned” in the respondent’s witness statement, but legal professional privilege for the letter was not lost). See also *Lucas v Barking, Havering and Redbridge Hospitals NHS Trust [2003] EWCA Civ 1102; [2003] 4 All ER 720* [24], [42]. See further the discussion of waiver in Ch.16 Legal Professional Privilege.
- 220 *Favor Easy Management Ltd v Wu [2010] EWCA Civ 1630; [2011] 1 W.L.R. 1603* [22]; and *Thorpe v Chief Constable of Greater Manchester [1989] 1 W.L.R. 665, CA*.

- 221 *Webster v Ridgeway Foundation School Governors* [2009] EWHC 1140 (QB).
- 222 See *Barr v Biffa Waste Services Ltd* [2009] EWHC 1033 (TCC) [27]. This decision is discussed in Ch.7 Statements of Case para.7.42 in relation to applications for disclosure of details of insurance cover.
- 223 *National Crime Agency v Abacha* [2016] EWCA Civ 760. See also *FCA v Papadimitrakopoulos* [2022] EWHC 2061 (Ch) [15].
- 224 For detailed discussion and criticism of this rule, see Ch.21 Experts paras 21.69–21.79.
- 225 As to the meaning of “control” in this context, see above, paras 15.67 ff.
- 226 As to the situation where the disclosing party is under a duty to withhold a document from inspection under a foreign law, see para.15.131 below and the review of authorities in *Public Institution for Social Security v Al Wazzan* [2023] EWHC 1065 (Comm) [43]–[52].
- 227 Note that the position is different where a party claims to have a duty not to disclose the very existence of the document, in order to protect the public interest. In such circumstances the party may apply, without notice, for an order permitting them to withhold disclosure of a document on the ground that disclosure would damage the public interest: CPR 31.19(1); and see Ch.19 Public Interest Immunity and Closed Material Procedure paras 19.45 ff.
- 228 See above, paras 15.54–15.55. Where no list is served, the claim to withhold inspection must be directed to the person wishing to inspect the document: CPR 31.19(4)(b).
- 229 *West London Pipeline & Storage Ltd v Total UK Ltd* [2008] EWHC 1729 (Comm) [64]–[73].
- 230 *West London Pipeline & Storage Ltd v Total UK Ltd* [2008] EWHC 1729 (Comm) [74].
- 231 See *WH Holding Ltd v E20 Stadium LLP* [2018] EWCA Civ 2652 [39]–[40], criticising the approach taken by Beatson J in *West London Pipeline & Storage Ltd v Total UK Ltd* [2008] EWHC 1729 (Comm) [76] ff as too narrow. See also Ch.16 Legal Professional Privilege paras 16.165–16.166.
- 232 *IPCom GmbH & Co KG v HTC Europe Co Ltd* [2013] EWHC 2880 (Ch).
- 233 *IPCom GmbH & Co KG v HTC Europe Co Ltd* [2013] EWHC 2880 (Ch) [44].
- 234 See above, para.15.95; and see for example the discussion of unless orders in Ch.12 Case Management Pt I paras 12.85 ff; and the discussion of the consequences of non-compliance in Pt II paras 12.176 ff.
- 235 See above, paras 15.3 and 15.90, respectively. See also Ch.12 Case Management Pt II paras 12.315 ff and the discussion of committal for contempt of court in Ch.24 Enforcement.
- 236 See also Ch.12 Case Management Pt I para.12.60.
- 237 *Rall v Hume* [2001] EWCA Civ 146; [2001] 3 All ER 248. See also *O’Leary v Tunnelcraft Ltd* [2009] EWHC 3438 (QB); and *Douglas v O’Neill* [2011] EWHC 601 (QB).
- 238 See the discussion of such evidence in Ch.22 Trial and Evidence paras 22.81 ff.
- 239 See C. Hollander, Documentary Evidence, 15th edn (London: Sweet & Maxwell, 2024) para.9-29–9-30.
- 240 *Rigg v Associated Newspapers Ltd* [2003] EWHC 710 (QB); [2003] All ER (D) 97.
- 241 *Favor Easy Management Ltd v Wu* [2010] EWCA Civ 1630; [2011] 1 W.L.R. 1603.
- 242 *Harris v Society of Lloyd’s* [2008] EWHC 1433 (Comm).
- 243 Deliberate deletion of computer files in breach of a search order may amount to contempt of court: *LTE Scientific Ltd v Thomas* [2005] EWHC 7 (QB). Search orders are discussed further below, at paras 15.221 ff.
- 244 See above, para.15.106; see also the discussion of unless orders in Ch.12 Case Management Pt I paras 12.85 ff; and the discussion of the consequences of non-compliance in Pt II paras 12.176 ff.
- 245 *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55, CA; see above, paras 15.5–15.6. See also PD 31A, para.5.5(1)(b), which expressly empowers the court to grant an order for specific disclosure on the train of inquiry basis.
- 246 *Favor Easy Management Ltd v Wu* [2010] EWCA Civ 1630; [2011] 1 W.L.R. 1803; and *First Subsea Ltd v Balltec Ltd* [2013] EWHC 584 (Ch).
- 247 *Sky Blue Sports & Leisure Ltd v Coventry City Council* [2013] EWHC 3366 (Admin).

E-Disclosure

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 15 - Disclosure

E-Disclosure

- 15. 114** The proliferation of electronically stored information (ESI) has given rise to new issues.²⁴⁸ On the upside is the fact that an ever-increasing amount of information is permanently stored and retrievable, which in turn increases the likelihood of establishing the truth. Moreover, it is not just the extent and quality of preserved information that assists the determination of truth, but also modern search and retrieval systems which allow for sifting and discrimination (i.e. by using sophisticated search strategies). On the downside, as we have seen, the definition of “document” in CPR 31.4 is wide enough to encompass electronic documents, such as emails, text and voice messages, word documents, scanned documents and electronic databases, including information stored in back-up systems and “metadata” (i.e. data about data, such as information concerning the creation and modification of documents).²⁴⁹ The definition of “document” in PD 57AD para.2.5 expressly covers a range of electronic documents.²⁵⁰ Consequently, the volume of data that may need to be searched for relevance may be enormous. This has two particular disadvantages. First, notwithstanding modern search technology, the time and cost consumed by the retrieval and processing of large volumes of data can be very considerable. Second, these processes are subject to a law of diminishing returns. Beyond a certain point any further information leads to what is known as information overload which renders it more difficult to process the information and integrate it into a coherent set of conclusions. To these points it may be added that where the volumes of data are very large and teams of lawyers and experts need to be involved, there is also the risk of inconsistent performance by different teams.
- 15. 115** In *Australian Rugby Union Ltd v Canterbury International (Australia) Pty Ltd (No. I)*, Perram J of the Federal Court of Australia summarised the issues surrounding disclosure of electronic documents as follows:
- “[T]he near ubiquity of electronically stored data and documents has now transformed the process of discovery away from anything even vaguely analogous to the issues confronting Chancery lawyers in the nineteenth century. That transformation has been both positive and negative. It is positive because a large quantity of significant communications now take place in media which are permanent. Unguarded views are often expressed in emails, SMS or through instant messaging platforms which in earlier more languid times were reserved for a quiet word between courses at lunch. Consequently there are now more ‘smoking guns’ than there have been in the past. On the other hand, the transformation has been negative to the extent that the price paid for it has been one of dramatic proliferation both of original communications and of individual documents. In that regard a single document can now not only exist in multiple drafts but each of those drafts may exist in multiple locations and formats.”²⁵¹
- 15. 116** Electronic disclosure (or e-disclosure) is regulated by PD 31B (for multitrack cases) and PD 57AD (broadly for cases in the Business and Property Courts).²⁵² The general principles governing e-disclosure are articulated in PD 31B para.6, and are aimed at ensuring that the process is conducted in an efficient way that furthers the overriding objective and minimises costs. For cases where PD 57AD applies, similar principles are found in para.2.3 and the express duty on legal representatives to “liaise and cooperate … so as to promote the reliable, efficient and cost-effective conduct of disclosure, including through the use of technology” (para.3.2(3)).²⁵³
- 15. 117** As we have seen, CPR 31.7 requires parties giving standard disclosure to make a reasonable search for disclosable documents and PD 57AD requires a party giving search-based Extended Disclosure to undertake a reasonable and proportionate search. The factors that need to be considered in determining reasonableness are mentioned in CPR 31.7(2)²⁵⁴ and, where PD 57AD

applies, in PD 57AD, paras.6.4 and 9.5. They include the ease and expense of retrieval of any particular document. This factor is central to e-disclosure as it requires the parties and the court to assess evidential utility against cost. For this reason, PD 31B para.21(3) spells out that the ease and expense of retrieval of any particular document includes:

- (a)the accessibility of electronic documents including email communications on computer systems, servers, back-up systems and other electronic devices or media that may contain such documents taking into account alterations or developments in hardware or software systems used by the disclosing party and/or available to enable access to such documents;
- (b)the location of relevant electronic documents, data, computer systems, servers, back-up systems and other electronic devices or media that may contain such documents;
- (c)the likelihood of locating relevant data;
- (d)the cost of recovering any electronic documents;
- (e)the cost of disclosing and providing inspection of any relevant electronic documents; and
- (f)the likelihood that electronic documents will be materially altered in the course of recovery, disclosure or inspection.

PD 57AD does not set out what the ease and expense of retrieval of any particular document means, but does state that it must take into account any limitations on the information available and on the likely accuracy of any costs estimates (PD 57AD, para.6.4(5)).

- 15. 118** The examination of each individual document in a large class of potentially relevant documents may be far too time-consuming and expensive. It is therefore permissible to search for disclosable documents by means of keyword searches or other automated methods (PD 31B para.25; PD 57AD para.9.6(1)(e)). Where necessary, this technique may be supplemented by other techniques (PD 31B para.26–27).²⁵⁵ Provision is made for disclosure of metadata (PD 31B para.28–29; PD 57AD paras 13.1–13.2); lists of documents and disclosure data in electronic form (PD 31B para.30–31); electronic copies of disclosed documents (PD 31B para.32–36; PD 57AD paras 13.1–13.2); and the use of specialised technology (PD 31B para.36).
- 15. 119** In conducting a reasonable search for documents and in the process of reviewing potentially relevant documents, the parties should have recourse to software tools which can reduce the amount of time required to review documents.²⁵⁶ Such software tools include de-duplication which removes, from the pool of documents to be reviewed, document duplicates. This reduces the number of documents required to be reviewed. In *West Africa Gas Pipeline Company Ltd v Willbros Global Holdings Inc*,²⁵⁷ Ramsey J identified three problems in the disclosure given by the claimant. First, the claimant failed to de-duplicate documents, which led to copies of documents being reviewed numerous times. Since multiple copies of documents had been disclosed, it also meant that there were inconsistencies in how some of those documents were redacted. Second, the claimant did not “harvest” a complete set of ESI, leading to inadequacies in the disclosure. Third, the court found that there was an inadequate review of an initial set of documents, which led to errors in the way in which the external litigation support team reviewed documents. As a result, Ramsey J awarded the defendant some of its costs for the time wasted in dealing with of these problems.
- 15. 120** As soon as litigation is contemplated, the parties are required to preserve disclosable documents, including electronic documents that would have otherwise been deleted in the ordinary course of business or in accordance with any retention policy. To ensure compliance, PD 31B para.7 (or PD 57AD para.3.2) requires the legal representatives to notify their clients of this duty. Parties and their legal representatives are expected to discuss prior to the first case management conference, and if the case is complex even prior to the commencement of proceedings, the process of e-disclosure and the means and manner of conducting it. This may involve a consideration of such matters as the technology to be used, the use of keyword searches (PD 31B para.5(6); PD 57AD para.9.6(1)(e)), data sampling (PD 31B para.5(1); PD 57AD Appendix 1, para.1.3), costs, the format to be used, methods of identifying privileged and other non-disclosable documents, identifying duplicate documents and the use of agreed software tools (PD 31B paras.8–9 and [CPR 31.5](#); PD 57AD para.9.6). If the parties fail to reach common ground on these matters, or if the court is dissatisfied with the parties’ agreement, the court will have to give written directions or order a separate hearing in relation to disclosure (PD 31B paras.15 and 17–19; PD 57AD para.11). The court may order disclosure in progressive stages ([CPR 31.13](#); PD 57AD para.9.4).²⁵⁸

- 15.121 PD 31B and PD 57AD require early co-operation between lawyers. The consequences of a lack of co-operation were illustrated in *Digicel (St Lucia) Ltd v Cable & Wireless Plc.*²⁵⁹ In providing standard disclosure the defendants searched the email accounts of 85 persons by using keywords suggested by their lawyers without consulting the claimants. The operation consumed 6,700 hours of lawyers' time and cost some £2.17 million. Morgan J deprecated the fact that neither side paid attention to PD 31B para.2A.5, which requires that keyword searches should be agreed between the parties. He criticised the defendants' failure to attempt to agree the keywords with the claimants in advance. Their unilateral decisions were subsequently challenged by the claimant. In the event, the court ordered that additional keyword searches be applied by the defendants and that the solicitors of the claimants and defendants meet to consider a review of documents kept on back-up tapes which the defendants had not searched because they had taken the view that it was unreasonable to do so. This case serves as a reminder of the additional costs and delays that may arise where parties do not co-operate prior to commencing the disclosure process. A series of decisions on PD 57AD have also emphasised the need for co-operation.²⁶⁰
- 15.122 The common method of collecting, reviewing and disclosing documents is provided for in the Electronic Discovery Reference Model. This is the model utilised by practitioners in the field of e-discovery. It sets out steps which are to be undertaken in storing ESI in anticipation of litigation, identifying and collecting material which may be potentially relevant to a matter, culling irrelevant documents, the process of analysis and review and, finally, the production of the disclosed material.²⁶¹ To facilitate an understanding of the nature of the ESI held by each party, PD 31B para.10 allows the parties to exchange an electronic documents questionnaire and PD 57AD, para.10 requires the parties to complete, seek to agree and update the Disclosure Review Document in cases where Extended Disclosure is sought.²⁶² The questionnaire requires the party on whom it is served to provide information regarding the "scope, extent and most suitable format for disclosure". The answers to the questionnaire must be verified by a statement of truth (PD 31B para.12) and must be served at the same time as the report required under CPR 31.5(3) (CPR 31.5(4)). PD 57AD, para.10.8 requires the parties to file and serve a signed Certificate of Compliance substantially in the form set out in Appendix 3 not less than two days before the case management conference.
- 15.123 As technology develops and becomes more sophisticated, new methods of conducting the e-disclosure process will lead to savings in both time and cost. One such method is predictive coding (or Technology Assisted Review), which relies on the concept of machine learning. A representative sample of the documents to be reviewed is used to "train" the software, which analyses documents and scores them for relevance. Provided that the definition of "relevance" remains consistent, the software is able to replace the need for manual review of swathes of documents, saving time and cost. The use of predictive coding in the disclosure process has been sanctioned in both England and Wales²⁶³ and Australia.²⁶⁴ Indeed, PD 57AD, para.9.6(3)(a) requires the parties to discuss and seek to agree inter alia "the use of software or analytical tools, including technology assisted review software and techniques".²⁶⁵

Footnotes

248 In addition to those that follow, see, e.g., imaging orders: see para.15.224 below.

249 See PD 31A para.2A and PD 31B para.5(3)–(7).

250 "A 'document' may take any form including but not limited to paper or electronic; it may be held by computer or on portable devices such as memory sticks or mobile phones or within databases; it includes e-mail and other electronic communications such as text messages, webmail, social media and voicemail, audio or visual recordings."

251 *Australian Rugby Union Ltd v Canterbury International (Australia) Pty Ltd (No.1) [2012] F.C.A. 497, [5]–[6]* (Fed, Ct. of Australia). And see Electronic Disclosure: A Report of a Working Party Chaired by the Hon. Mr Justice Cresswell (6 October 2004) para.3.3.

252 PD 57AD, para.1.8. References in PD 57AD to an Electronic Documents Questionnaire should be treated as references to the Disclosure Review Document.

253 See also the guidance notes in the Disclosure Review Document (Appendix 2 to PD 57AD).

- 254 See para.[15.82](#) above.
- 255 PD 57AD does not contain an equivalent of PD 31B para.26–27 but guidance in s.3 of the DRD contemplates the parties agreeing a methodology for the disclosure exercise, which includes various forms of analytics and not just keyword searches.
- 256 PD 57AD para.9.6(3)(a).
- 257 *West Africa Gas Pipeline Co Ltd v Willbros Global Holdings Inc [2012] EWHC 396 (TCC)*. In order to show that a disclosing party was in breach, it was not enough merely to show that it had within its control relevant documents which were not mentioned in the list. It would have to be established that no reasonable search had taken place: *Re Atrium Training Services Ltd (In Liquidation) [2013] EWHC 2882 (Ch)*.
- 258 See for instance *Goodale v Ministry of Justice [2009] EWHC B41 (QB)*.
- 259 *Digicel (St Lucia) Ltd v Cable & Wireless Plc [2008] EWHC 2522 (Ch)*.
- 260 In particular, *McParland & Partners Ltd v Whitehead [2020] EWHC 298 (Ch)* [53]–[54] and [58] and *Eurasian Natural Resources Corporation Ltd v Qajygeldin [2021] EWHC 1961 (Ch)* [17]–[23].
- 261 For further discussion of the Electronic Discovery Reference Model, see Jackson, Preliminary Report pp.377–379.
- 262 As to the Disclosure Review Document, see paras.[15.59–15.61](#).
- 263 *Pyrrho Investments Ltd v MWB Property Ltd [2016] EWHC 256 (Ch)*.
- 264 *McConnell Dowell Constructions (Aust) Pty Ltd v Santam Ltd (No.1) [2016] VSC 734 (Supreme Court of Victoria)*.
- 265 Further, the guidance notes in the Disclosure Review Document (Appendix 2 to PD 57AD) states that parties should seek to agree as early in the process as possible “How each party intends to use technology assisted review to conduct a proportionate review of the data set (particularly where the review data set is likely to be in excess of 50,000 documents)”.

Inadvertent Disclosure of Privileged Documents

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Inadvertent Disclosure of Privileged Documents

The general rule

15. 124 It occasionally happens that a litigant inadvertently allows another to inspect a document in respect of which the former is entitled to assert a privilege or immunity. This may happen, for instance, where a party facilitates inspection of a large volume of disclosable documents and accidentally includes among them some privileged material. In such circumstances, the inspecting party does not have an automatic right to make use of the privileged document; nor is it necessary for the disclosing party to seek an injunction to restrain their opponent.²⁶⁶ Rather, CPR 31.20 provides that where “a party inadvertently allows a privileged document to be inspected, the party who has inspected the document may use it or its contents only with the permission of the court”. PD 57AD, para.19 is to similar effect.
15. 125 It must be remembered that a person is free to waive their right to legal professional privilege or the privilege against self-incrimination.²⁶⁷ This feature of privilege has implications for the operation of CPR 31.20, because the limitation on use does not arise where a person has waived privilege; it only arises where a person entitled to privilege has inadvertently allowed inspection, without any intention of waiving privilege. Even where there was no actual intention to waive privilege, the courts have held that the inspecting party is generally entitled to assume that any privilege in documents that have been provided for inspection has been waived.²⁶⁸ Accordingly, the court will generally only refuse an application under CPR 31.20 where there are compelling reasons to do so, namely where the documents were disclosed because of fraud or by obvious mistake.²⁶⁹ These exceptions can be explained on the basis that where they apply, the inspecting party does not in fact have a legitimate expectation to protect. The fact that the exceptions are narrowly drawn is also justified on the basis that once the inspecting party has been allowed to acquire knowledge of an otherwise privileged document, the whole reason for the existence of the privilege has been defeated. In these circumstances, it is difficult to justify withholding the information from the court and thereby running the risk of a judgment that is known to the inspecting party to be at variance with the evidence.²⁷⁰
15. 126 The obvious mistake exception has been the source of considerable difficulty, since the test of obviousness is not self-evident and tends to necessitate detailed examination of the facts.²⁷¹ Much will depend on the stage at which the inadvertent disclosure was made,²⁷² on the manner of the disclosure²⁷³ and on the nature of the document and the consequences of allowing use to be made of it.²⁷⁴ The reasonable solicitor, in the objective limb of the obvious mistake exception, may also take into account the character of the firm giving disclosure and the manner in which disclosure has been given.²⁷⁵ At least in cases of complex, large-scale disclosure, if there is something in the nature of the document disclosed which ought to alert the reasonable solicitor (or document reviewer) to the possibility of mistake, they ought to inquire further and/or refer the document to a higher level review.²⁷⁶ Further, the exception (or a variant of it) applies even where the mistake would not have been obvious to a reasonable solicitor, but where the solicitor who received the document *in fact* realised that it had been disclosed in error. Even when the solicitor who received the document did not spot that it had been disclosed by mistake, the court would restrain its use if that solicitor referred it to a colleague who did spot the error before use was made of the document.²⁷⁷ Where it is obvious that a document has been disclosed inadvertently, or where the solicitor actually appreciates that there has been an error, they should refrain from reading the document and draw the inadvertent disclosure to the disclosing party’s attention. Otherwise, they could be said to be guilty of exploiting that party’s mistake. The court may order lawyers who have received inadvertent disclosure

not to communicate the documents to their clients; or even to cease to act if they have read the document and their conduct of the case is likely to be influenced by knowledge of it.²⁷⁸

15. 127 Although the above principles provide useful pointers to the exercise of the [CPR 31.20](#) and PD 57AD para.19 discretion, it must be remembered that in each case the court must have regard to all the circumstances and may depart from these principles if it considers it just to do so. It has been held, for instance, to be contrary to the interests of justice to allow a party to suppress an inadvertently disclosed expert report which was inconsistent with a later report from the same expert, notwithstanding that the mistake was immediately obvious.²⁷⁹ Similarly, it is unlikely that the court would withhold permission where the inadvertently disclosed information shows that the disclosing party was guilty of perjury or had tried to mislead the court.

Inadvertent disclosure of documents subject to public interest immunity

15. 128 Public interest immunity does not fit neatly into [CPR 31.20](#), because such immunity does not arise as a matter of right but rather must be approved by the court, and is not therefore a privilege; moreover, it is concerned with the protection of the public interest and may not be foregone by any one person.²⁸⁰ If the court has granted permission to withhold disclosure or inspection of a document on the grounds that it is satisfied that the public interest in withholding disclosure outweighs the general interests of the administration of justice and the private interest of the parties in ensuring that all relevant evidence comes before the court, it is only natural that, in the exercise of the same inherent jurisdiction to protect the public interest, it may order that documents or information inadvertently disclosed should not be used in legal proceedings or for any other purpose.
15. 129 It is therefore something of a surprise that the principles applicable under [CPR 31.20](#) to privileged documents were formerly also applied to documents in respect of which public interest immunity was claimed.²⁸¹ However, the Court of Appeal in *Tchenguiz v Director of the Serious Fraud Office* overturned this approach.²⁸² In *Tchenguiz*, the claimants had brought a claim against the Serious Fraud Office for having improperly obtained warrants for their arrest. In the course of proceedings, the Serious Fraud Office inadvertently disclosed three documents which were said to be subject to legal professional privilege, and one document which was said to be subject to public interest immunity. The Court of Appeal allowed the claimants' appeal in relation to the privileged documents, holding that they were entitled to use them, but refused to allow them to use the document subject to public interest immunity. In so deciding, Moore-Bick LJ rejected the view that the principles applicable to legal professional privilege applied equally to public interest immunity.²⁸³ He explained that the two doctrines differ fundamentally, and accordingly inadvertent disclosure of documents subject to public interest immunity raises quite different questions from those that arise in connection with legal professional privilege. In relation to documents which had been withheld on public interest grounds, the court will not ask whether the inadvertent disclosure was procured by fraud or was an obvious mistake. Rather, the court must "balance the public interest in maintaining confidentiality against the public interest in the due administration of justice. If the need for confidentiality outweighs the need to promote the administration of justice, the document must not be disclosed".²⁸⁴

Footnotes

266 It was necessary to obtain such an injunction under the pre-CPR system. The Court of Appeal in *Al Fayed v Commissioner of Police for the Metropolis ("Al Fayed")* [2002] EWCA Civ 780 [14] and [18], held that the court should adopt the same approach to the exercise of the discretion under [CPR 31.20](#), as to the grant of an injunction. Consequently, the pre-CPR authorities continue to be of relevance.

267 See the discussions of waiver in [Ch.16 Legal Professional Privilege](#) and [Ch.18 Self-Incrimination](#) respectively.

268 *Al Fayed* [2002] EWCA Civ 780 [16(iii)].

269 *Al Fayed* [2002] EWCA Civ 780 [16(v)–(vii)].

270 C.f. *R v G.* [2004] EWCA Crim 1368; [2004] 1 W.L.R. 2932.

- 271 This point is illustrated by *Al Fayed [2002] EWCA Civ 780* itself, where after extensive consideration of the disclosure process the Court of Appeal concluded that “while a solicitor might have concluded that a mistake had been made, it was by no means obvious”: at [74].
- 272 For instance, it will be too late to insist on privilege where, at the trial, counsel for the party entitled to privilege has introduced a privileged document into the record: *Great Atlantic Insurance Co v Home Insurance Co [1981] 2 All ER 485; [1981] 1 W.L.R. 529*.
- 273 For example, where a document was not deployed in proceedings but was seen by the claimant for the first time when the defendant sent over documents for inclusion for the trial bundle, this was treated as an obvious mistake: *Comberg v Vivopower International Services Ltd [2020] EWHC 575 (QB)*.
- 274 It might be said that it is inherently unlikely that legal advice, or a document setting out a possible trial strategy, would be intentionally provided. Thus the result in *Al Fayed [2002] EWCA Civ 780*, which concerned legal advice, could be explained on the basis that privilege had previously been intentionally waived in respect of advice by the same counsel, so it was not obvious that the same was not true on this occasion. However, the Court of Appeal has disapproved this assumption in *Tchenguiz v Director of the Serious Fraud Office [2014] EWCA Civ 1129*. More to the point, it would be generally unfair to allow use to be made of such documents, even if they were probative of anything (as to which see Ch.16 Legal Professional Privilege paras 16.30 ff).
- 275 *New Lottery Co Ltd v Gambling Commission [2025] EWHC 1058 (TCC)* [52].
- 276 *New Lottery Co Ltd v Gambling Commission [2025] EWHC 1058 (TCC)* [49].
- 277 *Atlantisrealm Ltd v Intelligent Land Investments (Renewable Energy) Ltd [2017] EWCA Civ 1029*.
- 278 See *Webster v James Chapman & Co (a firm) [1989] 3 All ER 939, ChD*; and *Ablitt v Mills & Reeve (a firm), The Times 25 October 1995, ChD*. But see *R v G [2004] EWCA Crim 1368; [2004] 1 W.L.R. 2932*, where the Court of Appeal was not prepared to countenance this in a criminal case.
- 279 *Webster v James Chapman & Co (a firm) [1989] 3 All ER 939, ChD*.
- 280 See discussion in Ch.19 Public Interest Immunity and Closed Material Procedure paras 19.56 ff.
- 281 *Al Fayed v Commissioner of Police for the Metropolis [2002] EWCA Civ 780* [17].
- 282 *Tchenguiz v Director of the Serious Fraud Office [2014] EWCA Civ 1129*.
- 283 The court was not bound by *Al Fayed* on this point, because in *Al Fayed* the Court of Appeal had proceeded on the basis of an assumption and without the benefit of argument. See *Tchenguiz v Director of the Serious Fraud Office [2014] EWCA Civ 1129* [44].
- 284 *Tchenguiz v Director of the Serious Fraud Office [2014] EWCA Civ 1129*, [35].

Limiting Disclosure in Order to Protect other Interests

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Limiting Disclosure in Order to Protect other Interests

15. 130 CPR 31 is principally concerned to ensure that the disclosure process is conducted with efficiency, proportionality and, more generally, with a view to furthering the overriding objective. However, quite apart from its managerial discretion, the court has a long-standing jurisdiction to limit disclosure (or, more precisely, inspection) in order to protect other worthwhile interests. These may be interests recognised by statute, by the European Convention on Human Rights (ECHR), or by popular morality. The purpose of this section is to identify some of these interests and discuss their potential effect on the disclosure process. The principles discussed in this section and in the remainder of this chapter apply equally to cases governed by PD 57AD and CPR 31.

15. 131 Subject to certain well-defined exceptions, such as legal professional privilege and the privilege against self-incrimination, no person has a right to withhold from the court information that is relevant to an issue before the court.²⁸⁵ Neither a party nor a non-party is entitled to invoke privacy or an obligation of confidentiality as a reason for refusing disclosure of documents or providing information, if it is required in the legal process. The court could thus order disclosure and the provision of information, notwithstanding that compliance would put a respondent in breach of a duty of confidentiality arising under foreign law and at risk of criminal prosecution overseas.²⁸⁶ This is because questions of disclosure and inspection are part of the law of procedure and are therefore matters of English law as the *lex fori*; foreign law cannot be permitted to override the English court's ability to conduct proceedings in England in accordance with English law and procedure. A court will only rarely be persuaded not to make an order for disclosure and inspection on the basis of a risk of prosecution in a foreign state, and only if the disclosing party shows that the foreign law is regularly enforced, such that the threat is real.²⁸⁷ At the same time, however, the court is not bound to ignore the effect that an order for disclosure may have on a person's privacy or on their right to maintain certain information as confidential. On the contrary, the court must accord protection to the interests of privacy and confidentiality to the extent that it can be done without compromising the administration of justice. The court may, as was observed in Ch.3, hold proceedings behind closed doors in order to maintain the secrecy of sensitive commercial information,²⁸⁸ or by imposing confidentiality restrictions in respect of the documents inspected.²⁸⁹

Respect for confidentiality and privacy

15. 132 A tension may arise between, on the one hand, the interest of the administration of justice in seeing that disputes are resolved in accordance with all the relevant evidence and, on the other hand, the interests of third parties in protecting their confidences and their private affairs. This tension may arise during the disclosure process, when documents are sought from a party or a non-party, or during the trial when witnesses are called to testify. When the court is considering whether to excuse a person from disclosing a document or testifying on a certain matter in order to protect some interest, the starting point is that no one has a right to withhold documents or information on the grounds that to do so would violate an obligation of confidence or would amount to an invasion of privacy.²⁹⁰ With that in mind the court may consider what protection, if any, can be given to countervailing interests. In *D v National Society for the Prevention of Cruelty to Children*, Lord Edmund-Davies said that:

“Where (i) a confidential relationship exists *and* (ii) disclosure would be in breach of some ethical or social value involving the public interest, the court has a discretion to uphold a refusal to disclose relevant evidence, provided it considers that, on balance, the public interest would be better served by excluding such evidence.”²⁹¹

15. 133 An early illustration of the exercise of this discretion is provided by *Science Research Council v Nassé*.²⁹² The House of Lords dealt with two cases in which claimants complained of discrimination in employment and sought disclosure of confidential reports relating to other candidates for appointment. It was held that when considering whether to order disclosure the court should have regard to the legitimate interest of protecting confidentiality and privacy. The court should not order discovery unless it was necessary either for disposing fairly of the proceedings or for saving costs. In reaching its conclusion the court should have regard:
- (a)to the fact that the documents were confidential and that to order disclosure would involve a breach of confidence; and
 - (b)to the extent to which the interests of third parties would be affected by disclosure.
15. 134 It seems clear from this decision that a two-stage process is involved. In the first stage, the court must consider whether the disclosure of the information is necessary for disposing fairly of the issues. If, for instance, the information can be obtained from other sources without violating confidence, it cannot be regarded as necessary and disclosure should not be ordered. Where, however, disclosure is necessary for fairly disposing of the proceedings, the court should proceed to the second stage, and consider whether justice could be done without compromising the confidential nature of the information. To this end it should inspect the documents and consider whether confidentiality could be protected by special measures, such as redacting confidential but irrelevant parts of the documents, substituting anonymous references for specific names or, in rare cases, a hearing in camera. If such measures are not available and discovery is necessary for fairly disposing of the proceedings, discovery must be ordered notwithstanding the documents' confidentiality.
15. 135 *Frankson v Home Office*,²⁹³ exemplifies the application of the *Nassé* test. The claimants sued the Home Office for assault inflicted on them by prison officers. They applied for an order under CPR 31.17(3) requiring the police to disclose the transcripts of interviews with the prison officers, which the police obtained in the course of investigating the claimants' complaints. The prison officers objected on the grounds that they were interviewed under caution, in circumstances of confidentiality and on the understanding that their answers would not be disclosed except in the event of criminal proceedings. The Court of Appeal accepted that the interviews were confidential. It also accepted that it was important to encourage persons to assist the police in their enquiries. However, it held that once the first condition of CPR 31.17(3)(a) has been established, namely, that the documents sought are likely to support the case of the applicant or adversely affect the case of one of the other parties, the court must proceed to consider whether disclosure was necessary in order to dispose fairly of the claim or to save costs. If there was no other route to obtain the necessary information, the court must proceed to balance the different interests.
15. 136 The court in *Frankson* had to weigh, on the one hand, the public interest in maintaining the confidentiality of those who made statements to the police in the course of a criminal investigation and, on the other hand, the public interest in ensuring that the courts should try civil claims on the basis of all the available relevant material so that they may arrive at a fair and just result. The Court of Appeal concluded that in this case the interest of enabling the claimants to prove their case outweighed the desirability of maintaining confidentiality, but it approved of the order made by the judge restricting the use of the disclosed interviews and their dissemination.²⁹⁴
15. 137 The ECHR approach to the tension between the need to determine legal disputes in accordance with all relevant evidence and the need to protect privacy is similar to the common law approach. In *Re B (Disclosure to Other Parties)*,²⁹⁵ the court weighed, on the one hand, the interests of a father who applied for a care order in respect of his child, and who was seeking disclosure relying on his right to a fair trial under ECHR art.6, and, on the other hand, the ECHR art.8 rights of other children to confidentiality of their care records. Munby J noted that while the rights under art.6 were absolute, it did not follow that the father had an absolute right to see all the documents in the case. He held that the harm which could occur due to non-disclosure was outweighed by the effect disclosure would have on the children's rights, and accordingly refused to order disclosure.²⁹⁶

15. 138

In addition to ECHR art.8, the [Data Protection Act 2018 \(DPA 2018\)](#) governs the processing of personal data in the UK, including restrictions on the disclosure of personal data relating to others.²⁹⁷ The [DPA 2018 Sch.2 para.5](#) provides an exemption to the non-disclosure provisions of the Act where disclosure of a third party's personal data is necessary for the purpose of, or in connection with, legal proceedings. Notwithstanding this exemption, the issue of privacy will still be relevant to deciding whether and to what extent to allow the disclosure of personal data.²⁹⁸ This is particularly important in applications for [Norwich Pharmacal](#) orders²⁹⁹ to disclose the personal data of potential third party wrongdoers, because they are not parties to the application. The implications of the [Data Protection Act 1998](#), which preceded the [DPA 2018](#), were considered in [Golden Eye \(International\) Limited v Telefonica UK Limited](#),³⁰⁰ and [Rugby Football Union v Consolidated Information Services Ltd](#).³⁰¹

15. 139 In [Golden Eye](#), the claimants (made up of copyright owners and licensees of various adult films and a representative organisation) sought a [Norwich Pharmacal](#) order against the defendant, an internet service provider. The order was to require the defendant to release information concerning the defendant's subscribers who had obtained unauthorised copies of the claimant's films via internet file sharing in breach of copyright. The claimant intended to use these details to send letters to each subscriber demanding £700 in damages or else face copyright infringement proceedings. The Court recognised that there was a conflict between the claimants' need for information in order to defend their copyrights and the subscribers' need for protection of their personal data. Both proprietary rights and privacy rights are protected under the ECHR, by Protocol 1 art.1 and art.8, respectively. Consequently, Arnold J found it necessary to embark on a balancing exercise which he described thus:

“(i) neither Article [of the ECHR] as such has precedence over the other; (ii) where the values under the two Articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary; (iii) the justifications for interfering with or restricting each right must be taken into account; (iv) finally, the proportionality test—or ‘ultimate balancing test’—must be applied to each.”³⁰²

15. 140 This balancing test in [Golden Eye](#) was approved by the Supreme Court in [Rugby Football Union](#).³⁰³ This decision is discussed further below, in the section on [Norwich Pharmacal](#) orders.³⁰⁴ Here it is only necessary to mention that on an application for the disclosure of information concerning non-parties, the court must ensure that the interference with non-party interests is proportionate to the objective of the order. The court is therefore required to weigh up factors such as the strength of the claimant's potential case, the ability to obtain the information sought through another source and privacy.³⁰⁵ Another factor that may be important where a party seeks disclosure which impinges on the privacy of another is the gravity of the allegations. In [Ashley v Chief Constable of Sussex](#),³⁰⁶ the family of a person who had been shot dead by the police in his home brought proceedings against the police and sought disclosure of documents relating to the disciplinary records of the officer who shot the deceased. Eady J held that in order to facilitate a fair and just outcome in litigation arising from the shooting of an unarmed citizen in their home by a police officer, it was justified to allow the claimants to inspect documents that contained potentially relevant details about the police officer's character and the state of their knowledge at the time of the shooting.

15. 141 Confidential relationships which do not attract legal professional privilege are subject to the balancing test identified above; however, the court will bear in mind the confidentiality that ordinarily attaches to the relationship.³⁰⁷ Communications between patient and doctor and between penitent and priest are not protected by any rule of immunity,³⁰⁸ but will normally receive sympathetic treatment.³⁰⁹ While the court has jurisdiction to order the claimant in a personal injury case to permit inspection of medical records, the court will only make such an order where it is necessary to do so, and may give directions limiting what information is to be seen and by whom (for example, that only certain records shall be seen by the defendant's medical expert).³¹⁰ Two other commonplace situations which do not have the benefit of an immunity, but which have nonetheless been accorded special treatment by the courts, merit further attention: protection of journalistic sources and of commercially sensitive information.

Protection of journalistic sources of information

15. 142 The need to protect journalistic sources of information has attracted special attention due to the importance that is attached to the freedom of the press in a democratic society.³¹¹ Press freedom receives strong protection both at common law and under ECHR art.10.³¹² The need to safeguard this freedom may come into conflict with the need to secure information necessary to enable the court to determine the truth concerning an issue in legal proceedings. The conflict may be particularly acute where a party requires disclosure of the source from which a journalist derived their information. If the confidentiality of journalistic sources were to be breached whenever the matter happened to be relevant to an issue in a civil dispute, journalistic sources of information might dry up and the ability of the press to scrutinise public affairs might well be compromised.

15. 143 In *Goodwin v UK*, the European Court of Human Rights (ECtHR) stressed the importance of protecting the confidentiality of journalistic sources:

“The Court recalls that freedom of expression constitutes one of the essential foundations of a democratic society and that the safeguards to be afforded to the press are of particular importance. Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of contracting states and is affirmed in several international instruments on journalistic freedoms. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result, the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with art 10 of the convention unless it is justified by an overriding requirement in the public interest.”³¹³

15. 144 Although press freedom is protected both at common law and under the ECHR, the protection is not absolute³¹⁴. ECHR art.10 recognises that everyone has freedom of expression and freedom to receive and impart information without interference from a public authority. But it also accepts that this freedom may be restricted to the extent that is “necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.” The ECHR position is said to be reflected in the *Contempt of Court Act 1981 s.10*, which states:

“No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.”³¹⁵

15. 145 While this provision would usually be invoked by journalists, its terms are wide enough to provide protection to “any person” to refrain from disclosing the sources of information contained in a publication, even when such a person is not a professional journalist but a mere blogger or simply any person who is responsible for a publication. It has been held that disclosure in “the interests of justice” means disclosure in the course of legal proceedings in a court of law, a tribunal or a body exercising the judicial power of the state, and does not imply a more general concept of justice.³¹⁶ A person is entitled to the protection of the section even if the information has not been published; otherwise, persons would be deprived of the protection if they decided not to publish or if they were prevented from doing so by an injunction.³¹⁷ Thus, every person is entitled to refuse to disclose the sources of information they possess, whether they published such information or not.

15. 146 In *X Ltd v Morgan-Grampian Ltd*, the scope of the provision was extended by the House of Lords to situations where persons needed pre-trial disclosure in order to be able to exercise important legal rights and to protect themselves from serious wrongs, whether or not resort to legal proceedings in a court of law would be involved.³¹⁸ The House of Lords held that the claimant company, which wished to dismiss an employee who had stolen its financial plans and passed them on to a journalist, was entitled to bring an action against the journalist claiming disclosure of the identity of the employee. It accepted that the *Contempt of Court Act 1981 s.10* may be invoked not only where the information sought would inevitably lead to the exposure of the identity of the source, but also where it might have this effect.³¹⁹ The House of Lords upheld the disclosure order against the journalist because he was mixed up in the tortious acts of the source and was therefore under a duty to assist the claimant to protect itself from future leaks and the risk of great harm to its business.
15. 147 The ECtHR disagreed with the conclusion reached by the House of Lords. It held in *Goodwin v UK*,³²⁰ that the order directing disclosure in *X Ltd* violated ECHR art.10. The ECtHR differed from the House of Lords not in its approach to the principles involved but in the factual assessment of the necessity for ordering disclosure in the particular circumstances of *X Ltd*. Unlike the House of Lords, the ECtHR considered that the injunction against further publication of the confidential information offered adequate protection to the applicants and that the order for disclosure was therefore disproportionate. Notwithstanding its criticism of the conclusion reached by the House of Lords, the ECtHR accepted in *Goodwin* that the *Contempt of Court Act 1981 s.10* and its interpretation by the English courts were essentially in conformity with ECHR art.10.
15. 148 In *Financial Times Ltd & Ors v United Kingdom*,³²¹ the ECtHR ruled that a disclosure order made against a group of newspapers requiring the disclosure of information as to how a leaked document was obtained, contravened the ECHR art.10. The leaked document contained information about a company's takeover plans. When the information was published, it had a significant impact on the amount of shares traded. The Court had regard to the fact that the bidding company did not seek an interlocutory injunction to prevent the publication after being given notice that one of the newspapers leaked the information. Furthermore, the Court reiterated that an order for disclosure of a source would only be appropriate in exceptional circumstances where no reasonable and less invasive alternative means of averting the risk posed to freedom of expression were available and where the risk threatened was sufficiently serious and defined to render such an order necessary within the meaning of art.10.³²² The ECtHR was not satisfied that there were no alternative means to a disclosure order.
15. 149 In *Ashworth Hospital Authority v MGN Ltd*,³²³ the House of Lords held that the protection of journalistic sources that is dictated by ECHR art.10 is part of our domestic law and governs the application of *s.10 of the Contempt of Court Act 1981*.³²⁴ The House of Lords stressed that both provisions require the court to scrutinise stringently any request for relief that might result in interference with the freedom of expression. In an application for disclosure of a journalist's sources, the court would order disclosure only if a pressing social need has been established and only if disclosure was proportionate to a legitimate aim that was being pursued by means of the application. The court came down in favour of the disclosure of the source that provided a journalist with confidential medical notes relating to a mental patient held in a secure hospital. It found that disclosure of patients' records tended to increase the difficulty and danger of running such institutions, and that disclosure was essential to the hospital's legitimate aim of identifying the source and taking the necessary measures to prevent a repetition of the breach of security and to deter similar wrongdoing in future.³²⁵
15. 150 The *Contempt of Court Act 1981 s.10* requires a two-stage approach to an application for disclosure of journalistic sources.³²⁶ First, the court has to decide whether disclosure is necessary in the interests of justice. To this end the court will assess whether disclosure is necessary for establishing a cause of action in civil proceedings or for furthering other rights; in this context, the nearest paraphrase of "necessary" is "really needed".³²⁷ If it is not satisfied that it is so necessary, then no disclosure order would be made. If it is satisfied that disclosure is necessary in this sense, it must then proceed to the second stage and weigh the conflicting interests involved—i.e. the need for disclosure on the one hand and the need for protection of journalistic sources on the other.³²⁸ The nature of the right or interest of the party seeking disclosure will be an important factor because the courts will be reluctant to override the public interest in protecting sources of journalistic information for the sake of a minor private

interest; the applicant must prove that the interests of justice in the context of the particular case are “so pressing as to require the absolute ban on disclosure to be overridden”.³²⁹ The greater the magnitude of harm to the applicant’s rights, the stronger would be the case for disclosure. A claim for disclosure would be stronger where there is a risk to the applicant’s livelihood, to the management of important public institutions, such as a mental hospital, or to the survival of a legitimate business. The court must be satisfied that there is, “no reasonable, less invasive, alternative means” of achieving whatever aim is pursued by a source disclosure application.

- 15. 151** Once a request for disclosure raises issues under the [Contempt of Court Act 1981 s.10](#), the burden is on the party seeking disclosure to persuade the court that the interest of protecting press sources is outweighed by one of the overriding interests mentioned in the section.³³⁰ Although this question has been described as a question of fact,³³¹ it is misleading to say that the applicant bears a burden of proof in the normal sense of this term. For although factual matters may be pertinent to the court’s decision, such as what use the applicant is proposing to make of the information or the likely harm to the applicant’s interests if the information were not disclosed, the decision will, in the final resort, have to be taken by balancing conflicting interests rather than by drawing factual conclusions from evidence. It “involves the exercise of judgment on the established facts”, as Lord Griffiths put it.³³²
- 15. 152** Furthermore, an order for disclosure would not be made unless the party seeking disclosure has first exhausted all other avenues of enquiry in order to identify the source without the need for breaching journalistic confidence.³³³ An isolated leak may not be sufficient to persuade the court to order disclosure,³³⁴ which suggests that the court would be more inclined to order disclosure where the leaks have been massive, as in the WikiLeaks case. Lastly, not only must the applicant for disclosure show that identifying the source is absolutely necessary to the protection of their rights, but they must also show that the disclosure would in fact lead to unmasking the culprit, for there could be situations in which the disclosure might not have that effect and would therefore be pointless.³³⁵
- 15. 153** The court may have regard to the nature of the journalistic interest involved, or indeed to the fact that protection from disclosure is sought by someone who is not a journalist. It may consider the extent to which there is a public interest in encouraging sources to come forward and inform the press. Clearly, there is a far greater public interest in protecting the identity of persons who pass on to the press information about impropriety in the public sphere, than in protecting persons who divulge personal information of a purely prurient interest. Much will also turn on the manner in which the information was obtained by the source. If the source obtained the information by legitimate means, the argument for protection would be greater than where the source obtained it by illegitimate means.³³⁶ It has been held that where an investigative journalist obtained information from medical records, the public interest in the protection of a journalist’s source outweighed the interest of the hospital concerned to seek redress against the source of the leak, and that therefore it was disproportionate to order disclosure of the source.³³⁷ The upshot is that the result in any given case is bound to turn on the particular circumstances and cannot therefore be predicted with certainty.
- 15. 154** Unlike the balance between freedom of the press and the interests of the administration of justice, relatively little difficulty has been encountered in balancing the interests of the press against the interests of national security and the prevention of disorder or of crime. Thus the court would order disclosure of the identity of persons responsible for leaking secret government documents, if this is necessary to avert future serious risk to the public interest.³³⁸ The court may order disclosure of identity and registration details of a party who posted defamatory statements on a website notice board.³³⁹ When disclosure is sought in the interest of preventing disorder and crime, there is no need to show that a particular crime is planned or that disclosure would result in preventing the commission of crime; it is enough to show that disclosure would assist the fight against crime in general.³⁴⁰

Protection of parties’ commercially sensitive information

- 15. 155**

As a matter of principle, a party has a right to be informed of all the arguments and evidence presented to the court by their opponent, though as we shall see in due course, [CPR 31.22](#) places limits on the use that may be made of documents obtained in disclosure.³⁴¹ However, as noted in [Ch.3](#), in some situations there is a need not just to protect sensitive information from general exposure, but to screen it from one of the parties in particular.³⁴² This tends to arise in disputes regarding patents and the like, where one or other of the parties wishes to safeguard a secret technical process or innovation from the opponent who is also a competitor.³⁴³ In such claims, as Lord Dyson noted, “the whole object of the proceedings is to protect a commercial interest” such that “full disclosure may not be possible if it would render the proceedings futile”.³⁴⁴

- 15. 156** In *Church of Scientology v Department of Health and Social Security*, Templeman LJ set out three principles concerning the protection of confidential information:

“The first principle is that the court shall not order discovery which is not necessary for the fair disposal of the action. It follows that the court has power to impose restrictions which ensure that the ambit of discovery is not wider than is necessary to dispose fairly of the action. The second principle is that the court may act to prevent any possibility of conduct which might constitute contempt of court. The third principle is that the court may act to prevent what may be an abuse of the process of the court.”³⁴⁵

But if these aspects are not sufficient to safeguard against the risks attendant upon disclosure of commercially sensitive information to an opponent, the party claiming secrecy may apply for an order for controlled disclosure of the information to specific individuals, such as the opponent’s legal representatives and experts, upon an undertaking by such individuals not to disclose the information to their own client or make any use of it except for advancing the proceedings in question.³⁴⁶ Such an arrangement is known as a “confidence ring”. There is no universal form of order suitable for use in every case, or even at every stage of the same case.³⁴⁷ The court must balance the interests of the receiving party in having the fullest possible access to relevant documents against the interests of the disclosing party, or third parties, in the preservation of their confidential commercial and technical information.³⁴⁸

- 15. 157** The power to impose such restrictions derives from the court’s inherent jurisdiction.³⁴⁹ However, where an order limits disclosure to a party’s representative only, care needs to be taken to ensure that the party’s ability to advance its case is not hampered. The problem is illustrated by *Dyson Appliances Ltd v Hoover Ltd (No.3)*.³⁵⁰ The proceedings concerned an inquiry into damages for infringement of patent. Dyson sought to restrict disclosure of its most commercially sensitive documents to Hoover’s solicitors, counsel and experts. Laddie J noted that it is a basic rule of justice that:

“... all the parties before the judge should have access to the same material that the judge himself has access to for the purpose of coming to his conclusion. The same point can be put the other way round. It would appear to me to be *prima facie* unfair for a judge to decide a case against a party on the basis of material to which the judge had access but the party against whom he finds does not.”³⁵¹

Consequently, it is not normally enough that disclosure should be made only to the party’s legal representatives or experts.³⁵² Unless the party themselves know of the evidence against them, the party cannot adequately respond. The fact that their legal representatives have been informed does not necessarily satisfy the requirement that the parties must be given notice of the case against them and an adequate opportunity to respond. This is because the party, not their representatives, has the fullest familiarity with the disputed facts and surrounding circumstances, and can appreciate the full implications of the disclosed materials.

- 15. 158** Laddie J therefore held that in an application for limited disclosure the starting point is that there should be full disclosure to the parties to the litigation of all those materials which are going to be considered and which may be put before the court. The onus is on the party seeking to limit the disclosure to displace the presumption that there was a need for full disclosure to the other parties.³⁵³ The court should not accede to an application if there was any other way of protecting the commercial interest

in question—for example, by requiring undertakings from the other parties; and where it does accede to the application, the restriction on disclosure to the other parties must be limited to the narrowest extent possible;³⁵⁴ different types of information may require different degrees of protection, according to their value and potential for misuse.³⁵⁵ It was thus for Dyson to show why, notwithstanding onerous undertakings as to confidentiality given by Hoover, documents should not be shown to the latter. In the event, Laddie J was not persuaded by Dyson's reasons and dismissed the application.³⁵⁶

Footnotes

285 See the discussion in Ch.3 Fair Trial paras 3.203 ff.

286 *Secretary of State for Health v Servier Laboratories Ltd [2013] EWCA Civ 1234*; see also *Bank Mellat v HM Treasury [2019] EWCA Civ 449*, where disclosure was ordered notwithstanding that it put the claimant bank at risk of criminal prosecution in Iran.

287 Also *Bank Mellat v HM Treasury [2019] EWCA Civ 449*; *Public Institution for Social Security v Al Wazzan [2023] EWHC 1065 (Comm) [44]*.

288 See Ch.3 Fair Trial paras 3.123 ff.

289 *Bank Mellat v HM Treasury [2019] EWCA Civ 449* [63(v)].

290 *Alfred Crompton Amusement Machines Ltd v Commissioners of Customs and Excise (No.2) [1974] AC 405; [1973] 2 All ER 1169, HL*. See also E. Bray, *The Principles and Practice of Discovery* (London: Reaves & Turner, 1885) pp.302–303; and Ch.3 Fair Trial paras 3.203 ff.

291 *D v National Society for the Prevention of Cruelty to Children [1978] AC 171 at 245; [1977] 1 All ER 589* at 618, HL. See also Law Reform Committee, *Sixteenth Report on Privilege in Civil Proceedings* (London: HMSO, 1967) Cmnd 3472.

292 *Science Research Council v Nassé, BL Cars Ltd (formerly Leyland Cars) v Vyas [1980] AC 1028; [1979] 3 All ER 673, HL*. See also *Mears Ltd v Leeds City Council [2011] EWHC 40 (QB)*.

293 *Frankson v Home Office [2003] EWCA Civ 655; [2003] 1 W.L.R. 1952*. See also *Wallace Smith Trust Co v Deloitte Haskins and Sells (a firm) [1996] 4 All ER 403, CA*. A further illustration of the *Nassé* test may be seen in *Webster v Ridgeway Foundation School Governors [2009] EWHC 1140 (QB)*.

294 *Frankson v Home Office [2003] EWCA Civ 655; [2003] 1 W.L.R. 1952* [39].

295 *Re B (Disclosure to Other Parties) [2001] 2 F.L.R. 1017 (Fam Div)*.

296 See also *Re W (children) (care proceedings: evidence) [2010] UKSC 12; [2010] 2 All ER 418*.

297 The **DPA 2018** implements Regulation 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (the General Data Protection Regulation, or GDPR). As a result of the UK's departure from the EU on 31 January 2020, the GDPR has ceased to apply qua the UK's status as an EU member state. However, EU law continued to apply in the UK for a transition period which ran from 1 February 2020 to 31 December 2020: the UK-EU Withdrawal Agreement art.127 and the *European Union (Withdrawal) Act 2018 ss.1A–1B* as amended. After the transition period, the GDPR is part of retained EU law and the **DPA 2018** continues in force (the *European Union (Withdrawal) Act 2018 ss.2–3* as amended), subject to certain technical amendments made by the *Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations (SI 2019/419)*.

298 *Rugby Football Union v Consolidated Information Services Ltd (Formerly Viagogo Ltd) (In Liquidation) [2012] UKSC 55*, [25]. But the principles enshrined in the **DPA 2018** are only relevant, not determinative, and should not distract from the main balancing exercise: *Dunn v Durham County Council [2012] EWCA Civ 1654*.

299 *Norwich Pharmacal Co v Customs and Excise Commissioners [1974] AC 133; [1973] 2 All ER 943, HL*. See paras 15.203 ff for *Norwich Pharmacal* orders generally.

300 *Golden Eye (International) Ltd v Telefonica UK Ltd [2012] EWHC 1152 (Ch)*.

301 *Rugby Football Union v Consolidated Information Services Ltd (Formerly Viagogo Ltd) (In Liquidation) [2012] UKSC 55*.

302 *Golden Eye (International) Ltd & Ors v Telefonica UK Ltd [2012] EWHC 1152 (Ch)* [117]. On appeal by some of the claimants, the Court of Appeal approved Arnold J's statement of principle but allowed the appeal in respect of his application of the test to those claimants: *Golden Eye (International) Ltd v Telefonica UK Ltd [2012] EWCA Civ 1740*.

303 *Rugby Football Union v Consolidated Information Services Ltd (Formerly Viagogo Ltd) (In Liquidation) [2012] UKSC 55*.

304 See below, paras 15.216–15.217.

- 305 *Rugby Football Union v Consolidated Information Services Ltd (Formerly Viagogo Ltd) (In Liquidation) [2012] UKSC 55* [17]. See [37] for the factors which swayed the Supreme Court.
- 306 *Ashley v Chief Constable of Sussex [2008] EWHC 3151 (QB)*.
- 307 *Three Rivers District Council v Bank of England (Disclosure) (No.4) [2002] EWCA Civ 1182; [2002] 4 All ER 881*.
- 308 *Wheeler v Le Marchant (1881) 17 Ch D 675, 681, CA*.
- 309 *Attorney-General v Mulholland [1963] 1 All ER 767, CA*.
- 310 See *R v Mid Glamorgan Family Health Services Ex p. Martin [1995] 1 All ER 356; [1995] 1 W.L.R. 110, CA*; and *Bennett v Compass Group UK & Ireland Ltd [2002] EWCA Civ 642*.
- 311 *R v Secretary of State for the Home Department Ex p. Simms [1999] 3 All ER 400 at 408; [2000] 2 AC 115 at 126–127, HL; Various Claimants v MGN Limited [2019] EWCA Civ 350 [18]*.
- 312 *Ashworth Hospital Authority v MGN Ltd [2002] UKHL 29; [2002] 4 All ER 193*.
- 313 *Goodwin v UK (1996) 22 E.H.R.R. 123* [39].
- 314 *Various Claimants v MGN Limited [2019] EWCA Civ 350* [19].
- 315 *Camelot Group Plc v Centaur Communications Ltd [1999] QB 124; [1998] 1 All ER 251, CA*. See also Ch.3 Fair Trial para.3.215.
- 316 *Secretary of State for Defence v Guardian Newspapers Ltd [1985] AC 339; [1984] 3 All ER 601*.
- 317 *X Ltd v Morgan-Grampian Ltd [1991] 1 AC 1; [1990] 2 All ER 1, HL*.
- 318 *X Ltd v Morgan-Grampian Ltd [1991] 1 AC 1; [1990] 2 All ER 1, HL*. See also *Ashworth Hospital Authority v MGN Ltd [2002] UKHL 29; [2002] 4 All ER 193*.
- 319 *X Ltd v Morgan-Grampian Ltd [1991] 1 AC 1; [1990] 2 All ER 1, HL*.
- 320 *Goodwin v UK (1996) 22 E.H.R.R. 123*.
- 321 *Financial Times Ltd & Ors v United Kingdom, The Times, 16 December 2009, ECtHR*.
- 322 *Financial Times Ltd & Ors v United Kingdom, The Times, 16 December 2009* [69], ECtHR.
- 323 *Ashworth Hospital Authority v MGN Ltd [2002] UKHL 29; [2002] 4 All ER 193*.
- 324 See also *Camelot Group Plc v Centaur Communications Ltd [1999] QB 124; [1998] 1 All ER 251, CA*.
- 325 For the continuing efforts to identify the source in *Ashworth Hospital Authority*, see *Mersey Care NHS Trust v Ackroyd [2003] EWCA Civ 663*. For a distillation of the applicable principles see C. Hollander, Documentary Evidence, 15th edn (London: Sweet & Maxwell, 2024) para.4-41.
- 326 In *Various Claimants v MGN Limited [2019] EWCA Civ 350* [20], the Court of Appeal approved Warby J's summary of the principles governing s.10 in *Arcadia Group Ltd v Telegraph Media Group Ltd [2019] EWHC 96 (QB)* [15].
- 327 *In re An Inquiry under the Company Securities (Insider Dealing) Act 1985 [1988] AC 660*, 704.
- 328 *John v Express Newspapers Plc [2000] 3 All ER 257 at 264; [2000] 1 W.L.R. 1931* at 1938; and *Ashworth Hospital Authority v MGN Ltd [2002] UKHL 29; [2002] 4 All ER 193* [90]–[92].
- 329 *Various Claimants v MGN Limited [2019] EWCA Civ 350* [20], citing *X Ltd v Morgan-Grampian (Publishers) Ltd [1991] 1 AC 1* at 53C.
- 330 *Various Claimants v MGN Limited [2019] EWCA Civ 350* [20].
- 331 *X Ltd v Morgan-Grampian Ltd [1991] 1 AC 1* at 44; [1990] 2 All ER 1 at 9, HL; *Secretary of State for Defence v Guardian Newspapers Ltd [1985] AC 339* at 372; [1984] 3 All ER 601 at 623, HL; *Galloway v Daily Telegraph [2006] EWCA Civ 17*, [68]; and *Mersey Care NHS Trust v Ackroyd [2007] EWCA Civ 101* [35].
- 332 *In re an Inquiry Under the Company Securities (Insider Dealing) Act 1985 [1988] AC 660* at 704; [1988] 1 All ER 203 at 208–209, HL.
- 333 *Broadmoor Hospital v Hyde, The Times, 18 March 1994, QBD*.
- 334 *John v Express Newspapers Plc [2000] 3 All ER 257; [2000] 1 W.L.R. 1931*.
- 335 *Secretary of State for Defence v Guardian Newspapers Ltd [1985] AC 339; [1984] 3 All ER 601*.
- 336 However, the Supreme Court of Ireland held that court disapproval of the manner in which a journalist obtained the information would be by no means decisive: *Mahon v Keena [2010] I.R. 336 (Ireland Supreme Court)*.
- 337 *Mersey Care NHS Trust v Ackroyd (No.2) [2006] EWHC 107 (QB)*, affirmed in *Mersey Care NHS Trust v Ackroyd [2007] EWCA Civ 101*.
- 338 *Secretary of State for Defence v Guardian Newspapers Ltd [1985] AC 339; [1984] 3 All ER 601*.
- 339 *Totalise Plc v Motley Fool Ltd [2001] EWCA Civ 1897*, where it was held that there was no justification under the Data Protection Act 1998 or under the Contempt of Court Act 1981 s.10 not to order the disclosure sought.

- 340 *In re an Inquiry Under the Company Securities (Insider Dealing) Act 1985 [1988] AC 660; [1988] 1 All ER 203, HL*. See also *Rugby Football Union v Consolidated Information Services Ltd (Formerly Viagogo Ltd) (In Liquidation) [2012] UKSC 55* [37].
- 341 See below, paras 15.239 ff.
- 342 Ch.3 Fair Trial paras 3.190–3.191.
- 343 Such concerns may also arise in competition proceedings where rival commercial interests are involved: *Infederation Ltd v Google LLC [2020] EWHC 657 (Ch)* [29].
- 344 *Al-Rawi v Security Service [2011] UKSC 34; [2012] 1 AC 531* [64].
- 345 *Church of Scientology of California v Department of Health [1979] 3 All ER 97; [1979] 1 W.L.R. 723* at 746, CA; see also *Danisco AS v Novozymes AS [2012] EWHC 389 (Pat)* [68]–[73].
- 346 *Warner-Lambert Co v Glaxo Laboratories Ltd [1975] R.P.C. 354, CA; InterDigital Technology Corp v Nokia Corp [2008] EWHC 969 (Pat)* and *Oneplus Technology (Shenzhen) Co Ltd v Mitsubishi Electric Corp [2020] EWCA Civ 1562* [39]. In *Anan Kasei Co Ltd v Neo Chemicals & Oxides (Europe) Ltd [2021] EWHC 3295 (Pat)*, Mellor J rejected the submission, based on *McKillen v Misland (Cyprus) Investments Ltd [2012] EWHC 1158 (Ch)*, that the court had no jurisdiction to deny a party access to the evidence at trial or that any such jurisdiction was so exceptional to be of largely theoretical interest only: see [12] and [36]–[37].
- 347 *Oneplus Technology (Shenzhen) Co Ltd v Mitsubishi Electric Corp [2020] EWCA Civ 1562* [39(iii)].
- 348 *Oneplus Technology (Shenzhen) Co Ltd v Mitsubishi Electric Corp [2020] EWCA Civ 1562* [39(i)].
- 349 *Danisco AS v Novozymes AS [2012] EWHC 389 (Pat)* [71].
- 350 *Dyson Appliances Ltd v Hoover Ltd (No. 3) [2002] EWHC 500 (Pat); [2003] R.P.C. 42*. See also *Bombardier Transportation UK Ltd v Merseytravel [2017] EWHC 726 (TCC)*.
- 351 *Dyson Appliances Ltd v Hoover Ltd (No.3) [2002] EWHC 500 (Pat); [2003] R.P.C. 42* [27].
- 352 “An arrangement under which an officer or employee of the receiving party gains no access at all to documents of importance at trial will be exceptionally rare, if indeed it can happen at all”: *Oneplus Technology (Shenzhen) Co Ltd v Mitsubishi Electric Corp [2020] EWCA Civ 1562* [39(ii)].
- 353 The onus is also on the disclosing party throughout to justify their designation of documents as “external eyes only”, if such a tier is created: *Oneplus Technology (Shenzhen) Co Ltd v Mitsubishi Electric Corp [2020] EWCA Civ 1562* [39(v)], citing *TQ Delta LLC v Zyxel Communications UK Ltd [2018] EWHC 1515 (Ch)* [21] and [23].
- 354 *Infederation Ltd v Google LLC [2020] EWHC 657 (Ch)* [42].
- 355 *Oneplus Technology (Shenzhen) Co Ltd v Mitsubishi Electric Corp [2020] EWCA Civ 1562* [39(vi)].
- 356 See also *Atari Inc v Philips Electronics and Associated Industries Ltd [1988] F.S.R. 416*, where disclosure of the claimants’ secret computer source code was ordered without limitation on the terms of disclosure upon the defendants and their expert giving strict undertakings as to confidentiality.

Pre-action Disclosure

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 15 - Disclosure

Pre-action Disclosure

The jurisdiction to order pre-action disclosure

15. 159 Traditionally, English law provided parties with extensive facilities for obtaining disclosure of documents from each other only once litigation has commenced. In advance of proceedings, however, it offered no facility for enabling parties to a dispute to obtain documents from each other. This could cause considerable hardship where a victim of a wrong was unable to ascertain whether they had a cause of action against another person without access to that person's documents. For example, a patient who appeared to have sustained injury as a result of hospital treatment was not always able to know whether they had a legitimate complaint against the hospital without first seeing the hospital records. To overcome this difficulty the Report of the Committee on Personal Injuries Litigation³⁵⁷ recommended the introduction of pre-action discovery in personal injuries claims. This was implemented by the [Administration of Justice Act 1969 s.21\(1\)](#), which empowered the court to order pre-action disclosure at the request of a person who appeared likely to be a party to subsequent proceedings in respect of personal injuries.³⁵⁸ This facility was intended to assist potential claimants who could not otherwise establish whether they had grounds for action, as well as those who required support for a case they could already plead.³⁵⁹

15. 160 Pre-action disclosure was extended much further following Lord Woolf's reports on access to justice. One of the key recommendations of the report was that parties to a dispute should co-operate with each other and should communicate to each other the key elements of their case even before proceedings commence. The pre-action protocols provide the framework for an early and meaningful exchange of arguments and evidence. The common feature of the different protocols is the requirement that parties exchange material documents before commencing proceedings.³⁶⁰ However, the pre-action protocols are not directly enforceable and cannot assist a person faced with an opponent who refuses to co-operate. Lord Woolf recommended therefore the extension of the power to order pre-action disclosure to all categories of claims.³⁶¹ The [Senior Courts Act 1981 s.33](#), as amended,³⁶² implemented this recommendation, which is now reflected in [CPR 31.16](#). Pre-action disclosure is part of a general strategy to enable the parties to acquire reasonably complete information about each other's documentary material as early as possible, so that they may be able to arrive at a well-informed view about the strengths of their respective cases, about the advisability of pressing ahead with litigation and about the possibility of settlement without litigation. The [Senior Courts Act 1981 s.33\(2\)](#) states:

Section 33:(2)

(2) On the application, in accordance with rules of court, of a person who appears to the High Court to be likely to be a party to subsequent proceedings in that court, the High Court shall, in such circumstances as may be specified in the rules, have power to order a person who appears to the court to be likely to be a party to the proceedings and to be likely to have or to have had in his possession, custody or power any documents which are relevant to an issue arising or likely to arise out of that claim—

(a) to disclose whether those documents are in his possession, custody or power; and

(b) to produce such of those documents as are in his possession, custody or power to the applicant or, on such conditions as may be specified in the order—

(i) to the applicant's legal advisers; or

- (ii) to the applicant's legal advisers and any medical or other professional adviser of the applicant;
- or
- (iii) if the applicant has no legal adviser, to any medical or other professional adviser of the applicant."

15. 161 The County Court is endowed with similar jurisdiction under the [County Courts Act 1984 s.52\(2\)](#). [CPR 25.4](#) stipulates that applications made under the [Senior Courts Act 1981 s.33](#) or the [County Courts Act 1984 s.52](#) must be made in accordance with [CPR 23](#). For the most part, however, the procedure for obtaining pre-action disclosure under these sections is set out in [CPR 31.16](#), which applies both under the general [CPR 31](#) regime and under PD 57AD. Where there is a risk that an application under this rule may not be effective, the court may grant an interim remedy to secure disclosure of relevant documents under [CPR 25.1\(1\)\(c\)\(j\)](#).

15. 162 [CPR 31.16\(3\)](#) sets out the necessary conditions for obtaining pre-action disclosure. It states that the court may make an order under this rule only where:

the respondent is likely to be a party to subsequent proceedings;

the applicant is also likely to be a party to those proceedings;

if proceedings had started, the respondent's duty by way of standard disclosure would extend to the documents in respect of which the applicant seeks disclosure;

disclosure before proceedings is desirable in order to dispose fairly of the anticipated proceedings, assist the dispute to be resolved without proceedings or save costs.

The above-mentioned provisions contain jurisdictional conditions, in the sense that a court may not make a disclosure order under this rule unless the applicant has fulfilled these conditions.³⁶³ An application under the rule must be supported by evidence ([CPR 31.16\(2\)](#)). An order for pre-action disclosure must specify the documents or classes of documents that need to be disclosed. It will require the respondent to indicate which documents are no longer in their control and to explain what became of them. The respondent must state whether they claim a right to withhold inspection. Orders will normally specify a time for disclosure and for inspection. Applications for pre-action disclosure may be made in judicial review proceedings, but will only rarely be successful.³⁶⁴

15. 163 Permission to serve out of the jurisdiction may be granted in respect of an application for pre-action disclosure under PD 6B, para.3.1(20),³⁶⁵ at least where the documents are located within the jurisdiction.³⁶⁶ In *Gorbachev v Guriev*, the Court of Appeal left open whether permission to serve out may be granted where the documents are outside the jurisdiction.³⁶⁷ Males LJ noted that there were possibilities. First, that [Senior Courts Act 1981 s.34](#) is limited to the production of documents located within the jurisdiction; this would "giv[e] effect to the principle of territoriality with a hard-edged rule". Second, that the court has jurisdiction to make such an order against a person located anywhere in the world, with the existence of judicial discretion providing a sufficient safeguard against any illegitimate interference with the sovereignty of other nations or inappropriate circumvention of the letter of request procedure.³⁶⁸ If permission to serve out cannot be granted where documents are outside the jurisdiction, the appropriate procedure would be letters of request under the Hague Evidence Convention, although the letter of request procedure is narrower than pre-action or third party disclosure pursuant to [CPR 31.16–31.17](#).³⁶⁹

The tension between “fishing” and legitimate disclosure

15. 164 At the heart of the jurisdiction to order pre-action disclosure there is a tension between seeking information concerning a cause of action and searching for a cause of action to pursue. The traditional purpose of disclosure is to assist parties to establish a case which they have reasonable grounds to bring or defend, not to enable a party to ferret out a case for which it has otherwise no grounds whatever. The latter is known as a “fishing expedition”, of which English law traditionally disapproved. But, in certain situations, justice requires that a person should be allowed to embark on what might otherwise be regarded as such an expedition.
15. 165 For instance, it is only reasonable to expect that a hospital should fully inform its patient of what took place in the course of the patient’s treatment. If it refuses, it should be ordered to make disclosure even before action. Similarly, it is only natural that persons who have suffered as a result of environmental pollution should wish to discover the persons responsible. In such cases it can be said that pre-action disclosure merely allows the affected persons to find out what they should be entitled to discover quite independently of any litigation. The hospital patient or the victim of pollution cannot therefore be criticised for embarking on a fishing expedition. The position is, however, quite different where a person seeks to obtain from another disclosure of documents or information to which they have no legal or moral right in order to find out whether they have a cause of action.³⁷⁰
15. 166 If pre-action disclosure orders were easily available, there would be a risk that applicants would seek to use them not so much for the purpose of making an early assessment of the advisability of proceedings, but in order to ferret out a cause of action of which they would otherwise be ignorant, to harass a competitor or to manoeuvre a potential defendant into an unattractive negotiating position.³⁷¹ As we shall presently see, in exercising its jurisdiction under CPR 31.16 the court has sought to tread a careful path between legitimate and unacceptable searches for information. In this regard it is worth bearing in mind Rix LJ’s warning in *Black v Sumitomo* that:

“[It] cannot be right to think that, wherever proceedings are likely between the parties to such an application and there is a real prospect of one of the purposes under [CPR 31.16(3)(d)] being met, an order for disclosure should be made of documents which would in due course fall within standard disclosure. Otherwise an order for pre-action disclosure should be made in almost every dispute of any seriousness, irrespective of its context and detail. Whereas outside obvious examples such as medical records or their equivalent (as indicated by pre-action protocols) in certain other kinds of disputes, by and large the concept of disclosure being ordered at other than the normal time is presented as something differing from the normal, at any rate where the parties at the pre-action stage have been acting reasonably.”³⁷²

The jurisdictional conditions

15. 167 Essentially, pursuant to CPR 31.16(3), an applicant must satisfy three conditions: (a) likelihood that the applicant and respondent would be parties to subsequent court proceedings³⁷³; (b) that the documents sought would come within standard disclosure in such proceedings; and (c) that pre-action disclosure is desirable for one of the reasons stated in the rule. The Court of Appeal has examined the nature of these conditions in two key cases: *Bermuda International Securities Ltd v KPMG*³⁷⁴ and *Black v Sumitomo*.³⁷⁵ It has also confirmed that the question of “arguability” is only relevant at the discretion stage; there is no jurisdictional requirement that an applicant demonstrate a *prima facie* case.³⁷⁶

“Likely to be a party”

15. 168 In *Black v Sumitomo*,³⁷⁷ Rix LJ considered the meaning of the words “likely to be a party to subsequent proceedings”, in the Senior Courts Act 1981 s.33 and CPR 31.16(3).³⁷⁸ The issue in the case was whether the statute and the rules require that it be likely that proceedings be issued, or only that the persons concerned are likely to be parties if subsequent proceedings are issued and, further, whether “likely” means “more probably than not” or “may well”.³⁷⁹ Rix LJ had no difficulty holding that the words mean “no more than that the persons concerned are likely to be parties in proceedings if those proceedings are issued”.³⁸⁰ He further held “that ‘likely’ here means no more than ‘may well’”.³⁸¹ Accordingly, the applicant must satisfy the court that they and the respondent may well be parties to proceedings, if such proceedings were to take place. Rix LJ thought that this should be sufficient to ensure that pre-action disclosure would not be ordered against a stranger to any possible proceedings, or against a person who would be unlikely to be involved in proceedings. This approach reflects the purpose of pre-action disclosure to enable people to ascertain whether they have a cause of action. If an applicant were required to establish that they had a likely cause of action against the respondent, pre-action disclosure would in effect be limited to those who already knew they had a cause of action against the respondent. The applicant must show that there would be a *prima facie* case which was more than a speculative punt.³⁸² However, disclosure will not be ordered where the dispute comes within the terms of an arbitration agreement as the proceedings would be referred to arbitration rather than tried in court.³⁸³

15. 169 Applications for pre-action disclosure pursuant to the Senior Courts Act 1981 s.33(2) and CPR r.31.16 must be made prior to the commencement of proceedings, as the court does not have jurisdiction to make such an order once proceedings have been issued.³⁸⁴ Where one claim is issued and an application for pre-action disclosure is made in respect of an overlapping claim yet to be issued, the court has jurisdiction to order disclosure of any causes of action contained in the second claim which are separate from those contained in the first claim.³⁸⁵ If there is an application under CPR 31.16 when proceedings are on foot and the applicants undertake to discontinue those proceedings and wish to have disclosure in relation to a second set of proceedings the court has jurisdiction to make such order.³⁸⁶

Pre-action disclosure limited to standard disclosure

15. 170 The second jurisdictional condition limits pre-action disclosure to documents that would be disclosable under standard disclosure. This means that an order of pre-action disclosure cannot impose a more extensive obligation of disclosure than would be imposed under standard disclosure.³⁸⁷ The implications of this condition were elaborated by Waller LJ in *Bermuda International Securities Ltd v KPMG*, where he explained that disclosure would be ordered only:

“where the court can say that the documents asked for will be documents that will have to be produced at the standard disclosure stage. It follows from that, that the court must be clear what the issues in the litigation are likely to be i.e. what case the claimant is likely to be making and what defence is likely to be being run so as to make sure the documents being asked for are ones which will adversely affect the case of one side or the other, or support the case of one side or the other.”³⁸⁸

15. 171 Since an applicant for pre-action disclosure must satisfy the condition that they and the respondent may well be parties to proceedings, considerable thought needs to be given to drafting the pre-application letter which the applicant will normally send to the respondent. The applicant should make as clear as possible the causes of action that are likely to be put forward and the nature and extent of loss. They should also identify as far as practicable the documents sought, their possible bearing on the issues that are likely to arise and that it is more probable than not that the documents are within the scope of standard

disclosure should an action commence.³⁸⁹ It might be advisable to accompany an application for pre-action disclosure with a draft statement of case, so as to satisfy the court of the substance of the application.³⁹⁰

Desirability

- 15.172 The third jurisdictional condition is concerned with desirability. The court must be satisfied that pre-action disclosure is desirable for at least one of three reasons: to dispose fairly of the anticipated proceedings; to assist the resolution of the dispute without proceedings; or to save costs.³⁹¹ The first is concerned with probative usefulness and therefore adds little to the requirement that the documents in question would come within standard disclosure in any anticipated proceedings. The remaining two conditions are of greater significance, for they require the court to consider whether early disclosure is likely to assist settlement and whether it is likely to save costs.
- 15.173 The court may refuse to order disclosure if the order is not necessary to enable action to be brought. The court will consider whether the information is vital to a decision to sue or to the ability to plead and, if so, whether the information sought could be obtained from other sources. If the applicant has enough information to bring proceedings without disclosure, pre-action disclosure would be considered wasteful and would not be ordered. Pre-action disclosure would not be ordered merely to assist the applicant to better focus his claim.³⁹²

Discretion to order pre-action disclosure

- 15.174 In *Bermuda International Securities Ltd v KPMG*, Waller LJ explained that even if the court has concluded that the disclosure would assist in disposing fairly of the proceedings, would help encourage settlement and would save costs, it may still conclude that for some reason an order would be undesirable.³⁹³ As Rix LJ pointed out in *Black v Sumitomo*, the “jurisdictional threshold is not intended to be a high one. The real question is likely to be one of discretion, and answering the jurisdictional question in the affirmative is unlikely in itself to give the judge much of a steer as to the correct exercise of his power”.³⁹⁴
- 15.175 The significance of the discretionary element will vary according to the nature of the case. It is unlikely to play a major role in personal injury claims, where the nature of the documents that need to be disclosed is clear and the range of disclosure well defined. But difficult questions may arise in commercial litigation, where the connection between documents and issues might be less obvious and where the categories of documents are extensive or ill-defined. As Rix LJ observed in *Black v Sumitomo*, to exercise discretion the court needs to know more than that the jurisdictional conditions have been fulfilled; “if the case is a personal injury claim and the request is for medical records, it is easy to conclude that pre-action disclosure ought to be made; but if the action is a speculative commercial action and the disclosure sought is broad, a fortiori if it is ill-defined, it might be much harder”.³⁹⁵ A major consideration, Briggs J stressed, would be whether the cost of pre-action disclosure could be justified.³⁹⁶
- 15.176 The exercise of discretion, Rix LJ explained in *Black v Sumitomo*, will depend (among other considerations) on the nature of the injury or loss complained of, the clarity and identification of the issues raised by the complaint, the nature of the documents requested, the relevance of any protocol or pre-action enquiries and the opportunity which the complainant has to make their case without pre-action disclosure.³⁹⁷ The court has, therefore, ample flexibility to balance the possible uncertainties of the situation against the specificity or otherwise of the disclosure requested. He noted that the narrower the disclosure requested and the more determinative it may be of the dispute, the easier it is for the court to find the request well-founded. Outside personal injury cases, it may be desirable to attach draft particulars of a claim to an application for pre-trial disclosure in order to rebut any suggestion of it being a fishing expedition and in order to narrow down the scope of the sought-after disclosure.³⁹⁸ Where

the intended claim is in fraud, there must be some real evidence of dishonesty or abuse; the court must be able to say that the available evidence is more consistent with dishonesty than with innocence.³⁹⁹

15. 177 Given that the court's decision whether to order pre-action disclosure may depend on the nature of the issue likely to be raised in any future proceedings, it might be tempting for the court to embark on an examination of the potential issue. In *Rose v Lynx Express Ltd*, the Court of Appeal warned of this temptation.⁴⁰⁰ The judge considered that the issue of construction at the centre of the dispute was crucial to the outcome of the disclosure application and ordered that it should be tried as a preliminary issue "insofar as it is relevant to [the] application for pre-action disclosure". In the event the judge dismissed the application. The Court of Appeal allowed the appeal against that decision and expressed strong reservations about the process followed by the judge. Peter Gibson LJ explained that by deciding the issue of construction for the purpose of the application the judge created the potential for an undesirable conflict between his preliminary decision on the issue and its final resolution after trial. This risk was all the more real, Peter Gibson LJ stated, since:

"[At] the pre-action stage, the parties may not have thought through or seen all the implications of the issue in the same way as they will have done by the time when it comes to be tried. Any pre-action determination will have to take place in light of assumptions about the factual circumstances, which may prove incomplete or incorrect."⁴⁰¹

He warned against the temptation to embark on any determination of substantive issues in the case. He concluded that "it will normally be sufficient to found an application under CPR 31.16(3) for the substantive claim pursued in the proceedings to be properly arguable and to have a real prospect of success, and it will normally be appropriate to approach the conditions in CPR 31.16(3) on that basis".⁴⁰²

15. 178 Nonetheless, the Court of Appeal in *Rose v Lynx Express Ltd* gave considerable attention to the issue of construction at centre of the dispute and concluded that:

"We consider the true meaning and application of the Articles to be somewhat elusive and we do not regard the arguments so far advanced on either side as entirely satisfying. Even assuming that it would be possible to confine the implications of any view we might express to the present context of pre-action disclosure, we have come to the conclusion that the right course is to do no more than to determine that Mr Rose has a properly arguable case and on that basis to order the limited pre-action which the judge identified. The true meaning and application of the Articles will have to be fully re-argued in the ordinary course of any trial. What follows is in these circumstances no more than our present perception of some of the points which arise."⁴⁰³

15. 179 As this decision makes clear, on an application for pre-action disclosure all that the court needs to decide is whether an order of disclosure is necessary and proportionate in order to enable a party to determine whether they have grounds for bringing proceedings. Beyond a minimal examination of whether the applicant may have an arguable case, the court is not concerned with merits. The court must not embark upon a consideration of difficult legal issues such as justiciability and the mental element required to establish the economic torts that the respondent relied on.⁴⁰⁴ Nor is the court required to investigate legally complex and debatable potential defences or grounds for stay, nor should it consider arguments about appropriate forum on an application for pre-action disclosure. Matters would be different, however, if a respondent could show beyond argument that a claim was hopeless or non-justiciable or if disclosure of the documents themselves raised non-justiciable issues such as sovereign confidentiality.⁴⁰⁵

15. 180 It is advisable to support an application for pre-action disclosure by such evidence as is available at that stage. For instance, a patient who applies for such an order on the grounds that they contemplate suing a hospital for medical negligence would be expected to show some evidence of injury resulting from hospital treatment. It should be noted that potential defendants, as well as potential claimants, might take advantage of this process. The hospital, in this example, may have an interest in seeing the patient's medical records subsequent to their discharge from hospital. It is unlikely that the court would make a pre-action

disclosure order without directing reciprocity, where this is appropriate. It may therefore be advisable for the respondent to consider making a cross-application and indicating the kind of reciprocal disclosure direction that they would like the court to give.

Costs of pre-action disclosure

- 15. 181** As a rule, the court will award the party against whom an order for pre-action disclosure is made their costs of the application and the costs of complying with the order ([CPR 46.1\(2\)](#)). Insofar as the costs of the application are concerned, the rule is designed to ensure that applications for pre-action disclosure are not made lightly, that applicants would normally be required to justify their request and that respondents should therefore be free to resist the application without the risk of costs.⁴⁰⁶ As far as the costs of compliance are concerned, it is only natural that an applicant who puts another person to the trouble of providing them with information should pay for that person's services.
- 15. 182** However, the court has discretion to depart from this rule where appropriate.⁴⁰⁷ If a respondent has unreasonably resisted the application, the court may deny the respondent the costs of the application and, in extreme circumstances, even order the respondent to pay the applicant's costs.⁴⁰⁸ If a respondent had already gathered together the documents, independently of the applicant's request, there should be no cost of compliance.

Footnotes

- 357** R. Winn, Report of the Committee on Personal Injuries Litigation (London: HMSO 1968) Cmnd 3691.
- 358** Rules of court were made to provide a framework for obtaining pre-action discovery: [RSC Ord.24 r.7A](#).
- 359** See *Black v Sumitomo Corp [2001] EWCA Civ 1819; [2002] 1 W.L.R. 1562* [68].
- 360** *Bermuda International Securities Ltd v KPMG [2001] EWCA Civ 269; [2001] C.P. Rep. 73* [37]–[42].
- 361** Woolf, Final Report p.127 para.48.
- 362** That is, by the [Civil Procedure \(Modification of Enactments\) Order 1998](#) (SI 1998/2940), art.5(a), made pursuant to the [Civil Procedure Act 1997](#) s.8. For a review of the history see *Black v Sumitomo Corp [2001] EWCA Civ 1819; [2002] 1 W.L.R. 1562*.
- 363** *Black v Sumitomo Corp [2001] EWCA Civ 1819; [2002] 1 W.L.R. 1562*.
- 364** *British Union for the Abolition of Vivisection (BUAV) v Secretary of State for the Home Department [2014] EWHC 43 (Admin)* [33]–[34].
- 365** “(20) A claim is made – (a) under an enactment which allows proceedings to be brought and those proceedings are not covered by any of the other grounds referred to in this paragraph.”
- 366** *Gorbachev v Guriev [2022] EWCA Civ 1270* [88]. This was a decision in respect of third party disclosure pursuant to [CPR 31.17](#) but the same result would apply in respect of pre-action disclosure under [CPR 31.17](#). Males LJ observed at [25] that “In view of the common origin and similar language of these two provisions ... it would be surprising if a different answer were to be given in the two cases.” “See also [34].”
- 367** *Gorbachev v Guriev [2022] EWCA Civ 1270* [89]–[90]. However, even if the court has jurisdiction, “in view of the availability of the letter of request procedure it would only be in an exceptional case that it would be appropriate to exercise that jurisdiction”: Males LJ at [90].
- 368** *Gorbachev v Guriev [2022] EWCA Civ 1270* [89].
- 369** *Gorbachev v Guriev [2022] EWCA Civ 1270* [59]–[63].
- 370** It should be noted that in some such circumstances, a person may have a freestanding right to the information—for example, under the [DPA 2018](#). It has been said that such mechanisms may be a useful and inexpensive alternative to pre-action disclosure (or indeed disclosure during proceedings), though they are not without limitations: *Durham County Council v Dunn [2012] EWCA Civ 1654* [16]. At the same time, though, it has been held that a data controller may

refuse to disclose personal information pursuant to a subject access request under [DPA 2018 s.45](#), at least where this would also entail disclosure of a third party's personal data, if the primary purpose of the subject access request is for pending litigation, since [CPR 31](#) provides the appropriate route for obtaining such disclosure: [DB v General Medical Council \[2016\] EWHC 2331 \(QB\)](#). These decisions are not altogether easy to reconcile, at least insofar as they relate to subject access requests as an alternative to non-party disclosure after proceedings have commenced.

371 Cf. [Arsenal Football Club Plc v Elite Sports Distribution Ltd \[2003\] 07 L.S. Gaz. R. 36](#); and [Snowstar Shipping Co Ltd v Graig Shipping Plc \[2003\] EWHC 1367 \(Comm\)](#).

372 [Black v Sumitomo Corp \[2001\] EWCA Civ 1819; \[2002\] 1 W.L.R. 1562](#) [85]. See also [Birse Construction Ltd v HLC Engenharia Gestao de Projectos SA \[2006\] EWHC 1258 QB \(TCC\)](#).

373 The proceedings must be court proceedings: [Insurance Co Ltd v Countrywide Surveyors Ltd \[2010\] EWHC 2455 \(TCC\)](#), holding that [CPR 31.16](#) did not apply where the underlying dispute was to be referred to arbitration.

374 [Bermuda International Securities Ltd v KPMG \[2001\] EWCA Civ 269; \[2001\] C.P. Rep. 73](#).

375 [Black v Sumitomo Corp \[2001\] EWCA Civ 1819; \[2002\] 1 W.L.R. 1562](#). See also [Birse Construction Ltd v HLC Engenharia e Gestao de Projectos SA \[2006\] EWHC 1258 QB \(TCC\)](#).

376 [Smith v Secretary of State for Energy and Climate Change \[2013\] EWCA Civ 1585](#) [27].

377 [Black v Sumitomo Corp \[2001\] EWCA Civ 1819; \[2002\] 1 W.L.R. 1562](#).

378 Although such an application will normally be made by a prospective claimant against a prospective defendant, there is nothing in the language of [CPR 31.16\(3\)\(a\)](#) preventing the prospective defendant from making such an application. However, this may be a factor relevant to the exercise of the court's discretion (as to which, see below, paras 15.172 ff): [Taylor Wimpey UK Ltd v Harron Homes Ltd \[2020\] EWHC 1190 \(TCC\)](#).

379 [Black v Sumitomo Corp \[2001\] EWCA Civ 1819; \[2002\] 1 W.L.R. 1562](#) [71].

380 He drew support for his conclusion from the fact that the additional condition that "a claim is likely to be made", which appeared in an earlier version of this provision, had been removed. See the [Administration of Justice Act 1970](#) s.31 and [61] of Rix LJ's judgment.

381 [Black v Sumitomo Corp \[2001\] EWCA Civ 1819 at \[72\]; \[2002\] 1 W.L.R. 1562](#) [72].

382 [Jet Airways \(India\) Ltd v Barloworld Handling Ltd \[2012\] EWHC 3364 \(Comm\)](#).

383 [Travellers Insurance Co Ltd v Countrywide Surveyors Ltd \[2010\] EWHC 2455 \(TCC\)](#).

384 [Personal Management Solutions Ltd v Gee 7 Group Ltd \[2015\] EWHC 3859 \(Ch\)](#).

385 [Anglia Research Services Ltd v Finders Genealogists Ltd \[2016\] EWHC 297 \(QB\)](#).

386 [Personal Management Solutions Ltd v Gee 7 Group Ltd \[2015\] EWHC 3859 \(Ch\)](#).

387 Although it is usual, in patent cases, for there to be a split trial on liability and quantum, that does not mean that standard disclosure does not extend to documents relating to quantum. A party is therefore able to apply for pre-action disclosure of documents relating to quantum, even if a split trial is very likely: [Big Bus Co Ltd v Ticketogo Ltd \[2015\] EWHC 1094 \(Pat\)](#).

388 [Bermuda International Securities Ltd v KPMG \[2001\] EWCA Civ 269; \[2001\] C.P. Rep. 73](#) at [26]. See also [Hutchison 3G UK Ltd v O2 \(UK\) Ltd \[2008\] EWHC 55 \(Comm\)](#).

389 [Snowstar Shipping Co Ltd v Graig Shipping Plc \[2003\] EWHC 1367 \(Comm\); \[2003\] All ER \(D\) 174 \(Jun\)](#) [35]; and [Hutchison 3G UK Ltd v O2 \(UK\) Ltd \[2008\] EWHC 55 \(Comm\)](#).

390 For an explanation of this requirement see [Hands v Morrison Construction Services Ltd \[2006\] EWHC 2018 \(Ch\)](#).

391 See [Medisys Plc v Arthur Andersen \(a firm\) \[2002\] Lloyd's Rep. P.N. 323, QBD](#); and [Hands v Morrison Construction Services Ltd \[2006\] EWHC 2018 \(Ch\)](#). See also [Hutchison 3G UK Ltd v O2 \(UK\) Ltd \[2008\] EWHC 55 \(Comm\)](#).

392 [Hands v Morrison Construction Services Ltd \[2006\] EWHC 2018 \(Ch\)](#). A similar approach was adopted in relation to pre-action disclosure under the [Norwich Pharmacal rule](#): [Nikitin v Richards Butler LLP \[2007\] EWHC 173 \(QB\)](#), discussed below at paras 15.203 ff.

393 [Bermuda International Securities Ltd v \[2001\] EWCA Civ 269; \[2001\] C.P. Rep. 73](#) [26].

394 [Black v Sumitomo Corp \[2001\] EWCA Civ 1819; \[2002\] 1 W.L.R. 1562](#), [73]. See also [Total E&P Soudan SA v Edmonds \[2006\] EWHC 1136 \(QB \(Comm\)\)](#); and [Hands v Morrison Construction Services Ltd \[2006\] EWHC 2018 \(Ch\)](#).

395 [Black v Sumitmo Corp \[2001\] EWCA Civ 1819; \[2002\] 1 W.L.R. 1562](#) [83].

396 [Hands v Morrison Construction Services Ltd \[2006\] EWHC 2018 \(Ch\)](#).

397 [Black v Sumitmo Corp \[2001\] EWCA Civ 1819; \[2002\] 1 W.L.R. 1562](#) [88]. It has been held that where a police informer indicated his intention to claim damages for psychiatric injury against the police, it was inappropriate to apply to the court for pre action disclosure as the issue could not be considered without a properly formulated claim: [Laurence v Commissioner of Police of the Metropolis \[2006\] EWCA Civ 425; \[2006\] Po. L.R. 77](#).

- 398 See *Hays Specialist Recruitment (Holdings) Ltd v Ions* [2008] EWHC 745 (Ch); [2008] All ER (D.) 216. Cf. *Medisys Plc v Arthur Andersen (a firm)* [2002] Lloyd's Rep. P.N. 323, QBD.
- 399 *Black v Sumitomo Corp* [2001] EWCA Civ 1819; [2002] 1 W.L.R. 1562 [92] and *Red Fort Capital Inc v Lockton Companies LLP* [2022] EWHC 2869 (Comm) [20]–[25].
- 400 *Rose v Lynx Express Ltd* [2004] EWCA Civ 447; [2004] 1 B.C.L.C. 455.
- 401 *Rose v Lynx Express Ltd* [2004] EWCA Civ 447; [2004] 1 B.C.L.C. 455 [3].
- 402 *Rose v Lynx Express Ltd* [2004] EWCA Civ 447; [2004] 1 B.C.L.C. 455 [3].
- 403 *Rose v Lynx Express Ltd* [2004] EWCA Civ 447; [2004] 1 B.C.L.C. 455 [27]. See also *Jet Airways (India) Ltd v Barloworld Handling Ltd* [2012] EWHC 3364 (Comm).
- 404 *Total E&P Soudan SA v Edmonds* [2007] EWCA Civ 50; [2007] C.P. Rep. 20.
- 405 *Total E&P Soudan SA v Edmonds* [2007] EWCA Civ 50; [2007] C.P. Rep. 20.
- 406 *SES Contracting Ltd v UK Coal Plc* [2007] EWCA Civ 791; [2007] C.P. Rep. 46.
- 407 *Bermuda International Securities Ltd v KPMG* [2001] EWCA Civ 269; [2001] C.P. Rep. 73 [30]–[33]. See also *Black v Sumitomo Corp* [2001] EWCA Civ 1819; [2002] 1 W.L.R. 1562. The authorities were reviewed in *Gorbachev v Guriev* [2023] EWCA Civ 327 [21]–[27].
- 408 *SES Contracting Ltd v UK Coal Plc* [2007] EWCA Civ 791; [2007] C.P. Rep. 46.

Disclosure Obtainable from Non-parties

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 15 - Disclosure

Disclosure Obtainable from Non-parties

15. 183 Parties to legal proceedings, or persons who contemplate such proceedings, have considerable means to obtain documents from non-parties, though not necessarily before the trial. Some of these means, such as requiring mere witnesses to produce documents for the purpose of legal proceedings, were not traditionally considered to come under the law of disclosure. Since the CPR came into force, there has been considerable convergence between the procedures for obtaining disclosure from parties to the proceedings and the procedures for obtaining documents from non-parties.
15. 184 There are two distinct procedures for obtaining documents from non-parties. The first is by means of a witness summons requiring a person to produce documents in court. The second is by means of an order for disclosure. Until relatively recently the main method of obtaining documents from non-parties was the witness summons, previously known as the subpoena duces tecum, which directed a person in possession of documents relevant to legal proceedings to attend trial and produce the documents specified in the summons. The summons could be used only for the purpose of requiring production of documents in court during the trial. It could not be used to require production to the parties in advance of the trial. Otherwise, there was almost no power to make disclosure orders against non-parties. Today, both the power to require production of documents in advance of trial and the power to make disclosure orders against non-parties are considerable.
15. 185 Although there is an overlap between the use of witness summons and disclosure orders, there remain significant differences. Broadly speaking, the witness summons is used to require a person to produce specific documents (although they may be compendiously described in the order) which are directly relevant to the proceedings and which the witness is believed to possess. A witness summons cannot be used to require a non-party to search for documents.⁴⁰⁹ A disclosure order against a non-party can be wider and may require a non-party to do more than just produce specific documents. A disclosure order directed to a non-party is therefore similar to a disclosure order directed to a party, except that the disclosure burden that can be reasonably imposed upon a non-party is more limited than the burden that may be imposed on a party.⁴¹⁰

Witness summons to produce documents

15. 186 The fact that a witness summons was traditionally limited to securing production of documents at the trial, or other hearing, was a cause of much inconvenience and waste, because it meant that a party, and sometimes both parties, would see the document for the first time at the trial. If the document presented by the witness turned out to be insignificant, cost and effort had been wasted unnecessarily. Even greater waste might result if the document turned out to be significant, because one or other of the parties might need an adjournment to study the consequences and to adjust their case accordingly. Further, an early disclosure of the document to the parties might have resulted in an early settlement and the avoidance of protracted litigation. To avoid such consequences Sir Donald Nicholls VC held in *Khanna v Lovell White Durrant (a firm)*⁴¹¹ that where a party could be summoned to produce a document at the trial, they could also be summoned to produce it in advance of the trial. An early disclosure order, he explained, did not impose any extra burden on the non-party, since it merely brought forward the time at which the non-party needed to produce the document.

15. 187

This jurisdiction is now available under **CPR 34.2**. The court may issue a witness summons under **CPR 34** directing a person to attend court in order to give evidence (formerly known as subpoena ad testificandum) or to produce a document (formerly known as subpoena duces tecum).⁴¹² A witness summons may require a person to produce documents to the court either on a day fixed for a hearing, or in advance of a hearing so that the parties may study them before the hearing (**CPR 34.2(4)**). Given that such orders are directed to witnesses, the rules do not require notice of the application to be given to the person in respect of whom an order is sought. However, since the court has an obligation to ensure “that this intrusive jurisdiction is not used inappropriately even by consent … the court may well be assisted by submissions made on behalf of any third party the protection of whose interests requires to be considered”.⁴¹³ The availability of such summons is limited to specific identified documents.⁴¹⁴

- 15. 188** In *Tajik Aluminium Plant v Hydro Aluminium AS*,⁴¹⁵ Moore-Bick LJ stressed the importance of maintaining a clear distinction between a witness summons under **CPR 34** and a disclosure order directed to a non-party under **CPR 31.17**. The former, he stated, was still governed by pre-CPR authorities concerning subpoenas duces tecum. While in a witness summons it was not necessary to describe documents individually, it was nevertheless necessary to identify them with sufficient certainty as to leave no real doubt in the mind of the person to whom the summons was addressed as to what they were required to do. A witness summons cannot be used to require a non-party to search for documents of a general description. It cannot, for instance, require a non-party to produce all documents relevant to a particular issue. Originally, it was a condition to admissibility that documents should be produced by the person who possessed the documents in order to verify their authenticity. As the admissibility rules have been relaxed this is no longer necessary.

- 15. 189** The principles governing witness summons were summarised by Gross J in *South Tyneside MBC v Wickes Building Supplies Ltd*:

“(i)The object of a witness summons is to obtain production at trial of specified documents; accordingly, the witness summons must specifically identify the documents sought, it must not be used as an instrument to obtain disclosure and it must not be of a fishing or speculative nature.

(ii)The production of the documents must be necessary for the fair disposal of the matter or to save costs. The Court is entitled to take into account the question of whether the information can be obtained by some other means. It is to be remembered that, by its nature, a witness summons seeks to compel production from a non-party to the proceedings in question.

(iii)Plainly a witness summons will be set aside if the documents are not relevant to the proceedings; but the mere fact that they are relevant is not by itself necessarily decisive in favour of the witness summons.

(iv)The fact that the documents of which production is sought are confidential or contain confidential information is not an absolute bar to the enforcement of their production by way of witness summons; however, in the exercise of its discretion, the Court is entitled to have regard to the fact that documents are confidential and that to order production would involve a breach of confidence. While the Court’s paramount concern must be the fair disposal of the cause or matter, it is not unmindful of other legitimate interests and that to order production of a third party’s confidential documents may be oppressive, intrusive or unfair. In this connection, when documents are confidential, the claim that their production is necessary for the fair resolution of proceedings may well be subjected to particularly close scrutiny.

(v)The Court has power to vary the terms of a witness summons but, at least ordinarily, the Court should not be asked to entertain or perform a redrafting exercise other than on the basis of a considered draft tendered by the party’s advocate.”⁴¹⁶

- 15. 190** A person served with a witness summons must be offered to have their travel expenses paid and to have their loss of time compensated (**CPR 34.7**). This is known as “conduct money”. Compensation for loss of time is calculated in accordance with rates laid down in regulations.⁴¹⁷ Since a witness summons will normally be confined to production of specific documents and will not involve any copying or sifting of documents, the compensation payable will be limited to loss of time in respect of

court attendance. Where, however, the witness is required to undertake substantial work in identifying and sifting documents, an application should be made under the [Senior Courts Act 1981 s.34](#); in which case the non-party would be entitled to costs under [CPR 46.1](#). If a witness summons has been used instead, the court will be able to order the witness's costs to be paid by the party serving the summons, under the general discretion conferred on it by the [Senior Courts Act 1981 s.51](#).⁴¹⁸

Disclosure orders directed to non-parties

- 15.191** Quite apart from the power to issue a witness summons to produce documents, the court has jurisdiction to order a non-party to give disclosure. The [Senior Courts Act 1981 s.34](#) states:

Section 34

“(2) On the application, in accordance with rules of court, of a party to any proceedings, the High Court shall, in such circumstances as may be specified in the rules, have power to order a person who is not a party to the proceedings and who appears to the court to be likely to have in his possession, custody or power any documents which are relevant to an issue arising out of the said claim—

(a) to disclose whether those documents are in his possession, custody or power; and

(b) to produce such of those documents as are in his possession, custody or power to the applicant or, on such conditions as may be specified in the order—

(i) to the applicant’s legal advisers; or

(ii) to the applicant’s legal advisers and any medical or other professional adviser of the applicant; or

(iii) if the applicant has no legal adviser, to any medical or other professional adviser of the applicant.

...

(4) The preceding provisions of this section are without prejudice to the exercise by the High Court of any power to make orders which is exercisable apart from those provisions.”

⁴¹⁹

The County Court is similarly empowered to order a non-party to give disclosure under [County Courts Act 1984 s.53](#). It should be noted that only parties to proceedings can apply for an order under these enactments. Therefore, no application can be made in advance of proceedings, as is the case under the [Senior Courts Act 1981 s.33\(2\)](#) and [CPR 31.16](#), discussed above.

- 15.192** [CPR 31.17](#) implements these provisions. It additionally applies where the claim is governed by PD 57AD. It applies where an application is made under any Act for disclosure by a person who is not a party to the proceedings. Unlike a witness summons under [CPR 34.2](#), which requires a person to produce documents, the procedure laid down in [CPR 31.17](#) is a proper disclosure procedure, which may require a person to conduct a search. An application for a disclosure order against a non-party must be made as an application for an interim remedy under [CPR 25.1\(1\)\(k\)](#). Notice of the application must be given to the non-party concerned and to all other parties ([CPR 23.4\(1\)](#)). The application must be supported by evidence ([CPR 31.17\(2\)](#)). An application may be made with respect to persons outside the jurisdiction where the documents are within the jurisdiction.⁴²⁰ An order for disclosure must specify the documents or classes of documents which the non-party must disclose ([CPR 31.17\(4\)](#)). It will instruct the non-party to specify the documents that are no longer in their control and explain what happened to them, and

to specify the documents in respect of which they assert a right or a duty to withhold inspection. The non-party would normally be entitled to recover the cost of the application and the costs involved in complying with the application ([CPR 46.1\(2\)](#)).⁴²¹

Jurisdictional conditions

- 15. 193** The court may make an order under [CPR 31.17](#) only where two conditions are satisfied, namely that:
- (a)the documents sought are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings; and
 - (b)disclosure is necessary in order to dispose fairly of the claim or to save costs.
- These are jurisdictional conditions in the sense that the court may not order disclosure under this rule unless these conditions are satisfied, but the court retains discretion whether to make the order.⁴²² It has been said that there is a third requirement, namely that “the definition of the documents is sufficiently clear and specific, so that no judgments about the issues in the case are required by the respondents”.⁴²³
- 15. 194** The jurisdictional conditions were explained by the Court of Appeal in *Three Rivers District Council v Bank of England (Disclosure) (No.4)*.⁴²⁴ In this case the respondent to an application for disclosure argued that the word “likely” in [CPR 31.17\(3\)\(a\)](#) should be interpreted as meaning “more probable than not” and that an applicant should therefore be required to establish on the balance of probabilities that the documents sought would assist their case or adversely affect that of their opponents. Chadwick LJ rejected this argument. He referred to the interpretation of the comparable wording of [CPR 31.16](#) in *Black v Sumitomo*, discussed above.⁴²⁵ He observed that the [Senior Courts Act 1981 ss.33\(2\)](#) and [34\(2\)](#), and their counterparts [CPR 31.16](#) and [CPR 31.17](#), have a common objective: to extend the scope of disclosure beyond the immediate parties to actual proceedings. Therefore, the word “likely” must have the same meaning in both rules. He concluded that the word *likely* means “may well”.⁴²⁶ Accordingly, an applicant for an order under [CPR 31.17](#) does not have to show that the documents will support the applicant’s case or that they will adversely affect the case of another party. It is enough that they may well do so. But the applicant must provide the court with sufficient information from which it can evaluate the necessity of disclosure.⁴²⁷ They must also ensure that a statement of case has been served; without this, there is no “case” which the documents could be likely to support.⁴²⁸
- 15. 195** The degree of probability required to justify an order must be higher than that involved in the test of “a real prospect of success”, which is used in other contexts in the [CPR](#), and which merely requires a realistic possibility as opposed to a fanciful one. Furthermore, the Court of Appeal thought that it was inconceivable that non-parties could be subjected to more extensive disclosure than parties or potential parties and that, therefore, disclosure orders against non-parties under [CPR 31.17](#) must be similarly confined to standard disclosure. Chadwick LJ explained the limitation by saying that in drafting [CPR 31.17\(3\)\(a\)](#):
- “The rule-making body has eschewed the wider test of relevance which is found in [section 34\(2\) of the 1981 Act](#). It has confined the documents of which disclosure may be ordered to those within categories (a) and (b) of [CPR 31.6](#); but with modifications which take account of the twin premises (i) that the applicant does not have (and may never have seen) the documents of which he seeks disclosure and (ii) that the person against whom an order for disclosure is sought is a stranger to the dispute. So, ‘documents on which he relies’ in [CPR 31.6\(a\)](#) and ‘documents which adversely affect another party’s case’ in [CPR 31.6\(b\)\(ii\)](#) have become ‘documents likely to support the case of the applicant’ and ‘documents likely to adversely affect the case of one of the other parties to the proceedings’ in [CPR 31.17\(3\)\(a\)](#).⁴²⁹

- 15. 196** However, the modification mentioned by Chadwick LJ in *Three Rivers District Council* creates difficulties where the test of “likely to support or adversely affect” has to be applied to classes of documents, rather than to individually specified

documents, because it is difficult to see how an applicant could demonstrate that every document in a class of documents that they have never inspected satisfies the jurisdictional requirement. This factor creates a tension between two considerations. On the one hand, it is plain that CPR 31.17 does not confer a jurisdiction to order disclosure of documents that fail to meet this test. The threshold condition, Chadwick LJ explained, cannot be circumvented by including documents which do not meet that condition in a class that also includes documents which do meet that condition. Nor can the threshold condition be circumvented by an order which puts upon the non-party the task of identifying those documents within a composite class of those which do, and those which do not, meet the condition, because the non-party will not normally have sufficient familiarity with the issues to be able to do that. On the other hand, however, it is equally plain that the rule-maker could not have expected an applicant to specify which documents under the control of another will support their case or adversely affect that of another party, let alone indicate whether they would wish to rely on these documents.

- 15. 197** While accepting that the threshold test must be applied to every document, the Court of Appeal in *Three Rivers District Council* made allowance for the exigencies of practice by holding that since the matter has to be decided at a preliminary stage, the court can only assess the potential of the document to assist one party or adversely affect another. The fact that some documents, which appear at the application stage likely to support the case of the applicant or adversely affect the case of one of the other parties, might turn out on inspection not to be relevant will not be fatal to the success of an application under CPR 31.17. Further, in applying the test to individual documents, it is necessary to have in mind that each document has to be read in context; so that a document which, considered in isolation, might appear not to satisfy the test, may do so if viewed as one of a class. Accordingly, the court may make an order for disclosure of a class of documents provided that it is satisfied that all the documents in the class meet the threshold condition. This may not be an elegant solution or a straightforward solution, but it is probably the best that is practically achievable.⁴³⁰
- 15. 198** The second jurisdictional condition, that disclosure is necessary in order to dispose fairly of the claim or to save costs, should give rise to fewer problems. In most cases it is likely to involve considerations such as whether the documents add significantly to what is already known or available to the applicant from other sources,⁴³¹ or whether the likely benefits of disclosure justify the expense.

Discretion to order disclosure by a non-party

- 15. 199** But this jurisdictional condition is only necessary, rather than sufficient. In some cases, as we have seen, the court may need to strike a balance between the applicant's need for access to the documents and some other competing interest.⁴³² This is especially likely to arise in the context of applications for disclosure of documents belonging to another, who has no direct interest in the litigation. The respondent may have a legitimate interest in keeping the documents private, in which case the court will have to balance this against the applicant's need for access to those documents.⁴³³ The respondent's privacy does not provide them with any immunity from disclosure, as noted above, but the court is entitled to consider whether it is necessary to infringe a person's privacy in order to enable a party to legal proceedings to prosecute their case. There may be circumstances where the incursion into the non-party's privacy would be so great and the benefits of disclosure so small that the court would decline to order disclosure,⁴³⁴ or where the court will impose measures that seek to preserve the third party's confidentiality, insofar as those measures are compatible with the fair resolution of the proceedings.⁴³⁵ In *Flood v Times Newspapers Ltd*, Eady J stressed that even when an application for a disclosure order against a non-party is made by consent between the parties, "the court has a clear obligation to ensure, if necessary of its own motion, that this intrusive jurisdiction is not used inappropriately—even by consent. In exercising its responsibility, the court may well be assisted by submissions made on behalf of any third party the protection of whose interests requires to be considered".⁴³⁶
- 15. 200** In *South Tyneside MBC v Wickes Building Supplies Ltd*, Gross J considered the need to protect a third party's commercially sensitive information in the context of an application for disclosure from that party. He stressed that:

“While the Court’s paramount concern must be the fair disposal of the cause or matter, it is not unmindful of other legitimate interests and that to order production of a third party’s confidential documents may be oppressive, intrusive or unfair. In this connection, when documents are confidential, the claim that their production is necessary for the fair resolution of proceedings may well be subjected to particularly close scrutiny.”⁴³⁷

- 15.201 Although the scope of documents that a non-party may be required to disclose under such an order is wider than the documents that a non-party may be required to produce in response to a witness summons under CPR 34.2, the court must take great care not to impose too heavy a burden on non-parties. The court may also impose strict conditions on the use of the documents—for example, by directing that they may be used solely for the purposes of inspection, drafting witness statements and preparing for trial.⁴³⁸ Moreover, Pumfrey J explained in *Re Howglen Ltd*⁴³⁹ that it “is not appropriate to leave the non-party with the duty of making up its mind whether they do or not” satisfy the disclosure conditions set out in that rule. It must be right to say that a non-party should not be required to decide which documents are relevant to an issue in litigation between strangers, since they have no access to the statements of case or to the evidence. An order under this rule must therefore make it quite clear what the non-party is required to disclose.
- 15.202 It has been held that CPR 31.17 may be used to obtain information and is not restricted to the production of documents. In *Kerner v WX*,⁴⁴⁰ the applicant sought an order that the DVLA, a non-party, provide the identity of the registered keeper of a car. A *Norwich Pharmacal* order could not be sought because the DVLA had not facilitated or become mixed up in the wrongdoing. Nevertheless, Warby J ordered that the DVLA provide the information sought. He stressed that it would be inappropriate to construe the Senior Courts Act 1981 s.34(2) and CPR 31.17(3)(a) in a narrow and literal way, which would obstruct or hinder the fair disposal or litigation.⁴⁴¹

Pre-action order to disclose the identity of a wrongdoer or missing assets—the *Norwich Pharmacal* rule

- 15.203 In addition to its general statutory powers set out above, the court has a jurisdiction to order non-parties to disclose information in certain other situations. This jurisdiction has been preserved by the Senior Courts Act 1981 s.34(4) and by CPR 31.18. It includes the power to order disclosure in aid of execution of judgment,⁴⁴² disclosure in aid of a freezing order⁴⁴³ and disclosure in connection with a search order.⁴⁴⁴ These powers are discussed elsewhere. Here we need only concern ourselves with the jurisdiction to order a non-party to disclose the identity of a wrongdoer under what is known as the *Norwich Pharmacal* principle.
- 15.204 As a matter of general principle, persons are free to withhold information from their fellow citizens, except to the extent that the law places a duty on them to produce documents or disclose some specific information. Thus, when testifying, witnesses are duty-bound to divulge in court facts relevant to the issues before the court. They may be similarly ordered, as we have just seen, to disclose documents directly relevant to issues in legal proceedings. However, unless they testify, potential witnesses are not obliged to disclose information to the parties. Non-parties may be ordered to disclose documents, but this can be done only when proceedings are already under way. Put differently, mere witnesses cannot be required to provide the parties with information in advance of trial.⁴⁴⁵
- 15.205 There is, however, one situation where a non-party may come under an obligation to provide information in advance of proceedings. In *Norwich Pharmacal v Customs and Excise Commissioners* the House of Lords held: “if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing he may incur no personal liability

but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers".⁴⁴⁶ The wrongdoing justifying an order of disclosure may take the form of a tort, breach of contract or some other civil or criminal wrongful act.⁴⁴⁷ Accordingly, disclosure could be obtained where the applicant has been the victim of a breach of confidence or breach of contract. Behind this rule lies the idea that it would be unjust for a person who facilitated, or was involved in, a wrong against another to deny the wronged victim information they require in order to seek vindication of the wrong.⁴⁴⁸ In order to obtain an order under this jurisdiction, the applicant must establish that they have suffered wrongdoing by the person whose identity they are seeking to establish.⁴⁴⁹

- 15. 206** In *Collier v Bennett*,⁴⁵⁰ Saini J suggested a fourfold test for the grant of *Norwich Pharmacal* relief, which test was approved by the Privy Council in *Stanford Asset Holdings Ltd v AfrAsia Bank Ltd*⁴⁵¹:

- “(i)The applicant has to demonstrate a good arguable case that a form of legally recognised wrong has been committed against them by a person (‘the Arguable Wrong Condition’).
- (ii)The respondent to the application must be mixed up in so as to have facilitated the wrongdoing (‘the Mixed Up In Condition’).
- (iii)The respondent to the application must be able, or likely to be able, to provide the information or documents necessary to enable the ultimate wrongdoer to be pursued (‘the Possession Condition’).
- (iv)Requiring disclosure from the respondent is an appropriate and proportionate response in all the circumstances of the case, bearing in mind the exceptional but flexible nature of the jurisdiction (‘the Overall Justice Condition’).”

- 15. 207** In *Ashworth Hospital Authority v MGN Ltd*, Lord Woolf CJ stressed the importance of the "Mixed Up In Condition":

“Although this requirement of involvement or participation on the part of the party from whom discovery is sought is not a stringent requirement, it is still a significant requirement. It distinguishes that party from a mere onlooker or witness. The need for involvement, the reference to participation can be dispensed with because it adds nothing to the requirement of involvement, is a significant requirement because it ensures that the mere onlooker cannot be subjected to the requirement to give disclosure. Such a requirement is an intrusion upon a third party to the wrongdoing and the need for involvement provides justification for this intrusion.”⁴⁵²

However, he also said that the class of situations in which the jurisdiction may be exercised is not closed. “New situations are inevitably going to arise”, he said, “where it will be appropriate for the jurisdiction to be exercised where it has not been exercised previously. The limits which applied to its use in its infancy should not be allowed to stultify its use now that it has become a valuable and mature remedy”.⁴⁵³

- 15. 208** No obligation of disclosure arises where a person has merely witnessed a wrong. A bystander who observes a hit-and-run accident has no obligation to tell the victim the identity of the offending driver,⁴⁵⁴ though of course such a person may be called as a witness at the trial and asked on oath to divulge the information. In some earlier cases it was thought that a duty of disclosure arose only where the information was required in order to enable the wronged person to take legal proceedings against the wrongdoer.⁴⁵⁵ But it has since been established that it is sufficient that the claimant requires the information to protect their interests in ways other than the taking of legal proceedings, such as dismissing an employee who has leaked confidential information or protecting itself from suffering further wrongs.⁴⁵⁶

- 15. 209** In order to assist the applicant to seek redress for a wrong, a person may be ordered to disclose the identities of others who were not themselves wrongdoers. In *CHF Software Care Ltd v Hopkins and Wood*,⁴⁵⁷ a solicitor was ordered to reveal the

names and addresses of persons to whom they sent letters on behalf of their clients in which they impugned the applicants' copyright to certain products that the applicants had been marketing. Disclosure was held to be necessary in order to enable the applicants to protect their interests by putting the record right. However, where the wrong attributed to the wrongdoer consists of disclosure of confidential information, then, if the person responsible for the leaking of the information has a public interest defence for revealing the information, disclosure may not be ordered under the *Norwich Pharmacal* rule.⁴⁵⁸ Since the source of the leak is not known, it may be difficult to establish whether the source has a public interest defence, which in turn gives rise to considerable practical difficulties in exercising the jurisdiction.

- 15.210 An application under the *Norwich Pharmacal* rule would normally be made where it is clear that the applicant suffered a wrong but it is not known who perpetrated it. But, in exceptional cases, an order of disclosure may also be made where information is required in order to determine whether a wrong has been committed against the person seeking disclosure. In *P v T Ltd*,⁴⁵⁹ the claimant had been dismissed by the defendant company for gross misconduct following allegations made against the claimant. The claimant did not know whether the allegations made against him amounted to a wrong. Nevertheless, it was held that given the serious consequences that the claimant had suffered and the damage to his future prospects of employment, justice required that his employer should reveal to him the nature and source of the allegations so that he could establish whether he had been the victim of a wrong and thus protect himself. In *Carlton Film Distributors Ltd v VCI Plc*,⁴⁶⁰ Jacob J held that in a contractual dispute the court may order a non-party to disclose information that would enable a person to determine whether they had a claim for breach of contract. The non-party in that case had produced for the potential defendant copies of material protected by intellectual property rights in breach of the defendant's contract with the applicant and there was sufficient material to found a suspicion that a breach had been committed. These decisions are not easily reconciled with subsequent authorities, which suggest that the applicant has to demonstrate a good arguable case that a form of legally recognised wrong has been committed against them: see para.15.205.
- 15.211 The common thread running through these cases is that disclosure is necessary in order to enable a person to vindicate their rights and a sense of the injustice that would ensue if the court did not come to their assistance and order disclosure. However, the court is not bound to order disclosure merely because the applicant has fulfilled the threshold requirements of the *Norwich Pharmacal* principle. Lord Woolf CJ emphasised in *Ashworth Hospital Authority* that this is a discretionary jurisdiction that the court will exercise only if it is established to be a necessary and proportionate response in all the circumstances.⁴⁶¹ He further explained that in exercising its discretion the court will take into account the intrusive effect of a disclosure order on non-parties and the inconvenience to non-parties arising from being drawn into a dispute that is not of their making and the fact that being compensated in costs may not always make up for such disadvantages.⁴⁶²
- 15.212 "The essential purpose of the remedy", Lord Kerr said, "is to do justice. This involves the exercise of discretion by a careful and fair weighing of all relevant factors".⁴⁶³ He went on to list the various relevant factors identified in the authorities:
- (i)the strength of the possible cause of action contemplated by the applicant for the order;
 - (ii)the strong public interest in allowing an applicant to vindicate their legal rights;
 - (iii)whether the making of the order will deter similar wrongdoing in the future;
 - (iv)whether the information could be obtained from another source;
 - (v)whether the respondent to the application knew or ought to have known that they were facilitating arguable wrongdoing;
 - (vi)whether the order might reveal the names of innocent persons as well as wrongdoers and, if so, whether such innocent persons will suffer any harm as a result;
 - (vii)the degree of confidentiality of the information sought;
 - (viii)the privacy rights under ECHR art.8 of the individuals whose identity is to be disclosed;
 - (ix)the rights and freedoms under the EU data protection regime of the individuals whose identity is to be disclosed; and

(x)the public interest in maintaining the confidentiality of journalistic sources, as recognised in the *Contempt of Court Act 1981* s.10 and ECHR art.10.

- 15.213 This list may be reduced into two fairly distinct types of considerations: necessity and proportionality. When considering necessity, the focus is on the applicant and the extent of their need for the information. For instance, if the applicant can obtain the information from another source, the court would normally consider it unnecessary to make an order. When considering proportionality, the court looks first at the respondent's interests, their nature and importance, and then asks whether an order of disclosure would be a justified or unjustified interference with the respondent's interests. Proportionality requires the court to balance the competing interests of the applicant and the respondent in a much more intense way than when it considers necessity. Before making an order, the court must be satisfied that it is both appropriate and proportionate.
- 15.214 Necessity will be established where without the identity of a wrongdoer, or some other crucial information, a person would be unable to bring proceedings in order to obtain redress for a significant wrong suffered.⁴⁶⁴ An order was refused where the applicant had insufficient information to bring the claim without further disclosure.⁴⁶⁵ It is not, however, necessary that the applicant intends to bring legal proceedings; any form of redress (for example, disciplinary action or the dismissal of an employee) will suffice to ground a *Norwich Pharmacal* application.⁴⁶⁶ Nor does the remedy sought need to be one of last resort.⁴⁶⁷ In deciding necessity the court is entitled to consider all the circumstances, including the size and resources of the applicant, the urgency of their need and any public interest in having their needs satisfied.⁴⁶⁸ Thomas LJ went out of his way to stress that "there is nothing in any authority which justifies a more stringent requirement than necessity by elevating the test to the information being a missing piece of the jigsaw or to it being a remedy of last resort".⁴⁶⁹
- 15.215 The importance of the respondent's rights comes to the fore when proportionality is considered. If a disclosure order would impinge on the press' freedom of expression, the court must accord appropriate importance to the interests of journalists to protect their sources. For this reason, in *Mersey Care NHS Trust v Ackroyd (No.2)*,⁴⁷⁰ a sequel to the *Ashworth Hospital Authority* case, Tugendhat J refused to order disclosure, finding that there was no longer a pressing social need to override the legitimate interests of the journalist to whom the source revealed the information.
- 15.216 The proportionality factor was considered by the Supreme Court in *Rugby Football Union v Consolidated Information Services Ltd*, discussed above.⁴⁷¹ The Rugby Football Union (RFU) obtained an order directing the respondents, which operated an internet site for selling tickets to rugby matches, to disclose the identities of persons who sold tickets on its site at prices higher than their face value in breach of contract between such persons and the applicants. The respondents appealed, arguing that the order was a disproportionate interference with the rights of the potential wrongdoers under, inter alia, the ECHR art.8. The respondents submitted that, in assessing whether the order was proportionate, the court had to limit itself to considering the benefits that the applicant would derive from suing any person who had sold a ticket above its face value against that person's right to have their personal data protected from disclosure. In so doing, the respondents argued, the court had to ignore the applicants' interest in deterring others from such acts. Lord Kerr rejected this argument, holding that it "is unrealistic to fail to have regard to the overall aim of the RFU in seeking this information. It is not simply to pursue individuals. It obviously includes an element of active discouragement to others who might in the future contemplate the flouting of rules which the RFU seeks to enforce."⁴⁷²
- 15.217 The Supreme Court in *Rugby Football Union* rejected the idea that one should start with the assumption that it was proportionate to make an order where it had been shown that there was arguable wrongdoing and there was no other means of discovering the identity of the arguable wrongdoers. The correct approach, Lord Kerr explained, was:

"The particular circumstances affecting the individual whose personal data will be revealed on foot of a *Norwich Pharmacal* order will always call for close consideration and these may, in some limited instances, displace the interests of the applicant for the disclosure of the information even where there is no immediately feasible alternative way in which the necessary information can be obtained."⁴⁷³

On the facts, the Supreme Court found that the worthy motive of the applicants in seeking to maintain the price of tickets at a reasonable level not only promoted the sport of rugby, but was in the interests of all those members of the public who wish to avail themselves of the chance to attend international matches. The court concluded that the impact that can reasonably be apprehended on the individuals whose personal data was sought was simply not of the type that could possibly offset the interests of the applicants in obtaining that information.

15. 218 The above authorities were reviewed in detail by Flaux J in *Ramilos Trading Ltd v Buyanovsky*.⁴⁷⁴ The claimant suspected that a group of companies in which it had a financial interest had suffered from improper revenue shifting to a different group of companies. It applied for an order that the defendant, the chief financial officer of both groups, answer 39 detailed questions concerning the groups of companies. Flaux J refused the application, and confirmed that the *Norwich Pharmacal* jurisdiction is an exceptional one with a narrow scope. It can be used to help a claimant discover the identity of a wrongdoer and also to help it to obtain the “missing piece of the jigsaw” in terms of information required to perfect its claim; but it cannot be used as a fishing expedition for wide-ranging and unnecessary disclosure. The claimant’s 39 questions were too wide and in many cases were classic examples of a fishing expedition.
15. 219 The means of identifying wrongdoers, especially in copyright infringement cases, have become complicated in the age of the internet. As demonstrated in the *Golden Eye* case,⁴⁷⁵ copyright owners may seek to obtain information from internet service providers as to the identities of users committing copyright infringement. The infrastructure for a more robust procedure has been set out in the *Digital Economy Act 2010*, which amends the *Communications Act 2003* to allow copyright owners to make a copyright infringement report to internet service providers (ISPs) and to require ISPs to provide copyright owners with a copyright infringement list, which do not identify subscribers by name, in certain circumstances.⁴⁷⁶ The legislation contemplates that owners may then seek disclosure of the identities of the subscribers.

Bankers Trust Orders

15. 220 Disclosure may be obtained not just for learning the identity of a wrongdoer, but also in order to discover the whereabouts of missing funds or assets. Thus a person who has been defrauded may seek information about their missing assets from the bank through which they passed, notwithstanding that the bank acted entirely innocently.⁴⁷⁷ An applicant for such disclosure must demonstrate (i) good grounds for concluding that the money or assets about which information is sought belonged to the applicant; and (ii) a real prospect that the information may lead to the location or preservation of assets to which they are making a proprietary claim.⁴⁷⁸ The order should, so far as possible, be directed at uncovering the particular assets which are to be traced and should not be wider than is necessary in the circumstances.⁴⁷⁹

Footnotes

- 409 *Panayiotou v Sony Music Entertainment (UK) Ltd [1994] 1 All ER 755* at 762–764, ChD. See also *BNP Paribas v Deloitte & Touche LLP [2003] EWHC 2874 (Comm)* in respect of arbitrations.
- 410 *Re Howglen Ltd [2001] 1 All ER 376*, at 382, ChD.
- 411 *Khanna v Lovell White Durrant (a firm) [1994] 4 All ER 267; [1995] 1 W.L.R. 121, ChD.*
- 412 In the High Court, disobeying a witness summons may be punishable as contempt of court (as to which, see Ch.24 Enforcement). In the county court, it is punishable with a fine not exceeding £1,000: *County Courts Act 1984* s.55.
- 413 *Gary Flood v Times Newspapers Ltd [2009] EWHC 411 (QB)* [29].
- 414 *Re Howglen Ltd [2001] 1 All ER 376*, at 384, ChD.
- 415 *Tajik Aluminium Plant v Hydro Aluminium AS [2005] EWCA Civ 1218; [2005] 4 All ER 1232.*

- 416 *South Tyneside MBC v Wickes Building Supplies Ltd [2004] EWHC 2428 (Comm) [23]. See also Morris v Hatch [2017] EWHC 1448 (Ch).*
- 417 2025 WB 34.7.1; and PD 34A para.3.2.2.
- 418 *Individual Homes Ltd v Macbream Investments Ltd [2002] 46 L.S. Gaz. R. 32.*
- 419 As amended by the Civil Procedure (Modification of Enactments) Order 1998 (SI 1998/2940) art.5(b).
- 420 See para.15.163 above. The position where the documents are outside the jurisdiction is unresolved; however, even if the court has jurisdiction, “in view of the availability of the letter of request procedure it would only be in an exceptional case that it would be appropriate to exercise that jurisdiction”: *Gorbachev v Guriev [2022] EWCA Civ 1270; [2023] K.B. 1* [90].
- 421 See *Gorbachev v Guriev [2023] EWCA Civ 327* [27].
- 422 *Three Rivers District Council v Bank of England (Disclosure) (No.4) [2002] EWCA Civ 1182; [2002] 4 All ER 881; Frankson v Home Office [2003] EWCA Civ 655; [2003] 1 W.L.R. 1952; Gary Flood v Times Newspapers Ltd [2009] EWHC 411 (QB); and Mitchell v News Group Newspapers Ltd [2014] EWHC 1885 (QB).* In relation to judicial review proceedings, it has been said that the first condition cannot have any independent application; instead, the minimum requirement is that disclosure of the documents or information requested is necessary for the fair determination of the issues in the case: *R (AB) v Secretary of State for Health and Social Care [2022] EWHC 87 (Admin) [8]-[9].*
- 423 *Bugsby Property LLC v LGIM Commercial Lending Ltd [2021] EWHC 1054 (Comm) [17] and [22]. See also para.15.201.*
- 424 *Three Rivers District Council v Bank of England (Disclosure) (No.4) [2002] EWCA Civ 1182; [2002] 4 All ER 881.*
- 425 See above, para.15.166.
- 426 *Three Rivers District Council v Bank of England (Disclosure) (No.4) [2002] EWCA Civ 1182; [2002] 4 All ER 881 [32].*
- 427 *Commissioner of Police of the Metropolis v The Times Newspapers Ltd [2011] EWHC 1566 (QB).*
- 428 *Abbas v Shah [2014] EWHC 662 (QB) [30].*
- 429 *Three Rivers District Council v Bank of England (Disclosure) (No.4) [2002] EWCA Civ 1182; [2002] 4 All ER 881 at [28].*
- 430 In *Flood v Times Newspapers Ltd [2009] EWHC 411 (QB)*, Eady J indicated that when determining whether a document or class of documents had a potentially relevant bearing on the case it was necessary to focus narrowly on the pleadings as they stood, in order to see how the issues had been defined up to that point.
- 431 *Andrew v News Group Newspapers Ltd [2011] EWHC 734 (Ch) [71].*
- 432 See the discussion above of limiting disclosure generally on such grounds, at paras 15.130 ff.
- 433 See *Commissioner of Police of the Metropolis v The Times Newspapers Ltd [2011] EWHC 1566 (QB).*
- 434 *South Tyneside MBC v Wickes Building Supplies Ltd [2004] EWHC 2428 (Comm).* For a decision going the other way, on the grounds that the evidence was potentially crucial, see *Frankson v Home Office [2003] EWCA Civ 655; [2003] 1 W.L.R. 1952.* See above, paras 15.132 ff.
- 435 *Bugsby Property LLC v LGIM Commercial Lending Ltd [2021] EWHC 1054 (Comm) [24].*
- 436 *Flood v Times Newspapers Ltd [2009] EWHC 411 (QB), [29]. See also Mitchell v News Group Newspapers Ltd [2014] EWHC 879 (QB),* where an application for non-party disclosure of evidence held by the Commissioner of the Metropolitan Police was dismissed on the grounds that the court could not conduct the requisite balancing exercise, as there was insufficient evidence of the potential impact on the witnesses who had given the evidence.
- 437 *South Tyneside MBC v Wickes Building Supplies Ltd [2004] EWHC 2428 (Comm) [23]. See the discussion above of limiting disclosure of commercially sensitive information, at paras 15.155 ff.*
- 438 As in *Frankson v Home Office [2003] EWCA Civ 655; [2003] 1 W.L.R. 1952.*
- 439 *Re Howglen Ltd [2001] 1 All ER 376* at 382–383, ChD.
- 440 *Kerner v WX [2015] EWHC 1247 (QB).*
- 441 *Kerner v WX [2015] EWHC 1247 (QB) [25].*
- 442 See CPR 71, which empowers the court to order a judgment debtor to provide information. This is discussed in Ch.24 Enforcement at paras 24.34 ff.
- 443 See Ch.11 Freezing Injunctions paras 11.68 ff.
- 444 See the discussion of search orders below, at paras 15.221 ff.
- 445 See for instance *AXA Equity Life Assurance Plc v National Westminster Bank Plc [1998] C.L.C. 1177, CA.*
- 446 *Norwich Pharmacal Co v Customs and Excise Commissioners [1974] AC 133 at 175; [1973] 2 All ER 943 at 948, HL.* This decision followed *Upmann v Elkan (1871) L.R. 12 Eq. 140.* See also *British Steel Corp v Granada Television Ltd [1981] AC 1096; [1981] 1 All ER 417, HL; Harrington v North London Polytechnic [1984] 3 All ER 666; [1984] 1*

- W.L.R. 1293, CA; *President of the State of Equatorial Guinea v Royal Bank of Scotland International* [2006] UKPC 7; and *Ramilos Trading Ltd v Buyanovsky* [2016] EWHC 3175 (Comm).
- 447 *Ashworth Hospital Authority v MGN Ltd* [2002] UKHL 29; [2002] 4 All ER 193 [26].
- 448 But see the discussion at para.15.200 above, concerning situations in which the court may use its power under CPR 31.17 to order a non-party to disclose a person's identity where the non-party is not in any way involved in the wrongdoing.
- 449 *Mersey Care NHS Trust v Ackroyd (No.2)* [2006] EWHC 107 (QB) [70], affirmed in *Mersey Care NHS Trust v Ackroyd* [2007] EWCA Civ 101.
- 450 *Collier v Bennett* [2020] EWHC 1884 (QB) [35].
- 451 *Stanford Asset Holdings Ltd v AfrAsia Bank Ltd* [2023] UKPC 35 [36].
- 452 *Ashworth Hospital Authority v MGN Ltd* [2002] UKHL 29; [2002] 4 All ER 193 [35].
- 453 *Ashworth Hospital Authority v MGN Ltd* [2002] UKHL 29 [2002] 4 All ER 193 [57].
- 454 *Ashworth Hospital Authority v MGN Ltd* [2002] UKHL 29; [2002] 4 All ER 193 [35].
- 455 *Handmade Films Ltd v Express Newspapers Ltd* [1986] F.S.R. 463.
- 456 *X Ltd v Morgan-Grampian Ltd* [1991] 1 AC 1; [1990] 2 All ER 1, HL; *Camelot Group Plc v Centaur Communications Ltd* [1999] QB 124; [1998] 1 All ER 251, CA; and *Ashworth Hospital Authority v MGN Ltd* [2002] UKHL 29; [2002] 4 All ER 193.
- 457 *CHF Software Care Ltd v Hopkins & Wood* [1993] F.S.R. 241.
- 458 See also *Mersey Care NHS Trust v Ackroyd (No.2)* [2006] EWHC 107 (QB), affirmed in *Mersey Care NHS Trust v Ackroyd* [2007] EWCA Civ 101.
- 459 *P v T Ltd* [1997] 4 All ER 200; [1997] 1 W.L.R. 1309, ChD.
- 460 *Carlton Film Distributors Ltd v VCI Plc* [2003] EWHC 616 (Ch); [2003] F.S.R. 47.
- 461 *Ashworth Hospital Authority v MGN Ltd* [2002] UKHL 29; [2002] 4 All ER 193 [36]. See also *Mersey Care NHS Trust v Ackroyd* [2003] EWCA Civ 663. Subsequent authorities have used the phrase "appropriate and proportionate": see *Collier v Bennett* [2020] EWHC 1884 (QB) [35], approved by the Privy Council in *Stanford Asset Holdings Ltd v AfrAsia Bank Ltd* [2023] UKPC 35 [36].
- 462 See also *Carlton Film Distributors Ltd v VCI Plc* [2003] EWHC 616 (Ch); [2003] F.S.R. 47. For the proposition that the applicant must ordinarily pay the non-party respondent's costs, see: *Totalise Plc v Motley Fool Ltd* [2001] EWCA Civ 1897; [2002] 1 W.L.R. 1233, [29]; *Cartier International AG v British Sky Broadcasting Ltd* [2018] UKSC 28 [12]; and *Jofa Ltd v Benherst Finance Ltd* [2019] EWCA Civ 899.
- 463 *Rugby Football Union v Consolidated Information Services Ltd (Formerly Viagogo Ltd) (In Liquidation)* [2012] UKSC 55 [17].
- 464 *Mitsui & Co Ltd v Nexen Petroleum UK Ltd* [2005] EWHC 625 (Ch); [2005] 3 All ER 511; and *Nikitin v Richards Butler LLP* [2007] EWHC 173 (QB).
- 465 *Nikitin v Richards Butler LLP* [2007] EWHC 173 (QB) [34].
- 466 *British Steel Corp v Granada Television Ltd* [1981] AC 1096; and *Rugby Football Union v Consolidated Information Services Ltd (Formerly Viagogo Ltd) (In Liquidation)* [2012] UKSC 55.
- 467 *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No.1)* [2008] EWHC 2048 [94]; and *Rugby Football Union v Consolidated Information Services Ltd (Formerly Viagogo Ltd) (In Liquidation)* [2012] UKSC 55.
- 468 *Campaign Against Arms Trade v BAE Systems Plc* [2007] EWHC 330 (QB); and *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2008] EWHC 2048 (Admin).
- 469 *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2008] EWHC 2048 (Admin) [94].
- 470 *Mersey Care NHS Trust v Ackroyd (No. 2)* [2006] EWHC 107 (QB), affirmed on appeal: *Mersey Care NHS Trust v Ackroyd* [2007] EWCA Civ 101.
- 471 *Rugby Football Union v Consolidated Information Services Ltd (Formerly Viagogo Ltd) (In Liquidation)* [2012] UKSC 55. For discussion of the protection of privacy when granting *Norwich Pharmacal* orders see *Golden Eye (International) Ltd v Telefonica UK Ltd* [2012] EWHC 723 (Ch) and the discussion at paras 15.138–15.139 above.
- 472 *Rugby Football Union v Consolidated Information Services Ltd (Formerly Viagogo Ltd) (In Liquidation)* [2012] UKSC 55 [37].
- 473 *Rugby Football Union v Consolidated Information Services Ltd (Formerly Viagogo Ltd) (In Liquidation)* [2012] UKSC 55 [46].
- 474 *Ramilos Trading Ltd v Buyanovsky* [2016] EWHC 3175 (Comm). The authorities are discussed in *Burford Capital Ltd v London Stock Exchange Group Plc* [2020] EWHC 1183 (Comm); *Collier v Bennett* [2020] EWHC 1884 (QB) and *Stanford Asset Holdings Ltd v AfrAsia Bank Ltd* [2023] UKPC 35.
- 475 *Golden Eye (International) Ltd v Telefonica UK Ltd* [2012] EWHC 1152 (Ch).

- 476 See Cornish, Llewelyn & Aplin (eds), Intellectual Property: Patents, Copyrights, Trademarks & Allied Rights (10th edn) and *R (British Telecommunications Plc) v Secretary of State for Business, Innovation and Skills [2012] EWCA Civ 232* [10]–[21].
- 477 *Bankers Trust v Shapira [1980] 3 All ER 353; [1980] 1 W.L.R. 1274, CA.*
- 478 *Arab Monetary Fund v Hashim (No. 5) [1992] 2 All ER 911, ChD; Kyriakou v Christie Manson and Woods Ltd [2017] EWHC 487 (QB)* [14].
- 479 *Kyriakou v Christie Manson and Woods Ltd [2017] EWHC 487 (QB)* [14].

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Search and Imaging Orders

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 15 - Disclosure

Search and Imaging Orders

Jurisdiction to make a search order

15. 221 The [Civil Procedure Act 1997 s.7\(8\)](#) confers the jurisdiction to make search orders only on the High Court. Although the county court may generally make any order that could be made by the High Court ([County Courts Act 1984 s.38](#)), its jurisdiction to make a search order is severely restricted.⁴⁸⁰ Only a nominated circuit judge sitting in the Patents County Court or a High Court judge sitting in the county court may make a search order. But the county court may vary a search order with the agreement of all the parties.⁴⁸¹

Grounds for making a search order

15. 222 In 1976 the seminal case of [Anton Piller KG v Manufacturing Processes](#)⁴⁸² brought into existence the civil search order, which prior to the [CPR](#) was therefore known as an [Anton Piller](#) order. The jurisdiction to make such orders has since been put on a statutory basis by the [Civil Procedure Act 1997 s.7](#). [CPR 25.1\(1\)\(h\)](#) and (i) list search orders and imaging orders among the interim remedies. The [1997 Act s.7](#) states:

Section 7

“Power of courts to make orders for preserving evidence, etc.

- (1) The court may make an order under this section for the purpose of securing, in the case of any existing or proposed proceedings in the court—the preservation of evidence which is or may be relevant, or the preservation of property which is or may be the subject-matter of the proceedings or as to which any question arises or may arise in the proceedings.
- (2) A person who is, or appears to the court likely to be, a party to proceedings in the court may make an application for such an order.
- (3) Such an order may direct any person to permit any person described in the order, or secure that any person so described is permitted—to enter premises in England and Wales, and while on the premises, to take in accordance with the terms of the order any of the following steps.
- (4) Those steps are—to carry out a search for or inspection of anything described in the order, and to make or obtain a copy, photograph, sample or other record of anything so described.
- (5) The order may also direct the person concerned—to provide any person described in the order, or secure that any person so described is provided, with any information or article described in the order,

and to allow any person described in the order, or secure that any person so described is allowed, to retain for safe keeping anything described in the order.

(6) An order under this section is to have effect subject to such conditions as are specified in the order.

(7) This section does not affect any right of a person to refuse to do anything on the ground that to do so might tend to expose him or his spouse to proceedings for an offence or for the recovery of a penalty.

(8) In this section—

means the High Court, and ‘*premises*’ includes any vehicle;

and an order under this section may describe anything generally, whether by reference to a class or otherwise.”

- 15.223 A search order is normally made without notice and before service of originating process on the respondent. It directs the respondent (who is usually a defendant) to permit authorised persons described in the order to enter the respondent’s premises in order to search, inspect,⁴⁸³ copy or take away items described in the order, for the purpose of preserving evidence, documentary or real, and/or property. The order may direct the respondent to provide the authorised persons with information, described in the order. However, there is a need to distinguish between the evidence-preservation functions of a search order and orders for the disclosure of information by defendants: a without notice order for the disclosure and inspection of documents and/or the provision of information pursuant to either [CPR 18](#) or the court’s inherent jurisdiction are conceptually and practically distinct orders governed by different principles.⁴⁸⁴ An order which is limited to a requirement to hand over materials but falls short of authorising entry and search is known as a doorstep delivery-up order.⁴⁸⁵ A search order, it must be stressed, does not authorise forcible entry or the doing of anything without the consent or co-operation of the person to whom the order is directed. A refusal to allow entry and to comply with the requirements of the order may amount to contempt of court.⁴⁸⁶

Imaging Orders

- 15.224 An “image” is a complete copy of the contents of a computer or other digital device or cloud storage. An imaging order is an order requiring the respondent to permit imaging of their digital devices and/or cloud storage by an independent computer specialist. Imaging is only ever a preservation step, which must be followed by proper consideration of the issues of disclosure and inspection of the documents preserved by the imaging process.⁴⁸⁷ In *TBD (Owen Holland) Ltd v Simons*, Arnold LJ (with whom David Richards and Newey LJ agreed) suggested that “the availability of imaging has important consequences for search orders which in my experience have frequently been disregarded.” These consequences include that any court hearing a without notice application for both a traditional search order and an imaging order should first consider whether to grant an imaging order. If the court is prepared to grant an imaging order, then it should be presumed unless the contrary is shown that a traditional search order is unnecessary.⁴⁸⁸ An imaging order may be granted where: (a) the applicant can show that the respondent has failed to comply with their disclosure obligations, having been given the opportunity to do so, and where there are “aggravating factors” or (b) the applicant shows substantial reasons for believing that a defendant is intending to conceal or destroy documents in breach of their obligations of disclosure under the [CPR](#).⁴⁸⁹

Like a search order, an imaging order requires safeguards for the protection of the respondent; these safeguards are found in the model search and imaging order published online by HMCTS.⁴⁹⁰ These include that the applicant is not allowed to access or inspect or use the images (the electronic copies of the respondent’s data) without the permission of the court.⁴⁹¹ This reflects the fact that the purpose of an imaging order is evidence preservation, and not to give early and unfettered disclosure to the applicant.⁴⁹² It is on the return date that consideration must be given to the timing and methodology of disclosure and inspection

of documents captured in the images. In *TBD (Owen Holland) Ltd v Simons*, Arnold LJ said “The presumption should be that it will be for the defendant to give disclosure of such documents in the normal way, but this presumption may be departed from where there is sufficient justification. Even if the presumption is departed from, there should be no unilateral searching of the images by or on behalf of the claimant: the methodology of the search must be either agreed between the parties or approved by the court.”⁴⁹³

Search Orders: Protections and Requirements

- 15. 225** Given that search orders are granted in a process that denies the respondent the right to be heard and given their invasive nature, they are on the very borderline of due process. The Court of Appeal acknowledged in the *Anton Piller* case that an order of this kind “is at the extremity of this court’s powers. Such orders, therefore, will rarely be made, and only when there is no alternative way for ensuring that justice is done to the plaintiff”.⁴⁹⁴ Accordingly, search orders may not be granted where normal disclosure would be sufficient to secure relevant evidence and other material that may be required in the legal process. An applicant can obtain a search order only where they can show a serious risk that a person will not comply with their disclosure obligations but would destroy, conceal or interfere with evidence unless they are pre-empted by a search order. English law’s approach to search orders has therefore been cautious. As Hoffmann J observed:

“The making of an intrusive order ex parte even against a guilty defendant is contrary to normal principles of justice and can only be done when there is a paramount need to prevent a denial of justice to the plaintiff there must be *proportionality* between the perceived threat to the plaintiff’s rights and the remedy granted. The fact that there is overwhelming evidence that the defendant has behaved wrongfully in his commercial relationship does not necessarily justify an *Anton Piller* order. Not everyone who is misusing confidential information will destroy documents in the face of a court order requiring him to preserve them.”⁴⁹⁵

- 15. 226** Similar restraint is dictated by the ECHR. A search order may involve an incursion into the respondent’s right to privacy, which is protected by ECHR art.8(1).⁴⁹⁶ However, art.8(2) permits legally sanctioned incursions into the private sphere provided that such interference is “in accordance with the law and [to the extent that it is] necessary in a democratic society for the protection of the rights and freedoms of others”. Accordingly, a search order would be justified under art.8 where there is a serious risk that unless materials are taken for safekeeping they would be concealed or destroyed by the respondent so as to defeat the applicant’s rights.⁴⁹⁷ In order to conform with art.8 the search order must be narrowly defined and must be proportionate to the risk that it is meant to address.⁴⁹⁸ A search order that is proportionate is therefore likely to be compatible with the ECHR art.6 right to fair trial.⁴⁹⁹

- 15. 227** Early experience with the *Anton Piller* procedure demonstrated that unless adequate safeguards are put in place, search orders are capable of being used oppressively and of inflicting unwarranted harm on respondents.⁵⁰⁰ The unexpected appearance on the defendant’s doorstep of the claimant’s solicitor armed with a search order can be humiliating, alarming and upsetting, even when service is carried out with care and consideration. The requirements of CPR 25.16–25.19 are to ensure that the more blatantly oppressive practices that accompanied search orders in the past are avoided under the present rules. The underlying aim is to safeguard the interests of the defendant and to ensure that a search process is carried out with appropriate regard for the defendant’s interests and with the utmost propriety. Infringements must be regarded not as mere technical breaches but as serious defects capable of undermining the right of fair trial.⁵⁰¹ Still, maintaining a satisfactory balance between respect for privacy and for due process, on the one hand, and the need to prevent improper interference with evidence, on the other hand, is not an easy task. Since applications for search orders are made without notice, the court is inevitably presented with a one-sided version of the events. In the absence of an adversary, it is all too easy to make one’s case look strong, and although the applicant has to make full and frank disclosure of all material facts, their view of the situation may well be distorted by exaggerated fears. A court must therefore be always on its guard and should approach applications with great care.

15. 228 A number of key conditions that must be established before granting a search order may be derived from the authorities:

(1)There must be a strong *prima facie* case of a civil cause of action. The court will closely consider the merits of the claimant's case before granting a search order.

(2)The claimant must establish that there is a serious danger (not just a mere possibility) that evidence will be destroyed or will disappear and that such evidence is of major importance and not merely marginal. The fact that a respondent can be shown to have behaved improperly will not always justify an order. There must be a real reason to believe that the respondent will disobey an injunction for the preservation of the evidence in question.

(3)There must be clear evidence that the defendants had in their possession incriminating documents or things.

(4)The harm likely to be caused by the execution of the order to the respondent and their business affairs must not be excessive or out of proportion to the legitimate object of the order. This precondition must be particularly observed where the order involves the seizure of trading stock or the perusal by the claimant of confidential commercial documents.⁵⁰²

If an imaging order is granted, then it should be presumed that a traditional search order is unnecessary.⁵⁰³

Application procedure

15. 229 Applications for search orders are governed by [CPR 23](#) and [25](#), and the various court guides.⁵⁰⁴ Since the procedure is aimed to forestall evasion, concealment or destruction of evidence, applications for a search order are almost invariably made without notice and very often before service of the claim form. Where at the time of the application the claim form has not been issued, the applicant must undertake to issue the claim form and pay the court fee on the same or next working day ([CPR 25.9\(3\)\(e\)](#)). In situations of extreme urgency, an application may be dealt with by telephone (PD 23A para.6). The applicant should use the standard form search order unless there is good reason to depart from it.⁵⁰⁵

15. 230 The applicant's obligation to set out all material facts is of great importance in view of the fact that the respondent is normally denied a right of participation. An application for a search order must be supported by affidavit evidence ([CPR 25.17\(1\)](#)). It must set out the facts on which the applicant relies and all other material facts of which the court should be made aware, including facts that would count against the grant of the search order.⁵⁰⁶ In their affidavit the applicant must not only fully disclose the reasons for believing that material would disappear if the order were not made, but also deal with all the relevant surrounding circumstances, such as the applicant's own ability to compensate the respondent (through their cross-undertaking in damages) in the event that the order is discharged.⁵⁰⁷ In short, the applicant must disclose all the facts that could have a bearing on the court's decision, whether for or against the grant of the order. Furthermore, as the execution of a search order is a task that calls for considerable expertise, practical good sense and sensitivity, the applicant's affidavit must state the name, address and experience of the supervising solicitor who will carry out the order, and the address of the premises. Most significantly, the applicant must indicate whether the premises are a private residence or a business address, since different conditions would normally attach to the search of private premises than to the search of business premises. The courts attach considerable importance to correct compliance with the application procedure, and substantial departure from the guidelines is likely to result in the discharge of the search order.⁵⁰⁸

The applicant's undertakings

15. 231

The applicant's undertakings are set out in [CPR 25.9\(3\)](#) and the standard form search order. A search order must contain an undertaking by the applicant to serve the application notice, the evidence in support and any order made on the respondent as soon as practicable and an undertaking to pay any damages which the court considers that the applicant should pay to the respondent ([CPR 25.9\(3\)](#)). The court should also consider whether to require an undertaking by the applicant to pay any damages sustained by a person other than the respondent, including another party to the proceedings or any other person who may suffer loss as a consequence of the order ([CPR 25.9\(5\)](#)). If made without notice, the order must contain a return date for a further hearing in the presence of all the parties ([CPR 25.9\(3\)\(c\)](#)). The standard form search order also contains undertakings relating to collateral use, the maintenance of a sum of money in an account controlled by the applicant's solicitors and the insurance of property removed from the premises.

- 15.232** Where a search order is varied or discharged, the court should consider whether it is appropriate to assess damages at once and direct immediate payment.⁵⁰⁹ Indeed, there should be a presumption in favour of immediate compensation, since the questions relevant to this decision are unlikely to require further investigation at the trial and since the harm to the respondent, if any, should not be compounded by further delay and uncertainty.⁵¹⁰

Execution of a search order

- 15.233** At first, the claimant's solicitors executed search orders themselves. This proved inflammatory because a defendant was bound to resent the ransacking of their premises by their opponent's solicitors. Furthermore, it is difficult to expect the opponent's solicitors to carry out the order with the detachment, fair-handedness and objectivity that are required in order to ensure that the intrusion into the defendant's private sphere is kept within proper bounds and that it does not become an instrument of oppression designed to press the defendant into submission. The former practice has now been abandoned. One of the more important safeguards of present practice is the provision that the "supervising solicitor"—i.e. the solicitor who serves the order and carries out the search, must not be an employee or member of the applicant's firm of solicitors ([CPR 25.16](#)). Although complete objectivity cannot be expected from someone who is instructed by the applicant's solicitors, at least this provision removes the unseemly friction that was caused in the past by the direct and antagonistic contact between the claimants' solicitors and the defendant. Only the supervising solicitor named in the order, accompanied by such other persons as are mentioned in the order, is allowed to carry out the order.⁵¹¹
- 15.234** The supervising solicitor must serve the order on the respondent, unless the court permits some other arrangement. The search order must be accompanied by the evidence that was adduced in support of the application and by any documents capable of being copied. Where the applicant adduced confidential exhibits to support their application, such as statements provided by informers, they need not be served with the search order. However, they must be made available for inspection by the respondent in the presence of the applicant's solicitors while the order is carried out and must afterwards be retained by the respondent's solicitors on their undertaking not to permit the respondent to see them or copies of them except in their presence, and not to make or take away any note or record of them.
- 15.235** At the time of serving the order, the supervising solicitor must explain its terms to the respondent in plain language and advise them of their right to seek legal advice before permitting entry and of their right to apply to the court to vary or discharge the order. If the respondent wishes to take legal advice, they must be given reasonable time before requiring them to allow entry, provided that the delay is not likely to frustrate the execution of the order.⁵¹² Problems may arise where the supervising solicitor does not find the defendant at the premises subject to the order. It is the supervising solicitor's duty to establish whether the person found at the premises in question is a "responsible employee", in the sense of having sufficient authority to permit the search. If the person on the premises wishes to contact the defendant and seek their authorisation, they must of course be allowed to do so. If the defendant wishes to be present at the search, they must be given reasonable time to arrive. Where the defendant cannot be reached, or cannot arrive within a reasonable time, it is for the supervising solicitor to judge whether the person at the premises is of sufficient seniority in the defendant's organisation to be expected to make an informed decision

whether to allow entry. In any event, such a person must be given a reasonable opportunity to seek advice from more senior officers or from legal advisers.

15.236 The search must be confined to that which the court order allows. Only materials described in the order may be inspected, copied or taken away. Unauthorised entry or removal of materials may amount to trespass or wrongful interference. The respondent's materials must be accurately listed before they are taken away. If at all practical, the respondent must be given a reasonable opportunity to check the material against the list before it is taken away. A respondent must not be deprived of documents or other material for longer than is reasonably necessary in order to achieve the purposes of the order. Thus, where documents are taken for copying, the original must be returned within the time stated in the search order. Once a search order has been executed, the supervising solicitor must compile a report on the operation and submit it to the applicant's solicitors, who must then serve a copy of it on the respondent, and file a copy with the court.

15.237 The supervising solicitor is concerned only with the immediate execution of the order on the respondent's premises. Once they have carried out the entry, identified the relevant material and removed it, their role comes to an end. As long as the material remains in the possession of the supervising solicitor, any privilege against self-incrimination may still be asserted.⁵¹³ The processing of this material, such as the copying of documents and the retrieval of computer records, is the responsibility of the applicant's solicitors. Where materials are removed and kept pending trial, the applicant's solicitors should place them in the custody of the respondent's solicitors on their undertaking to retain them in safekeeping and to produce them to the court when required. Where listed items exist only in computer readable form, the respondent must afford the applicants' solicitors access to any relevant information kept in the computers, which may involve divulging passwords and other codes. On their part, the applicant's solicitors must take all reasonable steps to ensure that the retrieval of computer information is carried out by experts and that the respondent's systems are not damaged in the course of such operation.

The respondent's options on being served

15.238 A search order requires immediate compliance. A respondent has no right to say that they will not comply until they have had an opportunity to seek a discharge of the order. Nonetheless, a respondent served with a search order can take certain steps to protect their interests. The respondent may legitimately insist, as we have noted, that no search or removal should take place until they have had a chance to consult their solicitor, provided that such consultation can take place within a short time and provided that the respondent can offer adequate safeguards that no precipitate action would be taken in the meantime. Notwithstanding the mandatory terms of a search order, a respondent has considerable scope for offering alternative arrangements, provided they are as effective as the terms of the order in securing the material sought by the applicants. For instance, a respondent may legitimately insist that the search should be carried out not by the supervising solicitor but by their own solicitors in the presence of the supervising solicitor and according to their requirements. They may offer that the material indicated in the order should be taken into the safe custody of their own solicitor until they have had an opportunity to challenge the order in court. It is difficult to imagine that such a reaction would amount to contempt of court on the part of the respondent. However, fear of reprisals by wrongdoers provides no justification for not complying with a search order.⁵¹⁴

Footnotes

480 County Court Remedies Regulations 1991 regs 3(1), 3(2) and 3(4).

481 County Court Remedies Regulations 1991 regs 3(1) and (4)(b); Chancery Guide (2024) para.15.43.

482 *Anton Piller KG v Manufacturing Processes* [1976] Ch 55; [1976] 1 All ER 779, CA. The first few cases in which civil search orders were granted are not reported; the first reported reasoned decision is *EMI Ltd v Pandit* [1975] 1 W.L.R. 302: see *TBD (Owen Holland) Ltd v Simons* [2020] EWCA Civ 1182; [2021] 1 W.L.R. 992 [127].

- 483 “The purpose of inspecting documents during the course of the search, to the extent permitted by the order, is to identify documents which should be preserved”: *TBD (Owen Holland) Ltd v Simons [2020] EWCA Civ 1182; [2021] 1 W.L.R. 992* [175].
- 484 *TBD (Owen Holland) Ltd v Simons [2020] EWCA Civ 1182; [2021] 1 W.L.R. 992* [143], [161], [170] and, particularly, [175]. For the principles governing an order for the disclosure of information, see *Norwich Pharmacal Co v Customs and Excise Comrs [1974] AC 133* (discussed at paras 15.201 ff above) and *Bankers Trust Co v Shapira [1980] 1 WLR 1274* (discussed at para.15.220 above).
- 485 *Hyperama Plc v Poulis [2018] EWHC 3483 (QB)*; see also *Universal City Studios Inc v Mukhtar & Sons [1976] 2 All E.R. 330*.
- 486 Committal for contempt of court is discussed in Ch.24 Enforcement.
- 487 *TBD (Owen Holland) Ltd v Simons [2020] EWCA Civ 1182* [178].
- 488 *TBD (Owen Holland) Ltd v Simons [2020] EWCA Civ 1182* [180].
- 489 *TBD (Owen Holland) Ltd v Simons [2020] EWCA Civ 1182* [184]; *Nix v Emerdata Limited [2024] EWHC 125 (Comm) [26]*. Cf *Re Valorem Holdings Ltd [2023] EWHC 2625 (Ch)* [61], where it was accepted that the legal test for the grant of an imaging order is the same as for a search order.
- 490 CPR 4(2) and 25.18(1).
- 491 Model imaging order, para.9. See also the applicant’s fourth undertaking in Schedule B of the model imaging order: “The applicant will not, without the permission of the court, use any information obtained as a result of carrying out this order or access inspect or use the Electronic Copies until after the return date”.
- 492 *TBD (Owen Holland) Ltd v Simons [2020] EWCA Civ 1182* [178] and [189]. An image, as a complete copy, will often contain irrelevant and private documents and/or privileged documents.
- 493 *TBD (Owen Holland) Ltd v Simons [2020] EWCA Civ 1182* [193].
- 494 *Anton Piller KG v Manufacturing Processes [1976] Ch 55; [1976] 1 All ER 779* at 784, CA.
- 495 *Lock International Corp v Beswick [1989] 3 All ER 373* at 384; [1989] 1 W.L.R. 1268 at 1281, ChD.
- 496 This protection extends to professional premises: *Niemietz v Germany (1992) 16 E.H.R.R. 97*.
- 497 *Chappell v United Kingdom [1989] 12 E.H.R.R. 1*.
- 498 *Niemietz v Germany [1992] 16 E.H.R.R. 97*.
- 499 See the view of the (then) European Commission of Human Rights in Noviflora Sweden Aktiebolag v Sweden, App. No.14369/88 (EComHR, unrep, 12 October 1992).
- 500 See for example: *Columbia Picture Industries v Robinson [1987] Ch 38; [1986] 3 All ER 338, ChD*; and *Lock International Corp v Beswick [1989] 3 All ER 373; [1989] 1 W.L.R. 1268, ChD*. In *TBD (Owen Holland) Ltd v Simons [2020] EWCA Civ 1182* [157]—[171], the Court of Appeal discussed these “notorious” decisions and the subsequent changes, principally (i) the introduction of the appointment of an independent solicitor, (ii) the 1994 and 1996 PDs and (iii) the statutory basis for search orders (s.7 of the 1997 Act).
- 501 *Gadget Shop Ltd v Bug Com Ltd [2001] F.S.R. 383*.
- 502 *Indicia Salus Ltd v Chandrasekaran [2006] EWHC 521 (Ch)*; and see 2025 WB Vol 2, 15-91.
- 503 *TBD (Owen Holland) Ltd v Simons [2020] EWCA Civ 1182; [2021] 1 W.L.R. 992* [180].
- 504 Commercial Court Guide (11th edn, revised July 2023) paras F1–F14; King’s Bench Guide (2024), paras 12.1–12.5; and Chancery Guide (June 2024 update) paras 15.43–15.62
- 505 CPR 25.18(1). The Court of Appeal has said that the standard form should be used unless there is good reason to depart from it: *TBD (Owen Holland) Ltd v Simons [2020] EWCA Civ 1182; [2021] 1 W.L.R. 992* [173]–[174]; Chancery Guide, para 15.52.
- 506 For the obligation to make full and frank disclosure see Ch.10 Interim Remedies paras 10.225 ff.
- 507 *Lock International Corp v Beswick [1989] 3 All ER 373; [1989] 1 W.L.R. 1268, ChD*.
- 508 *Gadget Shop Ltd v Bug Com Ltd [2001] F.S.R. 383*.
- 509 Although this is specifically set out in the Commercial Court Guide (11th ed, revised July 2023), para.F14.12, there is no reason why the practice should not be taken to be generally applicable.
- 510 *Lock International Corp v Beswick [1989] 3 All ER 373; [1989] 1 W.L.R. 1268, ChD*.
- 511 CPR 25.19, unless the court otherwise orders, in which case the reasons must be set out in the order: CPR 25.18(3).
- 512 *Bhimji v Chatwani [1991] 1 All ER 705; [1991] 1 W.L.R. 989, ChD*.
- 513 *C Plc v P [2006] EWHC 1226 (Ch)*, discussed in Ch.18 Self-Incrimination, especially para.18.15). Cf. *O Ltd v Z [2005] EWHC 238 (Ch)*.

- 514 *Coca-Cola Co v Gilbey* [1995] 4 All ER 711, ChD; cf. *Coca-Cola Co v Aytacli (Contempt: Committal)* [2003] EWHC 91 (Ch); [2003] 11 L.S. Gaz. R. 31. See also *Lakatamia Shipping Co Ltd v Morimoto* [2020] EWHC 3201 (Comm) [47].
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Subsequent Use of Disclosed Documents

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 15 - Disclosure

Subsequent Use of Disclosed Documents

The general principle

15. 239 The public interest in ensuring that all relevant information is available to the adjudicative process justifies, all else being equal, compulsory measures to force litigants and non-parties to disclose relevant documents.⁵¹⁵ However, the interests of the administration of justice can provide justification for the invasion of the private sphere only to the extent that it is necessary in order to enable a court fairly to decide the case before it. It would be wrong, therefore, to allow a party who receives a document in the process of disclosure to treat the information as their own to dispose of as they see fit. The freedom of a party to use a disclosed document or its contents must not outstrip the purpose for which the document was disclosed to that party.⁵¹⁶
15. 240 Lord Diplock explained the need for a restriction on the use of disclosed material in *Home Office v Harman*:

“The use of discovery involves an inroad, in the interests of achieving justice, on the right of the individual to keep his own documents to himself; it is an inroad that calls for safeguards against abuse, and these the English legal system provides, in its own distinctive fashion, through its rules about abuse of process and contempt of court.”⁵¹⁷

Lord Keith added in the same case:

“Discovery constitutes a very serious invasion of the privacy and confidentiality of a litigant’s affairs. It forms part of English legal procedure because the public interest in securing that justice is done between parties is considered to outweigh the private and public interest in the maintenance of confidentiality. But the process should not be allowed to place upon the litigant any harsher or more oppressive burden than is strictly required for the purpose of securing that justice is done.”⁵¹⁸

As a matter of general principle, therefore, parties who receive documentary disclosure are allowed to use the documents only for the purposes for which they were disclosed.⁵¹⁹

15. 241 The restriction on the use of disclosed documents may also be based on ECHR art.8, which effectively permits the invasion of a person’s privacy in the interests of the administration of justice, provided that it is strictly required for the fair determination of a dispute. The dissemination of disclosed documents should not, therefore, be allowed to go further than is necessary for the purpose of determining the proceedings in which disclosure is obtained. Under English law it would be improper for a litigant to pass on disclosed documents to a stranger to the proceedings, even if the stranger were a public institution such as a government department or the police.⁵²⁰ Importantly, the principle applies not only to protect the disclosed documents themselves, but also prevents their contents or the information derived from them from being disseminated or otherwise used.⁵²¹ Thus, an expert who sells to the press information that they have gleaned from documents obtained in disclosure, which have been submitted to them by a litigant in order to receive expert advice, would be guilty of a most reprehensible breach of duty.⁵²² It would amount to an abuse of process and to contempt of court for a litigant to exploit the process of disclosure in order to extract information from an opponent with a view to giving it publicity rather than for the purpose of advancing their case in the proceedings.

15. 242 It was a general feature of the pre-CPR law on disclosure that the use of documents disclosed for the purpose of legal proceedings was under the control of the court. The obligation not to use the documents for any other purpose was said to arise from an implied undertaking that every party who received disclosed documents gave to the court.⁵²³ The court was perfectly free to release a party from the undertaking and allow collateral use but, as Brooke J observed, the court always retained control in order to prevent its process from being abused.⁵²⁴ CPR 31.22 seeks to reflect this general principle. It states:

Rule 31_22

“(1) A party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, except where—

(a) the document has been read to or by the court, or referred to, at a hearing which has been held in public;

(b) the court gives permission; or

(c) the party who disclosed the document and the person to whom the document belongs agree.

(2) The court may make an order restricting or prohibiting the use of a document which has been disclosed, even where the document has been read to or by the court, or referred to, at a hearing which has been held in public.

(3) An application for such an order may be made—

(a) by a party; or

(b) by any person to whom the document belongs.

(4) For the purpose of this rule, an Electronic Documents Questionnaire which has been completed and served by another party pursuant to Practice Direction 31B is to be treated as if it is a document which has been disclosed.”

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15. 243 CPR 31.22 abandons the fiction that the limitation on the use of disclosed documents arises from an implied undertaking given to the court, but otherwise it reflects the common law position and the pre-CPR authorities continue to be of relevance. Since the rule ostensibly applies to any disclosure of a document, pre-action disclosure is caught,⁵²⁶ as presumably is non-party disclosure. It may also apply to a document mentioned in a statement of case, witness statement or affidavit which a party has a right to inspect under CPR 31.14.⁵²⁷ Certainly, this seems a better view than holding that mentioning a document in a statement of case, witness statement or affidavit counts as voluntary disclosure which is not protected by CPR 31.22.⁵²⁸

15. 244 The applicability of the limitation on subsequent use to documents disclosed in compliance with pre-action protocols is unclear. On the face of it, CPR 31.22 does not clearly apply to such disclosure, as Dr Sue Gibbons has argued.⁵²⁹ Yet the protocol process is intended to encourage free early exchange of documents that would be disclosable later.⁵³⁰ If pre-action protocol disclosure were not protected in the same way that other disclosure is protected, disputants may feel obliged to hold back until proceedings were commenced, which would tend to defeat the aim of encouraging early disclosure. It is suggested that the policies behind the pre-action protocols dictate that disclosure in compliance with pre-action protocols should be treated on the same footing as post-action disclosure, and indeed pre-action disclosure under CPR 31.16, which are covered by CPR 31.22.⁵³¹ After all, protocol disclosure is not altogether voluntary, due to the potential adverse costs consequences that non-compliance with the requirements of the pre-action protocols may attract. Nonetheless, litigants would be wise to follow Dr Gibbons’ suggestion of

requiring an undertaking of confidentiality before making disclosure pursuant to the relevant protocol. If such an undertaking were not forthcoming, a party may be justified in refusing pre-action protocol disclosure.

- 15. 245** At common law the ban on collateral use also applied to affidavits sworn under compulsion,⁵³² to documents produced under a subpoena duces tecum (now CPR 34.2(1)(b))⁵³³ and to information obtained compulsorily under statutory powers.⁵³⁴ There is no reason to suppose that CPR 31.22 has altered these common law rules, which presumably continue to apply.⁵³⁵ However, CPR 31.22 does not extend to documents that are revealed to a party other than in compliance with disclosure obligations (for example, documents which the disclosing party chooses to serve).⁵³⁶ Further, CPR 31.22 does not apply to submissions and discussions about draft judgments.⁵³⁷
- 15. 246** It is worth noting that several other CPR provisions restrict the use of information exchanged among the parties to proceedings (and other CPR provisions provide for the supply of documents to parties or non-parties).⁵³⁸ For example, CPR 18.2 affords the court a power to direct that information provided by a party to another party, whether given voluntarily or following an order to provide information under CPR 18.1, “must not be used for any purpose except for that of the proceedings in which it is given”. Similarly, CPR 34.12 provides that where the court orders a party to be examined about their or any other assets for the purpose of any hearing except the trial, the deposition may be used only for the purpose of the proceedings in which the order was made (except when such a use is made by the party who was examined, by their consent or by the court’s permission). Restrictions on the use of witness statements are stipulated in CPR 32.12: a party may use witness statements it has prepared itself for any purpose; witness statements prepared by the other side, however, which have not yet been put in evidence at trial, are subject to the restriction on collateral use in CPR 32.12(1).⁵³⁹ Finally, the court may occasionally order that commercially sensitive documents should be disclosed only to a party’s legal advisers and not to the party itself,⁵⁴⁰ in which case the lawyers would be under a duty not to use the documents in any other proceedings.⁵⁴¹

Documents may only be used “for the purpose of the proceedings” in which they were disclosed

Restriction on use in other legal proceedings

- 15. 247** Until the Court of Appeal’s decision in *Riddick v Thames Board Mills Ltd*,⁵⁴² virtually all reported cases on the topic were concerned with improper or collateral use of disclosed documents in contexts other than subsequent legal proceedings, such as giving publicity to information obtained from otherwise confidential documents.⁵⁴³ In *Riddick*, the Court of Appeal addressed for the first time the question of whether the restriction on use of disclosed documents applied to use in subsequent legal proceedings. The court held that documents disclosed in one action may not be used by the receiving party in other proceedings. Furthermore, a litigant was not allowed to use information or knowledge derived from disclosed documents in order to bring fresh proceedings, even if they did not propose to use the disclosed documents themselves in these later proceedings.⁵⁴⁴
- 15. 248** *Miller v Scorey*⁵⁴⁵ illustrates the operation of the latter principle. New trustees brought proceedings against former trustees and others for commissions that the defendants had received and which should have been made over to the trust fund. Disclosed documents gave the claimants reason to believe that one of the defendants had bribed the former trustees, and the claimants brought fresh proceedings against the defendants alleging bribery. Rimer J held that, notwithstanding that the fresh action was closely related to the original action and involved the same defendants, the use of the documents was improper and dismissed the new action as an abuse of process.

The meaning of “use”

15. 249 “Use” for the purposes of CPR 31.22 is broadly construed: even review of documents can constitute “use”,⁵⁴⁶ as will referring to the documents and any characteristics of the documents.⁵⁴⁷ Although there is an implicit right to read documents to ascertain whether to make an application for permission to make collateral use, that implicit permission is extremely narrow. It does not extend to reviewing documents with a view to deciding (for example) whether the party wished actually to rely on or otherwise actively make use of any of those documents in advancing its case or meeting the case against it in other proceedings.⁵⁴⁸

The “for the purpose of the proceedings” test

15. 250 Since the prohibition on collateral use applies to use in subsequent legal proceedings, as well as to other uses, questions may arise about the proper boundaries of the “proceedings” in which disclosure was given, to which we may refer as the original proceedings.⁵⁴⁹

15. 251 It is accepted that the “for the purpose of the proceedings” test allows not only use in the original proceedings,⁵⁵⁰ but also uses that can legitimately be regarded as flowing from the purpose of that action. The House of Lords held in *Crest Homes v Marks*⁵⁵¹ that where disclosed documents reveal non-compliance with an earlier order in the same or related proceedings they may be used to establish contempt of court, provided that this will not “occasion injustice” to the producer of the documents.⁵⁵² It was suggested in the course of that decision that materials seized as a result of search orders may be used more widely because the whole purpose of such orders is to obtain evidence without giving the defendant the opportunity of deciding for themselves whether to make disclosure.⁵⁵³ Subsequent decisions held that the implied undertaking does apply to documents obtained under search orders⁵⁵⁴ and the standard form of search order includes an express undertaking by the applicant not to use any information or documents obtained as a result of carrying out the order except for the purposes of the present proceedings (including adding further respondents) or commencing civil proceedings in relation to the same or related subject matter until after the return date.⁵⁵⁵ In one case, when the claimants learnt in the course of disclosure that the defendants no longer possessed certain key documents, they commenced an action for disclosure against an employee of the defendants and relied on a document that the defendants had disclosed. It was held that such use was for the proper conduct of the first action.⁵⁵⁶

15. 252 In certain situations disclosure may be ordered for the very purpose of facilitating other proceedings, as where a person is required to reveal the identity of a wrongdoer (discussed above).⁵⁵⁷ CPR 31.22 could not have been intended to forbid the deployment of documents for the very purpose for which they were obtained in the first place.⁵⁵⁸ The “for the purpose of the proceedings” test may therefore be expanded to a test that says that documents obtained in disclosure may be used for “the purpose for which the order was made, namely the purposes of that litigation then before the court between those parties”.⁵⁵⁹ In a claim for disclosure of the identity of a wrongdoer, for instance, the purpose is to sue the wrongdoer and the information is usable for this purpose: *Shlaimoun v Mining Technologies International Inc*,⁵⁶⁰ where it was held that, where a *Bankers Trust/Norwich Pharmacal* order is made, the court is implicitly giving permission to the applicant to use the documents in the subsequent proceedings. In *Omar v Omar*,⁵⁶¹ the claimants brought proceedings to trace missing assets and obtained disclosure. It was held that such documents could be used for all purposes connected with the recovery of the property, including obtaining interim relief, such as a freezing order, amending the statement of case to add a personal claim in respect of the missing assets, pursuing recovery in foreign proceedings and even suing other persons who held the property. Emphasis was placed on the fact that the claimant was not using the documents to found proceedings on a fresh cause of action, but only to enforce the rights which formed the basis of the tracing claim.

15. 253 The outer bounds of the “for the purpose of the proceedings” test are thus far from clear and this uncertainty encourages satellite litigation about subsequent use.⁵⁶¹ Moreover, the test as presently framed gives rise to unhelpful and artificial distinctions. For example, it has been held that it is acceptable to use documents to plead a new cause of action within the same proceedings, even if this would mean joining new parties as defendants⁵⁶²; but it would be a breach of the rule to bring precisely the same cause of action as a separate claim.⁵⁶³ It is therefore unsafe to proceed on the assumption that subsequent use would be permissible in other proceedings brought to pursue the same underlying interest for which the original proceedings were brought. Similarly, because the prohibition is directed towards the receiving party’s “purpose” in using a disclosed document, the party may be prevented from obtaining advice from an external adviser or expert about the prospects of contemplated related proceedings, but would be permitted to obtain substantially similar advice from the same expert if it was confined to the prospects in the original proceedings.⁵⁶⁴

The restriction on use in subsequent legal proceedings is questionable

15. 254 As we have seen, the “for the purpose of the proceedings test” gives rise to problematic and artificial distinctions, when applied to use in subsequent legal proceedings (as distinct from other forms of collateral use). It is also doubtful whether the blanket prohibition on the use of disclosed information in subsequent legal proceedings fulfils any useful function. The justification for the ban is distinctly shaky. In the *Riddick* case, the Court of Appeal stressed the importance to the administration of justice of promoting full and frank disclosure in civil proceedings and reasoned that litigants would be reluctant to comply with their disclosure obligations if they feared that materials disclosed in one set of proceedings might be used for founding fresh proceedings based on completely unrelated matters. Waller LJ explained:

“In my opinion it is highly desirable that there should be no discouragement to full and frank disclosure on discovery. If there be a risk that disclosure may produce new causes of action parties may be deterred from disclosing the document. I am of the opinion that to use this document, which had been compulsorily disclosed in other proceedings, is an abuse of the process of the court and it would be contrary to public policy to allow it to be used in the proceedings.”⁵⁶⁵

15. 255 The trouble with this rationale is that it proves too much. For if litigants are likely to be deterred from fulfilling their disclosure obligation in present proceedings by the fear that disclosure might harm their interests in some future proceedings, they would be even more likely to be deterred if they feared the adverse consequences of disclosing damaging documents in present proceedings. Since, by and large, litigants fulfil their disclosure obligations even where they may be harming their own prospects in the litigation, it is unrealistic to suppose that the apprehension of adverse consequences in some future proceedings would have a greater chilling effect.

15. 256 The main aim of CPR 31.22 cannot, therefore, sensibly be understood as encouraging compliance with disclosure obligations. To understand the true rationale of the rule, it is important to consider the purpose for which disclosure is compelled in the first place—namely to ensure that the court is able to accurately and effectively enforce legal rights. It makes little sense to require disclosure for this purpose in one set of proceedings, but to impose a blanket prohibition on using that disclosure towards the same ends in other, related legal proceedings.⁵⁶⁶ Seen from this perspective, the proper aim of the ban on collateral use is rather more limited than the Court of Appeal in *Riddick* thought; it is to prevent litigants from making use of disclosed documents in ways that are improper or truly collateral to the purpose for which they were disclosed—namely to assist litigants and the court in ascertaining the truth and vindicating legal rights. Consequently, the main concern in the context of subsequent use in legal proceedings is simply to maintain court control over the disclosure process. Brooke J stressed this matter when he said, of the pre-CPR law, that “the implied undertaking is not absolute in terms, since the court may always vary its terms. But it has the effect of enabling the court to control the use to which documents can be put if anyone wishes to use them outside the four corners of the proceedings in which they were disclosed”.⁵⁶⁷ Since the court compels disclosure

it should have the power to ensure that the disclosure process is not abused. But court control may be just as effectively maintained without a blanket prohibition on subsequent use in legal proceedings.

15. 257 An example will help illustrate these points. Suppose that documents disclosed in action A are capable of establishing the truth in action B. In order to deploy the documents in action B the receiving party must first obtain the leave of the court. What is the court to do when faced with such an application? If the court refuses leave, it may effectively stifle the determination of truth in action B and thereby bring the law into disrepute. For what confidence can the public have in a legal process that prevents a judge from learning something relevant to the issues, when the information is already available to both parties? If permission were forthcoming whenever the evidence proved relevant to the determination of truth in other proceedings, it is difficult to see what useful purpose the leave procedure fulfils, other than creating scope for expensive procedural litigation.

15. 258 It is not suggested that the parties should always be free to use disclosed documents for any purpose connected with legal proceedings. The court must always be able to control its own process in order to prevent abuse of disclosure, as Brooke J observed.⁵⁶⁸ What is suggested is that there is no need for a general prohibition against use in subsequent proceedings in order to maintain court control and prevent improper use. All that is needed in order to prevent improper use is for the court to forbid such use where it appears likely. Put another way, consideration should be given to reversing the presumption so that use in subsequent proceedings would be permissible unless the court has made an order restraining such use. Such a rule would more accurately reflect the true position and would not lull parties into believing that what they disclose in present proceedings will not be used against them for other purposes. A rule, similar to the American rule, which requires the disclosing party to apply for a restriction on use would remove the need to consider what is and what is not within “the purpose of the proceedings” in which disclosure is given, and would thereby obviate expensive and time-consuming arguments of a rarefied nature. It would instead focus attention on whether there is a real justification for restricting subsequent use.

15. 259 The reversal of this presumption, it is suggested, would avoid difficulties such as those encountered in *Cobra Golf Ltd v Rata*.⁵⁶⁹ In that case, Cobra had settled an action for trademark infringement and passing off, the defendant having given an undertaking to cease and desist. Thereafter, Cobra discovered that the defendant had in fact continued their unlawful activities, from a competitor who had had a similar experience with the defendant, and who had obtained extensive evidence of the defendant’s illicit conduct through the execution of a search order. Notwithstanding the defendant’s contempt, the competitor was prevented from sharing the evidence with Cobra, so as to enable Cobra to enforce the undertaking given by the defendant, because the proposed enforcement proceedings were unrelated to the proceedings in which the competitor had obtained the search order. Cobra therefore obtained a search order of its own, but in order to do so had to issue a fresh writ in respect of trademark infringements subsequent to the settlement of the original action, because a search order could not be granted in the original action, which had concluded. Yet having executed the search order and obtained materials demonstrating the defendant’s breach of the undertaking given in the original action, Cobra was refused permission to rely on these materials to bring contempt proceedings for the breach of the undertaking, because the search order was not made in the proceedings in which the contempt was committed.

15. 260 It is immediately apparent that the litigation in *Cobra* was complex, protracted and wasteful. More to the point, it is difficult in the extreme to see why the documents that had been obtained by the competitor, and especially the documents procured by Cobra in the execution of its own search order, should not have been used to establish the defendant’s breach of the undertaking. That the defendant’s own underhand conduct could coalesce with the current rule in order to frustrate the enforcement of the undertaking in this way is apt to bring the administration of justice into disrepute. A rule whereby evidence obtained in disclosure could *prima facie* be used in other proceedings would resolve these difficulties while still enabling the court to forbid such use in those cases where it would be oppressive or would amount to an abuse of process. Experience in the US, where a similar rule operates by virtue of the Federal Rules of Civil Procedure r.26(c) (providing for so-called “protective orders”), suggests that such an approach works well in practice.⁵⁷⁰

15. 261 Until such a change is instituted, however, parties who wish to use disclosed documents in other proceedings (or, indeed, for other purposes altogether) must bring themselves within one of the three exceptions to the general rule, to which we now turn. To these exceptions it may be added that a person (A), who wishes to use a document previously disclosed by another

(B) in subsequent proceedings to which B is not party, could apply under [CPR 34.2](#) to summon B as a witness to produce the document.⁵⁷¹ Alternatively, in the subsequent proceedings A could apply for a non-party disclosure order against B under [CPR 31.17](#).⁵⁷² However, as matters stand the court might consider such attempts to be inconsistent with the prohibition of [CPR 31.22](#) and therefore an abuse of process.⁵⁷³ The safest way is to apply for permission under [CPR 31.22\(1\)\(b\)](#), discussed below, to used disclosed documents in other proceedings.

The three exceptions to the general rule

Subsequent use by agreement

15. 262 Subsequent use by mutual agreement is allowed by virtue of [CPR 31.22\(1\)\(c\)](#). This does not represent a true exception to the rule against subsequent use, since the rule is designed to protect a disclosing party from the possibility that their documents would be used without their agreement. Where a party agrees to the proposed use of the documents, no need for protection arises and [CPR 31.22\(1\)\(c\)](#) seeks to make this clear. However, this reasoning does not apply in situations where the disclosed documents belong to non-parties or where they contain information concerning non-parties. The protection of the interests of non-parties should not be left entirely to the mercy of the parties, as Dr Gibbons has argued.⁵⁷⁴ Subsequent use in such situations will require the consent of the non-party who disclosed the information (the “person to whom the document belongs” in [CPR 31.22\(1\)\(c\)](#)) or court permission.

Documents referred to in open court

15. 263 There is no limitation on use where a “document has been read to or by the court, or referred to, at a hearing which has been held in public” ([CPR 31.22\(1\)\(a\)](#)),⁵⁷⁵ unless the court has issued a restriction order under [CPR 31.22\(2\)](#).⁵⁷⁶ For the purpose of [CPR 31.22\(1\)\(a\)](#), it is not necessary that the documents should be read out in open court. It is sufficient that the judge has read the documents, or that reference was made to them at a hearing or in witness statements.⁵⁷⁷

15. 264 The freedom to use disclosed material that has been brought out in open court is dictated by the basic principle of publicity of legal proceedings and by the right to freedom of expression under ECHR art.10.⁵⁷⁸ Given that what has passed at a public hearing may be publicised and disseminated by parties, or by anyone else, there is no justification for prohibiting reliance on such materials in other legal proceedings (or indeed, using them for any other purpose). Indeed, such prohibition could only serve to undermine public confidence in the administration of justice.

Restricting use of documents that have been referred to in open court

15. 265 [CPR 31.22\(2\)](#) empowers the court to “make an order restricting or prohibiting the use of a document which has been disclosed, even where the document has been read to or by the court, or referred to, at a hearing which has been held in public”. If the court makes a restricting order under [CPR 31.22\(2\)](#), but the document in question comes into the possession of a third party, any use by the third party of the document with knowledge of the court’s order could amount to contempt of court.⁵⁷⁹

15. 266

Given the importance of the principle of publicity, the court requires an applicant for such an order to establish a convincing justification for departing from the general principle. Guidelines for the exercise of this jurisdiction were provided by Buxton LJ in *Lilly Icos Ltd v Pfizer Ltd*.⁵⁸⁰ The court must bear in mind that the principle of publicity is intended to enable the public to scrutinise legal decisions and the starting point must therefore be that very good reasons are required for departing from the normal rule of publicity. The court should not, as a general rule, suppress the publication of documents that are essential to the understanding of the court's judgment. Although the court may take into account the extent to which the document was central to the proceedings, it should start from the assumption that all documents in the case are necessary and relevant for the purpose of understanding the court's judgment and should not accede to general arguments that it would be possible to understand the trial and its outcome without access to a particular document. Nor should the court accept bare assertions of confidentiality and of the damage that would be done by publication, even if supported by both parties. The court should therefore require an applicant to put forward specific reasons why subsequent use of a document that has already been brought out in open court would be damaging. In reaching its decision, the court may take into account the adverse effect that an order might have on the interests of a third party. In situations that would justify holding a hearing in private in order to protect confidential or sensitive material, it may be preferable to limit subsequent use rather than exclude the public from the hearing. Where proceedings have been held in private, the court may well consider it necessary to make an order under CPR 32.22(2) in order to strengthen the protection of confidential information that was discussed behind closed doors.

15. 267

The principle of publicity is bolstered by the guidelines that the Court of Appeal elaborated in the *Lilly Icos* case, even if the court's conclusion was less than self-evident. The Court of Appeal approved an order imposing a restriction on publication in order to preserve the confidentiality of information which, but for passing reference to the document containing it, played no role in the decision-making process. It is puzzling, however, that the court should have accepted the parties' "strong" assertions for the need to keep such information protected from public gaze when the appeal judges themselves acknowledged that they "would not claim to understand the full reasons for that reluctance [to allow publicity], and the evidence in this case does not enlighten us".⁵⁸¹ It has since been stressed that restrictions on the use of documents referred to in open court can only be made in the public interest, and not in the private interests of the parties.⁵⁸² An order under CPR 32.33(2) was also made in *Rawlinson and Hunter Trustees SA v Director of the Serious Fraud Office*,⁵⁸³ in which the Serious Fraud Office sought an order that 14 days' notice be given if the respondents planned to use documents which may have been read to or by the court in previous interlocutory hearings. The order was granted on the basis that the SFO would incur substantial costs if it had to identify each and every document which had been read to or by the court.

15. 268

Restriction on the use of documents brought out in public proceedings may be justified in order to prevent oppression or where there is a suspicion that a party brought out documents in open court not so much for the purpose of the proceedings in question but in order to use the documents in other proceedings, in which their disclosure could not be obtained.⁵⁸⁴ The court's discretion in applications for restricting subsequent use must be exercised in conformity with the right to fair trial under ECHR art.6. A restraint on the use of the documents which practically prevents a person from prosecuting their rights may impede that person's access to justice. It is suggested that a restraint which prohibits one party from using documents in subsequent proceedings but which leaves the other free to choose whether to do so may amount to a breach of the right to equality of arms.

Permission for collateral use

15. 269

As highlighted above, if a litigant cannot bring themselves within the first two exceptions, they must apply to the court for permission to make collateral use of disclosed documents, under CPR 31.22(1)(b). The applicant must demonstrate cogent and persuasive reasons for allowing the collateral use sought.⁵⁸⁵ It appears that the applicant may in some circumstances have a choice to make the application for permission to make collateral use in the proceedings where the documents are disclosed, or in the proceedings where the documents are sought to be deployed; the applicant may not have a choice where the party who produced the documents is not a party to the separate proceedings.⁵⁸⁶ The court has wide powers under this provision; it may, for example, make an order that documents be disclosed for inspection, but that any subsequent use of the documents in open court requires permission.⁵⁸⁷ Or it may order that the applicant may make unfettered use of the document.

In exceptional circumstances the court may give retrospective permission, in order to legitimise what would otherwise be improper use.⁵⁸⁸ The factors relevant to the grant of retrospective permission include whether prejudice was caused to any other litigant by the unauthorised use, whether the breach was inadvertent, whether if a proper application had been made timeously it would have been granted and the proportionality of debarring the applicant from use of the documents.⁵⁸⁹

15. 270 The main purpose of the jurisdiction is to enable the court to avoid harsh and unjust consequences of the subsequent use rule. Suppose, for instance, that documents are disclosed in litigation for breach of contract, which reveal that the defendant had stolen the claimant's property. It would be unjust if the claimant were prevented from bringing proceedings for the recovery of their property and from adducing in evidence the documents proving the theft. In one case, the execution of a search order against the defendant turned up material suggesting breaches of the claimant's rights by other persons. The claimant was granted permission to use the material in order to bring proceedings against these other persons.⁵⁹⁰ Similarly, permission would be given to use documents disclosed in a tracing claim in order to sue other persons in respect of the same property.⁵⁹¹ Permission may be given to a claimant who obtained documents in one defamation action to use them in a defamation action against a different defendant in order to clear their name.⁵⁹² In a case where there were parallel domestic and European proceedings for abuse of a dominant position, permission was given for the claimant to use an analysis of the defendant's documents in the European proceedings; there was an important public policy that the domestic proceedings should be consistent with the European proceedings.⁵⁹³ Permission was granted to allow the applicant to show disclosed documents to an independent legal consultant in order to determine whether criminal offences were committed by a third party mentioned in the documents.⁵⁹⁴ The resolution of an application for permission requires close examination of the issues, of the proposed use and of the parties' conflicting interests and thus may call for extensive argument and detailed judicial examination.⁵⁹⁵

15. 271 The court may permit documents disclosed in a civil claim to be used in criminal proceedings.⁵⁹⁶ It was held in *A v A (ancillary relief); B v B (ancillary relief)*⁵⁹⁷ that leave for subsequent use may be given when it is in the public interest to do so. The court was thus willing to allow disclosed information to be passed on to the tax authorities because there was a strong public interest that all tax and revenue penalties due should be paid and that evaders of tax should be convicted and sentenced. In another case, Eady J was willing to allow "carefully defined" reuse in order to pursue a remedy other than through "civil proceedings in the conventional sense", on the grounds that public policy encourages the pursuit of remedies via self-regulatory or statutory bodies without having to engage the full panoply of court litigation.⁵⁹⁸ Permission will usually be given where the party is under an obligation under an applicable foreign law to disclose the documents to foreign authorities.⁵⁹⁹

15. 272 A request for permission may arise as a result of an attempt by a stranger to the proceedings to obtain disclosed documents from one of the parties. In *Marlwood Commercial Inc v Kozeny*,⁶⁰⁰ the claimants brought proceedings against the defendants, who were companies and individuals resident in the Bahamas. The defendants disclosed documents that they brought from abroad. The District Attorney of New York, who was conducting a criminal investigation into the affairs of one of the defendants, made a request for assistance in obtaining evidence in the UK and the Director of the Serious Fraud Office served notices on the defendants calling for production of copies of documents disclosed by the defendants. The claimants' solicitor applied for permission under CPR 31.22. The Court of Appeal upheld the permission to disclose on the grounds that the public interest in the investigation or prosecution of an offence of serious fraud took precedence over the general concern of the courts to control the collateral use of compulsorily disclosed documents. The fact that the documents had been brought from abroad for the purposes of disclosure by a foreign litigant, the court held, should not be regarded as a reasonable excuse for non-compliance with the notice.

15. 273 It has been said that the fact that the applicant requires the documents in order to prosecute their case in subsequent proceedings is not by itself sufficient.⁶⁰¹ However, it is suggested that where the subsequent use of disclosed documents is in pursuit of a legitimate claim or defence the court should not refuse leave to use the disclosed documents, unless there are some special factors rendering such use unfair, as where subsequent use would infringe legal professional privilege.⁶⁰² This position is

supported, as emphasised above, by the public interest that a court of law should be able to determine the truth and decide civil disputes on the basis of all the relevant evidence.⁶⁰³ A court that turns its back on relevant material which is known to both parties risks undermining public confidence in its own processes. It is therefore reasonable to conclude that permission to use disclosed documents would normally be obtainable where the applicant wishes to adduce them, or otherwise use information derived from them, in subsequent legal proceedings that are otherwise reasonable and legitimate bearing in mind all the circumstances.

Use in civil proceedings of documents disclosed in criminal proceedings

15.274 CPR 31.22 applies only to civil proceedings. Therefore, the question of whether documents disclosed in criminal proceedings may be used subsequently in civil proceedings is governed by the common law. The House of Lords held in *Taylor v Serious Fraud Office*⁶⁰⁴ that documents disclosed in criminal proceedings are subject to an implied undertaking given by those who receive disclosure not to use the documents for any purpose outside the proceedings in which they were disclosed. This rule, the House of Lords explained, was an expression of the principle that the use of documents disclosed in legal proceedings should remain under the control of the court. Furthermore, the House of Lords held that a person who provided a document or made a statement in order to assist the investigation or prosecution of crime has absolute immunity from suit in defamation based on such document or statement.

15.275 The distinction between the ban on subsequent use of disclosed documents and the immunity rule was explained by Lord Hoffmann, who stressed that although both were concerned with promoting the proper administration of justice, they were directed at protecting different interests. The limitation on subsequent use aims to limit the invasion of privacy and confidentiality caused by compulsory disclosure. The limitation therefore applies only where documents were obtained by compulsory process, not where they were volunteered. However, this limitation is not absolute, because the court is the final arbiter in this matter and may allow a party who obtained disclosure to use the information for purposes outside the proceedings in which the disclosure was made.⁶⁰⁵ Moreover, the limitation ceases to apply once disclosed documents have been read out or referred to in open court. By contrast, immunity confers a freedom from suit in defamation on the persons making a statement in connection with a criminal prosecution regardless of any compulsion, because the immunity is designed to encourage free speech and free and open communication of information in judicial proceedings. The immunity is absolute and cannot be removed by the court or affected by subsequent publication of the statement to which the immunity attaches.⁶⁰⁶

Arbitration proceedings

15.276 The rule against subsequent use has distinctive ramifications in arbitration proceedings. Arbitration is a private matter from which strangers are excluded. In arbitration, each party owes other parties an obligation of confidentiality. This principle, coupled with the implied undertaking of a party who obtains documents in discovery not to use them for any purpose outside the dispute in which they were obtained, prevents parties to arbitration proceedings from using materials and information obtained in arbitration discovery in any other proceedings.⁶⁰⁷

15.277 Permission for subsequent use would, however, be granted by the court if “it is reasonably necessary for the protection of the legitimate interests of an arbitrating party. In this context, that means reasonably necessary for the establishment or protection of an arbitrating party’s legal rights vis-à-vis a third party in order to found a cause of action against that third party or to defend a claim (or counterclaim) brought by the third party”.⁶⁰⁸ Further, the public interest may dictate that collateral use be permitted where a witness has given materially different evidence on different occasions. An exception in such a case is justified because of the importance that judicial decisions should be reached on the basis of truthful and accurate evidence.⁶⁰⁹

Footnotes

- 515 See discussion in [Ch.3 Fair Trial paras 3.203 ff.](#)
- 516 For a meticulous and comprehensive analysis of the subject of subsequent use see: S. Gibbons, “Subsequent Use of Documents Disclosed in Civil Proceedings” (DPhil thesis, University of Oxford, 2002).
- 517 [Home Office v Harman \[1982\] 1 All ER 532](#) at 534, HL.
- 518 [Home Office v Harman \[1982\] 1 All ER 532](#) at 540, HL.
- 519 [Home Office v Harman \[1982\] 1 All ER 532](#) at 540, HL. See also [Derby & Co Ltd v Weldon \(No.2\), The Times, 20 October 1988, ChD](#), per Browne-Wilkinson VC; quoted in [SmithKline Beecham Biologicals SA v Connaught Laboratories Inc \[1999\] 4 All ER 498](#), at 506, CA; and [Prudential Assurance Co Ltd v Fountain Page Ltd \[1991\] 3 All ER 878; \[1991\] 1 W.L.R. 756, QBD](#). See also E. Bray, *The Principles and Practice of Discovery* (London: Reaves & Turner, 1885), p.238.
- 520 [Alterskye v Scott \[1948\] 1 All ER 469](#), where disclosed documents were passed to the Ministry of Agriculture and the police.
- 521 [IG Index Plc v Cloete \[2013\] EWHC 3789 \(QB\) and \[2014\] EWCA Civ 1128](#) [24(ii)]; and [The Ecu Group Plc v HSBC Bank Plc \[2018\] EWHC 3045 \(Comm\)](#).
- 522 [Distillers Co \(Biochemicals\) Ltd v Times Newspapers Ltd \[1975\] QB 613; \[1975\] 1 All ER 41](#).
- 523 [Taylor v Director of the Serious Fraud Office \[1999\] 2 AC 177; \[1998\] 4 All ER 801, HL](#).
- 524 [Mahon v Rahn \(QBD, unreported, 19 June 1996\)](#); although Brooke J’s decision was reversed on appeal, [Mahon v Rahn \[1998\] QB 424; \[1997\] 3 All ER 687, CA](#), his view was later approved by the House of Lords in [Taylor v Director of the Serious Fraud Office \[1999\] 2 AC 177; \[1998\] 4 All ER 801, HL](#).
- 525 2025 WB 31.22.1. Note that [CPR 31.22](#) also applies in proceedings which are governed by PD 57AD: see paras 1.8.–1.9 and Section II.
- 526 See [The Ecu Group Plc v HSBC Bank Plc \[2018\] EWHC 3045 \(Comm\)](#) in relation to pre-action disclosure.
- 527 C.f. [Expandable Ltd v Rubin \[2008\] EWCA Civ 59](#).
- 528 [Cassidy v Hawcroft \[2000\] EWCA Civ 238; \[2000\] C.P.L.R. 624](#).
- 529 S. Gibbons, “*Protecting Documents Disclosed under Pre-Action Protocols against Subsequent Use*” (2002) 21 C.J.Q. 254.
- 530 See for example Pre-Action Protocol for Personal Injury Claims para.7.
- 531 See [The Ecu Group Plc v HSBC Bank Plc \[2018\] EWHC 3045 \(Comm\)](#).
- 532 [Medway v Doublelock Ltd \[1978\] 1 All ER 1261; \[1978\] 1 W.L.R. 710, ChD; Prudential Assurance Co Ltd v Fountain Page Ltd \[1991\] 3 All ER 878; \[1991\] 1 W.L.R. 756, QBD](#); and [Lubrizol Corp v Esso Petroleum Co Ltd \(No. 2\) \[1993\] F.S.R. 53](#).
- 533 [Sybron Corp v Barclays Bank Plc \[1985\] 1 Ch 299](#).
- 534 [Bhimji v Chatwani \(No.3\) \[1992\] 4 All ER 912](#), sub nom [Bhimji v Chatwani \(No.2\) \[1992\] 1 W.L.R. 1158; Marcel v Metropolitan Police \[1992\] 1 All ER 72, CA](#); and [British & Commonwealth Holdings plc \(in administration\) v Barclays de Zoete Wedd Ltd \[1999\] 1 B.C.L.C. 86](#).
- 535 This has been confirmed by the court in [The Official Receiver v Skeene \[2020\] EWHC 1252 \(Ch\)](#), in relation to affidavits. See also [CPR 32.12\(3\)](#), which provides that [CPR 32.12](#) (which provides that, subject to limited exceptions, a witness statement may be used only for the purpose of the proceedings in which it is served) applies to affidavits in the same way as it applies to witness statements.
- 536 Though a duty of confidentiality may sometimes arise in such situations: [Prudential Assurance Co Ltd v Fountain Page Ltd \[1991\] 3 All ER 878; \[1991\] 1 W.L.R. 756, QBD](#). Cf. [Bourns Inc v Raychem Corp \[1999\] 3 All ER 154, CA](#).
- 537 [R \(Mohamed\) v Secretary of State for Foreign and Commonwealth Affairs \[2010\] EWCA Civ 158](#).
- 538 CPR 5.4B, 5.4C and CPR 32.13.
- 539 See [Barry v Butler \[2015\] EWHC 447 \(QB\)](#) [57]–[58].
- 540 I.e. a “confidentiality ring”; see above, paras 15.155 ff.
- 541 [British Sky Broadcasting Group Plc v Virgin Media Communications Ltd \(formerly NTL Communications Ltd\) \[2008\] EWCA Civ 612](#).
- 542 [Riddick v Thames Board Mills \[1977\] QB 881; \[1977\] 3 All ER 677, CA](#).

- 543 See for instance: *Richardson v Hastings* (1844) 7 Beav. 354, 49 ER 1102; *Williams v Prince of Wales Life, Etc, Co* (1857) 23 Beav. 338, 53 ER 133; *Hopkinson v Lord Burghley* (1867) 2 Ch App. 447; *Reynolds v Godlee* (1858) 4 K. & J. 88, 70 ER 37; and *Tagg v South Devon Rly Co* (1849) 12 Beav. 151, 50 ER 1017. For discussion see: P. Prescott, “*Improper Uses of Discovery*” (1978) 94 L.Q.R. 488; I. Eagles, “*Disclosure of Materials Obtained on Discovery*” (1984) 47 M.L.R. 284.
- 544 *Sybron Corp v Barclays Bank Plc* [1985] Ch 299.
- 545 *Miller v Scorey* [1996] 3 All ER 18; [1996] 1 W.L.R. 1122, ChD.
- 546 *Lakatamia Shipping Co Ltd v Morimoto* [2020] EWHC 3201 (Comm) [54] and [57].
- 547 *IG Index Ltd v Cloete* [2014] EWCA Civ 1128 [40].
- 548 *Tchenguiz v Grant Thornton UK LLP* [2017] EWHC 310 (Comm) [29] and *Lakatamia Shipping Co Ltd v Morimoto* [2020] EWHC 3201 (Comm) [55] and [59].
- 549 For a detailed and compelling analysis of this test see: S. Gibbons, “*Subsequent Use of Disclosed Documents—the ‘Purpose of the Proceedings’ Test*” (2001) 20 C.J.Q. 303.
- 550 Consequently, it is permissible to use disclosed documents for obtaining advice about the proceedings: see *The Ecu Group Plc v HSBC Bank Plc* [2018] EWHC 3045 (Comm) [20]. It is permissible to use the documents in order to join a new party as co-defendant to an existing cause of action; likewise to raise a new cause of action within the same proceedings, even if the new cause of action involves new parties: *Grosvenor Chemicals Ltd v UPL Europe Ltd* [2017] EWHC 1893 (Ch) [158]–[159] and [160], respectively.
- 551 *Crest Homes v Marks* [1987] AC 829. But see *Cobra Golf Ltd v Rata* [1998] Ch 109; [1997] 2 All ER 150, ChD.
- 552 *Crest Homes v Marks* [1987] AC 829 at 858. In *Garvin v Domus Publishing Ltd* [1989] Ch 335 it was held that using documents obtained as a result of such orders for the purpose of proving contempt is not within the purpose of such orders.
- 553 *VDU Installations Ltd v Integrated Computer Systems and Cybernetics Ltd* [1989] 1 FSR 378 at 395 and *Tate v Boswell* [1991] Ch 512 at 526.
- 554 *Lakatamia Shipping Co Ltd v Morimoto* [2020] EWHC 3201 (Comm) [82]–[103].
- 555 *Wilden Pump & Engineering Co v Fusfield* [1985] F.S.R. 581.
- 556 *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133; [1973] 2 All ER 943, HL. See above, paras 15.201 ff.
- 557 *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380, HL. However, one should safeguard against the possibility of confusing the “purpose of proceedings” test with a “purpose of disclosure” test; cf. *Savings & Investment Bank v Gray* (CA, unrep, 10 August 1990).
- 558 *Prudential Assurance Co Ltd v Fountain Page Ltd* [1991] 3 All ER 878 at 886; [1991] 1 W.L.R. 756 at 765, QBD.
- 559 *Shlaimoun v Mining Technologies International Inc* [2011] EWHC 3278 (QB) [38].
- 560 *Omar v Omar* [1995] 3 All ER 571; [1995] 1 W.L.R. 1428, ChD.
- 561 S. Gibbons, “*Subsequent Use of Disclosed Documents—the ‘Purpose of the Proceedings’ Test*” (2001) 20 C.J.Q. 303.
- 562 *Grosvenor Chemicals Ltd v UPL Europe Ltd* [2017] EWHC 1893 (Ch) [160].
- 563 *Sybron Corp v Barclays Bank plc* [1985] Ch 299; and *Miller v Scorey* [1996] 3 All ER 18; [1996] 1 W.L.R. 1122, ChD.
- 564 *The Ecu Group Plc v HSBC Bank Plc* [2018] EWHC 3045 (Comm) [20].
- 565 *Riddick v Thames Board Mills* [1977] QB 881 at 912; [1977] 3 All ER 677 at 702, CA. See also *Home Office v Harman* [1982] 1 All ER 532, HL; *Sybron Corp v Barclays Bank Plc* [1985] Ch 299; *Crest Homes v Marks* [1987] AC 829; [1987] 2 All ER 1074, HL; *Cobra Golf Ltd v Rata* [1998] Ch 109; [1997] 2 All ER 150, ChD, per Rimer J. In *Taylor v Director of the Serious Fraud Office*, Lord Hoffmann doubted that the principal reason for the limitation on use in subsequent legal proceedings was to offer an inducement to litigants to disclose documents that they might otherwise be inclined to conceal. He thought that the rule was instead founded on considerations of fairness, which demanded that the privacy and confidentiality of the maker of the document or its owner should not be invaded more than was absolutely necessary for the purposes of justice: *Taylor v Director of the Serious Fraud Office* [1999] 2 AC 177 at 211; [1998] 4 All ER 801 at 811, HL.
- 566 It might also be said that such an approach could have the effect of discouraging settlement, because a party who is aware they may have further causes of action, based on documents which have been disclosed to them, may consider it necessary to litigate to trial in order to rely on the documents in open court and thereby bring them within the exception in CPR 31.22(1)(a), discussed below at paras 15.263 ff.
- 567 *Mahon v Rahn* (19 June 1996, unreported).
- 568 *Mahon v Rahn* (19 June 1996 unreported, QBD); although Brooke J’s decision was reversed on appeal, *Mahon v Rahn* [1998] QB 424; [1997] 3 All ER 687, CA, his view was subsequently approved by the House of Lords in *Taylor v Director of the Serious Fraud Office* [1999] 2 AC 177; [1998] 4 All ER 801, HL.

- 569 *Cobra Golf Ltd v Rata [1998] Ch 109; [1997] 2 All ER 150, ChD.*
- 570 See the discussion of protective orders in A. Miller et al (eds), Wright and Miller on Federal Practice and Procedure, 5th edn (Eagan, MN: Thomson Reuters, 2019) Vol.8. For further discussion see S. Gibbons, “Subsequent Use of Documents Disclosed in Civil Proceedings” (DPhil thesis, University of Oxford, 2002) p.196.
- 571 See above, paras 15.186 ff.
- 572 See above, paras 15.191 ff.
- 573 Cf. *British Sky Broadcasting Group Plc v Virgin Media Communications Ltd (formerly NTL Communications Ltd) [2008] EWCA Civ 612.*
- 574 S. Gibbons, “Subsequent Use of Documents Disclosed in Civil Proceedings” (DPhil thesis, University of Oxford, 2002) p.157.
- 575 For the open justice principle generally, see Ch.3 Fair Trial paras 3.107 ff; it should be noted that “a hearing held in public” includes hearings held in chambers, provided they are not held in private: see para.3.120. See paras 3.123 ff for the situations in which a hearing may not be held in public.
- 576 See below, paras 15.265 ff.
- 577 *SmithKline Beecham Biologicals SA v Connaught Laboratories Inc [1999] 4 All ER 498, CA; NAB v Serco Ltd [2014] EWHC 1225 (QB); Dring v Cape Intermediate Holdings Ltd [2019] UKSC 38 [32] and UXA v Merseycare NHS Foundation Trust [2021] EWHC 3455 (QB).* Cf. *Rigg v Associated Newspapers Ltd [2003] EWHC 710 (QB); [2003] All ER (D) 97.*
- 578 See Ch.3 Fair Trial paras 3.107 ff. And see *Mahon v Rahn [1998] QB 424 at 452; [1997] 3 All ER 687* at 711, 714, CA; *Lilly Icos Ltd v Pfizer Ltd [2002] EWCA Civ 2;* and *UXA v Merseycare NHS Foundation Trust [2021] EWHC 3455 (QB) [18]–[29].*
- 579 *Lilly Icos Ltd v Pfizer Ltd [2002] EWCA Civ 2 [5].*
- 580 *Lilly Icos Ltd v Pfizer Ltd [2002] EWCA Civ 2 [25].*
- 581 *Lilly Icos Ltd v Pfizer Ltd [2002] EWCA Civ 2; [2002] 1 All ER 842; [2002] 1 W.L.R. 2253 [27].*
- 582 *Chodiev v Stein [2016] EWHC 1210 (Comm) [34].*
- 583 *Rawlinson and Hunter Trustees SA v Director of the Serious Fraud Office [2015] EWHC 937 (Comm).*
- 584 Cf. *Bourns Inc v Raychem Corp [1999] 3 All ER 154, CA.*
- 585 *Lakatamia Shipping Co Ltd v Morimoto [2020] EWHC 3201 (Comm) [53].*
- 586 *Lakatamia Shipping Co Ltd v Morimoto [2020] EWHC 3201 (Comm) [64]–[66].*
- 587 *Property Alliance Group Ltd v Royal Bank of Scotland Plc [2015] EWHC 321 (Ch).*
- 588 *Miller v Scorey [1996] 3 All ER 18; [1996] 1 W.L.R. 1122, ChD;* and *The Ecu Group Plc v HSBC Bank Plc [2018] EWHC 3045 (Comm).*
- 589 *Lakatamia Shipping Co Ltd v Morimoto [2020] EWHC 3201 (Comm) [63].*
- 590 *Sony Corp v Anand [1981] Com. L.R. 55; [1981] F.S.R. 398.*
- 591 *Omar v Omar [1995] 3 All ER 571; [1995] 1 W.L.R. 1428, ChD.* Cf. *Bank of Crete SA v Koskotas (No. 2) [1993] 1 All ER 748; [1992] 1 W.L.R. 919.*
- 592 *C v News Group Newspapers Ltd [2002] EWHC 1101 (QB).*
- 593 *Infederation Ltd v Google Inc [2015] EWHC 3705 (Ch).*
- 594 *Tchenguiz v Director of the Serious Fraud Office [2014] EWHC 1315 (Comm).*
- 595 See for instance *Tassilo Bonzel & Schneider (Europe) AG v Intervention [1991] R.P.C. 43, Pat Ct.*
- 596 *Attorney-General for Gibraltar v May [1999] 1 W.L.R. 998, CA; Marlwood Commercial Inc v Kozeny (disclosure of documents) [2004] EWCA Civ 798; [2004] 3 All ER 648; C Plc v P [2006] EWHC 1226 (Ch);* and *Gilani v Saddiq [2018] EWHC 3084 (Ch).* See also the decision of the Supreme Court of Canada, holding that the common law implied undertaking prohibits parties from passing evidence of a crime obtained through disclosure in civil proceedings to the police, unless the court gives permission: *Juman v Doucette [2008] SCC 8.* As to the position where documents obtained in criminal proceedings are sought to be used in civil proceedings, see below, paras 15.274 ff.
- 597 *A v A (ancillary relief); B v B (ancillary relief) [2000] 1 F.L.R. 701, Fam Div.*
- 598 *Chase v News Group Newspapers [2002] EWHC 1101 (QB).*
- 599 *PJSC National Bank Trust v Mints [2020] EWHC 3253 (Comm) [149]–[152].*
- 600 *Marlwood Commercial Inc v Kozeny (Disclosure of Documents) [2004] EWCA Civ 798; [2004] 3 All ER 648.*
- 601 *Riddick v Thames Board Mills [1977] QB 881; [1977] 3 All ER 677, CA.*
- 602 *Bourns Inc v Raychem Corp [1999] 3 All ER 154, CA.*
- 603 See above, paras 15.256–15.257.

- 604 *Taylor v Director of Serious Fraud Office* [1999] 2 AC 177; [1998] 4 All ER 801, HL. See also *Tchenguiz v Serious Fraud Office* [2014] EWCA Civ 1409 [58].
- 605 The approach to permission is thus essentially similar to the approach taken under CPR 31.22(1)(b)—in other words the question is whether there is a legitimate or public interest in the proposed collateral use. For example, in one case a convicted prisoner was released after his conviction was quashed following a reference to the Court of Appeal. Subsequently, the policemen who had been responsible for the miscarriage of justice brought defamation proceedings against a newspaper that criticised their conduct. The prisoner was permitted to pass on documents that he had obtained in disclosure in his criminal case to the newspaper, so that it could use them in its defence to the defamation claim. Lord Taylor CJ held there was an important public interest in allowing the defendant newspaper to exonerate itself by reference to the documents: *Coventry Newspapers Ltd, Ex p.* [1993] QB 278 at 292; [1993] 1 All ER 86 at 95. However, special consideration may attach to witness evidence given in the course of a criminal investigations under an expectation of confidentiality: *Rawlinson and Hunter Trustees SA v Director of the Serious Fraud Office* [2015] EWHC 266 (Comm).
- 606 See for example: *Heath v Commissioner of Police of the Metropolis* [2004] EWCA Civ 943; *South London & Maudsley NHS Trust v Dathi* [2008] IRLR 350, EAT.
- 607 *Ali Shipping Corp v Shipyard Trogir* [1998] 2 All ER 136; [1999] 1 W.L.R. 314. See also *Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184; cf. *Esso Australia Resources Ltd v Plowman (Minister for Energy and Minerals)* (1995) 183 C.L.R. 10 (High Court of Australia).
- 608 *Ali Shipping Corp v Shipyard Trogir* [1998] 2 All ER 136 at 147; [1999] 1 W.L.R. 314 at 327.
- 609 *Ali Shipping Corp v Shipyard Trogir* [1998] 2 All ER 136 at 148; [1999] 1 W.L.R. 314 at 327–328. See also *Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184.

Introduction

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Mainwork

Chapter 17 - Without Prejudice

Introduction

- 17.1** The importance attached to the public interest in promoting settlements is reflected in the “without prejudice” rule.¹ Statements made in the course of negotiations or discussions aimed at finding an agreed resolution to a legal dispute are inadmissible and immune from compulsory disclosure.² The privilege belongs to the parties, in the sense that they alone are able to waive it by mutual agreement.³ It also covers communications between the parties’ lawyers in the course of such settlement negotiations, and without prejudice statements are inadmissible against them too.⁴ The aim of the rule is to facilitate settlement negotiations without fear that what is said during negotiations may later be relied upon as admissions or otherwise used to the disadvantage of the parties participating in such discussions.
- 17.2** The without prejudice rule has two aspects. First, statements made in the course of settlement negotiations may not be tendered in evidence or relied upon by the parties, unless both agree: the inadmissibility aspect.⁵ The rule prevents a party from using their own statements in evidence as well as the opponent’s. A party may not, for example, rely on without prejudice negotiations to show that they would have been willing to meet an appropriate request for compensation.⁶ Second, communications made in aid of settlement are immune from disclosure to others: the confidentiality or privilege aspect. In *Ofulue v Bossert*, Lord Rodger referred to *Rush & Tompkins Ltd v Greater London Council*, and stated that “it establishes that not only the parties to the correspondence, but third parties also, are prevented from making use of the contents of without prejudice correspondence ... the rule is actually a privilege which forms part of the general law of evidence and is based on public policy”.⁷ Thus, without prejudice communications continue to be inadmissible and privileged even after the case has been concluded, whether by agreed settlement or by judgment.⁸ However, a party may disclose documents and information obtained under without prejudice cover to others in order to seek assistance in connection with the negotiations.⁹

Footnotes

- 1** N.H. Andrews, “Privileged Documents: ‘Without Prejudice’ Communications” (1989) 48 C.J.Q. 43; D. Vaver, “Without Prejudice Communications—Their Admissibility and Effect” (1974) 9 UBC LR 85; P.M. Perell, “The Problems of without Prejudice” (1992) 72 Can. Bar. Rev. 223; and H.L. Ross, “The Without Prejudice Rule” (2002) 152 (7050) N.L.J. 1488. For arbitration see: J.A. Fry, “Without Prejudice and Confidential Communications in International Arbitration” (1998) 1(6) Int. A.L.R. 209. See generally C. Hollander, Documentary Evidence, 15th edn (London: Sweet & Maxwell, 2024), Ch.20.
- 2** *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280; [1988] 3 W.L.R. 939, HL; *Unilever Plc v Procter & Gamble Co* [2000] 1 W.L.R. 2436, CA; and *Ofulue v Bossert* [2009] UKHL 16; [2009] 1 AC 990.
- 3** A company can assert privilege, where it is available, against its own shareholders: *Aabar Holdings SARL v Glencore Plc* [2024] EWHC 3046 (Comm); *Jardine Strategic Ltd v Oasis Investments II Master Fund Ltd* [2025] UKPC 33.
- 4** *Willers v Joyce* [2019] EWHC 937 (Ch).
- 5** *Walker v Wilsher* (1889) 23 QBD 335; *Cutts v Head* [1984] Ch 290; [1984] 1 All ER 597, CA; and *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280; [1988] 3 W.L.R. 939, HL.
- 6** *Jackson v Ministry of Defence* [2006] EWCA Civ 46.
- 7** *Ofulue v Bossert* [2009] UKHL 16; [2009] 1 AC 990 [37]; and *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280; [1988] 3 W.L.R. 939, HL.

- 8 *Rush & Tompkins Ltd v Greater London Council [1989] AC 1280; [1988] 3 W.L.R. 939, HL; Ofulue v Bossert [2009] UKHL 16; [2009] 1 AC 990*; and *Oceanbulk Shipping and Trading SA v TMT Asia Ltd [2010] UKSC 44; [2011] 1 AC 662* [22] (per Lord Clarke, with whom Lord Rodger, Lord Walker, Lord Brown, Lord Mance and Lord Dyson JJSC agreed).
- 9 *EMW Law LLP v Halborg [2017] EWHC 1014 (Ch)*.

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The Rationale of the without Prejudice Rule

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 17 - Without Prejudice

The Rationale of the without Prejudice Rule

17.3

Questions have arisen about the kind of communications that fall within the rule or within one of the exceptions discussed below. Such questions can only be answered by reference to the rationale or policy behind the rule. Two related rationales are advanced: public policy, and convention. The first of these was explained by Oliver LJ in *Cutts v Head*:

“... the rule rests, at least in part, on public policy... It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should ... be encouraged freely and frankly to put their cards on the table. The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability.”¹⁰

17.4

This view was endorsed by Lord Griffith's in *Rush & Tompkins Ltd v Greater London Council*,¹¹ stressing that the without prejudice rule governs the admissibility of evidence and is founded on the public policy of encouraging litigants to settle their differences rather than litigate them to a finish.¹² The rule applies to all negotiations genuinely aimed at settlement, whether oral or in writing, from being given in evidence. However, while questions may arise whether communications were for the purpose of settlement or not,¹³ it is clear that once a settlement has been concluded, the settlement agreement itself is not protected by the without prejudice rule.¹⁴ Communications which led to the settlement generally remain privileged,¹⁵ unless they have been incorporated into or referred to in the agreement.¹⁶

17.5

By freeing the parties of the worry that statements made during settlement negotiations could be later used to their disadvantage, the rule encourages the uninhibited exchange of views between the parties and thereby increases the prospect of settlement.¹⁷ The importance of a safe channel for inter-party communications as a vehicle for settlement cannot be overstated. For the less inhibited parties are in their communications with each other, the more likely it is that they would exchange important information and tell each other what they might be willing to concede, which in turn increases the likelihood of an agreed resolution. Put differently, the prospects of settlement are increased by the availability of a secure and private sphere for negotiations, in which the adversaries can feel free to inform each other of their objectives and discuss possible compromises without fear that what they say may be used later as an admission or otherwise to their disadvantage. Accordingly, a court called upon to decide the scope of the protection afforded by the rule must bear in mind both the policy of encouraging settlement and that a secure negotiating sphere is essential for promoting this policy.¹⁸ Given that encouraging settlement forms part of the overriding objective (CPR 1.1(2)(f), 1.4(2)(e)-(f)),¹⁹ the importance of the without prejudice rule is today even greater than before.

17.6

A further justification for the rule has been suggested. It is founded on the idea that once parties have agreed to enter without prejudice negotiations, their communications are protected not just by policy but also by convention.²⁰ Bray wrote:

“The right to discovery may under very special circumstances be lost by contract as where correspondence passed between the parties' solicitors with a view to an amicable arrangement of the question at issue in the suit on a

stipulation that it should not be referred to or used to the defendant's prejudice in case of a failure to come to an arrangement.”²¹

The dual justification for the rule was reiterated by Lord Clarke in *Oceanbulk Shipping and Trading SA v TMT Asia Ltd*:

“while … the rule was recognised as being based at least in part on public policy, its other basis or foundation is in the express or implied agreement of the parties themselves that communications in the course of their negotiations should not be admissible in evidence if, despite their negotiations, a contested hearing ensues.”²²

17. 7 The convention or contract rationale, though powerful, is by itself insufficient. For one thing, it does not explain why the opening communication coming from a party offering a settlement should be privileged when the other party has done nothing to invite it. Yet under the rule such communication remains privileged even if the other party failed to respond or openly rejected it. For another, a contract between parties to withhold information from the court is not necessarily a valid excuse against compulsory disclosure. While parties could agree not to use their communications in civil proceedings,²³ such an agreement could not by itself prevent a stranger from seeking disclosure if the communications were relevant to an issue before the court. Having said that, the public policy justification and the agreement justification are intimately connected. The public policy justification explains why the law is prepared to provide protection to settlement negotiations. The parties' mutual reliance on the protection creates legitimate expectations. As Jacob LJ observed, “parties who have negotiated on a wholly ‘without prejudice’ basis have always done so in the faith and expectation that what they say cannot be used against them even on the question of costs”.²⁴

17. 8 It is therefore difficult to accept that without prejudice privilege applies only to admissions by one of the parties, as was suggested in *Muller v Linsley and Mortimer*.²⁵ A majority of the House of Lords in *Ofulue v Bossert*²⁶ refused to limit the exclusionary rule to admissions. Lord Rodger observed that:

“parties … who are trying to settle a dispute should be able to negotiate openly, without having to worry that what they say may be used against them subsequently, whether in their current dispute or in some different situation. If that is right, then there is no obvious justification for drawing a line between admissions and acknowledgements.”²⁷

Lord Hope stressed that:

“it is the ability to speak freely that indicates where the limits of the rule should lie. Far from being mechanistic, the rule is generous in its application. It recognises that unseen dangers may lurk behind things said or written during this period, and it removes the inhibiting effect that this may have in the interests of promoting attempts to achieve a settlement.”²⁸

Lord Walker said that he “would not restrict the without prejudice rule unless justice clearly demands it”.²⁹ Lord Neuberger emphasised practical considerations,³⁰ endorsing the judgment of Walker LJ in *Unilever Plc v Procter & Gamble Co* who said that:

“the protection of admissions against interest is the most important practical effect of the rule. But to dissect out identifiable admissions and withhold protection from the rest of without prejudice communications (except for a special reason) would not only create huge practical difficulties but would be contrary to the underlying objective of giving protection to the parties … to speak freely about all issues in the litigation … Parties cannot speak freely at a without prejudice meeting if they must constantly monitor every sentence, with lawyers … sitting at their shoulders as minders.”³¹

It is accepted that the policy objective can only be achieved by full, unqualified protection, subject only to narrow recognised exceptions.³² The without prejudice rule is not limited to admissions made against a party's interest, although the protection of admissions against interest is its most important practical effect.³³ Furthermore, if the parties have proceeded on the assumption that they have full protection, there can be no justification for denying them such protection.³⁴

- 17.9 As the protection is not limited to the use of statements as admissions, it prevents, for example, reliance on statements placing a value on a disputed right, seeking further information from the opponent, expressing an intention to take legal proceedings, or seeking to probe the strength of the parties' respective allegations.³⁵ A claimant cannot rely on a damage report that they had revealed in without prejudice negotiations in order to prove that the defendants knew of the extent of the damage from an early stage.³⁶ Nor may the court when considering the question of costs draw an adverse inference from the fact that one party to without prejudice communications refused to waive their privilege when the other was prepared to do so.³⁷
- 17.10 It is sometimes said that the without prejudice rule represents a trade-off between, on the one hand, the desirability of placing all the relevant evidence before the court and, on the other hand, the desirability of encouraging settlement.³⁸ However, it is doubtful whether the without prejudice rule does result in a net loss of relevant evidence. For in the absence of protection for communications in aid of settlement, parties would simply tend to refrain from communicating information that might compromise their case. Put differently, the removal of the without prejudice rule is unlikely to result in a gain to accuracy but only in a loss to the prospect of settlement.³⁹
- 17.11 Quite apart from public policy, without prejudice statements cannot normally support, as a matter of logical inference, an admission of liability. Such statements are usually made for the purpose of reaching an accommodation and not for the purpose of asserting factual truths.⁴⁰ A claimant's offer to accept 50 per cent of their claim to damages cannot be taken as an admission that they have no right to their full damages. Such an offer merely reflects the claimant's economic judgement about the value of a settlement, not necessarily their belief about the correct quantum of damages.⁴¹ A settlement, Pill LJ explained in *Gnitrow Ltd v Cape Plc*,⁴² may have been reached for commercial reasons, perhaps in order to put to rest a whole class of potential cases, in order to save the costs of litigation or for other similar reasons. While the scope for inferring admissions is limited, there would be instances where without prejudice communication may have some other probative value.⁴³ Nonetheless, it is important to stress that on the whole without prejudice statements lack probative value as to the truth of facts expressed or implied by such a statement.

Footnotes

- 10 *Cutts v Head* [1984] Ch 290 at 306; [1984] 1 All ER 597 at 605–606, CA.
- 11 *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280 at 1299; [1988] 3 W.L.R. 939 at 942, HL.
- 12 See also *Ofulue v Bossert* [2009] UKHL 16; [2009] 1 AC 990.
- 13 As to which see below, paras 17.12 ff.
- 14 *Walker v Wilsher* (1889) 23 QBD 335; *Gnitrow Ltd v Cape Plc* [2000] 1 W.L.R. 2327, CA.
- 15 *Avonwick Holdings Ltd v Webinvest Ltd* [2014] EWCA Civ 1436.
- 16 *BGC Brokers LP v Tradition (UK) Ltd* [2019] EWCA Civ 1937.
- 17 *Cutts v Head* [1984] Ch 290 at 306; [1984] 1 All ER 597 at 605–606, CA.
- 18 *Unilever Plc v Procter & Gamble Co* [2000] 1 W.L.R. 2436, CA.
- 19 See Ch.1 The Overriding Objective.
- 20 See *Rabin v Mendoza & Co* [1954] 1 All ER 247; [1954] 1 W.L.R. 271, CA; *Cutts v Head* [1984] Ch 290 at 307; [1984] 1 All ER 597 at 606, CA; *Muller v Linsley & Mortimer (a firm)* [1996] P.N.L.R. 74, CA; and *Unilever Plc v Procter & Gamble Co* [2000] 1 W.L.R. 2436, CA.

- 21 E. Bray, *The Principles and Practice of Discovery* (London: Reaves & Turner, 1885) p.308.
- 22 *Oceanbulk Shipping and Trading SA v TMT Asia Ltd* [2010] UKSC 44; [2011] 1 AC 662 [24]. See also *Muller v Linsley and Mortimer (a firm)* [1996] P.N.L.R. 74, 77, CA; *Unilever Plc v Procter & Gamble Co* [2000] 1 W.L.R. 2436, CA; and *Prudential Assurance Co Ltd v Prudential Insurance Co of America (No.2)* [2003] EWCA Civ 1154; [2004] E.T.M.R. 29 (discussed below at para.17.18).
- 23 *Avonwick Holdings Ltd v Webinvest Ltd* [2014] EWCA Civ 1436 [18].
- 24 *Reed Executive Plc v Reed Business Information Ltd* [2004] EWCA Civ 887; [2004] 4 All ER 942 [21]. The exception to the rule which enables communications to be adduced for the purposes of determining costs questions, where the parties have agreed that the communications would be “without prejudice except as to costs”, is discussed below at paras 17.56 ff.
- 25 *Muller v Linsley and Mortimer (a firm)* [1996] P.N.L.R. 74, 79–80, CA. For discussion see C. Hollander, “Without Prejudice, Third Parties and Muller” (2015) 34 C.J.Q. 164.
- 26 *Ofulue v Bossert* [2009] UKHL 16; [2009] 1 AC 990.
- 27 *Ofulue v Bossert* [2009] UKHL 16; [2009] 1 AC 990 [43].
- 28 *Ofulue v Bossert* [2009] UKHL 16; [2009] 1 AC 990 [12]. The ability to speak freely was also stressed by Lord Clarke in *Oceanbulk Shipping and Trading SA v TMT Asia Ltd* [2010] UKSC 44; [2011] 1 AC 662 [41].
- 29 *Ofulue v Bossert* [2009] UKHL 16; [2009] 1 AC 990 [57].
- 30 *Ofulue v Bossert* [2009] UKHL 16; [2009] 1 AC 990 [89].
- 31 *Unilever Plc v Procter & Gamble Co* [2000] 1 W.L.R. 2436, 2448–2449, CA; *Ofulue v Bossert* [2009] UKHL 16; [2009] 1 AC 990 [43]. As Miles J put it in *Kings Security Systems Ltd v King* [2020] EWHC 2996 (Ch), “the courts do not allow discussions to be dissected or salami-sliced into admissions on the one hand and other communications on the other”. See also *Suh v Mace (UK) Ltd* [2016] EWCA Civ 4.
- 32 See also *Single Buoy Moorings Inc v Aspen Insurance UK Ltd* [2018] EWHC 1763 (Comm) [54]; *Briggs v Clay* [2019] EWHC 102 (Ch) [64]. The recognised exceptions to the rule are discussed below.
- 33 *Unilever Plc v Procter & Gamble Co* [2000] 1 W.L.R. 2436, 2448–2249, CA; *Mornington 2000 LLP (t/a Sterilab Services), Sante Global LLP v The Secretary of State for Health and Social Care* [2025] EWHC 540 (TCC) [47].
- 34 *Bradford & Bingley Plc v Rashid* [2005] EWCA Civ 1080; *Wilkinson v West Coast Capital* [2005] EWHC 1606 (Ch).
- 35 *Unilever Plc v Procter & Gamble Co* [2000] 1 W.L.R. 2436, CA. See also *Instance v Denny Bros Printing Ltd* [2000] FSR 869, ChD; and *South Shropshire District Council v Amos* [1987] 1 All ER 340; [1986] 1 W.L.R. 1271, CA.
- 36 *UYB Ltd v British Railways Board, The Times*, 15 November 2000, CA; which is of course different from relying on the report itself.
- 37 *Reed Executive Plc v Reed Business Information Ltd* [2004] EWCA Civ 887; [2004] 4 All ER 942 [36].
- 38 See for example *Prudential Assurance Co Ltd v Prudential Insurance Co of America (No.2)* [2003] EWCA Civ 1154; [2004] E.T.M.R. 29 [23].
- 39 In *Oceanbulk Shipping and Trading SA v TMT Asia Ltd* [2010] UKSC 44; [2011] 1 AC 662 (discussed below) the Supreme Court was prepared to extend an existing exemption because it considered that it would not undermine the parties’ willingness to negotiate.
- 40 P. Tillers (ed.), *Wigmore on Evidence* (Boston: Little, Brown, 1983) s.1061; and D. Vaver, “Without Prejudice Communications—Their Admissibility and Effect” (1974) 9 UBC L.R. 85 at 101.
- 41 The claimant’s judgment will be influenced by their belief about their actual loss, but we cannot calculate from their offer what this belief is because their offer is tempered by their assessment of their chance of success, by the inconvenience value of the litigation and by their ability to pursue it. These calculations denude the claimant’s offer of any probative value with regards to the issue of the quantum of damages. Eg *FKJ v RVT* [2022] EWHC 411 (QB).
- 42 *Gnitrow Ltd v Cape Plc* [2000] 1 W.L.R. 2327, CA.
- 43 See for example *Oceanbulk Shipping and Trading SA v TMT Asia Ltd* [2010] UKSC 44; [2011] 1 AC 662.

The Reach of the without Prejudice Rule

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Mainwork

Chapter 17 - Without Prejudice

The Reach of the without Prejudice Rule

Invoking the without prejudice rule

- 17.12 The without prejudice rule excludes all communications made in the course of negotiations genuinely aimed at resolving a dispute, whether oral or in writing, from being given in evidence and renders them immune from compulsory disclosure, subject to recognised exceptions.⁴⁴ To determine whether communications were made in the course of settlement negotiations, the court has “to consider the circumstances of the communications from an objective standpoint”.⁴⁵ The court has to determine the nature of the communications by considering all the circumstances of the case and not just what one or other party intended or understood to be the case.
- 17.13 The protection of the rule turns not so much on the words used for invoking the rule as on the nature and purpose of the communication.⁴⁶ While the protection will normally apply where a party expressly indicated that their communications were “without prejudice”, since in such circumstances both parties will (or should) have understood that the communications were aimed at settlement,⁴⁷ it is not necessary for the parties to form an express agreement to negotiate without prejudice in order to acquire the protection. Communication made as part of a genuine attempt to arrive at an agreed solution to the dispute is automatically protected, unless the contrary is indicated, even if no mention is made of the without prejudice rule.⁴⁸ Conversely, if a communication is not connected with an attempt to arrive at an agreed resolution, it would not receive the rule’s protection even if the without prejudice formula is expressly stated.⁴⁹
- 17.14 Engaging in without prejudice negotiations is voluntary. A party is perfectly free to communicate an offer of settlement which is stated to be open and which will be admissible in evidence.⁵⁰ Defendants who have received a without prejudice communication from the claimant, and wish to change the nature of their communications, must notify the claimant that all future communications between them would be open and useable by both parties in the proceedings.⁵¹ However, a refusal to negotiate on a without prejudice basis and an insistence on open negotiations could well be regarded as unco-operative conduct and may attract disapproval and adverse costs consequences.
- 17.15 In case of doubt, the court may inspect documents in order to determine whether they attract protection.⁵² To avoid the risk that the judge will be influenced by the contents of documents which they exclude after inspection, it is desirable that the inspection should be carried out by a judge other than the one who is going to try the case on the merits. Failure to do so may invalidate the judgment.⁵³

Without prejudice protection only available where litigation is contemplated or pending

- 17.16 The without prejudice protection does not extend to situations where there is no dispute to be settled. It does not apply where there is no dispute or issue to be resolved, or where litigation is not contemplated.⁵⁴ It is not, however, always easy to distinguish between situations where protection is required to facilitate a free exchange between the parties and situations where it is not. There are situations in which persons with opposing interests communicate with each other in order to reach an accommodation even though they may not be involved in, or envisage, a dispute. For instance, parties to a building contract may hold discussions in order to resolve difficulties that have been encountered in carrying out the work. Neighbours may discuss their different thoughts concerning the effect that a fast-growing tree in one garden may have on the neighbouring garden, or the noise that their children make. Such persons may well have differences, but this fact alone would not necessarily attract the without prejudice protection. The dividing line between protected and unprotected communications is not, and cannot be, sharply defined. It runs somewhere along the spectrum which consists of situations where, at one end, litigation is clearly contemplated, as where a letter before claim has been sent, and at the other end, where the possibility of litigation has not entered the parties' minds, as where neighbours discuss how to ensure that their social parties do not impinge on each other's peace.
- 17.17 According to *Barnetson v Framlington Group Ltd*, "the crucial consideration would be whether in the course of negotiations the parties contemplated or might reasonably have contemplated litigation if they could not agree".⁵⁵ In that case, soon after the claimant entered the defendants' employment a dispute arose about the terms of employment, which the parties tried to resolve by negotiation. At the time, no litigation was threatened, nor did it commence soon after. The Court of Appeal was of the view that commencement of proceedings, or a threat to do so, was not indispensable to the application of the rule. As Auld LJ explained, if the privilege were confined to communications made after litigation has been threatened or shortly before litigation began, parties would have an incentive to escalate their dispute with threats of litigation or to move quickly towards it in order to be able to start talking freely and sensibly—which would hardly promote the prospects of settlement. Although the Court of Appeal reiterated that the ambit of the rule must not be extended any further than was necessary to promote the underlying public policy, it concluded that the amount of money in dispute, and the manner and content of the negotiations, suggested that the parties were conscious of the potential for litigation if they did not agree and that therefore the communications were privileged.⁵⁶
- 17.18 This may be contrasted with *Prudential Assurance Co Ltd v Prudential Insurance Co of America (No.2)*.⁵⁷ Prudential UK and Prudential US, two independent companies with similar names, had since 1974 negotiated accords in which they agreed that each would use the name "Prudential" in certain parts of the world but not in others, so as to avoid confusion and conflict, and that in those countries where both companies wanted to use their name, it should be used with some distinguishing qualifications. Years later they discovered that their agreement could not be implemented in China, where both had businesses, and where only one of them could use the name "Prudential", with or without qualifications. Proceedings ensued and Prudential UK sought to adduce the correspondence between the parties leading to earlier agreements. Prudential US objected, relying on the without prejudice rule. Sir Andrew Morritt VC found for Prudential UK, holding that the purpose of those negotiations was not to compromise an existing dispute, but to prevent any dispute arising. While the Court of Appeal ultimately upheld the decision on different grounds, it did not question the Vice-Chancellor's view.
- 17.19 A similar distinction was drawn in *Bradford & Bingley Plc v Rashid*,⁵⁸ where the issue was whether a limitation defence to a claim for repayment of debt had been undermined by an acknowledgement of the debt, in the form of a letter written by the debtor explaining that he could not afford to pay "the outstanding balance". It was argued on behalf of the debtor that the letter was without prejudice since it formed part of a settlement attempt. Lord Brown stated that "the without prejudice rule has no application to apparently open communications, such as those here, designed only to discuss the repayment of an admitted liability rather than to negotiate and compromise a disputed liability".⁵⁹ Thus, a communication between parties in dispute over a debt promising payment it is not protected.⁶⁰

- 17.20 To gain without prejudice protection it is not necessary to mention, let alone threaten, legal proceedings. It is sufficient for the communication to assert the party's legal rights and make clear that the party intends to enforce those rights.⁶¹ Since neither stating that the communication is without prejudice, nor threatening proceedings, is necessary, there is considerable scope for argument over the applicability of the rule. In some doubtful situations it would be pertinent to ask whether the parties were discussing the way that an admitted liability should be discharged, or whether they were discussing how to compromise a disputed liability. In the former case no protection would be available. In the latter case, a further question must be asked: whether the parties contemplated, or might reasonably have contemplated, litigation if they could not agree a compromise. Only if the answer to this is in the affirmative would the without prejudice rule apply. Discussions between a claimant, seeking payment from the defendant, and third parties about how best to deal with the defendant's liabilities would not be protected by the rule if there was no dispute between the claimant and the third parties.⁶² Nor would correspondence marked 'without prejudice' in a bidding process for assignment of a cause of action from a company's administrator because it was not concerned with the administrator's statutory power of compromise or release.⁶³

Application to foreign proceedings

- 17.21 The without prejudice rule is a rule of procedure and evidence and its effect cannot, therefore, be exported to foreign proceedings which in matters of procedure are governed by the *lex fori*.⁶⁴ Accordingly, the Court of Appeal held that an English court could not restrain a party from using without prejudice communications in foreign litigation exclusively on the grounds that such communications are protected by immunity and by inadmissibility.⁶⁵ However, it also held that an English court can restrain a party from breach of contract that is governed by English law, regardless of whether the breach may take place here or abroad. Therefore, where a party can establish that there was an agreement by the parties to negotiate without prejudice—i.e. that no party would be allowed to use statements made in these negotiations for any other purpose—an English court would enforce such an agreement and restrain any use of statements in breach of the agreement, whether such use was in domestic or foreign proceedings. But no such restraint would be forthcoming where in the course of without prejudice negotiations the parties agreed that their discussions relating to related proceedings in another state would be governed by the law of that state.⁶⁶

Statements made by and to non-parties

- 17.22 Statements made by non-parties during the parties' settlement negotiations may in certain circumstances attract the rule's protection. A statement made by a party's agent in connection with the party's settlement discussions would of course be considered the party's statement and would therefore be protected; for example, a statement made by a company director negotiating on the company's behalf. But a statement that is not made for the purpose of setting out a negotiating position on behalf of a party cannot be subject to the without prejudice rule, for the rule is only intended to free the parties of the anxiety that statements made during settlement negotiations may be used to their disadvantage.⁶⁷ Thus, the rule should not protect a statement made by a non-party who simply states a fact from their own knowledge or an opinion from their own experience.
- 17.23 In *Aird v Prime Meridian*,⁶⁸ the court stayed the proceedings for mediation and, in the exercise of its power under CPR 35.12(3), directed the parties' experts to prepare a joint statement. The experts' statement was discussed during the mediation, which failed. At trial, the defendant objected to the claimant's reliance on the joint report, arguing that it was produced for the mediation and was therefore protected by the without prejudice rule. The Court of Appeal held that a joint expert report prepared at the direction of the court was not protected by the without prejudice rule and could not acquire such protection by virtue of being used in the mediation.

17. 24 The decision in that case may be contrasted with *Rabin v Mendoza & Co*,⁶⁹ decided over half a century earlier. The plaintiff complained about the survey he had obtained from the defendants prior to purchasing a house. Before commencement of proceedings for negligence the parties held without prejudice discussions, during which it was agreed that the dispute would be resolved if the defendants procured insurance cover against the risk of future defects developing in the plaintiff's house. To this end the defendants obtained a further surveyor's report. The discussions failed and at the trial the defendants objected to the plaintiff's attempt to rely on this report. The Court of Appeal held that the report was privileged because it was made as a result, and for the purpose, of without prejudice negotiations. Nonetheless, it is difficult to accept that a report made by a non-party for the purpose of being used to obtain insurance cover is privileged merely because the need for such a report arose in the furtherance of settlement negotiations. After all, the plaintiff would have been at liberty to call the surveyor to testify as to what he found. The decision is better explained on the grounds, which were stressed by the Court of Appeal itself, that the parties had agreed that they would not use the surveyor's report in any later proceedings. It is suggested, however, that such agreement should not be inferred merely because the need for such a report arose in the course of settlement discussions.
17. 25 In the Australian case of *Field v Railway Commissioners for New South Wales*,⁷⁰ a doctor was asked to examine the claimant in relation to settling a personal injury claim. It was held that the doctor could testify, not only as to his observation of the claimant's condition but also as to an admission of negligence which the claimant made to him. The court founded its conclusion on the grounds that the admission was gratuitous and did not form part of the settlement negotiations. It is suggested that statements made by a party to a doctor in the course of a medical examination should not normally be protected by the without prejudice rule because such statements are not negotiating statements but are statements of fact intended to be relied upon for the purpose of establishing the true state of the party's medical condition.⁷¹

Use by non-parties of without prejudice statements

17. 26 As we have seen, in addition to preventing the parties from using without prejudice communications in their litigation, the rule generally confers immunity from compulsory disclosure of such communications to third parties. Quite apart from the public policy rationale, this is also because settlement negotiations between two parties will very rarely, if ever, be relevant to the rights enjoyed or obligations owed by a stranger to the litigation, as noted above.⁷² More difficult questions may arise in multi-party litigation, where one of the parties does not participate in without prejudice discussions held by the others.
17. 27 The Court of Appeal held in *Gnitrow Ltd v Cape Plc*⁷³ that where some parties to the proceedings settle but others do not, a non-settling party may have a right to obtain disclosure of the settlement agreement if its terms could affect their own liability to one of the settling parties.⁷⁴ Gnitrow had been sued by its employees for asbestos-related injuries. After settling this claim, Gnitrow sought contribution from its two independent contractors who were responsible for the operations leading to the asbestos exposure. One of them, Turner & Newalls, reached a general agreement with Gnitrow about the contribution it would make in asbestos cases of this kind on a national basis. Gnitrow then proceeded for a contribution against the other contractor, Cape Plc. Cape Plc sought disclosure of the terms of settlement with Turner & Newalls, but Gnitrow objected. The court accepted that the fact that Gnitrow and Turner & Newalls agreed to apportion the loss as between themselves in a certain way was inadmissible as evidence of their relative responsibility for the injuries, let alone the degree of Cape Plc's responsibility. As Pill LJ explained:
- “The settlement may have been reached for commercial reasons, such as saving costs, and with the intention of achieving a global settlement covering all cases without the need for detailed analysis of the merits of each particular case or even each particular shipyard. The agreement may not accurately reflect the view even of the parties with respect to the particular case”⁷⁵

17. 28

Nonetheless, the Court of Appeal ordered disclosure on the ground that it might be relevant to the amount of contribution sought from Cape Plc at trial, since Gnitrow was not entitled to receive more than it paid out to its former employees. It should be noted that to safeguard against double recovery it would have been sufficient to require Gnitrow to give an undertaking that the amount obtained from Cape Plc would not result in overcompensation. The Court of Appeal also observed that disclosure could be justified on the ground that Cape Plc required knowledge of the terms of the settlement in order to be able to calculate what CPR 36 offer to make. But this reasoning sits awkwardly with the court's own view that the agreement was irrelevant to the question of liability. It needs stressing that the material sought by Cape Plc was never protected by the without prejudice rule because, as explained above, a settlement agreement is not itself protected by the without prejudice rule, only the communications leading up to it.⁷⁶

- 17.29 It is unfortunate that the Court of Appeal's approach in *Gnitrow Ltd v Cape Plc* seems to be taken to justify ordering disclosure of discussions leading to a settlement agreement in order to safeguard against double recovery,⁷⁷ ignoring Lord Griffiths advice in *Rush & Tompkins Ltd v Greater London Council*:

“... the wiser course is to protect ‘without prejudice’ communications between parties to litigation from production to other parties in the same litigation. In multi-party litigation it is not an infrequent experience that one party takes up an unreasonably intransigent attitude that makes it extremely difficult to settle with him. In such circumstances it would, I think, place a serious fetter on negotiations between other parties if they knew that everything that passed between them would ultimately have to be revealed to the one obdurate litigant.”⁷⁸

- 17.30 Although the rule generally prevents non-parties from obtaining without prejudice statements by means of disclosure, what happens where such a statement has fallen into the hands of a non-party, who wishes to adduce it in evidence against its maker? This situation arose in *R v K*,⁷⁹ where the Court of Appeal held that a without prejudice statement which has fallen into the hands of prosecuting authorities is admissible in criminal proceedings brought against the maker of the statement. The court considered that the public interest in prosecuting crime was sufficient to outweigh the public interest in the settlement of disputes.

- 17.31 The ruling in *R v K* may be doubted. Moore-Bick LJ stated that “[g]iven that the law has not afforded such far-reaching protection to confidential communications between lawyer and client, we find it difficult to accept that, if evidence of an incriminating admission falls into the hands of the prosecuting authorities, it is rendered inadmissible against the maker at a subsequent criminal trial on public policy grounds simply by reason of the fact that it was made in the course of ‘without prejudice’ discussions”.⁸⁰ It is true that there is authority for the proposition that where material covered by legal professional privilege falls into the hands of a third party, that party is free to adduce it in evidence against the holder of the privilege. However, it may be questioned whether it is fair for the law to encourage clients to confide in their lawyers by telling them that they need not fear that what they say will be used against them later, and yet allow these very communications to be used to the prejudice of the client when such communications fall into the hands of others.⁸¹

- 17.32 The potential unfairness in the context of without prejudice discussions is even greater. For whereas legal professional privilege aims to encourage litigants to speak openly with their own lawyers, the without prejudice rule seeks to incentivise openness in settlement discussions with their adversaries. The facts of *R v K* provide an illustration. The litigation in which the without prejudice statement was concerned with ancillary relief, in which the wife questioned the extent to which the husband had made full disclosure of his assets. During without prejudice discussions the husband admitted that he had evaded tax. This admission was therefore inadmissible on behalf of the wife in any legal proceedings; nor was it disclosable to others. Despite this, it found its way by an unexplained route (one cannot help but wonder how) to the tax authorities, which in turn obtained permission from the court to use it in criminal proceedings against the husband for tax evasion. The court's decision is likely to have a chilling effect on the incentive to speak openly about such sensitive matters during settlement discussions. For while a party is not permitted to hurt their opponent openly in litigation by relying on what the opponent has said during negotiations, the punch may be delivered even harder by subterfuge.

Footnotes

- 44 *Rush & Tomkins v GLC [1989] AC 1280*. The exceptions to the rule are discussed below.
- 45 *Sang Kook Suh v Mace (UK) Ltd [2016] EWCA Civ 4* [20].
- 46 *Chocoladefabriken Lindt & Sprungli AG v Nestlé Co Ltd [1978] R.P.C. 287, ChD*.
- 47 *Sang Kook Suh v Mace (UK) Ltd [2016] EWCA Civ 4* [22].
- 48 *Chocoladefabriken Lindt & Sprungli AG v Nestlé Co Ltd [1978] R.P.C. 287, ChD*; *Rush & Tompkins Ltd v Greater London Council [1989] AC 1280*; [1988] 3 W.L.R. 939, HL; *Savings & Investment Bank Ltd (In Liquidation) v Fincken [2003] EWCA Civ 1630*; [2004] 1 W.L.R. 667; *Bradford & Bingley Plc v Rashid [2006] UKHL 37*; [2006] 1 W.L.R. 2066 [13] per Lord Hoffmann. An offer to settle made in a text message could benefit from the rule: *Octagon Overseas Ltd v Circus Apartments Ltd [2022] UKUT 302*; *Jackson v Ministry of Defence [2006] EWCA Civ 46*; *Midgley v Vossloh Cogifer UK Ltd [2024] EAT 149*.
- 49 *Buckinghamshire County Council v Moran [1989] EWCA Civ 11*; [1990] Ch 623; a letter, stated to be “without prejudice”, was not protected because it merely asserted rights and argued the case. See also *Parry v News Group Newspapers Ltd [1990] N.L.J.R. 1719, CA*; *Schering Corp v Cipla Ltd [2004] EWHC 2587 (Ch)*; and *Bradford & Bingley Plc v Rashid [2006] UKHL 37*; [2006] 1 W.L.R. 2066, [87] per Lord Mance.
- 50 *Dixons Stores Group Ltd v Thames Television Plc [1993] 1 All ER 349*. Or they may state it to be “without prejudice except as to costs”, in which case it will be admissible when the court comes to determine the issue of costs: see below, paras 17.56 ff.
- 51 *Cheddar Valley Engineering Ltd v Chaddlewood Homes Ltd [1992] 4 All ER 942*; [1992] 1 W.L.R. 820, ChD.
- 52 *South Shropshire District Council v Amos [1987] 1 All ER 340*; [1986] 1 W.L.R. 1271, CA.
- 53 *AZ v BY [2023] EWHC 2388 (TCC)*.
- 54 See for instance *Avonwick Holdings Ltd v Webinvest Ltd [2014] EWCA Civ 1436*.
- 55 *Barnetson v Framlington Group Ltd [2007] EWCA Civ 502*; [2007] 1 W.L.R. 2443 [34].
- 56 Pre-termination of employment negotiations are now normally subject to the rule: *Gallagher v McKinnon's Auto and Tyres Ltd [2024] EAT 174*.
- 57 *Prudential Assurance Co Ltd v Prudential Insurance Co of America (No.2) [2003] EWCA Civ 1154*; [2004] E.T.M.R. 29.
- 58 *Bradford & Bingley Plc v Rashid [2006] UKHL 37*; [2006] 1 W.L.R. 2066.
- 59 *Bradford & Bingley Plc v Rashid [2006] UKHL 37*; [2006] 1 W.L.R. 2066 [73]; *St James's Place Wealth Management Plc v Dixon-Nutt [2023] EWHC 1431 (Comm)*.
- 60 *Shepherd Construction Ltd v Berners (BVI) Ltd [2010] EWHC 763 (TCC)*.
- 61 *Best Buy Co & Anor v Worldwide Sales Corp Espana SL [2011] EWCA Civ 618* [20]–[23].
- 62 *CMC Spreadbet Plc v Tchenquiz (CCC, unreported, 23 April 2021)*.
- 63 *Rollingson v Hollingsworth [2020] EWHC 3568 (QB)*.
- 64 For discussion see C. Hollander, Documentary Evidence, 15th edn (London: Sweet & Maxwell, 2024), Ch.20.
- 65 *Prudential Assurance Co Ltd v Prudential Insurance Co of America (No.2) [2003] EWCA Civ 1154*; [2004] E.T.M.R. 29 [23].
- 66 *Autostore Technology AS v Ocado Group Plc [2021] EWCA Civ 1003*.
- 67 See for example *Stax Claimants v Bank of Nova Scotia Channel Islands Ltd [2007] EWHC 1153 (Ch)*.
- 68 *Aird v Prime Meridian Ltd [2006] EWCA Civ 1866*; [2007] C.P. Rep. 18.
- 69 *Rabin v Mendoza & Co [1954] 1 All ER 247*; [1954] 1 W.L.R. 271, CA.
- 70 *Field v Railway Commissioners for New South Wales (1957) 99 C.L.R. 285*.
- 71 The corollary of this is that statements made to non-parties which are part and parcel of the settlement negotiations—for example, statements to mediators—ought to attract the privilege, everything else being equal. This is well-established in family proceedings (see below, para. 17.62) but is less obviously the case in other types of litigation. For discussion, see P. Matthews and H. Malek, Disclosure, 6th edn (London: Sweet & Maxwell, 2023), Ch.14; and C. Hollander, Documentary Evidence, 15th edn (London: Sweet & Maxwell, 2024), Ch.20.
- 72 See above, para. 17.11.
- 73 *Gnitrow Ltd v Cape Plc [2000] 1 W.L.R. 2327, CA*.

74 See also *BGC Brokers LP v Tradition (UK) Ltd* [2019] EWCA Civ 1937; and see above, para.17.5.

75 *Gnitrow Ltd v Cape Plc* [2000] 1 W.L.R. 2327, 2331, CA. The rule to which Pill LJ refers is now contained in CPR 36.16(2).

76 See above, para.17.4.

77 It should be noted that once a settlement agreement is held to be disclosable to a non-party, it may be all too easy for the non-party to invoke one of the exceptions to the without prejudice rule so as to gain access to the underlying negotiations; for example, where the non-party wishes to pray in aid without prejudice communications in order to prove the existence of a contract (see *EMW Law LLP v Halborg* [2017] EWHC 1014 (Ch); and below, paras 17.40, 17.48).

78 *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280; [1988] 3 W.L.R. 939, HL.

79 *R v K* [2009] EWCA Crim 1640; [2010] QB 343; [2010] 2 All ER 509.

80 *R v K* [2009] EWCA Crim 1640; [2010] QB 343; [2010] 2 All ER 509 [72].

81 For discussion of this issue see Ch.16 Legal Professional Privilege.

Pre-action Protocols and the without Prejudice Rule

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Mainwork

Chapter 17 - Without Prejudice

Pre-action Protocols and the without Prejudice Rule

- 17.33 It is necessary to consider the relationship between the without prejudice rule and pre-action protocols, which require parties to engage in a constructive exchange of communications before commencing proceedings.⁸² Encouraging settlement is one of the main aims of the pre-action protocols. Practice Direction—Pre-Action Conduct and Protocols para.3, states that before “commencing proceedings, the court will expect the parties to have exchanged sufficient information to: (a) understand each other’s position; (b) make decisions about how to proceed; (c) try to settle the issues without proceedings”. At the same time, the protocols require parties to provide each other with adequate information about their positions. Such exchanges are not covered by the without prejudice rule because they only amount to statements of the parties’ respective cases and not to settlement negotiations.⁸³ In addition, the pre-action protocols require the court to consider at various stages whether the parties complied with the requirements of the relevant protocol and to impose costs sanctions where appropriate.⁸⁴ It is, therefore, expressly contemplated that the pre-action protocol exchanges will be brought to the attention of the court and that adverse consequences may result.
- 17.34 This view is supported by the Pre-Action Protocol for Personal Injury Claims, for example, which addresses the possibility of differences between the position taken in the letter of claim or response to it and the party’s pleaded case and states that it “would not be consistent with the spirit of the Protocol for a party to ‘take a point’ on this in the proceedings, provided that there was no obvious intention by the party who changed their position to mislead the other party”.⁸⁵ This paragraph assumes that there is no impediment to the use of disparities between the letter of claim or the response and the pleaded case. The inevitable implication from the purpose and nature of the protocols is that communications under the protocols are open to court consideration and are, therefore, outside the without prejudice protection.⁸⁶
- 17.35 A consequence of the foregoing is that a party who merely complies with the pre-action protocols cannot unilaterally render the protocol exchanges immune by simply declaring them to be without prejudice.⁸⁷ Nor should an agreement by the parties to conduct the entire pre-action phase without prejudice render communications pursuant to the protocols privileged, because one of their express functions is to assist the court in managing the case. However, any discussions between the parties beyond those mandated by the relevant protocol (for example, settlement discussions following the exchange of a letter before claim and the defendant’s response) would normally be without prejudice.

Footnotes

- ⁸² For discussion of the pre-action protocols see [Ch.1 The Overriding Objective](#). For an assessment of the without prejudice rule in relation to the [CPR](#) see: *J. Michaelson, “Should This Be the End of ‘Without Prejudice’?”* (2000) 150 *N.L.J.* 1850.
- ⁸³ See [Buckinghamshire County Council v Moran \[1989\] EWCA Civ 11; \[1990\] Ch 623](#).
- ⁸⁴ Practice Direction—Pre-Action Conduct and Protocols paras 13–16.
- ⁸⁵ Pre-Action Protocol for Personal Injury Claims para.5.7.
- ⁸⁶ See [CPR 3.1\(4\)–\(5\), 3.9](#) and [44.3\(5\)\(a\)](#). See also [CPR 44.2\(4\)\(c\)](#) which refers to an “admissible offer to settle”.
- ⁸⁷ See above, paras [17.12 ff.](#)

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Waiver

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Chapter 17 - Without Prejudice

Waiver

- 17.36** The protection of the without prejudice rule belongs to both parties who, together, can agree to waive it and place their communications before the court.⁸⁸ Since the parties are bound by their own agreement to negotiate without prejudice, a party who believes that they have learnt something useful during settlement negotiations cannot turn round and say that it now waives the protection and wishes to rely on the information obtained from their opponent to the latter's disadvantage. Waiver must, therefore, be consensual.⁸⁹ This joint privilege may be waived only with the consent of all parties.⁹⁰ Even where one party brought without prejudice communications to the attention of the court, they remain inadmissible unless the privilege is waived by both parties.⁹¹ Where more than two parties participate in settlement negotiations, the privilege belongs to all of them, otherwise the effectiveness of the protection would be undermined. Once the protection of the without prejudice rule had been waived, the waiver applies to entire communications and not just those aspects which one of the parties had sought to deploy.⁹²
- 17.37** Waiver need not be express or even agreed in advance by all parties. It is enough that all parties to the without prejudice communications have by their conduct shown willingness to allow the materials to be used or disclosed in litigation.⁹³ Where one party, without obtaining the consent of their opponent, makes use (even in interim proceedings) of part of a communication protected by without prejudice privilege, that party will lose the right to object to the use of the rest of the communication against them.⁹⁴ More generally, the protection will be waived where one party has relied on protected material and the opponent has not objected but instead relied on other protected material forming part of the same settlement negotiations.⁹⁵ But waiver will not be easily inferred from failure to object immediately to the opponent's use of privileged communications. Waiver will be inferred only when the conduct of the party entitled to the privilege was such as to render it unjust for that party to argue that the communications remained privileged.⁹⁶
- 17.38** Where a claimant relies on without prejudice negotiations in which they were involved in relation to previous litigation with a third party, the defendant would also be allowed to make reference to those negotiations.⁹⁷ If a party relies on a judicial or quasi-judicial decision to establish a fact, the opponent challenging the fact would be entitled to disclosure of the without prejudice communications that led to the decision in order to probe the foundations upon which the factual inferences were based. In *Property Alliance Group Ltd v Royal Bank of Scotland Plc*,⁹⁸ the claimants sued a bank for mis-selling a financial product involving unlawful manipulation of LIBOR. In its defence, the bank relied on an agreed settlement it reached with the Financial Services Authority (FSA), a regulatory body. In so doing, the bank was seeking to show that it was not guilty of the conduct alleged by the claimant. Birss J held that, by relying on the FSA-agreed ruling, the bank put in issue the basis for the regulatory findings and thereby waived privilege to the otherwise privileged communications that led to the agreed ruling, without which the FSA's findings could not be challenged. Upon this decision, and in order to avoid disclosure, the bank sought permission to amend its pleadings to remove the reliance on the FSA-agreed ruling. Birss J agreed that once reliance on the FSA ruling was removed from the pleadings, the bank would be entitled to rely on its without prejudice privilege so as to avoid disclosure of the communications. This conclusion may have been justified on the facts of that particular case, because the amendment may have rendered the without prejudice communications irrelevant. However, it would be difficult to justify a restoration of the privilege where the communications continued to be relevant, for a party cannot waive privilege when it suits it and reassert it when it does not. In the event, however, Birss J refused the bank permission to amend and this issue did not come to a head.

Footnotes

- 88 *Walker v Wilsher* (1889) 23 QBD 335; *Somatra Ltd v Sinclair Roche & Temperley* [2000] 1 Lloyd's Rep. 311, QBD; approved on appeal in this regard: *Somatra Ltd v Sinclair Roche & Temperley (No.1)* [2000] 1 W.L.R. 2453; [2000] 2 Lloyd's Rep. 673, CA.
- 89 *Savings & Investment Bank Ltd (In Liquidation) v Fincken* [2003] EWCA Civ 1630; [2004] 1 W.L.R. 667; *Brunel University v Vaseghi* [2007] EWCA Civ 482.
- 90 *Berkeley Square Holdings Ltd v Lancer Property Asset Management Ltd* [2021] EWCA Civ 551.
- 91 *Forster v Friedland* (CA, unreported, 10 November 1992); *Sang Kook Suh v Mace (UK) Ltd* [2016] EWCA Civ 4; and *Avonwick Holdings Ltd v Webinvest Ltd* [2014] EWCA Civ 1436.
- 92 *Somatra Ltd v Sinclair Roche & Temperley (No.1)* [2000] 1 W.L.R. 2453; [2000] 2 Lloyd's Rep. 673, CA; and see *Willers v Joyce* [2019] EWHC 937 (Ch).
- 93 *Willers v Joyce* [2019] EWHC 937 (Ch).
- 94 *Somatra Ltd v Sinclair Roche & Temperley (No.1)* [2000] 1 W.L.R. 2453; [2000] 2 Lloyd's Rep. 673 [28]–[30], CA.
- 95 *Muller v Linsley & Mortimer (a firm)* [1996] P.N.L.R. 74, CA; *Somatra Ltd v Sinclair Roche & Temperley* [2000] 1 W.L.R. 2453; [2000] 2 Lloyd's Rep. 673, CA; and *Brunel University v Vaseghi* [2007] EWCA Civ 482.
- 96 *Sang Kook Suh v Mace (UK) Ltd* [2016] EWCA Civ 4.
- 97 *Brunel University v Vaseghi* [2007] EWCA Civ 482.
- 98 *Property Alliance Group Ltd v Royal Bank of Scotland Plc* [2015] EWHC 3272 (Ch).

Exceptions

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Chapter 17 - Without Prejudice

Exceptions

- 17.39 There are a number of exceptions to the general rule.⁹⁹ It must be stressed, however, that where an exception applies, the parties are not completely freed from the constraint of the without prejudice rule, but are only allowed to use privileged communications for the purpose of the exception. For example, one of the exceptions allows proof of a concluded compromise agreement. This exception permits without prejudice communications to be adduced in order to establish that a binding agreement was entered into, but it does not allow the parties to use the communications as proof of facts stated therein. Similarly, where evidence of negotiations may be adduced for the purpose of explaining a delay in the proceedings, the prohibition on using such statements for any other purpose remains unaffected.

Proof of an agreed settlement, its validity and its interpretation

- 17.40 Without prejudice communications are admissible in order to prove a binding compromise agreement.¹⁰⁰ It may be said that this is not a true exception to the rule, since the very existence of the rule is intended to encourage such agreements, so that proof of a compromise is consistent with the aim of the rule. Even a stranger to the settlement agreement and to the negotiations leading to it may take advantage of this exception to prove a concluded agreement, where this is relevant to its case.¹⁰¹ Just as without prejudice communications may be used to establish a concluded agreement, so they may be used to challenge the validity of any such agreement, for example by proof of fraud or misrepresentation under a further exception discussed below. In *Berkeley Square Holdings Ltd v Lancer Property Asset Management Ltd*¹⁰² the Court of Appeal held that the respondents may adduce evidence of mediation statements to uphold the settlement's validity, when it had been put in issue by the appellants who argued that their agent had no authority to conclude the agreement.
- 17.41 The Supreme Court held in *Oceanbulk Shipping and Trading SA v TMT Asia Ltd*¹⁰³ that statements made during without prejudice negotiations leading up to a settlement are admissible for the purpose of interpreting the terms of the agreement, to the same extent that they are admissible under normal contractual rules. Although this ruling is regarded as representing a distinct exception, it is nothing of the kind. To prove the existence of a contract in the abstract is of little use. The legal significance of a contract lies in the rights and duties to which it gives rise, and these depend on the meaning of the contractual terms. Therefore, proof of the existence of a contract necessarily involves establishing the meaning of its terms. Put differently, if without prejudice discussions may be used to establish the existence of a contract, it follows that it is permissible to use them to establish its terms in the sense of identifying the rights and duties arising from the contract.
- 17.42 However, the interpretation of contracts is subject to certain rules. It is generally impermissible to adduce extrinsic evidence to contradict, vary, add to or subtract from the terms of a written contract.¹⁰⁴ The reason is obvious: by reducing their agreement into writing the parties have indicated their intention to be bound by the written terms and nothing else. Since the wording of a contract may be unclear, contract law has accepted that extrinsic evidence is admissible where the meaning of the written contract is doubtful or where difficulty has arisen in its application to an unforeseen situation. But this relaxation is not always enough to overcome problems of ambiguity because the ambiguity itself may only transpire from a consideration of circumstances leading up to the formation of the contract. Contract law, therefore, provides that evidence may be given of the surrounding facts—the factual matrix—to explain the meaning of the written agreement. “The starting point”, Lord Steyn explained, “is that language

in all legal texts conveys meaning according to the circumstances in which it was used. It follows that the context must always be identified and considered before the process of construction or during it. It is, therefore, inaccurate to say that the court may only resort to evidence of the contextual scene when an ambiguity has arisen.”¹⁰⁵

- 17.43 The upshot is that, on the one hand, it is impermissible to adduce evidence of what was said or done during the course of pre-contract negotiations to alter the meaning of the written contract,¹⁰⁶ but on the other hand it is permissible to prove the factual matrix surrounding the formation of the contract in order to interpret its terms. As Lord Clarke put it in *Oceanbulk*, judges “have to distinguish between material which forms part of the pre-contractual negotiations which is part of the factual matrix and therefore admissible as an aid to interpretation and material which forms part of the pre-contractual negotiations but which is not part of the factual matrix and is not therefore admissible”.¹⁰⁷

- 17.44 This distinction is overlaid by a further principle: that the words of the contract (whether spoken or written) must be given the meaning that “a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean”.¹⁰⁸ A reasonable bystander may well consider that what was said by the parties during their pre-contract negotiations is relevant to the interpretation of the contract. They may regard the parties’ statements of fact, of understanding and of intention to be part of the factual matrix against which the contract should be understood.

- 17.45 The Supreme Court reasoned in *Oceanbulk* that “[n]o sensible line can be drawn between admitting without prejudice communications in order to resolve the issue of whether they have resulted in a concluded compromise agreement and admitting them in order to resolve the issue of what that agreement was”.¹⁰⁹ Lord Clarke stated:

“I see no reason why the ordinary principles governing the interpretation of a settlement agreement should be any different regardless of whether the negotiations which led to it were without prejudice. The language should be construed in the same way namely what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. That background knowledge may well include objective facts communicated by one party to the other in the course of the negotiations. As I see it, the process of interpretation should in principle be the same, whether the negotiations were without prejudice or not. In both cases the evidence is admitted in order to enable the court to make an objective assessment of the parties’ intentions.”¹¹⁰

- 17.46 While it makes sense to employ the same interpretative tools regardless of whether a contract has emerged from without prejudice negotiations, it is necessary to consider whether this would promote prospect of settlements or hinder it; whether it would serve or hinder the public policy underpinning the without prejudice rule. Lord Clarke’s view in *Oceanbulk* was that “if a party to negotiations knows that, in the event of a dispute about what a settlement contract means, objective facts which emerge during negotiations will be admitted in order to assist the court to interpret the agreement in accordance with the parties’ true intentions, settlement is likely to be encouraged not discouraged”.¹¹¹ Negotiating parties need to take great care in what they say during the negotiations, for the rights arising out of the ensuing agreement may well be affected by an incautious word. The Supreme Court’s ruling may thus have the effect of undermining the public policy behind the without prejudice rule.

- 17.47 Sophisticated negotiators could limit their exposure to later use of their negotiating postures against them by entering into an express collateral agreement that nothing said during the negotiations would be admissible for the purpose of interpretation. Such an agreement would ensure that settlement agreements have to be interpreted without reference to what was said without prejudice. As a result of the *Oceanbulk* decision it is fair to say that settlement negotiations are without prejudice except for the purpose of interpretation. Thus, in addition to the well-established category of “without prejudice except as to costs”, we now have “without prejudice except as to interpretation”. However, there is an important difference between the two. The former applies only where a party has expressly stated that a communication is without prejudice except as to costs. The latter will apply automatically, unless the parties expressly stipulated that their negotiations would be inadmissible even for the purposes

of interpretation. It is all the more important to keep these matters in mind during settlement discussions since strangers to the settlement may seek disclosure of the settlement agreement and widen their net of disclosure in aid of interpretation.¹¹²

Misrepresentation, fraud and undue influence

- 17.48 Evidence of what took place during without prejudice discussions is admissible to show that an agreement apparently concluded between the parties during the negotiations should be set aside on the ground of misrepresentation, fraud or undue influence.¹¹³ This exception is closely related to the contract aspect of settlement and is, in effect, the flip side of the exception which permits proof of a concluded agreement. For it is only natural that just as it is admissible to rely on without prejudice discussions to prove a contract, so it must be admissible to rely on such discussions to show that a contract apparently concluded was defective or otherwise unenforceable as a matter of ordinary contract law; i.e. due to misrepresentation, fraud or undue influence.¹¹⁴ Equally, where one party challenges the validity of a settlement agreement, the other may use without prejudice statements to uphold it.¹¹⁵ Finally, in the context of the duty to make full and frank disclosure, a party may be required to disclose, or to indicate the existence of, a without prejudice communication if it is clear that in the absence of such disclosure the court might be misled.¹¹⁶

Estoppel

- 17.49 Without prejudice communications are admissible to prove an estoppel. It is permissible to adduce in evidence a statement made by one party with the intention that the other would rely on it, where the other did so.¹¹⁷ Care must be taken, however, to distinguish between statements which do no more than indicate a party's negotiating stance (as will be the case with most statements made at a without prejudice meeting), and statements which are genuinely intended to be relied upon by the other party. Reliance upon the former would not generally be reasonable, and would therefore not bring the statement within the estoppel exception.¹¹⁸

Unambiguous impropriety

- 17.50 A party may be allowed to give evidence of what the other said or wrote in without prejudice negotiations if the exclusion of the evidence would act as a cloak for perjury, blackmail or other unambiguous impropriety.¹¹⁹ It is not, however, sufficient to establish an arguable case of impropriety, the test is whether the evidence establishes unambiguous impropriety.¹²⁰ The veil imposed by public policy, the Court of Appeal explained in *Unilever Plc v Procter & Gamble Co*,¹²¹ may have to be lifted in cases where the protection afforded by the rule has been unequivocally abused. The Court of Appeal stressed the need to exercise restraint in allowing without prejudice statements to be used under this exception, for it is only too easy for a dissatisfied litigant to accuse their opponent of concealment or misrepresentation during settlement discussions. As Hoffmann LJ observed in an earlier case, "the value of the without prejudice rule would be seriously impaired if its protection could be removed [for] anything less than unambiguous impropriety".¹²² The exception is therefore confined to cases where there is clear evidence of abuse of a privileged occasion.¹²³

- 17.51 The *Unilever* case was concerned with a particular kind of threat governed by the **Patents Act 1977, s.70**: a "threat of infringement proceedings", which entitles the subject of the threat to bring legal proceedings. In that case the Court of Appeal held that the exception did not apply because the agreed intention of the parties had been to hold an open discussion and it

would be unjust for one party to rely on threats or claims made by the other party in bringing proceedings. The Court of Appeal reached a different conclusion with regard to a similar threat in *Best Buy Co Inc v Worldwide Sales Corp Espana SL*.¹²⁴ It found that the threat was in a letter stating the party's position with regard to a trade mark which was not part of settlement negotiations. Much would depend on the propriety of the threat. With regard to a threat to bring committal proceedings, the Court of Appeal held that whilst it might be proper for a party to threaten committal proceedings if it had a genuine belief in some basis for such proceedings, it was wrong for them to use such threat to obtain a better price for shares when there was no other justification for an increased value.¹²⁵

- 17.52 The narrow scope of the impropriety exception was stressed in *Savings & Investment Bank*.¹²⁶ In the settlement of a claim brought against him by a company in liquidation the defendant warranted that he had made full disclosure of all his assets. Later, the claimant discovered undeclared assets and commenced proceedings to rescind the settlement on grounds of misrepresentation. In an attempt to settle these proceedings, a without prejudice meeting was held in which the defendant allegedly disclosed further undeclared assets. As a result, the claimant applied to amend its statement of claim in order to add those new instances of non-disclosure, arguing that they fell within the "unambiguous impropriety" exception. The Court of Appeal rejected the claimant's argument, holding that a mere inconsistency between an admission during negotiations and a pleaded case or stated position would not normally result in loss of protection even if there was a possibility that it would lead to perjury. To invoke the impropriety exception in such circumstances, the court held, it had to be shown that the privilege itself was abused. This could not be shown here because it could not be an abuse of the privilege to tell the truth, even where the truth was contrary to one's statement of case. Nor would the exception apply where one of the parties drew the other party's attention to the difficulty of enforcing an English judgment in Vietnam,¹²⁷ or where one of the parties sought some advantage by offering the opponent a solution to a tax problem that the latter had.¹²⁸

Explaining delay in the proceedings

- 17.53 Evidence of negotiations may be given in order to explain delay in the proceedings or apparent acquiescence by a party to such delay. Consistent with the general principle which restricts the use of exceptions to the purposes for which they exist, the court will limit reference to matters that passed during the negotiation to the bare minimum, such as showing that letters have been written on certain dates, rather than allowing disclosure of their contents.¹²⁹

Establishing reasonable conduct

- 17.54 A party may rely on without prejudice communications to show that they acted reasonably in settlement negotiations and achieved a reasonable settlement in order to show that they have satisfied their duty to mitigate their losses.¹³⁰

Proof of bankruptcy

- 17.55 There is 19th century authority, since approved by the Court of Appeal,¹³¹ that a declaration of inability to pay made during settlement negotiations is admissible as proof of an act of bankruptcy.¹³²

“Without prejudice except as to costs”

- 17.56 Parties may hold without prejudice negotiations but agree to retain the freedom to rely on matters passing in such negotiations in relation to costs orders. The device, known as a communication “without prejudice save as to costs” (WPSATC), was first recognised in *Calderbank v Calderbank*,¹³³ and was reaffirmed by the Court of Appeal in *Cutts v Head*¹³⁴ and by the House of Lords in *Rush & Tompkins*,¹³⁵ as based on an express or implied agreement between the parties. Where parties have negotiated on this basis, their communication will be protected in accordance with the general rule in all respects except in relation to the making of a costs order or in relation to the assessment of costs.¹³⁶
- 17.57 The importance of this device has substantially increased under the CPR because of the significance that the court now attaches to the parties’ conduct when deciding what costs orders to make.¹³⁷ CPR 44.2(4) confers an extensive jurisdiction on the court to take into account the parties’ conduct before and during the litigation when it decides the incidence of costs. Clearly, the willingness of the parties to respond positively to offers of compromise or suggestions to engage in alternative dispute resolution (ADR), and conduct during negotiations, are going to be influential in costs awards. It should be noted that CPR 36 offers are automatically deemed to be “without prejudice except as to costs” (CPR 36.16(1)).¹³⁸
- 17.58 It must be emphasised that unless the parties stated (or clearly implied) that their negotiations are “without prejudice except in the matter of costs”, their communications remain protected by the rule and are inadmissible. This is so even if they are relevant in determining the reasonableness of a refusal to participate in ADR.¹³⁹ The general without prejudice privilege should only be cut down where all the parties were unambiguously on notice of this.¹⁴⁰ Since the without prejudice privilege attaches automatically to communications made in the course of settlement negotiations, the fact that the parties failed to expressly state that they were “without prejudice” should not enable the court to infer that they were also “without prejudice except as to costs”, as was unfortunately held in one case.¹⁴¹ To permit such an easy inference to be drawn would run counter to the rationale that in settlement negotiations parties should be free of fear that what they say may later be used to their disadvantage.
- 17.59 However, this does not mean that the parties’ attitudes to ADR must remain hidden from the court in the absence of a clear agreement to the contrary. This is because it is always open to a party to make an offer or settlement approach in “without prejudice except as to costs” correspondence, and the opponent’s response (or lack thereof) will then be admissible for the purposes of determining costs. As Jacob LJ pointed out:

“[it] is open to either side to make open or *Calderbank* offers of ADR. The opposite party can respond to such offers, either openly or in *Calderbank* form. If it does so and gives good reason(s) why it thinks ADR will not serve a useful purpose, then that is one thing. If it fails to do so, then that is a matter the court may consider relevant ... in exercising its discretion as to costs. The reasonableness or otherwise of going to ADR may be fairly and squarely debated between the parties and, under the *Calderbank* procedure, made available to the court but only when it comes to consider costs.”¹⁴²

Footnotes

99 For a general survey see *Unilever Plc v Procter & Gamble Co* [2000] 1 W.L.R. 2436, CA; and *Oceanbulk Shipping and Trading SA v TMT Asia Ltd* [2010] UKSC 44; [2011] 1 AC 662.

- 100 *Tomlin v Standard Telephones and Cables Ltd* [1969] 3 All ER 201; [1969] 1 W.L.R. 1378, CA; *Unilever Plc v Procter & Gamble Co* [2000] 1 W.L.R. 2436, 2444 ff, CA; and *Oceanbulk Shipping and Trading SA v TMT Asia Ltd* [2010] UKSC 44; [2011] 1 AC 662 [30] ff.
- 101 *EMW Law LLP v Halborg* [2017] EWHC 1014 (Ch).
- 102 *Berkeley Square Holdings Ltd v Lancer Property Asset Management Ltd* [2021] EWCA Civ 551.
- 103 *Oceanbulk Shipping and Trading SA v TMT Asia Ltd* [2010] UKSC 44; [2011] 1 AC 662. See also *Berkeley Square Holdings Ltd v Lancer Property Asset Management Ltd* [2021] EWCA Civ 551.
- 104 H. Beale (ed), Chitty on Contracts, 35th edn (London: Sweet & Maxwell, 2024), para.16-022 ff.
- 105 *R (Westminster City Council) v National Asylum Support Service* [2002] UKHL 38; [2002] 1 W.L.R. 2956 [5]; *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 W.L.R. 989 at 995, HL. See also *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2017] AC 1173 for the iterative approach to contract interpretation.
- 106 See *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] 1 AC 1101; *Pratt v Aigaion Insurance Co SA* [2008] EWCA Civ 1314; [2009] 1 Lloyd's Rep. 225 [9]; and *ING Lease (UK) Ltd v Harwood* [2007] EWHC 2292 (QB); [2008] Bus L.R. 762.
- 107 *Oceanbulk Shipping and Trading SA v TMT Asia Ltd* [2010] UKSC 44; [2011] 1 AC 662 [39].
- 108 *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] AC 1101 [14], per Lord Hoffmann.
- 109 *Oceanbulk Shipping and Trading SA v TMT Asia Ltd* [2010] UKSC 44; [2011] 1 AC 662 [33].
- 110 *Oceanbulk Shipping and Trading SA v TMT Asia Ltd* [2010] UKSC 44; [2011] 1 AC 662 [40]. When interpreting a concise settlement agreement drafted quickly, the evidential context was perhaps more important than in a complex commercial contract negotiated in detail over a lengthy period: *Pentagon Food Group Ltd v B Cadman Ltd* [2024] EWHC 2513 (Comm).
- 111 *Oceanbulk Shipping and Trading SA v TMT Asia Ltd* [2010] UKSC 44; [2011] 1 AC 662 [41].
- 112 *Kings Security Systems Ltd v King* [2020] EWHC 2996 (Ch).
- 113 *Unilever Plc v Procter & Gamble Co* [2000] 1 W.L.R. 2436 (CA); *Underwood v Cox* (1912) 4 D.L.R. 66; *Pentagon Food Group Ltd v B Cadman Ltd* [2024] EWHC 2513 (Comm).
- 114 *Tapoohi v Lewenberg* (No.2) [2003] VSC 410, Supreme Court of Victoria held that a mediator may be held liable for putting undue pressure on a party to settle and to this end without prejudice discussions would be admissible. But see *Aujla v Aujla* (CC, unreported, 5 October 2022).
- 115 *Berkeley Square Holdings Ltd v Lancer Property Asset Management Ltd* [2021] EWCA Civ 551.
- 116 *Linsen International Ltd v Humpuss Sea Transport Pte Ltd* [2010] EWHC 303 (Comm).
- 117 *Hodgkinson & Corby Ltd v Wards Mobility Services Ltd* [1997] F.S.R. 178, ChD; reversed on appeal but not disapproved on this point: [1998] F.S.R. 530, CA; adopted in: *Unilever Plc v Procter & Gamble Co* [2000] 1 W.L.R. 2436, CA; and *Oceanbulk Shipping and Trading SA v TMT Asia Ltd* [2010] UKSC 44; [2011] 1 AC 662 [47].
- 118 *AAG Investments Ltd v BAA Airports Ltd* [2010] EWHC 2844 (Comm) [79]; *West v Churchill* [2024] EWHC 940 (Ch).
- 119 *Forster v Friedland* (CA, unreported, 10 November 1992); *Fazil-Alizadeh v Nikbin* (CA, unreported, 25 February 1993); *Finch v Wilson* (unreported, 8 May 1987); and *Hawick Jersey International v Caplan, The Times*, 11 March 1988. See further D. Foskett, Foskett on Compromise, 10th edn (London: Sweet & Maxwell, 2024), paras 19-39–19-55.
- 120 *Motorola Solutions Inc v Hytera Communications Corp Ltd* [2021] EWCA Civ 11.
- 121 *Unilever Plc v Procter & Gamble Co* [2000] 1 W.L.R. 2436, CA.
- 122 *Forster v Friedland* (CA, unreported, 10 November 1992). See also *UYB Ltd v British Railways Board, The Times*, 15 November 2000, CA.
- 123 *Forster v Friedland* (CA, unreported, 10 November 1992); *Fazil-Alizadeh v Nikbin* (CA, unreported, 25 February 1993); *Pentagon Food Group Ltd v B Cadman Ltd* [2024] EWHC 2513 (Comm).
- 124 *Best Buy Co Inc v Worldwide Sales Corp Espana SL* [2011] EWCA Civ 618; [2011] Bus L.R. 1166 [44]–[45].
- 125 *Ferster v Ferster* [2016] EWCA Civ 717.
- 126 *Savings & Investment Bank Ltd (In Liquidation) v Fincken* [2003] EWCA Civ 1630; [2004] 1 W.L.R. 667; and *Williams v Hull* [2009] EWHC 2844 (Ch).
- 127 *FW Aviation (Holdings) 1 Ltd v VietJet Aviation Joint Stock Co* [2024] EWHC 1823 (Comm).
- 128 *Bond v Webster* [2024] EWHC 989 (Ch). For rejection of exception arguments in employment cases see: *Garrod v Riverstone Management Ltd* [2022] EAT 177; *Swiss Re Corporate Solutions Ltd v Sommer* [2022] EAT 78.
- 129 *Walker v Wilsher* (1889) 23 QBD. 335. See also *Unilever Plc v Procter & Gamble Co* [2000] 1 W.L.R. 2436, at 2444–2445, CA; and *AAG Investments Ltd v BAA Airports Ltd* [2010] EWHC 2844 (Comm) [29]–[31].

- 130 *Muller v Linsley & Mortimer (a firm) [1996] P.N.L.R. 74, CA*. See also *Unilever Plc v Procter & Gamble Co [2000] 1 W.L.R. 2436* at 2445, CA; and *AAG Investments Ltd v BAA Airports Ltd [2010] EWHC 2844 (Comm)* [29]–[31]; *Kings Security Systems Ltd v King [2020] EWHC 2996 (Ch)*.
- 131 *Best Buy Co Inc v Worldwide Sales Corp Espana SL [2011] EWCA Civ 618; [2011] Bus L.R. 1166* [43]–[43].
- 132 *Re Daintrey ex p. Holt [1893] 2 QB 116, QBD*. For discussion of this aspect see H. Malek (ed.), *Phipson on Evidence*, 20th edn (London: Sweet & Maxwell, 2022) paras 24-27 ff.
- 133 *Calderbank v Calderbank [1975] 3 All ER 333*. See 2025 WB 36.2.1; and see Ch.27 Offers to Settle paras 27.3 and 27.13–27.14; and see Ch.28 Costs paras 28.40 and 28.57 for the general effects of such offers in determining the incidence of costs.
- 134 *Cutts v Head [1984] Ch 290; [1984] 1 All ER 597, CA*.
- 135 *Rush & Tompkins Ltd v Greater London Council [1989] AC 1280; [1988] 3 W.L.R. 939, HL*.
- 136 See for example *Chrulow v Borm-Reid & Co (a firm) [1992] 1 All ER 953; [1992] 1 W.L.R. 176*.
- 137 See Ch.28 Costs paras 28.58 ff.
- 138 Consequently, the offer must not be communicated to the court until the case has been decided (CPR 36.16(2)). For discussion of this aspect, see Ch.27 Offers to Settle paras 27.100 ff.
- 139 *Reed Executive Plc v Reed Business Information Ltd [2004] EWCA Civ 887; [2004] 4 All ER 942*.
- 140 Although the fact that negotiations were conducted without prejudice does not prevent the parties from later agreeing to vary the scope of the protection in relation to those past negotiations, so as to render them “without prejudice except as to costs”: see, for instance, *Willers v Joyce [2019] EWHC 937 (Ch)*.
- 141 *Sternberg Reed Solicitors v Harrison [2019] EWHC 2065 (Ch)*.
- 142 *Reed Executive Plc v Reed Business Information Ltd [2004] EWCA Civ 887; [2004] 4 All ER 942* [35].

Matrimonial And Parental Conciliation Privilege

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Mainwork

Chapter 17 - Without Prejudice

Matrimonial And Parental Conciliation Privilege

- 17.60 A rule analogous to the without prejudice rule has developed with respect to conciliation in family law proceedings.¹⁴³ The need for a special rule arose because legal proceedings in family matters are not always adversarial. This is true, in particular, of childcare proceedings. Persons involved in such proceedings, whether they are family members or social workers, cannot be regarded as parties to a dispute, since the court is not engaged in resolving a dispute but in protecting the welfare of children.¹⁴⁴ Furthermore, discussions between persons concerned with the welfare of children, who may include parents, other relatives or social workers, cannot be considered to be negotiations for settlement because the interests of children cannot be compromised nor can parents usually forego parental rights. Even where family proceedings are adversarial, such as the division of family property, the without prejudice rule may not cover all aspects of the discussions between the parties, as where the communications go beyond property matters and are concerned with child welfare.
- 17.61 Since promoting family conciliation is at least as important as promoting settlement in adversarial proceedings, a special rule has developed whereby statements for the purpose of family conciliation may not be used in evidence. In *Re D and another (minors) (conciliation: disclosure of information)*, Sir Thomas Bingham MR explained:

“Conciliation of parental or matrimonial disputes does not form part of the legal process but as a matter of practice is becoming an important and valuable tool in the procedures of many family courts. This underlines the great importance of the preservation of a cloak over all attempts at settlement of disputes over children. Non-disclosure of the contents of conciliation meetings or correspondence is a thread discernible throughout all in-court and out-of-court conciliation arrangements and proposals.”¹⁴⁵

The Master of the Rolls stressed that the courts should resist the temptation to create exceptions to this rule, otherwise the privilege in respect of conciliation discussions could be reduced to a mere shadow. But the court did allow an exception in the interest of protecting child welfare. Evidence may be given of otherwise protected statements if, and only if, they clearly indicate that the maker has in the past caused or is likely in the future to cause serious harm to the wellbeing of a child. The test propounded in *Re D (minors)* has been incorporated into a practice direction, under which nothing said in the course of a “financial dispute resolution” appointment may be disclosed, other than at the trial of a person for an offence committed at the appointment, or in the circumstances envisaged by *Re D (minors)* itself.¹⁴⁶

- 17.62 The privilege attaching to negotiations intended to settle matrimonial and parental disputes is wider than that attaching to other without prejudice negotiations.¹⁴⁷ Communications made between spouses before proceedings and communications to a third party who tries to facilitate conciliation are also protected.¹⁴⁸

Footnotes

¹⁴³ See D. Williams et al. (eds), Rayden & Jackson on Relationship Breakdown, Finances and Children, 19th edn (London: LexisNexis Butterworths, 2020), paras 2.398 ff.

¹⁴⁴ *Re L (a minor) (police investigation: privilege)* [1997] AC 16; [1996] 2 All ER 78, HL.

- 145 *Re D (minors) (conciliation: disclosure of information) [1993] 2 All ER 693, 699.*
- 146 See *Practice Direction (Ancillary Relief: Procedure) [2000] 1 W.L.R. 1480*, para.3.2. For the application of the rule to dispute under the Hague Convention: *Re D (A Child) (Hague Convention: Mediation) [2017] EWHC 3363 (Fam); E (A Child) (Mediation Privilege), Re [2020] EWHC 3379 (Fam).*
- 147 *Re D (minors) (conciliation: disclosure of information) [1993] 2 All ER 693, 699.*
- 148 *Mole v Mole [1951] P. 21; Henley v Henley [1955] P. 202.* For discussion of the suggestion that communications made to or via a mediator should be protected to the same extent in non-matrimonial proceedings, see for example P. Matthews and H. Malek, *Disclosure*, 6th edn (London: Sweet & Maxwell, 2023), paras 14.37 ff; and C. Hollander, *Documentary Evidence*, 15th edn (London: Sweet & Maxwell, 2024), paras 20-47 ff.

Introduction

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Mainwork

Chapter 22 - Trial and Evidence

Introduction

22. 1 The trial is the final and most visible stage of the litigation process. Trials are held in public before a judge sitting alone or, in a very small number of cases, with a jury.¹ It is at the trial that the parties present their evidence, probe each other's evidence and advance their arguments. Although judgment after trial is sometimes perceived as the main way of resolving disputes, this has never been entirely accurate and it is even less so today. The great bulk of claims are resolved by settlement, by default judgment or by summary judgment.² The overriding objective further strengthens the policy of disposing of as many disputes as possible without trial.³
22. 2 Although only a small minority of cases are resolved by trial on the merits, the rules governing trial continue to be of great importance. Disputes that go all the way to trial tend to be the more important or difficult cases, and the resultant judgments can be of considerable significance and public importance as precedent. It is also to be borne in mind that the likelihood of settlement is influenced by the parties' assessment of their chances at trial, which is in turn influenced by the trial rules. Similarly, recourse to the summary judgment procedure depends on whether a claim or a defence has a real prospect of success if a trial were held.⁴ Since an assessment of a litigant's prospects of success is necessarily influenced by the trial rules, it is no exaggeration to say that the litigation process is conducted from the outset in the shadow of these rules.
22. 3 The traditional English trial has undergone considerable transformation. In the past, a sharp division existed between the pre-trial and trial stages. The pre-trial consisted of a series of different procedural steps undertaken by the parties at various intervals without much court interference. The court was not involved in the identification of the issues or in the preparatory steps. Nor did the court have much say about the nature and extent of the evidence presented at the trial. The court had limited powers to dictate in advance of the trial the course that it would take.⁵
22. 4 The traditional trial itself was very much an oral affair. The judge arrived at the trial without advance knowledge of the issues. By means of opening speeches the advocates had to introduce the case to the court, inform it of the background, explain the issues and outline the means they were going to employ to establish their respective cases. Testimony was presented orally by way of examination-in-chief and cross-examination. Advocates would read out the documentary evidence to the judge. They presented legal authority and developed their arguments orally. Since the judge began the process with a minimal grasp of the case, the advocates had a considerable degree of control over the hearing and its duration.
22. 5 Trial is now a very different affair.⁶ Under the [CPR](#) the presentation of evidence and argument begins well before the trial itself. The preparations for the trial require the parties to supply the court in advance with virtually all the evidence and arguments on which they propose to rely. Witness statements, expert reports, bundles of relevant documents, reading guides and skeleton arguments have to be made available to the court in advance. Consequently, the court will be in possession of all the trial materials well ahead of the trial.
22. 6 It is normal in the High Court, and in the more complex cases in the county court, for the judge to peruse the materials before the opening of the trial and give appropriate directions for the conduct of the trial. By exercising its case and cost management powers in this way, the court may influence the fact-finding process long before the trial hearing. Oral presentation both of

evidence and argument may be subject to time and other limits. It is open to the court to restrict the issues in respect of which it will receive evidence and to limit the length of witness statements it will entertain ([CPR 32.2\(3\)](#)).⁷ It may also make adverse costs orders in cases of undue prolixity.⁸ The court would normally dispense with oral evidence-in-chief and would direct that expert evidence be limited to the expert's written reports. The court may direct that the documentary evidence should not be read out in court since the judge is already familiar with it. Apart from cross-examination of controversial witnesses, much of the trial hearing may now be devoted to the clarification of difficult points and to commenting on matters that the court has indicated need elaboration. It is therefore possible to say that adjudication is already under way well before the trial hearing has opened.

22. 7 The digitisation of existing processes has been the topic of significant debate over the recent period. If implemented effectively, there are clear benefits for the efficiency and accessibility of the civil justice system. Indeed the [CPR](#) has encouraged judges to make use of technology as part of active case management since its introduction ([CPR 1.4\(2\)\(k\)](#)).

In March 2025, HM Courts & Tribunal Services concluded an almost ten year long reform programme.⁹ When first contemplated the reform programme was debated across the profession as a potential revolution. The results of this programme have been far from revolutionary and marred by delay and de-scoping.¹⁰ It is now clear that the development of an "Online Solutions Court" as considered in the previous edition of this work remain far from implementation.

The most obvious reform to the civil justice system is the widespread introduction of video-conferencing facilities, partly hastened by the COVID-19 pandemic. Video technology is now said to be installed in 70% of courtrooms.¹¹ Other aspects remain analogue with a paper-free system remaining a fantasy. In recent evidence to the House of Commons, Sir Geoffrey Vos submitted that only 23% of cases begin and end through digital processes.¹²

There has been most progress in the development of a comprehensive online filing and case management system.¹³ CE-File, the use of which has expanded over time,¹⁴ enables claims and applications to be commenced and continued online, with most documents and communications between the parties and court scanned and uploaded to a digital case file.

Other specific programmes include the Money Claim Online (MCOL) system,¹⁵ which provides a framework for the defendant to respond online and, where appropriate, for a judgment in default or a warrant of execution to be requested online. If the defendant pays the claimant directly there is a process for settling the claim online. However, should the defendant wish to defend the matter, the claim cannot be progressed through the online system and will be transferred to a county court hearing centre. Its utility is therefore highly limited and its interface is already antiquated. Two specific reform projects have been introduced in the County Court; the first in relation to money claims,¹⁶ and the second in relation to damages claims.¹⁷ Both pilots are due to run until 1 October 2026.

22. 8 Although technological reform of the civil justice system has considerable potential to improve the speed and efficiency of commencement and case management processes, now that this reform process has concluded it is still correct to hold that these systems are in essence little more than a "digital gloss to procedures designed over many years to be operated on paper, and by lawyers".¹⁸ Likewise, increased use of telephone and video technology to conduct hearings merely maintains the traditional adversarial hearing, but removes it from a physical courtroom to a remote or online platform.¹⁹ There are green shoots of reform; the [Judicial Review and Courts Act 2022](#) introduced an Online Procedure Rule Committee from which the [Online Procedure Rules \(Specified Proceedings\) Regulations](#) has developed.²⁰ These phenomena presage the establishment of a fully digitised, online process, at least for some categories of claim.²¹

22. 9 When financial resources permit, or technology advances further, it is possible that there will be a further push for a more adventurous series of reforms. The rule of law implications must not be underestimated to any future change. For example, Briggs LJ recognised that an "Online Solutions Court" might be perceived as dispensing "second-tier, second-class justice" to those with less valuable claims, particularly given the loss (in most online court cases) of the possibility of having a "day in court", which is a defining characteristic of the English adversarial system.²² It is clear that there is a risk of this perception taking root, bearing in mind that the moral legitimacy of the English civil justice system is presently founded upon the adversarial process. Such a legitimacy deficit associated with an Online Solutions Court would undoubtedly be inimical to the rule of law,

since it is the court's perceived legitimacy that by and large inclines people to comply with the law, independently of reward or punishment.

- 22.10** These matters are compounded by a potential publicity deficit. The principle of publicity has, as we have seen, already been compromised by the greater use of written submissions and written evidence.²³ The additional impact on transparency and accountability, were a major part of the court process to move online and effectively be disposed of on the papers, is potentially severe. This is not to say that the intended move towards the online courts system is to be avoided. However, it must be remembered that the principles and standards reflected in this work have been accumulated over the course of centuries, to ensure the highest possible standards of fairness and rectitude in decision-making. From the outset, therefore, the online courts system must be sensitive to its potential legitimacy deficit and to ensure robust measures to counteract it are built into the design.²⁴

The foregoing assumes that judicial determination remains the primary means of civil dispute resolution. At the time of writing, predictions as to artificial intelligence vary. If the bolder predictions are realised it is entirely possible that the traditional state-supported method of judicial determination may morph entirely. Large companies have already adopted private online dispute resolution which is now accepted without controversy. That trend is only likely to continue over time. The recently concluded HMCTS reform programme does not provide confidence that the traditional Court system will engage and adapt to these developments with the necessary alacrity.

The balance of the present chapter deals with directions for the trial and with the conduct of the trial. It seeks to provide a general account of the more important rules of evidence as they apply to civil litigation, including the burden and standard of proof, relevance and admissibility, competence and compellability of witnesses, and hearsay.

Footnotes

- 1 The Senior Courts Act 1981 s.69, provides for trial by jury only in claims for malicious prosecution, false imprisonment and allegations of fraud, subject to the proviso that the court can refuse jury trial if it is of the opinion that “the trial requires prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury”.
- 2 Of the 278,000 judgments entered in January to March 2025, 92 per cent were default judgments: see Ministry of Justice, Civil Justice Statistics Quarterly, England and Wales, January to March 2025, <https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-january-to-march-2025/civil-justice-statistics-quarterly-january-to-march-2025>. [Accessed 26 July 2025].
- 3 See Ch.9 Disposal Without Trial paras 9.1–9.2; this consideration also underpins the policy under the CPR of promoting settlement—see Ch.1 The Overriding Objective paras 1.111 ff.
- 4 See Ch.9 Disposal Without Trial paras 9.62 ff; see paras 9.33 ff for discussion of the test in the context of applications to set aside default judgment.
- 5 See Ch.1 The Overriding Objective paras 1.21 ff.
- 6 See the discussion in Ch.3 Fair Trial paras 3.107 ff.
- 7 *MacLennan v Morgan Sindall (Infrastructure) Plc [2013] EWHC 4044 (QB)*; see also *Christoforou v Christoforou [2020] EWHC 1196 (Ch)*. See the requirements applying to the Business and Property Courts in PD 57AC and see generally Ch.20 Witness Statements paras 20.5 ff
- 8 See *Cummings v Ministry of Justice [2013] EWHC 48 (QB)*; and see Ch.20 Witness Statements paras 20.7–20.8.
- 9 <https://www.gov.uk/guidance/modernising-courts-and-tribunals-benefits-of-digital-services>.
- 10 NAO, Progress on the courts and tribunals reform programme, Session 2022-2023, 23 February 2023. House of Commons, Committee of Public Accounts: Progress on the courts and tribunals reform programme; HC 1002, 30 June 2023;
- 11 <https://www.gov.uk/guidance/modernising-courts-and-tribunals-benefits-of-digital-services> [Accessed 14 August 2025].
- 12 House of Commons, Justice Committee: Oral Evidence: Work of the County Court, HC 677 Q36 (Sir Geoffrey Vos).
- 13 Chapter 12 Case Management Pt I paras 12.29 ff.

- 14 CE-File was introduced in 2015, with an electronic working pilot scheme in what was PD 51O. Use of CE-File is now regulated by PD 5C. See also Chancery Guide (2022: Fifth Update September 2025) para.1.28–1.32; Commercial Court Guide (2022: Revised July 2023) para.B2; King’s Bench Guide (April 2025) Ch.3. CE-File is available in the courts listed in PD 5C para. 1.3. It is mandatory for parties that are legally represented, but is voluntary for litigants in person (para.2.1).
- 15 Via the HM Courts & Tribunals Service website, at <http://www.moneyclaim.gov.uk> [Accessed 14 August 2025]. See also PD 7C.
- 16 CPR PD 51R.
- 17 CPR PD 51ZB.
- 18 Briggs LJ, “The Online Solutions Court—Affordable Dispute Resolution for All”, speech given to Justice, London, 18 October 2016, para.3.
- 19 See PD 32 para.33, Annex 3; and [Ch.12 Case Management Pt I para.12.37](#).
- 20 [Online Procedure Rules \(Specified Proceedings\) Regulations 2025 \(SI 2025/536\)](#).
- 21 Sir Terence Etherton MR, “Rule-making for a digital court process”, in A. Higgins (ed.) The Civil Procedure Rules at 20 (Oxford: Oxford University Press, 2020).
- 22 Briggs, Civil Courts Structure Review: Final Report paras 6.5.1, 6.6 ff.
- 23 See [Ch.3 Fair Trial paras 3.107 ff](#).
- 24 See for example Lord Burnett CJ, “The Cutting Edge of Digital Reform”, speech at the First International Forum on Online Courts, London, 3 December 2018, para.16: “The use of technology will confront us with difficult questions about open justice. We must ensure that digitisation does not compromise open justice, and the democratic accountability of our justice systems. But there is no reason to suppose that technology, appropriately used, will not make justice more open than it is now, because seeing a dispute being resolved may no longer depend upon the physical presence of the spectator”.

Trial Preparations

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Chapter 22 - Trial and Evidence

Trial Preparations

22. 11 The effectiveness and efficiency of the trial are in large measure dependent on the quality of the preparations for it. The Chancery Guide expresses the essence of the modern approach to trial preparation:

“Parties will be expected to have taken all reasonable steps to ensure that their cases are adequately prepared in sufficient time to enable a trial which has been fixed to proceed.”²⁵

22. 12 The same applies to any hearing that gives rise to substantial issues. Failure to deliver skeleton arguments or bundles of documents in time may cause delay and have serious costs consequences for the defaulting party. The courts employ a variety of measures to deter tardy compliance.²⁶

Trial timetable

22. 13 Before the trial, the court will fix a trial timetable in consultation with the parties (CPR 28.5, 29.8 and 39.4). The timetable may consist of an overall limit on the duration of the trial and of time allocations to the different trial components, such as openings, cross-examination and legal argument. Each party is given its own allocation of time. The directions may be fairly general, but they may also be quite specific, depending on the nature and complexity of the process. During the trial, the court may revise its allocation of time for cross-examination, including to reduce it, if the interests of justice so require.²⁷ However, it is inappropriate for the court to impose a drastic time limit on cross-examination without prior notice to the parties and without giving them an adequate opportunity to make representations.²⁸

22. 14 The court has the power to revise timetables (PD 28 para.8.3 and PD 29 para.10.3). However, extending the overall duration of the trial could seriously disrupt the court’s arrangements regarding other cases, and could greatly inconvenience the legal representatives. Given that the overriding objective requires the court to have regard to the interests of all court users, and not just the parties, an overall trial allocation would be revised upwards only where a compelling reason presents itself.²⁹

22. 15 Given the importance attached to compliance with the trial timetable, advocates should consider as early as possible the adequacy of the time allocations and take appropriate steps if they find them insufficient. A party who objects to the timetable should seek its variation without delay. Expedition is essential in this regard. On the fast track, intermediate track and multi-track a party who does not seek a variation or appeal within 14 days of the court’s directions will be assumed to be content with them (PD 28 para.4.2(2) and PD 29 para.6.2(2)). A party whose application for a variation of directions has been dismissed may appeal, though permission to appeal is required. Late applications are to be avoided, except where unforeseen developments make it necessary to revise the timetable.

22. 16

Since the time allocated to trial will tend to be realistic rather than generous, advocates need to make careful and detailed preparations in order to be able to present their client's case adequately within the limits of the prescribed timetable. If failure to comply with the trial arrangements necessitates an adjournment, the court may disallow costs as between solicitor and client, order the person responsible to pay the costs under [CPR 48.7](#), dismiss the application or make any other order, including an order for the payment of costs on an indemnity basis.³⁰

Fast track

- 22.17** On the fast track, a trial timetable may be given as early as the allocation stage. More commonly, however, this will be determined as soon as practicable after the date specified for filing a completed pre-trial check list ([CPR 28.5](#)). Fast-track trials, it should be remembered, are not meant to last more than a day. The trial will be conducted in accordance with any order previously made ([CPR 28.6](#)), which includes timetable directions. Although the court has ultimate control over its proceedings and may direct otherwise, it is unlikely that parties would be allowed to stray outside the timetable. A five-hour trial day will normally be mostly devoted to cross-examination of witnesses.³¹

Intermediate track

- 22.18** Intermediate track trials should not last more than three days if the case is managed proportionately.³² A trial timetable is usually laid down shortly after the date for filing pre-trial checklists.³³ The judge will generally have read the papers before the trial, and may dispense with opening addresses.³⁴ Witness statements from factual witnesses usually stand as their evidence-in-chief.³⁵ Judges are encouraged to restrict cross-examination.³⁶ Oral expert evidence is likely to be limited to two experts per party.³⁷

Multi-track

- 22.19** The occasion for fixing a day for trial and a timetable will arise variously after the filing of pre-trial checklists, at a listing hearing or, where applicable, at a pre-trial review ([CPR 29.8](#)). The trial will be conducted in accordance with the timetable (being an order previously made), unless the trial judge directs otherwise ([CPR 29.9](#)). The amount of time allocated to each party, and to the various parts of a party's case, will depend on the nature of the issues and evidence, and the quantity and complexity of the evidence. Above all, it will turn on the extent to which the trial judge is able to limit the scope for oral evidence and argument by prior study of the materials. The more common factors relevant to time allocation are the extent to which opening speeches are necessary, the presentation of oral expert evidence, the need for cross-examination and its likely duration. General guidelines about trial conduct are to be found in the relevant practice guides.³⁸

Statement of issues and case summary

- 22.20** To facilitate effective management directions the parties are required to present the court with an easily comprehensible account of the issues in dispute. In the Commercial Court, for instance, the parties are required to file a case memorandum and a list of common ground and issues, in which the matters that are in dispute are clearly identified.³⁹ A similar direction may be given in any complex case in any court. The court may require the parties to produce case summaries in advance of case management hearings or, indeed, the trial. This is quite common in multi-track cases (PD 29 para.5.7). A case summary must set out in a clear and concise way the chronology of the dispute, the issues that need to be resolved and the evidence required.

Skeleton arguments

- 22.21 Skeleton arguments need to be filed in advance of most High Court trials, or indeed any heavy application hearing, and are desirable in some county court trials too. The function of skeleton arguments is to provide the court ahead of the hearing with a well-organised and succinct outline of the arguments that the parties are going to put forward and of the evidence or the legal authorities with which they propose to support them.⁴⁰ Close attention should be paid to the guidelines for the preparation of skeleton arguments found in the different court guides. Skeleton arguments must not be disproportionately lengthy or verbose.⁴¹ For present purposes it is sufficient to refer to the Chancery Guide as illustrative of the general approach.⁴² Skeletons are required to be filed at least two clear days before the trial hearing, but a shorter period is allowed in relation to lesser hearings.⁴³ Skeletons should include a concise summary of the party's submissions in relation to each of the issues. They should cite the main authorities relied upon, which may be attached. In addition, advocates may be required to provide summaries of their opening and closing speeches.

Chronologies

- 22.22 The parties are required to produce chronologies of the main events in the history of the dispute. Unlike skeleton arguments, chronologies should be non-contentious and agreed by all the parties. A chronology should indicate whether there is a disagreement about any event or description stated in the chronology.⁴⁴

Bundles of documents

- 22.23 Bundles of documents consist of the principal documents that the parties propose to rely on at the trial or hearing, arranged in a chronological and accessible order. CPR 39.5 provides that unless the court orders otherwise the claimant must file, not more than seven days and not less than three days before the start of the trial, a trial bundle containing documents required by any relevant practice direction or court order.⁴⁵ The responsibility for the preparation of the bundles generally lies with the claimant or applicant, but the bundle must be agreed as far as possible with the other parties and a summary of any disagreement included to ensure that it contains all the documents that any party proposes to rely upon.⁴⁶

Having agreed what should be included in the bundle, the parties are reminded that pursuant to CPR 32.19 any documents disclosed in the bundle will deem a party to have admitted the authority of the document.⁴⁷

Citation of authorities

- 22.24 In the previous Chancery Guide, it was contemplated that the parties could provide separate authorities in addition to skeleton arguments and bundles.⁴⁸ The Chancery Guide now only contemplates that an agreed single joint bundle will be provided.⁴⁹

- 22.25

Precedent is the lifeblood of the common law. But excessive citation of authorities can do more harm than good if it makes no contribution to the issues and increases costs.⁵⁰ For instance, in *A v B*, an appeal concerning the grant of an interim injunction restraining publication, the court was presented with a voluminous body of case law decided by English courts, the European Court of Human Rights (ECtHR) and numerous precedents from the Press Complaints Commission. Lord Woolf CJ deprecated the practice of excessive citation of authorities, and said that judges should be prepared to refuse to entertain such large numbers of authorities. He added that “[t]he need for control of the excessive citation of authority should be borne in mind in deciding questions of costs since it leads to disproportionate expense which can in turn make litigation beyond the means of the ordinary person.”⁵¹ Similarly, in *Sulaman v Axa Insurance Plc*,⁵² Longmore LJ deprecated the parties’ “excessive reliance on authorities” and stressed “that [it] is not usually helpful to compare factual details in one case with factual details in another”.

- 22.26 Striking a satisfactory balance between too much precedent and too little is not easy. In the US, for example, a majority of federal courts of appeal have adopted a practice of choosing which decisions to publish and, prior to 1 January 2007, forbade the citation of unpublished decisions. However, the system proved unsatisfactory and has since been abolished, as regards decisions handed down after 1 January 2007.⁵³ Interestingly, many US courts impose word limits on submissions by parties.⁵⁴ English practice follows a slightly different strategy. Practice Direction (Citation of Authorities) lays down a number of rules as to what material may be cited and the proper manner of citation.⁵⁵ This seeks to ensure that advocates cite only decisions that establish a principle or extend the law and avoid citations that merely apply settled law to the facts of the particular case. This is achieved, in particular, by confining citations to those cases that appear in the official or specialist law reports and prohibiting unnecessary or duplicative citations.⁵⁶ Similarly, the Commercial Court Guide warns:

“Unreported cases should normally be cited only where they are authority for some principle of law of which the substance (as distinct from mere choice of phraseology) is not to be found in any reported judgment.”⁵⁷

- 22.27 The court is required to pay particular attention to any indication given by the court delivering the judgment that it was seen by that court as only applying decided law to the facts of the particular case, or otherwise as not extending or adding to the existing law. If the judgment contains such an indication, advocates who seek to cite the judgment are required to justify their decision to cite the case. The Court of Appeal has reiterated the importance of adhering to Practice Direction (Citation of Authorities), in order to ensure that the limited time available for pre-reading can be more productively spent, and warned that non-compliance might result in the cost of preparing the bundle being disallowed.⁵⁸

- 22.28 Costs sanctions may not be straightforward, however, especially where both parties have engaged in excessive citation.⁵⁹ Further, where these rules are not complied with it is difficult to see how a trial judge could refuse to entertain authorities. The judge can hardly reject all of them and it would defeat the object of the exercise if the court were to sift through all cited cases to decide which are relevant. The other options open to the court are also far from satisfactory. The court could insist that advocates re-submit a list confined to core authorities. However, this may require redrafting of skeleton arguments and other written material, for which there may be insufficient time and which would generate further costs.

Footnotes

25 Chancery Guide (2022: Fifth Update September 2025) para.12.3.

26 Chancery Guide (2022: Fifth Update September 2025) para.12.4.

27 *Three Rivers DC v Bank of England (Restriction on Cross Examination)* [2005] EWCA Civ 889; [2005] C.P. Rep. 46.

28 *Hayes v Transco Plc* [2003] EWCA Civ 1261.

29 See *Nottinghamshire and City of Nottingham Fire Authority v Gladman Commercial Properties Ltd* [2011] EWHC 1918 (Ch) for an example of permission to rely on additional witness evidence during the course of a trial.

30 Chancery Guide (2022: Fifth Update September 2025) para.12.30.

- 31 For a typical fast-track trial timetable see 2025 WB 28.6.5.
- 32 CPR 26.9(7)(c)(i).
- 33 CPR 28.5(1)(b).
- 34 PD 28 para.8.2.
- 35 CPR 32.5(2) and PD 28 para.8.4(b).
- 36 CPR 32.1 and PD 28 para.8.4(a).
- 37 CPR 26.9(7)(c)(ii).
- 38 See for example Chancery Guide (2022: Fifth Update September 2025) Ch.12; and King's Bench Guide (April 2025) Ch.14.
- 39 Commercial Court Guide (2022: Revised July 2023) paras D4 and D.5.
- 40 In cases where the court is required to grapple with plans, maps, diagrams or photographs, the Court should be furnished with “at least one plan, photograph or map which leaves the court in no real doubt about the location of all the relevant features”, which plan, photograph or map the skeleton arguments should identify at “an early point”: *Hunte v E Bottomley & Sons Ltd [2007] EWCA Civ 1168* [30].
- 41 *Midgulf International Ltd v Groupe Chimique Tunisien [2010] EWCA Civ 66* [71]–[75]; and *R (Network Rail Infrastructure Ltd) v Secretary of State for the Environment, Food and Rural Affairs [2017] EWHC 2259 (Admin)* [8]–[12].
- 42 Chancery Guide (2022: Fifth Update September 2025), 12.49–12.51, Appendix Y. See also King's Bench Guide (April 2025) paras 9.1080–9.113; and Commercial Court Guide (2022: Revised July 2023) para.J6 and Appendix 5.
- 43 Chancery Guide (2022: Fifth Update September 2025), 14, 57, King's Bench Guide (April 2025) para.9.108 require delivery of skeleton arguments not later than 10.00am two days before the trial and not later than 10.00am one day before substantial applications or appeals. See also Commercial Court Guide (2022: Revised July 2023) para.J6.
- 44 Chancery Guide (2022: Fifth Update September 2025) para.12.52. See also Commercial Court Guide (2022: Revised July 2023) para.F11 and Appendix 6.
- 45 PD 32 para.27.5 sets out the documents to be included. In the Chancery Division the bundles must be delivered at least three (and no more than seven) days before a trial or application by order, and by 10.00am the day before any other hearing, though the court may direct even earlier delivery: Chancery Guide (2022: Fifth Update September 2025) Appendix X.
- 46 See also Commercial Court Guide (2022: Revised July 2023) para.F.10 and Appendix 7.
- 47 See Chancery Guide (2022: Fifth Update September 2025) para.12.68.
- 48 See Chancery Guide (2016) para.21.86.
- 49 See Chancery Guide (2022: Fifth Update September 2025) para.12.59. See also Commercial Court Guide (2022) para.F.12 and King's Bench Guide (April 2025) para.9.111.
- 50 See further the discussion of precedents concerning the application of the CPR in Ch.2 Rule-Making and Precedent paras 2.57 ff, especially para.2.59.
- 51 *A v B (a company) [2002] EWCA Civ 337; [2003] QB 195; [2002] 2 All ER 545*, [8]. See also *R v Erksine [2009] EWCA Crim 1425; [2010] 1 W.L.R. 183* [71].
- 52 *Sulaman v Axa Insurance Plc [2009] EWCA Civ 1331* [12].
- 53 See the US Federal Rules of Appellate Procedure r.32.1 and *D. Cleveland, “Overturning the Last Stone: The Final Step in Returning Precedential Status to All Opinions”* (2009) 10 J of Appellate Practice and Process 102. For criticism of rules previously prohibiting the citation of unpublished decisions, see the report submitted by the ABA Section of Litigation, Ronald Jay Cohen, Chair, 6 April 2001; and *K. Shuldburg, “Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals”* (1997) 85 Calif. L.R. 541. Note that there remains doubt in the US as to the precedential value of unpublished decisions; see for example Ninth Circuit, Local Rule 36-3.
- 54 For example, the Rules of the Supreme Court of the United States r.33.
- 55 *Practice Direction (Citation of Authorities) [2012] 1 W.L.R. 780*. In relation to appeals see PD 52C, para.29(2).
- 56 *Practice Direction (Citation of Authorities) [2012] 1 W.L.R. 780*. See also *A v B (a company) [2002] EWCA Civ 337; [2003] QB 195; [2002] 2 All ER 545* [9]. Lord Woolf CJ said where authorities “tend to repeat the same principles in successive cases in order to apply them to different situations ... [t]he citation of a single case may ... be all that is required.”
- 57 Commercial Court Guide (Eleventh Edition 2022: Revised July 2023) para.F12.1.
- 58 *Keystone Healthcare Ltd v Parr [2019] EWCA Civ 1246; [2019] W.L.R.(D) 406* [26]–[27].

- 59 This may leave the court with the option of making a wasted costs order, which is undesirable and in any event unlikely to be made except in cases of egregious breach of the rules. For discussion of the wasted costs jurisdiction, see Ch.28 Costs paras 28.260 ff.

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The Conduct of the Trial

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 22 - Trial and Evidence

The Conduct of the Trial

Court directs the conduct of the trial

- 22.29 A judge who reads the trial materials in advance is in a position to influence the conduct of the trial.⁶⁰ Directions for trial will provide the parties with a good indication of what is expected of them at the trial. If having studied the trial material before the trial opens, the court finds that the directions need to be changed, it may do so on the first day of trial. The court may, for instance, indicate the issues on which it wishes to be addressed and those on which it does not require oral argument, and it may limit the time for such addresses. The court may indicate that it does not require explanation of the documents submitted or of expert reports. Where documents or authorities are to be discussed, the court may indicate that only the key parts of any document or authority should be read aloud in court.
- 22.30 The court exercises control throughout the trial. It may interrupt the advocates by asking questions or cut short unnecessarily long arguments or improper addresses. But the judge must guard against unreasonable and intemperate interruptions, and against giving the impression that they have already made up their mind or that they will not fairly consider the argument or evidence presented by a party.⁶¹ Excessive intervention by the judge would not necessarily render the trial unfair; all depends on the effect that the judge's conduct had on the proper determination of the main issues.⁶² The judge must ensure that the trial is conducted in an even-handed way. If one party is allowed to rely on new evidence, the other should be allowed to call fresh evidence in rebuttal.⁶³

Order of presentation

- 22.31 The order in which the parties present their cases at the trial is governed by general rules, though the court has very considerable discretion to depart from these rules and determine how the parties should proceed. The first party to proceed is the party on whom the burden of proof lies. This will normally be the claimant. However, where the defendant has admitted all the issues in respect of which the burden lies on the claimant, the defendant will begin since the claimant will have been left with nothing to prove. Similarly, the judge may call on the defendant to address the claimant's points first if the issue is purely one of law or of interpretation. The party with the right to begin would traditionally make an opening speech, explaining the background of the dispute and the issues. Its main function was once to acquaint the court with the nature of the case that it had to try. However, where the judge is already familiar with the case, the court will tend to dispense with, or considerably curtail, the opening speech (PD 28 para.8.2 and PD 29 para.10.2).
- 22.32 After the opening speech the claimant (or the defendant, if they have the right to begin) will call their evidence. A party's evidence may consist of witness testimony, witness statements (if the court has directed that they should stand in the place of evidence-in-chief), hearsay, documents or real evidence. Other parties are entitled to cross-examine the witnesses. A witness who has been cross-examined may be re-examined by the advocate of the party who called them on the matters that were dealt

with in cross-examination. Where there is more than one claimant, they will present their cases in the order in which they appear on the record.

- 22.33 At the conclusion of the claimant's case, the defendant may make a submission of no case to answer, the nature of which is explained below. If no such submission is made, or if it has been rejected, the defendant will be called upon to present their case. Although the defendant may be allowed to make an opening speech, this is now quite rare. The defendant will call their evidence in much the same way as the claimant. Where there is more than one defendant, they will present their cases in the order in which they appear on the record.
- 22.34 If the defendant has called evidence, the defendant's closing speech will be made before that of the claimant. In their closing speeches the advocates will draw the court's attention to different aspects of the evidence, address the inferences to be drawn from the evidence and develop their legal arguments. The court may direct that closing submissions should be made in writing.

Footnotes

- 60 On the convergence of the pre-trial and trial processes see Ch.1 The Overriding Objective paras 1.89 ff.
- 61 *Jones v National Coal Board [1957] 2 QB 55; [1957] 2 All ER 155, CA; Brassington v Brassington [1961] 3 All ER 988, CA*; and *Re R (Children) [2001] EWCA Civ 1880*.
- 62 *Shaw v Grouby [2017] EWCA Civ 233* [45]–[46].
- 63 *Hayes v Transco Plc [2003] EWCA Civ 1261*.

Burden and Standard of Proof

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 22 - Trial and Evidence

Burden and Standard of Proof

Burden of proof

- 22.35 In the English adversarial system, judicial responsibility for ascertaining the facts is limited to reaching a decision on the basis of the evidence presented by the parties.⁶⁴ Given that the court cannot find facts beyond what the evidence called by the parties has proved, the law must provide answers to three essential questions: first, which party will lose on the point if the court fails to be persuaded of the existence of a fact in issue (the burden of persuasion); second, which party has to come forward and adduce evidence in support of a fact in issue (the burden of adducing evidence); and third, what level of proof is required in order to persuade the court of the existence of a fact in issue (the standard of proof).⁶⁵

Burden of persuasion

- 22.36 The burden of persuasion, also known as the probative burden, requires the party who carries it to prove their case to the appropriate standard of proof.⁶⁶ They must persuade the court, normally on the balance of probabilities, of the truth of the facts that they are required to establish in order to make out their case. If the party fails to discharge this burden, the court must decide against them. The party who carries the burden of persuasion may be said to carry the risk of error, or of non-persuasion, because the court would have to find against that party in the event that the case remains unproven one way or the other. For instance, a claimant suing in respect of personal injury suffered in a car accident bears the burden of proving that the injury was caused by the accident. If they were unable to advance sufficient evidence to persuade the court that the injury resulted from the accident, their claim would be dismissed even if the accident was in fact the cause.

- 22.37 The burden of persuasion is carried with respect to particular issues. Failure to prove a particular fact in issue will not necessarily lead to losing the case as a whole. For instance, a defendant who wishes to plead frustration of a contract bears the burden of persuasion on this issue. However, even if such defendant fails to persuade the court that a frustrating event took place they may still win if the claimant fails to prove breach of contract, in respect of which the claimant bears the burden of persuasion. We should, therefore, speak of the burden of persuasion or the probative burden in relation to particular issues of fact. It is often the case, though, that the claimant carries this burden on all the issues.

Burden of adducing evidence

- 22.38 The burden of adducing evidence (or the evidential burden) is different from the burden of persuasion and involves a different technique for allocating the risk of error. Sometimes a party who wishes to raise an issue is required to adduce some evidence capable of supporting the existence of the particular fact in issue even though the burden of persuasion in respect of that issue rests on the opponent. If the party bearing the evidential burden in respect of a particular issue fails to adduce evidence capable of supporting the existence of that fact, the court would simply not entertain the issue.

22.39 Normally, the burden of adducing evidence coincides with the burden of persuasion. For instance, in a claim founded on contract the claimant will bear both burdens in respect of establishing breach of contract. If the claimant fails to adduce evidence which, if believed, could prove breach they will have failed to discharge the burden of adducing evidence, and consequently also the burden of persuasion. The defendant would then be entitled to argue that there is no case to answer and that the claim should be dismissed without calling them to present their own evidence in rebuttal of the claimant's allegations.⁶⁷

22.40 However, as just noted, in certain situations, a party may bear only a burden of adducing evidence. For instance, a claimant who brings an action for personal injury following an accident bears the burden of persuading the court that the injury was caused by the accident. Suppose that the claimant proves that they suffered an accident and that soon afterwards they developed a certain disability. If the defendant admits as much but wishes to allege that the disability had been latent and merely coincided with, but was not caused by, the accident, they have to adduce some evidence supporting such an allegation. If the defendant does not adduce evidence suggesting (as distinguished from proving) the presence of a latent disability, the court would exclude the possibility of a latent disability from consideration. But if the defendant does produce such evidence, it is up to the claimant to disprove the latent disability allegation because the claimant bears the burden of persuasion on the issue of causation.⁶⁸

22.41 Just as the burden of persuasion carries with it a risk of error, so does the burden of adducing evidence. To revert to the last illustration, the fact that the defendant cannot come up with some evidence of a latent disability does not necessarily mean that there was no latent disability. It is quite possible that it was present nonetheless and, moreover, that if the claimant had been required to disprove it, they would not have been able to do so.

Burdens of persuasion and of adducing evidence are constant

22.42 Neither the burden of persuasion nor the evidential burden shifts during the course of the trial. The party bearing it must discharge it or face the consequences. What does change during the course of the trial is the need to respond to the opponent's case. For instance, if the defendant carries the burden of adducing evidence and the claimant the burden of persuasion with regard to a particular issue, then the claimant need do nothing unless and until the defendant has discharged their burden by adducing sufficient evidence on the issue. Once this has happened, the claimant must discharge their probative burden. But this is not because the defendant's burden has somehow passed on to the claimant. It is simply because the need to discharge the burden of persuasion only arises when the defendant has discharged their evidential burden.

The incidence of burdens—a matter of substantive law

22.43 The allocation of the risk of error in proceedings concerning rights is not a mere matter of procedure. It is fundamentally a moral and political decision for the legislature, though the parties are in principle free to stipulate in a contract a different distribution of the burdens. It is not possible or desirable to account here for the incidence of the burden of proof in each and every type of claim. For that purpose, the relevant substantive law must be consulted. But some general observations can be made.

22.44 The general rule is that the party seeking a court judgment or order bears the burden of persuasion to establish the fact giving rise to their alleged right. Normally, "he who asserts must prove, not he who denies".⁶⁹ Thus, the claimant must prove on the balance of probabilities the facts that give rise to the right to obtain the remedy or the order sought (unless, of course, the facts are admitted). Normally, the claimant will also bear the burden of adducing evidence on the disputed facts.

- 22. 45** However, “he who asserts must prove” is only a general principle to which there are many exceptions, because it is not always just that the claimant should bear these burdens. We have seen that in a personal injury claim, the defendant must adduce evidence of a latent injury before the issue would be considered. If this were not so, the claimant would have to adduce evidence that they did not suffer from any latent injury. This would be unduly burdensome, since it is inherently difficult to find evidence for a negative proposition. A claimant who had no reason to suspect a latent injury would have no evidence of absence of injury. If a claimant had to disprove all conceivable factors that could defeat their entitlement, much court time would be wasted in vain. Placing the burden of adducing evidence on the defendant in respect of such issues is therefore dictated by considerations of justice and by the need to ensure a proportionate use of resources. The imposition of the burden of adducing evidence on a party who does not bear a probative burden on a particular issue prevents that party from troubling their opponent and the court with wholly spurious allegations.
- 22. 46** Sometimes, justice requires that the burden of persuasion should itself be distributed between the claimant and the defendant on different issues. A claimant suing on contract must prove the contract, its breach and the damage suffered. However, frustration releases the defendant from the contractual obligation. The claimant has no duty to disprove frustration. The defendant bears the burden of adducing evidence, and of persuasion, on this issue. On the other hand, self-induced frustration does not release the defendant. On this issue the burden of persuasion rests on the claimant, who must prove the allegation that the frustration was self-induced if they wish to deny the defendant the benefit of a frustrating event.⁷⁰ In one case, the claimant sued in respect of damage caused by the failure of pipes installed which were not compliant with the contract. The defendants denied causation by alleging that the failure would have occurred even if they had installed the correct pipes. The Court of Appeal held that the defendants had to prove this allegation on the balance of probabilities.⁷¹
- 22. 47** The allocation of the burden of proof in the manner just described is governed by considerations of justice concerning the distribution of the risk of error between the opposing parties. Precisely because both parties are entitled to equal protection from the risk of error, it makes sense to hold that while one party runs a higher risk on one issue, the opponent should bear the risk on another issue. There are, however, no general rules about allocating the burden of proof between the parties.⁷²
- 22. 48** The incidence of the burdens depends on the nature of the particular rights and duties in question, and it is determined by legislation or common law. It will turn on many factors, such as whether one of the parties deserves special consideration because of some economic, social or personal disadvantage, or because of a general policy to discourage a certain activity.⁷³ Sometimes the onus of proof may be imposed on the defendant because of the inherent dangerousness of an activity.⁷⁴ Sometimes the allocation of the burden of proof is dictated by express statutory provision.⁷⁵ For instance, the **Employment Rights Act 1996 s.98** establishes that in an action for unfair dismissal the employee bears the burden of persuasion to establish that they were dismissed. But it is for the employer to prove that the dismissal was in accordance with the legislative criteria of fair dismissal.
- 22. 49** Occasionally, the court needs to step in to decide the burden of proof as a matter of policy. The general rule has always been that in an action to restrain a defendant from using confidential information, the burden is on the claimant to identify the confidential information and to prove on the balance of probabilities that they communicated the information to the defendant on a confidential basis.⁷⁶ Thus, a client who wishes to sue their solicitor for breach of confidence bears the burden of persuasion to establish that they communicated information to the solicitor on a confidential basis. But what if the client wishes to forestall any possibility of future breaches of confidence by restraining the solicitor from representing a new client with whom the former client has a conflict of interest? It has been held that once a client has established that their former solicitors were in possession of confidential information, the solicitors come under a burden to persuade the court that there was no risk that the information would come into the possession of a new client of the solicitors who has a conflict of interest with the former client.⁷⁷

Standard of proof

22. 50 In order to discharge the burden of persuasion a party needs to persuade the court of the truth of their allegation, but there are many degrees of persuasion. Belief in the truth of a proposition can be held with various degrees of conviction. Therefore, the law needs to specify the standard to which proof is required. There are two common standards in English law: proof on the balance of probabilities and proof beyond reasonable doubt. The first standard requires that the proponent show that it is more likely than not that their version of the facts is right, while the latter requires the proponent to ensure that the court is left with no reasonable doubt as to the correctness of the alleged facts.
22. 51 In civil cases, proof on the balance of probabilities is all that is required in order to discharge the burden of persuasion. This standard is dictated by considerations of justice. Given that all are equal before the law, there is normally no justification for discriminating between opposing litigants and imposing on one a substantially higher risk of error than on the other. It would be unjust, for instance, to require personal injury claimants to prove their claims beyond reasonable doubt, because it would mean that personal injury claims would have to be dismissed as long as the court has any lingering doubt, thus imposing on personal injury claimants a much higher risk of error than on their opponents. Any deviation from an even distribution of the risk of error will amount to treating litigants unequally and must therefore be justified.
22. 52 Requiring claimants to prove their case on the balance of probabilities is dictated by the need for a tiebreak in situations where at the end of the trial the court concludes that the claimant's and the defendant's allegations are equally probable. Since the matter cannot be left hanging in the air, the law must adopt a method for deciding it. Bearing in mind that justice requires that litigants should be treated on an equal footing, the tiebreak must impose no greater burden on one of them than is absolutely necessary for the purpose of reaching a decision in the event of doubt. Thus, if at the end of the trial the court concludes that the opposing allegations are equally probable, the court will not have been persuaded on the balance of probabilities of the correctness of the allegation in question. In that event, it must find against the party carrying the burden of persuasion. Once the balance has tipped in favour of the party carrying the burden on a particular issue, the court must decide in favour of that party on that issue. However, the court should not take a "mathematical" or "pseudo-mathematical" approach to the balance of probabilities.⁷⁷
22. 53 It is believed by some that the civil standard should be higher when allegations of criminal conduct are made. It is said that allegations of fraud or other serious misconduct should be proved to a higher standard than a mere balance of probabilities. This view is contrary to principle and is liable to cause injustice. As already noted, the standard of proof on the balance of probabilities represents a just distribution of the risk of error between opposing parties who are entitled to be treated as equals in procedure. If grave allegations required proof to a higher standard, it would mean that the parties making such allegations would carry a higher risk of error. This would be unjust, for there is no reason why the victim of fraud, of a brutal assault or of a sexual attack should have a heavier burden of proof to discharge in a civil context. This is particularly so given that the liberty of such a defendant is not at stake in civil proceedings.
22. 54 The court has time and again stressed that no matter how serious the allegations, the standard of proof "is ... finite and unvarying".⁷⁸ Lord Hoffmann elaborated this point in *Secretary of State for the Home Department v Rehman*:
- "The civil standard of proof always means more likely than not. The only higher degree of probability required by the law is the criminal standard. But, as Lord Nicholls of Birkenhead explained in *In re H (Minors) (Sexual Abuse: Standard of Proof) [1996] AC 563, 586*, some things are inherently more likely than others. It would need more cogent evidence to satisfy one that the creature seen walking in Regent's Park was more likely than not to have been a lioness than to be satisfied to the same standard of probability that it was an Alsatian. On this basis, cogent evidence is generally required to satisfy a civil tribunal that a person has been fraudulent or behaved in some other reprehensible manner. But the question is always whether the tribunal thinks it more probable than not."⁷⁹

- 22.55 Lord Brown sought to put paid to the idea that the gravity of the allegation requires proof to a higher standard in *R (D) v Life Sentence Review Comrs (Northern Ireland)*:

“If the evidence satisfies a tribunal charged with deciding questions on the balance of probabilities that an allegation made against *A* is more likely than not to be true—notwithstanding whatever unlikelihood there may be in *A* having acted as alleged given the serious adverse consequences to him likely to result from so acting—then in my judgment it would be quite wrong for that tribunal to decide the question in *A*'s favour merely to save him from the serious consequences of a finding against him—for example, to save a bank manager from a finding of dishonesty.”⁸⁰

It follows that the civil standard of proof on the balance of probabilities should apply in all civil cases, even if the case involves an allegation of fraud or of a criminal offence.⁸¹

- 22.56 To establish a case on the balance of probabilities the proponent must sometimes do more than simply show that their case is more probable than their opponent's, because this will not suffice if their case is highly improbable albeit less improbable than their opponent's. They must also persuade the court that it is credible. The point is illustrated by the House of Lords decision in *Rhesa Shipping Co SA v Edmunds*.⁸² The claimants were the owners of a ship that ruptured and sank. They sued their insurers for the loss and had to prove on the balance of probabilities that the ship was lost due to an insured risk—i.e. perils of the seas. The cause of the sudden rupture was unknown, but the ship owners alleged that it must have been caused by some accident at sea, such as a collision with a submerged object. The insurers argued that the rupture was due to the ship's unseaworthiness, which was not an insured risk. The trial judge considered both explanations to be improbable, but concluded that the insurers' unseaworthiness hypothesis was even less probable than the shipowners' submerged object hypothesis, and therefore decided in favour of the shipowners. The House of Lords held that the judge was wrong to conclude that the shipowners had established their case on the balance of probabilities. Lord Brandon said:

“If a judge concludes, on a whole series of cogent grounds, that the occurrence of an event is extremely improbable, a finding by him that it is nevertheless more likely to have occurred than not, does not accord with common sense.”⁸³

Accordingly, to satisfy the standard of proof on the balance of probabilities the proponent must establish first, that their allegation is more probable than their opponent's and, second, that it is sufficiently probable to be credible, and not merely that it is a little more probable than a competing highly improbable allegation.

- 22.57 Although at common law the required standard of proof in civil proceedings is the balance of probabilities, legislation may provide otherwise. For example, regulatory and similar disciplinary tribunals may be required to apply different standards of proof depending on the construction of the relevant rules.⁸⁴ Previously, applications for an anti-social behaviour order (ASBO) under the *Crime and Disorder Act 1998 s.1* required the claimant to prove beyond reasonable doubt that the defendant acted in an anti-social manner, even though such proceedings were not criminal proceedings for the purposes of the ECHR art.6.⁸⁵ This was because an ASBO intruded on the freedom of the subject for the protection of others, with whom the subject may have no specific legal relationship, and therefore had enough in common with criminal penalties to justify the imposition of the criminal standard. However, ASBOs have now been replaced by a new civil “injunction to prevent nuisance and annoyance”, or IPNA, pursuant to the *Anti-Social Behaviour, Crime and Policing Act 2014*,⁸⁶ which requires proof of anti-social conduct only to the civil standard.⁸⁷

Presumptions

Nature of presumptions

- 22. 58** Presumptions represent techniques for distributing the risk of error by means of a conditional allocation of the burden of persuasion or of the burden of adducing evidence. A presumption is a rule of law, which provides that on proof of one fact (the “basic fact”) by the proponent, the court is duty-bound to find the existence of another fact (the “presumed fact”), unless the opponent proves the contrary or, as is sometimes the case, unless the opponent adduces evidence to the contrary.
- 22. 59** The presumption of legitimacy is illustrative of the mechanism. A person is presumed to be the legitimate child of another person if they are the natural child of that person, and if they were born during their mother’s marriage to that person. The task of establishing legitimacy is assisted by this presumption in that if a proponent proves that they were born while their mother was married, they are presumed to be legitimate, unless the opponent proves the contrary. Birth during wedlock constitutes the basic fact of the presumption. The person alleging legitimacy bears the burden of persuasion on this issue. If they do not discharge this burden, the presumption does not bite. But if they do, the court will be duty-bound to conclude legitimacy unless the opponent proves, on the balance of probabilities, that the child was not the son of the mother’s husband.⁸⁸ There are therefore two avenues open to a person denying legitimacy: they could deny that birth occurred during wedlock, on which point the proponent bears the burden of persuasion, or they could try and establish that the proponent was not the natural child of their purported father, on which point the opponent bears the burden of persuasion.
- 22. 60** Instead of distributing the burden of persuasion, a presumption may merely allocate the burden of adducing evidence. This is the case with the presumption *omnia praesumuntur rite esse acta*, also known as the presumption of regularity. Suppose that the claimant has to establish that a certain person who purported to act as a public officer was duly appointed. An appointment is valid if, first, it was made by an authorised body and, second, if it was made in the legally prescribed form. The claimant carries the burden of persuasion on both issues. But they are assisted by the said presumption of regularity, which holds that if they show that the person in question purported to act in the requisite capacity (the basic fact), the court will find that that person was duly appointed (the presumed fact), unless the defendant produces some evidence from which lack of authority could be inferred. Once the defendant has done so, the court will decide in favour of the claimant if, and only if, they prove a valid appointment on the balance of probabilities.
- 22. 61** Rules of presumption specify the consequences flowing from proof of their basic facts. However, it must be borne in mind that the court does not deliver its findings piecemeal. It does not stop to consider whether the claimant has proved a basic fact before the defendant is required to rebut the presumed fact. The court will decide the case only at the end of the trial, after the parties have presented all the evidence they wish to present. This has important practical consequences for the presentation of the case. For instance, a claimant who has to establish the validity of an official act would be unwise simply to rely on the presumption of due appointment and hope that the defendant would be unable to advance evidence of lack of authority. They should also try to adduce evidence of valid appointment. It follows that while presumptions are of great help, a litigant would be well advised not to rest their entire case upon a presumption, if they can possibly avoid it.
- 22. 62** In the discussion so far, the term “presumption” has been used to describe a rule of law which lays down that upon the proof of a basic fact (or sometimes merely adducing evidence of a fact) the court must, not just may, come to a certain conclusion, unless the contrary is established (or evidence is adduced for the contrary proposition). The effect of individual presumptions is easily described by outlining the basic and the presumed facts, by stating the type of burden in relation to each of them and by indicating which parties bear the burden.

22. 63 Unfortunately, the term “presumption” is also used in a variety of other senses. It has been said that presumptions are divided into three groups: presumptions of fact, rebuttable presumptions of law and irrebuttable presumptions of law. The term presumption of fact is used for situations where as a matter of common sense the court may draw a certain factual inference from the existence of a certain set of facts. Presumption of fact thus refers to circumstances that commonly occur in conjunction. In this sense one may cite the presumption of continuance, whereby the court may infer the existence of a state of affairs from its existence at an earlier point in time. For instance, the court may infer that a person was alive at a certain time from the fact that they were alive a couple of days earlier. It was held in one case that there was a presumption that traffic lights continued to be in proper working order.⁸⁹ However, such presumptions amount to no more than common sense generalisations concerning the normal course of events. They involve no rule of law whatsoever.
22. 64 The term irrebuttable presumption is sometimes used to describe rules which lay down that upon the proof of certain facts the court is duty-bound to come to a certain conclusion, irrespective of the true state of affairs. For example, it is an irrebuttable common law presumption that all persons know the law. However, such usage is spurious. The “presumption” that all persons know the law does not purport to indicate who should prove what, or how the risk of error should be distributed between the parties. It is merely an awkward way of expressing a substantive rule of law that ignorance of the law is no defence. Accordingly, irrebuttable presumptions of law serve no useful purpose and have no place in the law of procedure and evidence.
22. 65 The third category of presumptions, the rebuttable presumption of law, which consists of a rule that upon the proof of a basic fact the court must (not just may) come to a certain conclusion, is the only useful category of legal presumptions.

Presumptions are governed by substantive law

22. 66 Like the rules determining the incidence of the burden of persuasion or of the burden of adducing evidence, presumptions are rules of substantive law. The substantive law uses presumptions to promote certain policies. For example, the presumption of legitimacy upholds family relationships where a formal status of marriage exists. Sometimes presumptions are designed to avoid uncertainty. For instance, the [Law of Property Act 1925 s.184](#) states that where two or more persons have died in circumstances rendering it uncertain which survived the other, it shall be assumed that they died in order of seniority. The presumption of death, discussed below, fulfils a similar function in that it enables the court to assume death after a seven-year absence.
22. 67 The precise effect of a particular presumption can be sensibly discussed only in the legal context in which it arises and in the light of the rules and policies of the relevant substantive law. A cursory look at the presumption of res ipsa loquitur is sufficient to illustrate this point.⁹⁰ The presumption assists proof of negligence. Its basic factual preconditions are:
- (a)that the claimant suffered harm from an object or an activity which was under the exclusive control of the defendant, and
 - (b)that the incident was of a kind that normally happens through lack of care by those in control.

Upon proof of these basic facts the court will infer negligence, unless the defendant overcomes the presumption. What a defendant has to do to overcome the presumption is, however, unclear. Some cases suggest that this is not a rule of law but merely a common sense generalisation. A second view is that the presumption casts the evidential burden on the defendant so that all they have to do in order to discharge it is to adduce evidence capable of supporting an inference that they were not negligent. The third view is that, on proof of the basic facts, the burden of persuasion is imposed on the defendant to disprove negligence on the balance of probabilities. Plainly, the law of procedure cannot offer any help in deciding between these different interpretations of the presumption. The solution must be found in the relevant area of substantive law. It is conceivable that policy considerations would dictate that this presumption should have different consequences in different areas of the law.

Presumptions are independent of probative weight

22. 68 It is important to distinguish between the probative force of the basic fact of a presumption and the legal effect that attaches to it. A presumption rule only indicates who should prove what and who should lose if the court fails to be persuaded of the truth of a proposition. Such a rule directs the court to come to a certain conclusion following proof of the basic fact regardless of its probative weight. Of course, the basic facts may possess some probative force, but this will not be on account of the presumption but on account of their actual probative significance in the circumstances of the case. To illustrate this point we may refer again to the presumption of legitimacy. The fact of birth during lawful wedlock may well have a strong probative force, but such force would depend on the circumstances of the husband and wife in question and not on the presumption. The couple may, for instance, have been on bad terms and living apart, in which case the fact of birth in lawful wedlock would have very little probative significance.

22. 69 A further illustration is provided by the presumption of death.⁹¹ A presumption of death arises upon proof of:

- (a)the fact that a particular person was not heard of for seven years;
- (b)that persons who were likely to hear from them, if they were alive, have not had an indication of their existence; and
- (c)that due enquiries have been made.

Upon proof of these basic facts, death will be presumed unless the opponent, who carries an evidential burden, adduces evidence from which the contrary might reasonably be inferred. The inference of death in the absence of evidence to the contrary is dictated by the presumptive effect of the rule, not by the probative force of the basic facts. If the basic facts were logically sufficient to lead to the conclusion of death, the party seeking to establish death would not need to wait until the end of the seven-year period. They could instead advance the basic facts as proof, rather than rely on the legal presumption.

No case to answer

22. 70 At the end of the claimant's case the defendant may submit that the claimant has not established a sufficient case to demand an answer and that therefore the judge should decide against the claimant there and then. This procedure has a superficial attraction: if the court accepts the submission it means that the claim is bound to fail, and that it is better to stop it without further waste of time and resources. However, this process is fraught with risk because if the court does accept the submission, and dismisses the claim, and on appeal it is found that there *was* a case to answer, then the case will have to be remitted for a new trial by a different judge and the whole process will have to start all over again. Quite apart from the risk of misjudging the sufficiency of the claimant's evidence, it is not always just to reject a claim without calling on the defendant to respond, even if the claimant's case appears weak at that stage. Some allegations simply call for an answer, even if only to test the defendant's willingness to advance their own case. Lastly, entertaining a "no case to answer" submission requires the court to form a view of the parties' respective cases, and then suspend it, if it decides that the trial should continue, in order to be able to keep an open mind.

22. 71 In order to avoid these difficulties, a practice developed under the pre-CPR system whereby a defendant who sought to make such a submission would be asked to elect whether they wished to call evidence. Only if the defendant elected not to call evidence would the court give judgment on the basis of the claimant's case.⁹² There was some uncertainty after the CPR came into force as to the correct approach to be taken to a submission of no case to answer. At one point it was said that under the CPR a judge is not required to put the defendant to their election.⁹³ But it was never satisfactorily explained why this should be so, seeing that considerations of efficiency were inconclusive.

22. 72

It is now established that the court should not entertain a submission of no case to answer at the end of the claimant's case. If the defendant is confident that they have a complete answer to the claimant's case without proceeding with their own case, they are of course free to choose not to call evidence of their own. A defendant will not normally be allowed to first find out whether the court is minded to accept a no case to answer argument and only then to elect whether to adduce evidence. The correct approach was set out by Brooke LJ in *Graham v Chorley BC*,⁹⁴ where he said the court must put the defendant to its election before entertaining a plea of no case to answer. This approach ensures that the court does not deprive the claimant of the opportunity of asking the judge to compare their case with that of the defendant. If the court decides that there is no case to answer without putting the defendant to their election, Brooke LJ explained, "the claimant is simultaneously being deprived of the opportunity of making a weak case stronger by eliciting favourable evidence from the defendants' witnesses and of the opportunity of inviting the court to draw adverse inferences from the defendants' failure to give evidence (because the judge has not put them to their election)".⁹⁵ It may be noted here that this view represents a shift from the traditional common law view that in the English adversarial system the claimant has to make out their case without help from the defendant.

22.73 There may, however, be rare cases where it would be appropriate to depart from the general rule and entertain a plea of no case to answer without putting the defendant to their election. It was held in *Bentley v Jones Harris & Co*⁹⁶ that where a judge upon hearing and assessing a claimant's evidence concluded either on the application of the defendant or of their own motion that the claim had no prospect of success, they were entitled to give judgment in the same way as if there had been an application for summary judgment under CPR 24.2 (or for strike-out under CPR 3.4(2)).⁹⁷ Where it is clear that the claim cannot possibly succeed, the court is entitled to rule on a submission of no case to answer without putting the defendant to their election, as where the claimant's case was founded entirely on the claimant's evidence, which the court found wholly unbelievable.⁹⁸

22.74 Situations justifying entertaining a plea of no case to answer are bound to be rare because weak claims should have been disposed of before trial by summary judgment under CPR 24 or by striking out under CPR 3.4(2) on the grounds that the statement of case disclosed no reasonable grounds for bringing the claim.⁹⁹ In those rare cases where the court does decide to entertain a plea of no case to answer, the test of whether the claim should be dismissed without calling on the defendant to present their case is very strict, as was explained by Simon Brown LJ in *Benham Ltd v Kythira Investments Ltd*:

"[H]ave the claimants advanced a prima facie case, a case to answer, a scintilla of evidence, to support the inference for which they contend, sufficient to call for an explanation from the defendants? That it may be a weak case and unlikely to succeed unless assisted, rather than contradicted, by the defendant's evidence, or by adverse inferences to be drawn from the defendant's not calling any evidence, would not allow it to be dismissed on a no case submission."¹⁰⁰

22.75 In *Miller v Cawley*,¹⁰¹ it was said that the test was that of a "reasonable prospect of success". However, while a reasonable prospect of success may be appropriate in applications for summary judgment, it may not be appropriate in the present context since the question here is whether the claimant has done enough to entitle them to put the defendant to their election. The *Benham* test has now been endorsed by the Court of Appeal in *Graham v Chorley BC*.¹⁰² It follows that a plea of no case to answer is likely to be entertained only in those cases where the claimant's case has suffered a serious collapse. Needless to say, where the defendant has been put to their election and decided not to call evidence, the court must determine whether the claimant proved their claim on the balance of probabilities.

Footnotes

64 See discussion in Ch.12 Case Management Pt I paras 12.21 ff.

- 65 For detailed discussion of the burden and standard of proof see: H. Malek (ed.), Phipson on Evidence, 20th edn (London: Sweet & Maxwell, 2021) Ch.6; and for discussion in the criminal context see P. Roberts and A. Zuckerman, Criminal Evidence, 2nd edn (Oxford: Oxford University Press, 2010) Ch.6.
- 66 The standard of proof is discussed below at paras 22.50 ff.
- 67 For further discussion of submissions of “no case to answer” see below paras 22.70 ff.
- 68 *Purkess v Crittenden* (1965) 114 C.L.R. 164; and A. Ligertwood and G. Edmond, Australian Evidence: a principled approach to the Common Law and Uniform Acts, 6th edn (New South Wales: LexisNexis Butterworths, 2017) paras 6.2-6.8.
- 69 *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp* [1942] AC 154, 174.
- 70 *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp* [1942] AC 154; *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal* [1983] 1 AC 854 at 909; and *FC Shepherd & Co Ltd v Jerrom* [1986] 3 All ER 589 at 597.
- 71 *BHP Billiton Petroleum Ltd v Dalmine Spa* [2003] EWCA Civ 170.
- 72 There is the supposed rule that one party must establish the elements of liability while the other party must establish the elements negating liability or those proving a defence, but no such distinction is tenable. See: J. Stone, “Burden of Proof and the Judicial Process” (1944) 60 L.Q.R. 260; and A. Zuckerman, “The Third Exception to the Woolmington Rule” (1976) 92 L.Q.R. 402.
- 73 *West v Bristol Tramways* [1908] 2 KB 14.
- 74 For example, under the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading 1924 (also known as the Hague Rules 1924), in cases where loss or damage has resulted from the unseaworthiness of a vessel, the burden of proving the exercise of due diligence is on the carrier: art.IV r.1; and *The ‘Bunga Seroja’* [1999] 1 Lloyd’s Rep. 512.
- 75 *GD Searle & Co Ltd v Celltech Ltd* [1982] F.S.R. 92.
- 76 *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222, HL; and C. Hollander and S. Salzedo, Conflicts of Interest, 5th edn (London: Sweet & Maxwell, 2016) pp.5-7. See also *Glencairn IP Holdings Ltd v Product Specialities Inc* [2020] EWCA Civ 609; [2021] Ch 201 in which the Court of Appeal considered the question of burden for solicitors against their former opponents.
- 77 *Re A (Children) (Care Proceedings: Burden of Proof)* [2018] EWCA Civ 1718 [48]-[63].
- 78 *R (on the application of D) v Life Sentence Review Comrs (Northern Ireland)* [2008] UKHL 33; [2008] 4 All ER 992 [28]. For discussion H. Malek (ed.), Phipson on Evidence, 20th edn (London: Sweet & Maxwell, 2021) paras 6-56-58.
- 79 *Secretary of State for the Home Department v Rehman* [2001] UKHL 47; [2003] 1 AC 153; [2002] 1 All ER 122, [55]. See also *R (D) v Life Sentence Review Comrs (Northern Ireland)* [2008] UKHL 33; [2008] 4 All ER 992 [28].
- 80 *R (D) v Life Sentence Review Comrs (Northern Ireland)* [2008] UKHL 33; [2008] 4 All ER 992 [46]. See also *Hornal v Neuberger Products Ltd* [1957] 1 QB 247 at 266-267; [1956] 3 All ER 970 at 978-979, CA, where Morris LJ said: “A court will not be deterred from a conclusion because of regret at its consequences: a court must arrive at such conclusion as is directed by the weight and preponderance of the evidence”.
- 81 *Hornal v Neuberger Products Ltd* [1957] 1 QB 247; [1956] 3 All ER 970, CA. See also *R (AN) and The Mental Health Review Tribunal (Northern Region) v The Secretary of State for the Home Department* [2005] EWCA Civ 1605; *Re B (Children) (Sexual Abuse: Standard of Proof)* [2008] UKHL 35; [2009] 1 AC 11; [2008] 4 All ER 1; *Re D (Children) (Non-Accidental Injury)* [2009] EWCA Civ 472; and *Jones v Birmingham City Council* [2018] EWCA Civ 1189 [57]-[58]. See contra H. Stratton, “Perfectly Safe, Five Times out of Six: The Briginshaw Principle and Its Paradoxes” (2019) 42(2) University of New South Wales Law Journal 376.
- 82 *Rhesa Shipping Co SA v Edmunds (“The Popi M”)* [1985] 2 All ER 712; [1985] 1 W.L.R. 948, HL.
- 83 *Rhesa Shipping Co SA v Edmunds (“The Popi M”)* [1985] 2 All ER 712 at 718; [1985] 1 W.L.R. 948 at 956, HL.
- 84 For examples see H. Malek (ed.), Phipson on Evidence, 20th edn (London: Sweet & Maxwell, 2021), para.6-59.
- 85 *R (McCann) v Manchester Crown Court* [2002] UKHL 39; [2003] 1 AC 787.
- 86 That is, with effect from 23 March 2015. From that date, an existing order dealing with anti-social behaviour cannot be varied to extend its duration or vary any of its provisions. After five years, any existing orders which are still in force will be automatically treated as IPNAs: the *Anti-Social Behaviour, Crime and Policing Act 2014* s.21(5). The procedure governing applications for such orders and injunctions is set out in CPR 65.
- 87 The *Anti-Social Behaviour, Crime and Policing Act 2014* s.1.
- 88 Family Law Reform Act 1969 s.26.
- 89 *Tingle Jacobs & Co v Kennedy* [1964] 1 All ER 888; [1964] 1 W.L.R. 638.

- 90 See *Lloyd v West Midlands Gas Board* [1971] 2 All ER 1240; [1971] 1 W.L.R. 749, CA. For discussion of the authorities
on this point see: H. Malek (ed.), Phipson on Evidence, 20th edn (London: Sweet & Maxwell, 2021) paras 6-32-33.
91 **Presumption of Death Act 2013**; and H. Malek (ed.), Phipson on Evidence, 20th edn (London: Sweet & Maxwell, 2021)
6-27.
- 92 *Alexander v Rayson* [1936] 1 KB 169.
- 93 For a discussion of this view see *Graham v Chorley BC* [2006] EWCA Civ 92 [28]. See also 2025 WB 32.1.6.
- 94 *Graham v Chorley BC* [2006] EWCA Civ 92. See also *Benham Ltd v Kythira Investments Ltd* [2003] EWCA Civ 1794;
[2004] C.P. Rep. 17 [32]; and *Boyce v Wyatt Engineering* [2001] EWCA Civ 692 [4].
- 95 *Graham v Chorley BC* [2006] EWCA Civ 92 [38].
- 96 *Bentley v Jones Harris & Co* [2001] EWCA Civ 1724; [2001] All ER (D) 37 (Nov).
- 97 *National Westminster Bank Plc v Rabobank Nederland (Application to Strike Out)* [2006] EWHC 2959 (Comm), for a
comparison of no case to answer and striking out under CPR 3.4.
- 98 *Mullan v Birmingham City Council, The Times*, 29 July 1999; and *Boyce v Wyatt Engineering* [2001] EWCA Civ 692;
[2001] All ER (D) 16 (May).
- 99 See Ch.9 Disposal Without Trial paras 9.54 ff, for discussion of summary judgment; and paras 9.46 ff, for discussion
of the jurisdiction to strike out on the grounds that the statement of case disclosed no reasonable grounds for bringing
the claim.
- 100 *Benham Ltd v Kythira Investments Ltd* [2003] EWCA Civ 1794; [2004] C.P. Rep. 17 [39]. See also *Boyce v Wyatt
Engineering* [2001] EWCA Civ 692 [4].
- 101 *Miller v Cawley* [2002] EWCA Civ 1100; [2002] All ER (D) 452 (Jul).
- 102 *Graham v Chorley BC* [2006] EWCA Civ 92 [30].

Admissibility

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 22 - Trial and Evidence

Admissibility

- 22.76 Contested facts may only be proved by admissible evidence. The test of admissibility is partly a question of fact and partly a question of law. Only relevant evidence is admissible. Relevance is a matter of fact not law, as we shall presently see. However, admissibility also depends on legal criteria, in that the evidence must not fall foul of an exclusionary rule and in that it must make sufficient contribution to justify its reception in legal proceedings.¹⁰³ The requirement of sufficiency of probative contribution is now governed by the overriding objective and by [CPR 32.1\(2\)](#), which empowers the court to exclude evidence that is otherwise admissible.

Relevance

- 22.77 Relevance is a pre-condition of admissibility. Stephen's definition of relevance can hardly be improved: relevance exists when "any two facts are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present or future existence or non-existence of the other".¹⁰⁴ The test of relevance is concerned with the potential, not actual, contribution of the particular evidence to the issues. To be relevant the evidence must be such that if believed it could affect the court's conclusion regarding a fact in issue. The test of relevance applies not only at the trial in the context of admissibility, but whenever the court is asked to make a decision about evidence. Questions of relevance may arise, for instance, at the disclosure stage, because irrelevant material does not need to be disclosed.¹⁰⁵

Exclusionary rules

- 22.78 Although in the past there were numerous exclusionary rules,¹⁰⁶ few of them have survived in civil proceedings. The principal exclusionary rules have already been discussed—i.e. exclusion on grounds of legal professional privilege,¹⁰⁷ exclusion of self-incriminating evidence,¹⁰⁸ exclusion on grounds of public interest immunity¹⁰⁹ and exclusion of statements made without prejudice.¹¹⁰ These rules exclude evidence not because of lack of probative value but principally on public policy considerations. The vestigial effects of the old rule against hearsay are discussed in [Ch.20](#) in relation to witness statements, and below.¹¹¹ Here it is necessary to mention another rule, also much reduced in its importance: the rule in [*Hollington v F Hewthorn & Co Ltd*](#).
- 22.79 The Court of Appeal held in [*Hollington v F Hewthorn & Co Ltd*](#)¹¹² that the judgment of another tribunal, in that case a criminal court, was not admissible in subsequent proceedings as evidence of the facts on which such judgment was based. This meant that a criminal conviction could not be adduced in subsequent civil proceedings as evidence of the commission of the crime by the convicted person. The inconvenience created by this ruling was removed by the [Civil Evidence Act 1968 \(the 1968 Act\)](#) s.11. The [1968 Act](#) provides that in any civil proceedings the fact that a person has been convicted of an offence in the UK or by a court-martial shall be admissible in evidence for the purpose of proving that they committed that offence. However, s.11(2)

states that the person so convicted “shall be taken to have committed that offence unless the contrary is proved”. A previous conviction creates therefore a rebuttable presumption and no more.¹¹³

- 22.80 The 1968 Act did not abolish the rule, which, despite judicial criticism,¹¹⁴ is said to be good law.¹¹⁵ Nonetheless, there are numerous exceptions, most clearly in the case of inquisitorial proceedings,¹¹⁶ or in for foreign conviction in proceedings under the *Proceeds of Crime Act 2002*.¹¹⁷ Outside these exceptions, there is a corpus of authority in which the rule has been avoided. For instance, the Court of Appeal in *Secretary of State for Business, Enterprise and Regulatory Reform v Aaron*¹¹⁸ found in proceedings for the disqualification of directors under the *Company Directors Disqualification Act 1986* that the Secretary of State could rely upon a finding of fact made in a report prepared by the Financial Services Authority (FSA) in accordance with its statutory powers despite the 1968 Act not applying. However, the Court of Appeal held that in disqualification proceedings there was an implied exception to the strict rules of evidence on hearsay evidence, opinion evidence and the rule in *Hollington v F Hewthorn & Co Ltd*, and that the findings of the FSA were therefore relevant as proof of the facts on which they were founded. Such findings merely created a presumption which the director was entitled to rebut by evidence.

Discretion concerning improperly obtained evidence

- 22.81 The traditional position of English law was that the court had no discretionary power to exclude evidence merely because it disapproved of the means by which it was obtained. Lord Goddard CJ expressed this position in a criminal case:

“In their Lordships’ opinion, the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained.”¹¹⁹

On this view evidence was admissible regardless of the means used to procure it.¹²⁰ The position was similar in civil cases, as Lord Denning MR explained:

“So far as civil cases are concerned, it seems to me that the judge has no discretion. The evidence is relevant and admissible. The judge cannot refuse it on the ground that it may have been unlawfully obtained”¹²¹

ECtHR jurisprudence has accepted that by itself the admission of evidence that has been obtained through violation of ECHR rights does not infringe the right to a fair trial.¹²²

- 22.82 This position is, however, subject to serious qualification. In criminal proceedings the court has the power to exclude evidence if its admission would render the proceedings unfair. The *Police and Criminal Evidence Act 1984* s.78 expressly confers such power on a court trying a criminal case in relation to prosecution evidence.¹²³ It has been held that the exclusionary discretion under s.78 is an essential safeguard of the right to a fair trial.¹²⁴ Although no similar statutory provision exists in respect of civil cases, it is inconceivable that a court trying a civil case would not have a comparable discretion to exclude evidence if it were necessary to do so in order to safeguard the fairness of the process.¹²⁵ This discretion is further strengthened by the overriding objective, and by *CPR 32.1(2)*, which empowers the court to “exclude evidence that would otherwise be admissible”.

- 22.83 The court’s approach to improperly obtained evidence is illustrated by *Jones v University of Warwick*.¹²⁶ An investigator, retained by the defendants’ insurers to look into the claimant’s allegations, gained access to the claimant’s home under false pretences and secretly filmed her. The video seemed to undermine the claimant’s allegations. The claimant argued that the evidence should be excluded since it involved trespass and an infringement of her right to privacy under the ECHR art.8(1).

The Court of Appeal held that the manner in which the evidence was obtained was a relevant circumstance to be considered by the court when exercising its case management powers, especially under CPR 32.1(2).¹²⁷

- 22.84 Lord Woolf CJ explained that the court must balance the need to discourage unlawful behaviour against the need to establish the facts.¹²⁸

The Court of Appeal stressed that excluding evidence was not the only measure that the court may take in order to mark its disapproval of the means used for obtaining it. The court may make an adverse costs order against the offending party, for instance. In the event, the Court of Appeal approved the trial judge's decision not to exclude the evidence, but ordered the insurers to pay all the costs relating to the argument over admissibility. The court would also be entitled to take into account the insurers' conduct when determining the costs of the action, especially if it emerged that the claimant was not exaggerating her disability. Lord Woolf explained that in "giving effect to the overriding objective, and taking into account the wider interests of the administration of justice, the court must while doing justice between the parties, also deter improper conduct of a party while conducting litigation. We do not pretend that this is a perfect reconciliation of the conflicting public interests. It is not; but at least the solution does not ignore the insurer's conduct".¹²⁹

- 22.85 The reconciliation of these conflicting interests is rendered all the more tricky by the disturbing phenomenon of false or exaggerated personal injury claims.¹³⁰ On the one hand, it is necessary to discourage improper conduct and, as Lord Woolf stated in the last quoted passage, to promote the wider interests of the administration of justice, such as proportionate use of resources. On the other hand, however, combating the scourge of false evidence may well necessitate resort to trickery and subterfuge. For, plainly, those who set out to commit fraud through legal process are going to make it difficult for the defendant to discover the truth. It is therefore not surprising that the court has struggled to develop a coherent approach to surveillance evidence.

- 22.86 In *O'Leary v Tunnelcraft*,¹³¹ an application to adduce surveillance evidence was rejected because the video evidence had been available for some months prior to the application, and its admission at that late stage would add disproportionately to the length of the proceedings as it would necessitate fresh consideration of the case by the experts and might require an adjournment of the trial. The court felt that, although the application was made before the trial, it amounted to an "ambush", and if allowed it would place unfair pressure on the claimant's advisers and would not be manageable.

- 22.87 Surveillance evidence normally takes the form of a video, which is a document, and not a witness testimony. Documentary disclosure takes place ahead of exchange of witness statements. However, as HHJ Collender QC pointed out in *Douglas v O'Neill*,¹³² the whole purpose of surveillance evidence in personal injury claims is to test the veracity of the claimant's allegations *after* they have produced a witness statement supported by a statement of truth. Otherwise a fraudulent claimant would be able to deprive the defendant of an opportunity to test their case. Besides, the defendant may not know the exact nature and consequences of the claimant's injury until the claimant commits themselves in a witness statement. Clearly, such evidence cannot be available at the disclosure stage. HHJ Collender QC distinguished *O'Leary* on the grounds that in the case before him the defendant disclosed the surveillance evidence soon after the claimant filed the witness statement.

- 22.88 A number of factors can be seen to be of particular significance in considering a late application for adducing surveillance evidence. The first is whether the surveillance agents used unlawful means. It is easier to obtain permission where the means were lawful. The second is the timing of the surveillance and of the application. Clearly, the defendant cannot deploy surveillance before the claim has been fully particularised and supported by a witness statement. It follows that there is a fairly limited window of opportunity before the trial. There may be situations where enough is known to justify surveillance before the filing of witness statements, in which case the defendant would be well advised to undertake such surveillance. If the surveillance is undertaken at a late stage, then the defendant must move swiftly and disclose it as soon as it is ready.

Proportionality—the requirement of sufficient probative utility

22.89 The fact that an item of evidence is relevant, in the sense that it could render a fact in issue more or less probable, has never been enough to justify its admission in evidence at the trial. The court has always insisted that evidence must be *sufficiently* relevant. Sufficiency of relevance depends on the circumstances of each case. “The degree of relevance needed to qualify for admissibility is not”, Hoffmann explained, “a fixed standard, like a point on some mathematical scale of persuasiveness. It is a *variable* standard, the probative value of the evidence being balanced against the disadvantages of receiving it such as taking up a lot of time or causing confusion”.¹³³ However, while before the [CPR](#) the court tended to allow parties a large measure of freedom in deciding whether the evidence that they proposed to adduce made a sufficient contribution to the process of adjudication, this freedom is much more circumscribed under the [CPR](#).

22.90 The overriding objective requires the court to safeguard proportionality in each and every department of litigation, including the admission of evidence (see also [CPR 32.1](#)).

The court must decide admissibility with the overriding objective in mind.¹³⁴ It must ensure that the contribution of the proposed evidence to the determination of the issues is proportionate. Proportionality in this context means that the evidence makes a sufficient probative contribution to justify the time and expense involved in its presentation. Lord Woolf MR explained:

“The court will strive to manage the case so as to minimise the burden on litigants of slender means. This includes excluding all peripheral material which is not essential to the just determination of the real issues between the parties, and whose examination would be disproportionate to its importance to those issues.”¹³⁵

22.91 Proportionality in admissibility depends on a wide variety of factors. The court is required to look at the case as a whole and not just at individual items of evidence in isolation. For instance, evidence that in isolation may be of considerable probative force might be considered useless if judged in the context of the rest of the evidence. If there are already five eyewitnesses to an event, one hardly needs to call a further five to attest to the same fact. The principle of diminishing practical utility applies to evidence as much as to anything else. A point will be reached beyond which any additional evidence will start to obstruct the fact-finding process rather than assist it, by sowing confusion and by distracting attention from more important matters.

22.92 Given that the proportionality test depends on the circumstances of the entire case, it is important to maintain some flexibility. The court should therefore be prepared to reconsider its decision on admissibility when the circumstances have changed, so that evidence that appeared insufficiently probative at an early stage should be admitted later, if developments in the case suggest that it is of significance after all. If an application is made at an interlocutory stage to strike out evidence on the grounds that it is irrelevant or, if relevant, it is unhelpful or disproportionate, the court must take particular care because it is unlikely to have a full picture of the issues in the case at that stage.¹³⁶

22.93 [CPR 32.1](#) provides the court with ample powers to respond to the needs of the case as they emerge.¹³⁷ These powers, it must be stressed, are not confined to the trial stage, but may be used at any appropriate stage in the proceedings. On the multi-track, the main opportunity for using these powers arises when the court gives directions for trial, because at that stage the court will be in a position to look at the totality of the evidence that the parties propose to call. It is at that stage that the court can decide which issues require evidence and which are not really in controversy. If it transpires from the witness statements or from expert reports that the witnesses are not divided on certain points, then the court may dispense with testimony on those points. Where witnesses are to be called, the court may direct that their statements should stand in the place of evidence-in-chief, and it may impose both subject matter limits and time limits on cross-examination, so as to ensure that the process is used in an effective way.

Similar fact evidence

- 22.94 The admissibility of similar fact evidence provides a good illustration of the proportionality principle. Unlike the complex test governing the admissibility of such evidence in criminal cases, its admissibility in civil cases is relatively straightforward. Evidence of conduct upon other occasions is in principle admissible, provided that it is relevant to the issues before the court.¹³⁸ Whether the court would allow it to be adduced would, however, depend on its probative usefulness. Relevance is a matter of common sense, as Lord Bingham observed in *O'Brien v Chief Constable of the South Wales Police*.¹³⁹ The process of determining relevance, he said “is a process of thought which an entirely rational, objective and fair-minded person might, depending on the facts, follow”.¹⁴⁰ Lord Phillips put it succinctly saying: “I would simply apply the test of relevance as the test of admissibility of similar fact evidence in a civil suit. Such evidence is admissible if it is potentially probative of an issue in the action”.¹⁴¹
- 22.95 If, on a common sense view, the evidence has probative significance, the court held in *O'Brien* that “it would require good reasons to deny a judicial decision-maker the opportunity to consider it.”¹⁴² The test is concerned with its usefulness in the particular case, which will “depend primarily on the judge’s assessment of the potential significance of the evidence, assuming it to be true, in the context of the case as a whole”.¹⁴³ The court will have to consider whether its admission would distort the trial and distract the decision-maker by focusing attention on collateral issues, especially when the trial is before a jury.¹⁴⁴ This assessment cannot necessarily be carried out at an early stage but may well need to be postponed until the court can see how the proposed similar fact evidence fits in with the totality of the evidence.¹⁴⁵
- 22.96 In jury trials a further consideration may be of importance: whether the potential probative value of the evidence may be cancelled out by any unfair prejudice that it might create. Depending on the circumstances, the court would consider whether the contribution that the evidence would make to the resolution of the dispute justifies the burden in time, cost and personnel resources that it may impose on other parties, in terms of lengthening the trial, increasing costs and stress, and in its potential prejudice to witnesses called upon to recall matters long closed. Lord Bingham concluded in the *O'Brien* case that in “deciding whether evidence in a given case should be admitted the judge’s overriding purpose will be to promote the ends of justice. But the judge must always bear in mind that justice requires not only that the right answer be given but also that it be achieved by a trial process which is fair to all parties”.¹⁴⁶ Lord Phillips put it more succinctly, as already noted, saying: “I would simply apply the test of relevance as the test of admissibility of similar fact evidence in a civil suit. Such evidence is admissible if it is potentially probative of an issue in the action”.¹⁴⁷ Even in a jury trial the court would admit similar fact evidence if its absence would create a risk of miscarriage of justice.¹⁴⁸

Footnotes

- 103 For example, in *HSBC Asia Holdings BV v Gillespie [2011] I.C.R. 192* [13], the EAT noted its power to exclude evidence that was “logically” or ‘theoretically’ relevant but nevertheless too marginal, or otherwise unlikely to assist the court, for its admission to be justified”. See Phipson on Evidence, 20th edn (London: Sweet & Maxwell, 2021), para.7-05.
- 104 J.F. Stephen, A Digest of the Law of Evidence, 12th edn (London: Macmillan, 1948) art.1. cf. Evidence Act 1995 (NSW) s.55(1) “The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding”.
- 105 See the discussion of the test for standard disclosure in Ch.15 Disclosure paras 15.79 ff.
- 106 See J. Henderson (ed.), Roscoe’s Digest on the Law of Evidence on the Trial of Civil Actions, 20th edn (London: Sweet & Maxwell, 1934).
- 107 Chapter 16 Legal Professional Privilege.

- 108 Chapter 18 Self-Incrimination.
- 109 Chapter 19 Public Interest Immunity and Closed Material Procedure.
- 110 Chapter 17 Without Prejudice.
- 111 See below, paras 22.113 ff; and Ch.20 Witness Statements para.20.50.
- 112 *Hollington v F. Hewthorn & Co Ltd* [1943] KB 587; [1943] 2 All ER 35. See also the discussion in Ch.26 Finality of Litigation paras 26.87 ff.
- 113 For the implications of this provision see Ch.26 Finality of Litigation paras 26.87 ff.
- 114 For criticism see: *Arthur JS Hall v Simons* [2002] 1 AC 615, 702; and *Lincoln National v Sun Life* [2004] EWHC 343 (Comm) [92].
- 115 *Conlon v Simms* [2006] EWCA Civ 1749; [2007] 3 All ER 802; *Secretary of State for Business, Enterprise and Regulatory Reform v Aaron* [2008] EWCA Civ 1146 [20]; *Ward v Savill* [2021] EWHC Civ 1378.
- 116 *Towuaghantse v General Medical Council* [2021] EWHC 681 (Admin); Phipson (20th edn) para.43-79.
- 117 *Director of the Assets Recovery Agency v Virtosu* [2008] EWHC 149 (QB); [2008] 3 All ER 637.
- 118 *Secretary of State for Business, Enterprise and Regulatory Reform v Aaron* [2008] EWCA Civ 1146.
- 119 *R v Kuruma* [1955] AC 197 at 203; [1955] 1 All ER 236 at 239.
- 120 See also *Calcraft v Guest* [1898] 1 QB 759; and *R v Sang* [1980] AC 402; [1979] 2 All ER 1222, HL.
- 121 *Helliwell v Piggott-Sims* [1980] F.S.R. 582, CA.
- 122 *Khan v United Kingdom* (2001) 31 EHRR 1016; save for the admission of evidence obtained in breach of ECHR art.3, the prohibition of which is absolute: see *Gäfgen v Germany* (2011) 52 EHRR 1; *Othman v United Kingdom* (2012) 55 EHRR 1; and *Ibrahim v United Kingdom* (2015) 61 EHRR 9. In *Shagang Shipping Co Ltd v HNA Group Co Ltd* [2020] UKSC 34; [2020] 1 W.L.R. 3549, the Supreme Court emphasised the importance of this exclusionary rule, but reiterated that it was only engaged where it was proved on the balance of probabilities that the evidence had been obtained in breach of art.3 of the ECHR, citing *A v Secretary of State for the Home Department (No.2)* [2005] UKHL 71; [2006] 2 AC 221 [104]–[107]. It was held, however, that where there was evidence, falling short of proof on the balance of probabilities, that evidence had been so obtained, the court must take that into account in assessing the weight to be attached to the impugned evidence: at [108]–[109]. Any other approach would be “inconsistent with the moral principles which underpin the exclusionary rule”: at [109].
- 123 See P. Roberts and A. Zuckerman, Criminal Evidence, 2nd edn (Oxford: Oxford University Press, 2010) Ch.5 for discussion of this provision. See also Police and Criminal Evidence Act 1984 s.76 in relation to confessions.
- 124 See discussion of this aspect in *Jones v University of Warwick* [2003] EWCA Civ 151; [2003] 1 W.L.R. 954.
- 125 *Re Westminster Property Management Ltd, Official Receiver v Stern* [2001] 1 All ER 633; [2000] 1 W.L.R. 2230.
- 126 *Jones v University of Warwick* [2003] EWCA Civ 151; [2003] 1 W.L.R. 954.
- 127 See also *Mustard v Flower* [2019] EWHC 2623 (QB) [23] ff per Master Davison.
- 128 *Jones v University of Warwick* [2003] EWCA Civ 151; [2003] 1 W.L.R. 954 [28].
- 129 *Jones v University of Warwick* [2003] EWCA Civ 151; [2003] 1 W.L.R. 954 [30].
- 130 See *Shah v Ul-Haq* [2009] EWCA Civ 542 at [13]; A. Zuckerman, “*Must a fraudulent litigant be allowed to think: if the fraud is successful, I will gain much; if it is not, I will still recover my legitimate claim?*” (2011) 30 C.J.Q. 1. For discussion of other court responses to such claims, such as the (now much-attenuated) jurisdiction to strike them out for abuse of process, see Ch.12 Case Management Pt II paras 12.250 ff; and for the power to dismiss under the Criminal Justice and Courts Act 2015 s.57, see paras 12.305 ff.
- 131 *O'Leary v Tunnelcraft Ltd* [2009] EWHC 3438 (QB).
- 132 *Douglas v O'Neill* [2011] EWHC 601 (QB).
- 133 L.H. Hoffmann, “*Similar Facts After Boardman*” (1975) 91 L.Q.R. 193, 205.
- 134 See also Ch.12 Case Management Pt II paras 12.55 ff.
- 135 *McPhilemy v Times Newspapers Ltd* [1999] 3 All ER 775 at 791, CA. See also *Jones v University of Warwick* [2003] EWCA Civ 151; [2003] 1 W.L.R. 954 [25].
- 136 *Bates v Post Office Ltd* [2018] EWHC 2698 (QB) [5].
- 137 See Ch.12 Case Management Pt II paras 12.55 ff.
- 138 Conduct on other occasions may be admissible even when it took place after proceedings commenced, since the question is one of probative value: *Birmingham City Council v Dixon* [2009] EWHC 761 (Admin).
- 139 *O'Brien v Chief Constable of the South Wales Police* [2005] UKHL 26; [2005] 2 All ER 931. See also *R v P (Children: Similar Fact Evidence)* [2020] EWCA Civ 1088; [2020] 4 W.L.R. 132 in which Peter Jackson LJ (David Richards and Hickinbottom LJJ agreeing) reviewed the authorities on this question.

- 140 *O'Brien v Chief Constable of the South Wales Police* [2005] UKHL 26; [2005] 2 All ER 931 [4].
141 *O'Brien v Chief Constable of the South Wales Police* [2005] UKHL 26; [2005] 2 All ER 931 [53].
142 *O'Brien v Chief Constable of the South Wales Police* [2005] UKHL 26; [2005] 2 All ER 931 [4].
143 *O'Brien v Chief Constable of the South Wales Police* [2005] UKHL 26; [2005] 2 All ER 931 [5].
144 For an example where the evidence was rejected due to insufficient probative usefulness, and tendency to complicate
and confuse, see: *JP Morgan Chase Bank v Springwell Navigation Corp* [2005] EWCA Civ 1602.
145 *Silversafe Ltd (In Liquidation) v Hood* [2006] EWHC 1849 (Ch).
146 *O'Brien v Chief Constable of the South Wales Police* [2005] UKHL 26; [2005] 2 All ER 931 [6].
147 *O'Brien v Chief Constable of the South Wales Police* [2005] UKHL 26; [2005] 2 All ER 931 [53].
148 *Desmond v Bower* [2009] EWCA Civ 857.

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Judicial Notice—Dispensing with Proof on Matters of Common Knowledge

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 22 - Trial and Evidence

Judicial Notice—Dispensing with Proof on Matters of Common Knowledge

22. 97 The process of drawing inferences from evidence is conducted in accordance with the rules of logic and common sense, not according to rules of law. This involves the use of generalisations concerning the normal course of events in nature and society. No matter whether a judge assesses circumstantial evidence or the credibility of witnesses, they cannot but use their own knowledge and experience of the world. If the issue is whether the ewe attacked the dog or the other way around, the judge will sensibly fall back on their own understanding of the normal course of events. The doctrine of judicial notice relieves the parties of the need to prove matters of general knowledge, by enabling the court to use its own familiarity with the world.
22. 98 However, this doctrine cuts across litigants' right to challenge and dispute the evidence used against them. By using its own knowledge, the court is effectively preventing the parties from examining the quality of the information used to arrive at its decision and is denying them an opportunity to challenge it. The conflict between the desirability of taking for granted obvious or unchallengeable information and the right to challenge evidence is reconciled by confining the operation of the doctrine of judicial notice to information that is accepted beyond all dispute or that is easily and reliably verifiable. If the information is indisputable, the parties lose nothing by being deprived of the opportunity of challenge, and, moreover, unproductive effort and expense are avoided. The use of the court's own knowledge in such cases poses no serious risk to the quality of its judgment, because any basic mistake that the court makes is likely to be spotted and corrected, especially where the court has circulated a draft judgment.¹⁴⁹
22. 99 The test of indisputability is key to identifying when a judge may properly dispense with the formalities of proof. Facts will be indisputable either because they are generally considered as true in the community or because they may be reliably ascertained from sources that are widely accepted as correct. For example, judicial notice has been taken of the fact that two weeks is too short a period for human gestation, that the University of Oxford exists for the advancement of learning and that a postcard is likely to be read by people other than the addressee.¹⁵⁰ Reference to indisputable sources may be made for the purposes of verification; for example, where the court has to ascertain on which day of the week 1 January 2000 fell, or where geographical facts need to be established (such as the location of certain places). The court may have access not only to reliable documentary sources but also to experts for the purpose of informing itself of such matters. Since the test of judicial notice is one of reasonable disputability, no question of contradicting judicial notice can arise. However, a party can argue that information that the court proposes to take as indisputable is in fact controversial, in which case the question must be resolved by evidence, not by judicial notice.
22. 100 A distinction needs to be drawn between taking judicial notice and allowing a particular matter to be decided by others. In a case where the independence of the state of Kelantan was in issue, the House of Lords held that the proper way of proceeding was to take judicial notice of the sovereignty of a state, and for that purpose to seek information from a secretary of state, which would not be disputable by the parties.¹⁵¹ In reality, however, the court was not taking judicial notice of an indisputable fact but leaving the question of independence to the government.
22. 101 It is sometimes said that judicial notice may be taken of the rules of professional bodies after consultation with experts familiar with the practices of such bodies. This too is a misconception. What is involved in such cases is the reception of expert testimony about the rules of the relevant professional body, which may or may not be open to challenge. In addition, the court may accept

that, as a matter of law, certain issues concerning professional conduct should be governed by the rules of particular professional bodies.

22. 102 Where the court proposes to use information that although indisputable might take the parties by surprise, it is highly desirable that the court should warn the parties of its intention to do so. It is similarly desirable that the court should articulate to the greatest extent possible the use it has made of generally known matters in deciding to prefer one party's version of the facts over another's, since this forms part of the general duty to give reasoned decisions. There are, however, limits to the extent to which it is possible to account for every factual assumption and generalisation that a judge takes into account in the process of reasoning. It must be accepted that the inferential process is inevitably carried out against the background of a large number of unstated common sense assumptions, all of which it is not always possible or even helpful to elaborate.

Footnotes

149 See [Ch.23 Judgment and Orders paras 23.23 ff](#) for discussion of draft judgments.

150 For further examples see H. Malek (ed.), Phipson on Evidence, 20th edn (London: Sweet & Maxwell, 2021) paras 3-17 ff. See also [Dobson v North Cumbria Integrated Care NHS Foundation Trust \[2021\] I.C.R. 1699](#) which held that judicial notice could be taken that women, because of their childcare responsibilities, were less likely to be able to accommodate certain working patterns than men.

151 [Duff Development Co v Government of Kelantan \[1924\] AC 797, HL](#).

Witnesses

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 22 - Trial and Evidence

Witnesses

Universal competence

22. 103 As a general principle, all persons are competent to testify and are compellable to do so if their testimony is required in civil proceedings.¹⁵² Unlike in criminal proceedings, witnesses cannot testify anonymously in civil cases, save in certain family law proceedings and, even then, only in highly exceptional circumstances.¹⁵³ Until well into the nineteenth century there were many categories of witness incompetence,¹⁵⁴ but none has survived. Witness competence is therefore universal. This means that the courts are prepared to receive information concerning disputed facts from any person capable of providing it in a comprehensible and potentially reliable manner.
22. 104 Where there is concern about a witness's maturity or mental capacity, the modern strategy is for the court to satisfy itself of the witness's ability to provide reliable information. The [Children Act 1989 s.96](#) provides that where a child does not understand the nature of the oath, their evidence may be heard only if in the opinion of the court they understand the duty to speak the truth and have sufficient mental ability to justify the reception of the testimony.¹⁵⁵ A similar approach is followed with respect to persons suffering from intellectual disability, where it is for the court to determine whether the witness understands the nature and sanction of an oath and the need to tell the truth.¹⁵⁶ The testimony of persons with intellectual disabilities may be admitted if the court considers that the witness is capable of giving truthful and reliable evidence.

Compellability

22. 105 The principle of universal competence is mirrored by an almost universal principle of compellability. Nearly all persons may be summoned to testify. Refusal to testify is punishable as a contempt of court. The nature and reason for this principle was discussed in Ch.3 in relation to the right of litigants to access relevant evidence.¹⁵⁷ Here it is only necessary to mention one or two exceptions to this principle. The sovereign and the heads of other sovereign states are not compellable as witnesses.¹⁵⁸ In theory, judges are competent to testify on matters that come to their attention in the course of court proceedings, but since it is contrary to the public interest that they should be called as witnesses to such matters, they may not be compelled to testify.¹⁵⁹
22. 106 One should distinguish between a witness's general compellability and any privilege they may have not to testify on certain matters. For example, the right against self-incrimination entitles a person to refuse to answer incriminating questions but does not exempt that person from the duty to attend court for the purpose of testifying.¹⁶⁰ Similarly, bankers are not compellable to produce certain documents,¹⁶¹ but this does not mean that they are not compellable to testify generally.

Witness immunity from suit

22. 107 Witnesses are bound to disclose all relevant information required by the court. To encourage full co-operation with the court, witnesses enjoy immunity from suit in respect of anything they say in the course of testifying.¹⁶² They may of course be sued for perjury, but no civil or disciplinary proceedings may be brought against a witness by, or at the behest of, a dissatisfied party or indeed anyone else.¹⁶³ There is now one important rider to this position: expert witnesses may now be sued for negligence by their clients, just as can lawyers.¹⁶⁴

Witness testimony in court or by video link

22. 108 Witnesses are normally expected to testify in court and may be compelled to do so by means of a witness summons. The court has, however, discretion to allow witnesses to testify by video link, known as video conferencing (VCF) ([CPR 32.3](#)).¹⁶⁵ Where a mere witness is concerned, the desirability of testifying by VCF turns principally on practical considerations, such as cost and the ability of the court to control the witness at the remote place from which they are to testify.¹⁶⁶ The court has the discretion to exclude a person, including a witness, from the courtroom if there is a good reason to do so. For example, the court may exclude one witness from hearing the testimony of another witness in order to protect the “quality, purity and reliability” of the evidence to be given.¹⁶⁷ These powers were significantly expanded during the COVID-19 pandemic but were subsequently repealed.¹⁶⁸ Regardless it is suggested that the discretion under [CPR 32.3](#) can only be impacted by the successful application of VCF during the pandemic which allowed the courts to account for health concerns while continuing with the administration of justice.

22. 109 More complex considerations are involved where one of the parties seeks permission to testify by VCF. In *Polanski v Condé Nast Publications Ltd*,¹⁶⁹ the claimant, who lived in France, sued the defendant for defamation but did not wish to come to the UK to give evidence as he was a fugitive from justice in the US and did not wish to run the risk of extradition. He sought permission to be allowed to give his evidence from France by means of VCF. The issue in the House of Lords was whether the administration of justice would be brought into disrepute if the claimant were allowed to testify by VCF. The House of Lords explained that if the administration of justice were not brought into disrepute by virtue of entertaining a claim from such a person, there was no reason why it should be regarded as brought into disrepute by permitting the fugitive to have recourse to a procedural facility flowing from a technological development readily available to all litigants. Accordingly, the court held that as a general rule, a claimant’s unwillingness to come to the UK because they were a fugitive from justice was a valid reason justifying a video conferencing order.

22. 110 However, a party who does wish to testify in person but is prevented from travelling to court cannot be made to testify by VCF. It was held in *The Three Mile Inn Ltd v Daley*¹⁷⁰ that the right to a fair trial and the overriding objective required that an adjournment should be granted in such circumstances. This is because a “party’s effective participation in proceedings may require that he should have the opportunity, not merely to give oral evidence (whether by video link or otherwise), but also to follow the proceedings, to note developments as they occur, to listen to the evidence given by, and on behalf of, the other party, and to consult freely with his counsel and other legal advisors and to give instructions to them”.¹⁷¹

Opinion

22. 111

English law has traditionally held that witnesses must confine their evidence to the facts and not offer their opinion.¹⁷² It is for the court, it is said, to draw inferences from the facts and form opinions about the issues; witnesses must confine themselves to informing the court of what happened. To make any sense of this principle one has to accept that the term “opinion” is not only used in this context in its ordinary sense. Most factual reports of witnesses involve a degree of opinion. When the witness reports that they saw their friend Jones cross the road, they do not report their sensory perceptions; they report the conclusion they drew from what they observed. The observation may have been made from a distance or from an angle that does not allow for perfect vision, and yet the witness is entitled to say that on the basis of what they could see they believe that the person crossing the road was Jones. The opinion rule is not meant to exclude evidence of this kind.¹⁷³ It does not seek to exclude all inferences formed from perception but to encourage witnesses to give evidence in the most concrete and testable manner.¹⁷⁴

- 22. 112** We may therefore conclude that the opinion rule requires the court to ensure that testimony is given in the most informative and testable manner and that the witness does not express their views about conformity to general standards of behaviour, which is a matter for the court to decide. The opinion rule seeks to reserve to the court the drawing of inferences that go beyond the reporting of impressions gained from immediate perceptions. Thus, a witness to a road accident will be allowed to testify as to who did what at the relevant time, but will not be allowed to attribute responsibility. For instance, a witness is allowed to say: “the claimant drove on the right-hand side of the road”, but is not allowed to say: “the claimant was driving carelessly”. The reason for allowing the first but not the second statement is that the first is easily testable, whereas the latter could be ambiguous and open to different interpretations.

Hearsay

- 22. 113** The rule against hearsay was a mainstay of the exclusionary system of the past. Happily, statutory interventions have reduced it in civil proceedings to an insignificant shadow of its former self. What used to be a rule of exclusion is now a rule of notice, which requires the party who proposes to adduce hearsay evidence to give notice of their intention so that other parties may be in a position to challenge the evidence. Further, failure to give notice is not necessarily fatal to admissibility, since, as with any other procedural default, it is for the court to determine the consequences.¹⁷⁵ We may therefore say that whatever status the hearsay rule may have had in the past as a rule of evidence rather than one of procedure, it is now comparable to other notice rules in the CPR.¹⁷⁶ As with any other evidence adduced in legal proceedings, the significance of hearsay in the determination of facts depends on its probative weight and nothing else.
- 22. 114** The Civil Evidence Act 1995 (the 1995 Act) s.1(2) defines hearsay as “a statement made otherwise than by a person while giving oral evidence in the proceedings which is tendered as evidence of the matters stated; and references to hearsay include hearsay of whatever degree”. The key provision is s.1(1), which states that evidence shall not be excluded on the grounds that it is hearsay. Section 2 supplements this as follows:

Section 2

“(1) A party proposing to adduce hearsay evidence in civil proceedings shall, subject to the following provisions of this section, give to the other party or parties to the proceedings—

(a) such notice (if any) of that fact, and

(b) on request, such particulars of or relating to the evidence,

as is reasonable and practicable in the circumstances for the purpose of enabling him or them to deal with any matters arising from its being hearsay.

(2) Provision may be made by rules of court—

(a) specifying classes of proceedings or evidence in relation to which subsection (1) does not apply, and

(b) as to the manner in which (including the time within which) the duties imposed by that subsection are to be complied with in the cases where it does apply.

(3) Subsection (1) may also be excluded by agreement of the parties; and compliance with the duty to give notice may in any case be waived by the person to whom notice is required to be given.

(4) A failure to comply with subsection (1), or with rules under subsection (2)(b), does not affect the admissibility of the evidence but may be taken into account by the court—

(a) in considering the exercise of its powers with respect to the course of proceedings and costs, and

(b) as a matter adversely affecting the weight to be given to the evidence in accordance with section 4.”

- 22. 115** The [1995 Act](#) preserves the provisions governing the admission of hearsay in special cases.¹⁷⁷ The rules implementing the provisions of the [1995 Act](#) are to be found in [CPR 33](#).¹⁷⁸ Their main significance is that notice must be given by the party who wishes to adduce hearsay evidence. If the hearsay is in a witness statement, notice is given by serving the witness statement (to that extent the hearsay notice requirement is subsumed in the more general requirement of serving witness statements). However, if the hearsay is in any other document, it is not enough to disclose the document in the list of documents. Rather, a separate hearsay notice is required ([CPR 33.2\(3\)](#)).¹⁷⁹ Failure to serve a hearsay notice does not render the hearsay inadmissible (the [1995 Act s.2\(4\)](#)). But such failure may persuade the court to decline to admit the evidence under [CPR 32.1\(2\)](#), to make an adverse costs order against the guilty party (the [1995 Act s.2\(4\)\(a\)](#)) or to discount the weight to be attached to such evidence (the [1995 Act s.2\(4\)\(b\)](#)).
- 22. 116** A party fulfils the notice requirement by serving the witness statement of the witness who reports the hearsay, by serving the witness statement of the person who has first-hand information but who the party does not propose to call to testify ([CPR 33.2\(1\)](#)) or through the including of the document in the hearing bundle.¹⁸⁰ Thus, for example, the requirement of notice will be fulfilled where the claimant serves the witness statement of B, who will be called to report what C said, or where the claimant serves the witness statement of B, who will not be called as a witness.¹⁸¹ Where the hearsay is in a document, the notice must identify the hearsay evidence, state the intention of relying on it and give the reasons for this ([CPR 33.2\(3\)](#)). The document containing the hearsay must be supplied on demand ([CPR 33.2\(4\)\(b\)](#)). It should be noted that a party may rely not just on first-hand hearsay but also on hearsay several times removed.
- 22. 117** The requirement of notice does not apply to hearings other than trials ([CPR 33.3\(a\)](#)), and there is therefore no need for notice in interim proceedings. Nor does it apply to an affidavit or witness statement which is to be used at trial but which does not contain hearsay evidence ([CPR 33.3\(aa\)](#)) or where otherwise excluded by a Practice Direction ([CPR 33.3\(c\)](#)). Furthermore, the notice requirements do not apply to the small-claims track, because the strict rules of evidence are not operative on this track ([CPR 27.2\(1\)\(d\)](#) and [27.8\(3\)](#)).
- 22. 118** Where notice of hearsay has been given, other parties may apply for permission to cross-examine the witness whose evidence is tendered as hearsay within 14 days after the notice was served ([CPR 33.4](#)). The court would normally be bound to give permission to cross-examine the witness if the hearsay testimony is of significant importance. Although the rule is silent about what would happen if the witness fails to turn up for cross-examination, the court must have the power to exclude their evidence, especially if it considers that entertaining the evidence without cross-examination would significantly prejudice the party seeking cross-examination. [CPR 32.7](#) allows the court to exclude written hearsay evidence, at a hearing other than the trial, where the person giving such evidence fails to attend the hearing for court-ordered cross-examination.
- 22. 119**

If the party wishing to rely on hearsay gives notice so late in the proceedings as to effectively deprive the opponent of the opportunity to cross-examine the witness, the court may refuse permission to adduce the hearsay statement.¹⁸² A party who wishes to call evidence to attack the credibility of a hearsay statement must give notice to the party relying on the hearsay statement ([CPR 33.5](#)). Where a defendant adduces as hearsay evidence a witness statement served by the claimant, the court may allow the claimant to cross-examine the witness the contents of their statement.¹⁸³ However, a party may not obtain permission to cross-examine a witness whose witness statement was served by another party who subsequently decided not to call the witness and withdrew the statement from the evidence.¹⁸⁴ Where permission has been given to cross-examine a witness on their statement but the witness does not attend for cross-examination, the court may exclude the statement from the evidence if its admission would be unfair to the other party.¹⁸⁵

- 22. 120** Although failure to give a hearsay notice does not render the evidence inadmissible, the court may take the default into account “in considering the exercise of its powers with respect to the course of proceedings and costs”, as well as draw the appropriate inference when assessing the reliability of the hearsay ([the 1995 Act s.2\(4\)](#)). The [1995 Act s.4](#) sets out the considerations relevant to assessing the probative weight of hearsay evidence. They essentially reflect what a normal, prudent person would consider in the circumstances, such as whether it would have been reasonable for the party to produce the maker of the original statement or whether the party seeks to prevent proper testing of the witness, whether the original statement was contemporaneous with the occurrence of the relevant events, whether the evidence involves multiple hearsay, whether the maker of the statement had an ulterior motive and the like.
- 22. 121** The court may exclude hearsay evidence in the exercise of its case management powers just as it may exclude any other admissible evidence under [CPR 32.1\(2\)](#). It might, for instance, exclude hearsay if its presentation would be disproportionate to the needs of the case. It may also exclude hearsay if it considers it unfair that other parties should be denied an opportunity to cross-examine the witness in order to test their reliability.¹⁸⁶ A party who fails to comply in time with an order to exchange witness statements may be denied permission to adduce hearsay evidence instead, if the effect of the late application to adduce the hearsay would effectively deny the opponent the opportunity to cross-examine or would disrupt the trial timetable.¹⁸⁷ The court is entitled to reject hearsay evidence if it has been contradicted by other evidence which was given on oath and tested in cross-examination, if the party adducing the hearsay has failed to produce evidence showing that the hearsay was reliable.¹⁸⁸
- 22. 122** The [1995 Act s.9](#) simplifies proof of business records and public authority records. A record will be accepted as authentic if an officer of the business or authority to which the record belongs certifies it. If a party wishes to rely on such a record as hearsay evidence, the hearsay procedure must be followed. If the court is doubtful about the reliability of particular records, it may direct that the provisions of [s.9](#) should not apply ([s.9\(5\)](#)).

Examination of witnesses

Evidence-in-chief

- 22. 123** Traditionally, witness testimony was primarily provided orally by means of evidence-in-chief. A witness who was called had to enter the witness box and take the oath or make a solemn affirmation.¹⁸⁹ Evidence-in-chief consisted of responses to questions put to the witness by the party calling them, who must not ask leading questions (that is, questions that contain, or suggest, their own answers), since the evidence must be provided by the witness and not by the advocate questioning the witness. Today, witness statements normally stand in the place of evidence-in-chief ([CPR 32.5\(2\)](#)).¹⁹⁰ The witness is called and asked to take the oath, which in effect verifies their witness statement ([CPR 32.5\(1\)](#)).¹⁹¹ It is fairly common for advocates to ask a few “supplementary” questions-in-chief in order to try to put the witness at ease before they are subjected

to cross-examination. Where there is a need to amend or supplement the witness statement, the party calling the witness may ask the witness to make any necessary amendments to their written statement.¹⁹²

22. 124 Where a party wishes to rely at trial on the evidence of a witness who has not made a witness statement, the party must obtain permission to call that witness to give oral evidence ([CPR 32.10](#)).¹⁹³ The witness's testimony will be given by way of oral examination-in-chief, and must be restricted to facts within the witness' personal knowledge (though such facts may constitute hearsay). The opponent will have a right to cross-examine the witness.

22. 125 The fact that a witness statement stands as evidence-in-chief does not mean that the witness cannot deviate from it. The court is empowered by [CPR 32.5\(3\)](#) to permit a witness to "(a) amplify his witness statement; and (b) give evidence in relation to new matters which have arisen since the witness statement was served on the other parties", provided, however, that "there is good reason not to confine the evidence of the witness to the contents of his witness statement" ([CPR 32.5\(4\)](#)).¹⁹⁴ The verb "amplify" suggests that permission may only be given to expand what is already in the statement rather than embark on wholly new matters of which there was no hint in the statement. If, for instance, the statement describes what the witness saw at the scene of an accident, it would normally be inappropriate to allow the witness to testify in court for the first time that after the accident they went to see the claimant in hospital where they observed certain facts.

Cross-examination

22. 126 Cross-examination follows the conclusion of evidence-in-chief; any party, other than the party calling the witness, is entitled to cross-examine the witness.¹⁹⁵ Its object is to enable other parties to challenge the witness, probe their account and try to demonstrate its unreliability. The cross-examiner may ask leading questions and is not generally confined to matters of which the witness spoke in their evidence-in-chief. The witness statement will often provide the platform for the cross-examination. Even where the witness statement does not stand in the place of evidence-in-chief, the witness may be cross-examined on the statement that they had made and which was served by the party calling the witness ([CPR 32.11](#)). Where the party calling a witness has merely served a witness summary in accordance with [CPR 32.9](#), the witness cannot be cross-examined on the summary because it does not contain their statement but merely a party's description of what they hope the witness will say. Where a person does not make themselves available for cross-examination the judge will approach the testimony with caution and may give it less weight than to evidence which has been tested, but that does not inevitably justify dismissing it altogether and preferring contrary evidence.¹⁹⁶

22. 127 A party who wishes to impugn the credibility of the witness must inform the witness, before or during the cross-examination, of their intention to do so and of the grounds upon which the challenge is made. In the Australian case of *Allied Pastoral Holdings v Federal Commissioner of Taxation*,¹⁹⁷ Hunt J referred to the House of Lords decision in *Browne v Dunn*¹⁹⁸ and said:

"unless notice has already clearly been given of the cross-examiner's intention to rely upon such matter, it is necessary to put to an opponent's witness in cross-examination the nature of the case upon which it is proposed to rely in contradiction of his evidence, particularly where that case relies upon inferences to be drawn from other evidence in the proceedings. Such a rule of practice is necessary both to give the witness the opportunity to deal with that other evidence, or the inferences to be drawn from it, and to allow the other party the opportunity to call evidence either to corroborate that explanation or to contradict the inference sought to be drawn."¹⁹⁹

This principle has been endorsed by the Supreme Court in *TUI UK Ltd v Griffiths*²⁰⁰ as a matter of procedural fairness to the parties and to witnesses. A decision reached in breach of this principle may be set aside. It is, however, permissible for a judge to disbelieve evidence for a reason not put to the witness in circumstances in which the evidence is "manifestly

incredible".²⁰¹ An absolute requirement for a cross-examiner to put every conceivable reason for disbelieving a witness to that witness would be "disproportionate" and "unrealistic".²⁰²

22. 128 A now established phenomenon that has affected the conduct of witnesses under cross-examination is witness training. In *Republic of Djibouti v Boreh*, Flaux J considered that it was a practice "to be discouraged since ... it tends to reflect badly on the witnesses who ... may appear evasive".²⁰³ He accepted, however, that witness training was not improper as long as it did not amount to coaching the witness.²⁰⁴ This disapprobation of the practice was echoed in *Harlequin Property (SVG) Ltd v Wilkins Kennedy (a firm)* where Coulson J, referencing Flaux J's remarks, observed that he "was unsurprised to learn that Mr MacDonald had had witness training ... the training he received exacerbated Mr MacDonald's natural tendency to avoid answering any difficult question."²⁰⁵

Order of cross-examination at a hearing other than the trial

22. 129 Where, at a hearing other than the trial, evidence is given in writing, any party may apply to the court for permission to cross-examine the person giving the evidence (CPR 32.7(1)). If the court gives such permission but the person in question does not attend as required by the order, their evidence may not be used unless the court gives permission (CPR 32.7(2)). Court permission is required in order to ensure that interim applications do not become mini-trials, or rehearsals for trial. For this reason permission would not normally be given.²⁰⁶ No formal application is required.²⁰⁷ Permission would be given where the court ordered affidavit evidence and there is reason to doubt its accuracy.²⁰⁸ This may happen, for instance, where in connection with a freezing injunction the defendant has been ordered to disclose assets,²⁰⁹ or where the court made a disclosure order against a third party.²¹⁰

Footnotes

152 *Hoskyn v Commissioner of Police for the Metropolis* [1978] 2 All ER 136; [1979] AC 474, HL.

153 See Criminal Evidence (Witness Anonymity) Act 2008, and *Suez Fortune Investments Ltd v Talbot Underwriting Ltd* [2018] EWHC 2929 (Comm); and *Re W (Care Proceedings: Witness Anonymity)* [2002] EWCA Civ 1626; [2003] 1 F.L.R. 329.

154 P. Tillers (ed.), *Wigmore on Evidence* (Boston: Little, Brown Book Group Ltd, 1983) s.515.

155 A child is a person under 18: *Children Act 1989* s.105. It is unlikely that the court would consider it necessary to enquire about a child's understanding of the oath if they are over 14. See H. Malek (ed.), *Phipson on Evidence*, 20th edn (London: Sweet & Maxwell, 2021) para.9-11.

156 *R v Hill (1851)* 2 Den. 254. See H. Malek (ed.), *Phipson on Evidence*, 20th edn (London: Sweet & Maxwell, 2021) para.9-10.

157 *Chapter 3 Fair Trial*, paras 3.208–3.209.

158 Some exemption from the duty to testify is also accorded to diplomats: *Diplomatic Privileges Act 1964*, *Consular Relations Act 1968*, *International Organisations Act 1968*, *Diplomatic and other Privileges Act 1971*, *State Immunity Act 1978*. See H. Malek (ed.), *Phipson on Evidence*, 20th edn (London: Sweet & Maxwell, 2021) para.9-16.

159 *Warren v Warren* [1997] QB 488; [1996] 4 All ER 664, CA.

160 For discussion of the privilege see *Ch.18 Self-Incrimination*.

161 *Bankers' Books Evidence Act 1879* s.6.

162 See H. Malek (ed.), *Phipson on Evidence*, 20th edn (London: Sweet & Maxwell, 2021) para.9-22. See *Clerk & Lindsell on Torts*, 24th edn (London: Sweet & Maxwell, 2025), para.9.45.

163 For discussion see *Ch.3 Fair Trial* paras 3.211 ff.

164 *Jones v Kaney* [2011] UKSC 13; [2011] 2 All ER 671. See the discussion in *Ch.21 Experts* paras 21.96 ff.

- 165 Guidance on the use of VCF in the civil courts is set out in PD 32 Annex 3.
 166 2025 WB 32.3.1.
- 167 *Luckwell v Limata [2014] EWHC 536 (Fam)*, [21]–[23].
- 168 Coronavirus Act 2020 ss.53–55; Schs 23–25 (now repealed).
- 169 *Polanski v Condé Nast Publications Ltd [2005] UKHL 10; [2005] 1 All ER 945*.
- 170 *The Three Mile Inn Ltd v Daley [2012] EWCA Civ 970*.
- 171 *The Three Mile Inn Ltd v Daley [2012] EWCA Civ 970* [12].
- 172 See Ch.21 Experts paras 21.3–21.5.
- 173 See Civil Evidence Act 1972 s.3(2).
- 174 See discussion in Ch.21 Experts para.21.4.
- 175 See the discussion in Ch.20 Witness Statements paras 20.34 ff and 20.48–20.50. See *Lavelle v Noble [2011] EWCA Civ 441* for an example of a case where hearsay evidence was excluded.
- 176 As to the desirability of giving notice of an intention to rely on hearsay evidence contained in an agreed court bundle, see *Charnock v Rowan [2012] EWCA 2; [2012] C.P. Rep 18*.
- 177 The Civil Evidence Act 1995 s.14(3) preserves: Documentary Evidence Act 1868 s.2 (mode of proving certain official documents); Documentary Evidence Act 1882 s.2 (documents printed under the superintendence of Stationery Office); Evidence (Colonial Statutes) Act 1907 s.1 (proof of statutes of certain legislatures); Evidence (Foreign, Dominion and Colonial Documents) Act 1933 s.1 (proof and effect of registers and official certificates of certain countries); and the Oaths and Evidence (Overseas Authorities and Countries) Act 1963 s.5 (provision in respect of public registers of other countries).
- 178 Committal applications are civil proceedings to which the Civil Evidence Act 1995 applies for the purposes of the admissibility of hearsay evidence: *Daltel Europe Ltd (In Liquidation) v Makki [2006] EWCA Civ 94*. See Ch.24 Enforcement para.24.7 for discussion of the distinction between criminal and civil contempt. Committal proceedings generally are discussed at paras 24.6–24.26.
- 179 See generally *First Subsea Ltd v Balltec Ltd [2013] EWHC 1033 (Pat)*.
- 180 *BXB v Watch Tower and Bible Tract Society of Pennsylvania [2020] EWHC 156 (QB); [2020] 4 W.L.R. 42*.
- 181 See 2025 WB 33.2.2.
- 182 *Cottrell v General Cologne Re UK Ltd [2004] EWHC 2402 (QB)*.
- 183 *Douglas v Hello! Ltd (No.5) [2003] EWCA Civ 332; [2003] C.P. Rep. 42*.
- 184 *Tsavliris Russ (Worldwide Salvage & Towage) Ltd v RL Baron Shipping Co SA (The Green Opal) [2003] 1 Lloyd's Rep. 523*.
- 185 See 2025 WB 33.4.1.
- 186 Civil Evidence Act 1995 s.14(1) states that the Act does not affect the exclusion of evidence on grounds other than that it is hearsay.
- 187 *Cottrell v General Cologne Re UK Ltd [2004] EWHC 2402 (QB)*.
- 188 *Mulloy v Chief Constable of Humberside Police [2002] EWCA Civ 1851; [2002] All ER (D) 199 (Dec)*.
- 189 Oaths Act 1978 ss.1 and 5–6.
- 190 Chapter 20 Witness Statements para.20.38 ff.
- 191 Oaths Act 1978 ss.1 and 5–6.
- 192 See CPR 32.5(2)–(3), and the discussion in Ch.20 Witness Statements paras 20.41 ff.
- 193 Chapter 20 Witness Statements paras 20.34 ff.
- 194 Ch.20 Witness Statements paras 20.41 ff. See also the discussion of the situation where a witness seeks to contradict their own witness statement at paras 20.46–20.47.
- 195 Although a litigant in person who had dismissed their counsel could not insist on cross-examining a witness who had already been cross-examined by their counsel: *Sharma v Sood [2006] EWCA Civ 1480*.
- 196 *Harb v Aziz [2016] EWCA Civ 556* [24].
- 197 *Allied Pastoral Holdings v Federal Commissioner of Taxation [1983] 44 A.L.R. 607*.
- 198 *Browne v Dunn [1894] 6 R. 67*.
- 199 *Allied Pastoral Holdings v Federal Commissioner of Taxation [1983] 44 A.L.R. 607, 623*.
- 200 *TUI UK Ltd v Griffiths [2023] UKSC 48*. See also *Markem Corp v Zipher Ltd [2005] EWCA Civ 267*, overruled on other grounds.
- 201 *TUI UK Ltd v Griffiths [2023] UKSC 48* [62].

- 202 *Chen v NG* [2017] UKPC 27, at [51]–[55].
203 *Republic of Djibouti v Boreh* [2016] EWHC 405 (Comm) [67].
204 *Republic of Djibouti v Boreh* [2016] EWHC 405 (Comm) [67].
205 *Harlequin Property (SVG) Ltd v Wilkins Kennedy (a firm)* [2016] EWHC 3188 (TCC) [18].
206 *West London Pipeline & Storage Ltd v Total UK Ltd* [2008] EWHC 1729 (Comm). See 2025 WB 32.7.1
207 *United Technology Holdings Ltd v Chaffe* [2022] EWHC 150 (Comm) [3].
208 *West London Pipeline and Storage Ltd v Total UK Ltd* [2008] EWHC 1729 (Comm).
209 *Yukong Line Ltd of Korea v Rendsburg Investments Corporation of Liberia* [1996] 2 Lloyd's Rep. 604, CA; and *Motorola Credit Corporation v Uzan (No.2)* [2003] EWCA Civ 752; [2004] 1 W.L.R. 113.
210 *Kensington International Ltd v Republic of Congo* [2006] EWHC 1848 (Comm); and *JSC BTA Bank v Solodchenko* [2011] EWHC 843 (Ch).

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Failure to Attend Trial or Hearing

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 22 - Trial and Evidence

Failure to Attend Trial or Hearing

Introduction

22. 130 As explained in Ch.11 Pt I, participation in litigation is voluntary not compulsory.²¹¹ A party is free to withdraw from the proceedings, and is therefore free to stay away from a hearing or a trial. As a general principle, a party who fails to attend a hearing of which they have had adequate notice may be taken to have waived their right to participate in the hearing.²¹² Where this happens, the court may either enter judgment against the absent party or proceed with the hearing in their absence.²¹³ Where a claimant fails to attend the trial or an applicant fails to attend an application hearing, it is normal for the court to dismiss the claim or the application. Where the absent party is the defendant or the respondent to an application, it is common for the court to proceed with the hearing and require the claimant or applicant to make out their case, though obviously the process will tend to be briefer than an inter partes process.
22. 131 The common law position is consistent with the right to a fair trial under the ECHR art.6. Like the common law, ECtHR jurisprudence recognises the right of a party against whom a decision was given in absentia to have an opportunity to explain their absence and seek to have it set aside.²¹⁴ One would have thought that the right to fair trial implies a right to have any decision made in their absence set aside if the absent party can show that they were unaware of the proceedings.²¹⁵ Although the generality of this proposition has been doubted (for example, in relation to applications to set aside default judgment entered without actual notice of the proceedings),²¹⁶ it remains the case that a party who has failed to attend a hearing is entitled to an opportunity to explain their absence so that they may show good reason for the absence.²¹⁷
22. 132 Even in the absence of formal notice, once a defendant knows about the proceedings and participates in them, the court has the necessary jurisdiction to make an order affecting them.²¹⁸ It must also be stressed that a party has a duty to remain contactable by the court and, if represented, by their solicitors.²¹⁹ Where a party has moved from the address that they have given to the court, the court may decide that the failure to receive notice does not justify the setting aside of a decision reached in the party's absence.²²⁰

Failure to attend a hearing other than the trial

22. 133 Non-attendance at an interim hearing is dealt with in CPR 23.11.²²¹ It provides that where the applicant or respondent fails to attend the hearing of an application, the court may proceed in the party's absence so as to grant or dismiss the application, as the case may be.²²² Applicants and respondents who fail to attend, having received due notice, may be said to have waived their right to an adversarial court determination of their arguments. A claimant who does not attend a hearing listed to deal with their application for an extension of time to serve the claim form can hardly complain if their application is dismissed out of hand. Similarly, the court may consider a respondent's absence tantamount to conceding the merits of the application. A

caveat needs to be added to this, however, in that it is unlikely that a court would grant an application which it considers to be unfounded. Thus, where it is the respondent who fails to appear, the court will normally give some consideration to the merits of the application (which may include the fact that it is not opposed), and may grant it if it considers it appropriate to do so.

22. 134 However, the court will exercise caution before proceeding even with an interim hearing in the absence of a party.²²³ It may instead adjourn the hearing in order to give the absent party a further opportunity to attend. Holding a hearing, including a hearing which is not itself a trial, in the absence of a party may amount to an infringement of the right to a fair trial under the ECHR art.6.²²⁴ This is particularly so where the absent party is known not to have been given notice. Before deciding whether to proceed or adjourn, the court should seek to identify whether the defaulting party received notice of the hearing.²²⁵ If the court is not satisfied that the absent party was on notice of the hearing, it must adjourn; but even if the court is satisfied that the absent party *was* notified of the hearing, it is not obliged to proceed. It would usually decline to proceed where it has reasons to suppose that the applicant or their legal representatives were prevented from attending by some event outside their control. The court will be very careful before proceeding with the hearing in the absence of a LiP. It would proceed only if it was satisfied that it was right to grant the applicant the relief they sought, notwithstanding the respondent LiP's absence, or if the LiP's application was hopeless.²²⁶
22. 135 Where the court has proceeded with an application and made an order in the absence of a party, it has the power to relist the application of its own initiative or upon application by a party ([CPR 23.11\(2\)](#)). In deciding whether to set aside its order and rehear the application in this way, the court will take into account the reasons advanced for non-appearance at the original hearing, any delay in making the application and the underlying merits.²²⁷ Furthermore, there may be circumstances where the original order, as perfected, has been relied upon such that it would be unjust to set it aside.²²⁸

Failure to attend the trial

22. 136 [CPR 39.3](#) lists the options available to the court where one or more parties fail to attend the trial. The general principle is that non-attendance does not automatically bring the trial to a standstill. On the contrary, the court may proceed in the absence of a party ([CPR 39.3](#)). But if no party attends the trial, [CPR 39.3\(1\)\(a\)](#) makes clear that the court may strike out the whole of the proceedings. [CPR 39.3](#) does not oblige the court to follow any of these options. It supplements the court's general case management powers, which means that court is free to make a different order, such as adjourning the hearing.

Adjournment

22. 137 Given the importance attached to keeping trial dates, an order to adjourn a hearing pursuant to [CPR 3.1\(2\)\(b\)](#) will be made only where there are compelling grounds for doing so and it would not be unfair to any of the parties—and then only for the shortest practical time.²²⁹ Mere inconvenience to one party or the unavailability of a party's preferred counsel, particularly if there is sufficient time for that party to brief alternative counsel, will not suffice.²³⁰ There is however a developed corpus that medical grounds will be a valid reason to adjourn.²³¹ If the court is informed that there was no valid service and that the defaulting party did not know of the proceedings, an adjournment must be ordered as a matter of right, rather than discretion, since holding a trial in such circumstances would breach the absent party's right to a fair trial. Similarly, a court should order an adjournment where it transpires that a party or their representatives have been prevented from attending by circumstances outside their control. Indeed, it would be wasteful of court resources to do otherwise, since the defaulting party would be entitled to have any judgment or order given in their absence set aside.²³²

22. 138

However, Norris J warned that “parties who think that … their non-attendance somehow strengthens the application for an adjournment are deeply mistaken. The decision whether or not to adjourn remains one for the judge. The decision must of course be a principled one … [b]ut the party who fails to attend either in person or through a representative to assist the judge in making that principled decision cannot complain too loudly if, in the exercise of the discretion, some factor might have been given greater weight”.²³³

Non-attendance by the defendant

22. 139

If the defendant does not attend the trial hearing, the court may strike out their defence and any counterclaim they have advanced ([CPR 39.3\(1\)\(c\)](#)).²³⁴ However, merely striking out a counterclaim may leave the claimant vulnerable to fresh proceedings in respect of the same cause of action, because striking out does not amount to a judgment on the merits and therefore creates no res judicata.²³⁵ Justice may require that a claimant who has invested expense and effort in bringing a claim all the way to trial should be able to obtain a final vindication. It is suggested that in such cases the court may use its power under [CPR 39.3\(1\)](#) and proceed to trial on the merits so that the claimant may “prove his claim at trial and obtain judgment on his claim and for costs” (PD 39A para.2.2(1)(a)).²³⁶ There is, however, one important rider that must always be borne in mind: the court would be careful to proceed in the defendant’s absence only if it is satisfied that the defendant received notice of the proceedings and only if it has no reason to believe that the defendant or their representatives were prevented from attending by circumstances beyond their control.

22. 140

Where the court has allowed the claimant to proceed and prove their claim in the defendant’s absence, the trial will proceed on the basis of the materials that have been filed—for example, witness statements, expert reports, bundles of relevant documents and skeleton arguments. As the absent defendant too will have submitted their written evidence and arguments, the court may well be in a position to decide the matter with some confidence. However, the fact that the defendant does not attend does not mean that the claimant is now free to advance points of which they have given no prior notice and which they should have raised earlier, because it is possible that if the claimant had raised a particular point, the defendant would have attended the trial in order to resist it. It has therefore been held that a claimant cannot go beyond their witness statement even though the defendant chose not to attend the trial.²³⁷

Non-attendance by the claimant

22. 141

If the claimant does not attend the trial, the court may strike out the claim and any defence to a counterclaim ([CPR 39.3\(1\)\(b\)](#)). Again, the rules do not expressly contemplate that the defendant may proceed to trial in the absence of the claimant, and obtain judgment dismissing the claim on the merits. But again, it is suggested it would be unjust to deny a defendant the possibility of obtaining a judgment on the merits when they had taken the trouble to defend the claim all the way to trial. Merely striking out the claim may be insufficient, because it would leave the defendant vulnerable to fresh proceedings by the claimant. Here, too, the possibility of obtaining judgment on the merits is implied by the opening words of [CPR 39.3\(1\)](#) that the “court may proceed with a trial in the absence of a party”. This interpretation is strengthened by the fact that there is no reason why defendants should be denied the opportunity of obtaining a decision on the merits when it is accorded to claimants. The defendant’s right to a trial of the claim is, of course, subject to the familiar rider that the court must be satisfied that the claimant had notice of the hearing and that there is no reason to suppose that they or their representative had been detained by events beyond their control.

Application to restore a statement of case or to set aside a judgment given in the absence of one party

22. 142

The court has the power to restore proceedings that have been struck out, or to set aside a judgment that has been given in the absence of a party to the proceedings (CPR 39.3(2)-(3)).²³⁸ An application to restore or set aside must be made in accordance with the CPR 23 application procedure.²³⁹ Doubt has been cast as to whether CPR 39.3 applies to hearings beyond a “trial” in the strict sense. It is doubted that it would apply to decisions on appeal. In *Howard v Stanton*,²⁴⁰ Lewison LJ pointed out, obiter, that CPR 39.3 “is headed ‘Failure to Attend the Trial’ and CPR 39.1(1) begins with the statement that the court may proceed with a trial in the absence of a party. [CPR 39.1] says that the word ‘hearing’ includes a trial, but it does not say that the word ‘trial’ includes a hearing. There is therefore a serious question mark whether that sub-rule applies to an appeal at all.” While one can see the force of this literal analysis, there is little reason to suppose the rule-maker intended appeals to be governed by a different regime. In any event, the court has ample power under CPR 3.1(2)(m) and 3.1(7) to set aside an order if it considers that the interests of justice demand it.²⁴¹ Moreover, CPR 39.3 may be applied by analogy.²⁴²

22. 143 The court’s power to restore proceedings or to set aside a judgment given in the absence of a party is not open-ended. The power may be exercised only where the applicant has satisfied the conditions set out in CPR 39.3(5). Moreover, the Court of Appeal held in *Nelson v Clearsprings (Management) Ltd*,²⁴³ that CPR 39.3 presupposes service on the defendant of the claim form in accordance with the rules as to service. In such a situation the court’s jurisdiction is not derived from CPR 39.3 but from CPR 3.1(2)(p) and 3.10.²⁴⁴

22. 144 CPR 39.3(5) states:

Rule 39_3:(5)

“(5)Where an application is made under paragraph (2) or (3) by a party who failed to attend the trial, the court may grant the application only if the applicant—
 (a)acted promptly when he found out that the court had exercised its power to strike out or to enter judgment or make an order against him;
 (b)had a good reason for not attending the trial; and
 (c)has a reasonable prospect of success at the trial.”

The conditions are cumulative and must all be satisfied before the court will exercise its discretion to set aside an order.²⁴⁵ This is in contrast to the court’s previously broad discretion. Once all the conditions have been satisfied, the court will ordinarily exercise its discretion to restore the proceedings or set aside the judgment, unless some exceptional circumstances exist.²⁴⁶ An application must be supported by evidence that shows that the applicant is able to satisfy these conditions.

22. 145 The conditions placed on the court’s power to restore proceedings or to set aside judgment represent a stricter approach to non-attendance than under the old rules, which did not contain comparable restrictions.²⁴⁷ The more exacting CPR approach reflects the policy of discouraging unwarranted waste of procedural resources. A party who cannot provide a well-supported reason for non-attendance cannot succeed in overturning a decision given in their absence.²⁴⁸ A party who has had due notice of the trial hearing but nonetheless fails to attend for no good reason will have foregone their opportunity to participate in the trial.²⁴⁹ Referring to the conditions of CPR 39.3(5) Lord Neuberger MR said:

“The strictness of this trio of hurdles is plain, but the rigour of the rule is modified by three factors. First, what constitutes promptness and what constitutes a good reason for not attending is, in each case, very fact-sensitive, and the court should, at least in many cases, not be very rigorous when considering the applicant’s conduct; similarly, the court should not pre-judge the applicant’s case, particularly where there is an issue of fact, when considering the third hurdle. Secondly, like all other rules, CPR 39.3 is subject to the overriding objective, and must be applied in that light. Thirdly, the fact that an application under CPR 39.3 to set aside

an order fails does not prevent the applicant seeking permission to appeal the order. It is not very convenient, but an applicant may be well advised to issue both a [CPR 39.3](#) application and an application for permission to appeal at the same time, or to get agreement from the other party for an extension of time for the application for permission to appeal.”²⁵⁰

22. 146 It would be a pity if the words “the court should … not be very rigorous when considering the applicant’s conduct” in the above-quoted dictum were taken to indicate a relaxed approach to litigants’ absence. Absence with no good reason disrupts not only the resolution of the case in question but also the court’s timetable and its ability to deal with other cases waiting their turn. What is involved in showing a “good reason” was explained by Dyson LJ in *Estate Acquisition and Development Ltd v Wiltshire*:

“if the reason for a party’s non-attendance is that he did not know that the hearing was taking place on the day when it did take place, it will usually be necessary to ask why the party was not aware that the hearing was taking place on that dayThe mere assertion that the party was unaware of the hearing date is unlikely to be sufficient to constitute a good reason. It will usually be relevant to inquire whether the party was aware that proceedings had been issued and served. Once a party is aware that proceedings have been served, he knows that it is likely that steps will be taken in the proceedings and that there will be a hearing or hearings. Unless he has nominated a solicitor to act on his behalf, he must be taken to expect to receive communications personally from the opposing party and/or the court. These will include notifications of hearing dates. If he does not have a system in place for ensuring that such communications are received by him, he is unlikely to be able to rely on the absence of such a system to say that he had a good reason for not attending the hearing.”²⁵¹

The Court of Appeal also thought that a person is under no obligation to make themselves amenable to potential claims of which they have no notice and that if they fail to attend a hearing in proceedings of which they are unaware, they have a good reason for failing to attend.

22. 147 A LiP who did not know that the trial was taking place because he was illiterate was held to have shown good reason.²⁵² Good reason for non-attendance was found where there was no letter before action, some of the documents were not translated into the defendant’s language and he had assumed that he was only required as a witness.²⁵³ Similarly, good reason was accepted where the defendant made a reasonable assumption that the trial might not take place and therefore avoided the expense of coming from Australia.²⁵⁴ Lack of supportive medical evidence that the applicant was too ill to attend is not necessarily fatal if the applicant’s condition is otherwise believable.²⁵⁵

22. 148 In addition to establishing a good reason for the non-attendance the applicant must show that they have acted promptly as soon as they found out that an order or judgment was given against them. Thus, the applicant must show that they have acted with all reasonable alacrity to protect their position.²⁵⁶ The need for prompt action is dictated by considerations of fairness to the other side. A party who has obtained an order or judgment in the opponent’s absence, and has notified the opponent of the outcome, is entitled to assume that the decision is final once a reasonable time has elapsed without protest from the opponent, unless they are aware of special circumstances preventing the opponent from objecting.

22. 149 Lastly, an order or judgment will not be set aside, nor will proceedings be restored, unless the applicant can show that they have a reasonable prospect of success.²⁵⁷ Where there is no such prospect of success, a further hearing would amount to a waste of resources. The requirement of establishing a reasonable prospect of success, Brooke LJ has observed, “gives the party in whose favour the judgment was given the chance of not having to prove his case all over again, with all the attendant expense that this will involve (which will very often be irrecoverable in practice), if a court is satisfied that there is in truth no reasonable prospect that the judgment would be reversed”.²⁵⁸ It is possible that the requirement of a “*reasonable* prospect of success” is a more flexible test than that of a “*real* prospect of succeeding”, which is used in connection with applications for summary judgment under [CPR 24.3](#).²⁵⁹ If so, it could be applied differently depending on the reasons for the party’s

absence. Where a party has been prevented from attending by unavoidable circumstances, the court might be satisfied by a lower prospect than where the party's reasons are less satisfactory or their application less than prompt.²⁶⁰

22. 150

Although the three conditions of CPR 39.3(5) are cumulative, it is clear that the key test will often be the reason for the non-attendance, as was explained in *Shocked v Goldschmidt*.²⁶¹ This decision precedes the CPR, but the approach outlined by Leggatt LJ is entirely consistent with the new rules:

“Each case depends on its own facts and the weight to be accorded to the relevant factors will alter accordingly I derive the following propositions or ‘general indications’ (1) Where a party with notice of proceedings has disregarded the opportunity of appearing at and participating in the trial, he will normally be bound by the decision. (2) Where judgment has been given after a trial it is the explanation for the absence of the absent party that is most important: unless the absence was not deliberate but was due to accident or mistake, the court will be unlikely to allow a rehearing. (3) Where the setting aside of judgment would entail a complete retrial on matters of fact which have already been investigated by the court the application will not be granted unless there are very strong reasons for doing so. (4) The court will not consider setting aside judgment regularly obtained unless the party applying enjoys real prospects of success. (5) Delay in applying to set aside is relevant, particularly if during the period of delay the successful party has acted on the judgment, or third parties have acquired rights by reference to it. (6) In considering justice between parties, the conduct of the person applying to set aside the judgment has to be considered: where he has failed to comply with orders of the court, the court will be less ready to exercise its discretion in his favour. (7) A material consideration is whether the successful party would be prejudiced by the judgment being set aside, especially if he cannot be protected against the financial consequences. (8) There is a public interest in there being an end to litigation and in not having the time of the court occupied by two trials, particularly if neither is short.”²⁶²

It is therefore clear that failure to attend the trial can be very risky and that a party cannot absent themselves from the proceedings and hope to have the result reversed merely by showing that they have a good case on the merits.

The relationship between an application under CPR 39.3 and appeal

22. 151

It is settled that CPR 39.3 does not provide a comprehensive procedure for challenging a judgment given in the absence of a party.²⁶³ That assumption had the merit of simplicity, but it was unsustainable for the simple reason that CPR 39.3 did not and does not allow the absent party to attack the judgment on its merits. This rule does not leave room for arguing that the judgment should be set aside, not because it was given in a party's absence, but because it was erroneous; for example, if the court found causation when it was unsupported by the evidence, or held that there had been a breach of contract where no contract had been established. The Court of Appeal was therefore right to hold in *Bank of Scotland v Pereira* that there was no reason why “the rights of appeal of an unsuccessful defendant should be any different in principle depending on whether the judgment was given in her presence or her absence. If the trial judge made an appealable decision, either in his final judgment or during the hearing, the defendant's ability to challenge the decision by way of an appeal under CPR 52 should in principle be the same”.²⁶⁴

22. 152

However, accommodating the CPR 39.3 procedure alongside the appeal procedure is in practice complicated, as the Court of Appeal was quick to appreciate. In an attempt to simplify matters the Court of Appeal in *Pereira* set out six guidelines as follows. These guidelines should be read bearing in mind that the main condition for obtaining permission to appeal is a real prospect of success²⁶⁵:

“(1)A party seeking a new trial because they had not attended the original trial should normally proceed under CPR 39.3, provided that they reasonably believed they could satisfy the requirements of CPR 39.3(5). Clearly there is no point in doing so if the party had no good reason for the failure to attend, or did not apply promptly.

(2) If they could not establish that they had good reason and/or that they had applied promptly, they could seek to appeal against the decision.

(3) The right to appeal a trial judge's order where a [CPR 39.3](#) application had failed should, in principle, be no different than if the application had not been made, although the appellate court would take a great deal of persuading to depart from a conclusion reached by the judge hearing the application. To do so in the absence of good reason would be invidious.

(4) A party would not normally be allowed to raise the same arguments on appeal as made in a [CPR 39.3](#) application which had failed as having no prospect of success at retrial. The proper course would usually be to challenge the refusal of the [CPR 39.3](#) application. However, there would be exceptional cases where it would be wrong to preclude a party from seeking permission to appeal on the basis that the judge was wrong for reasons rejected in the [CPR 39.3](#) application.

(5) A party whose [CPR 39.3](#) application had failed would normally face severe difficulties in seeking to rely on evidence which was not before the trial judge. The appellate court's approach had to depend to some extent on the facts and, in addition to the requirements of [CPR 39.3](#), the post-CPR application of the principles evinced in *Ladd v Marshall*.²⁶⁶ Where the new evidence could not reasonably have been available, the position of a party who had failed to attend the trial should normally be no different from a party who had attended. However, it would be very different where an application to adduce new evidence, or for a retrial, was essentially based on the fact that the applicant had not attended the trial. To allow an appeal on such a ground would be to allow it in through the back door; the policy behind [CPR 39.3](#) was to prevent a party seeking a retrial unless the requirements in [CPR 39.3\(5\)](#) were satisfied.

(6) Similar considerations applied if a party made no [CPR 39.3](#) application but appealed the trial judge's decision and sought to adduce new evidence, or a retrial."

22. 153

The upshot is that an absent party may have two bites at the cherry. The party may apply under [CPR 39.3](#) to have the judgment set aside. If the application is unsuccessful, the party may appeal. True, the fourth guideline above states that a party would not normally be allowed to raise the same arguments on appeal as made in a [CPR 39.3](#) application, which had failed as having no prospect of success at retrial. But there will be cases where the application has not failed on that ground alone. More important still, an appeal need not attack the judgment on its merits; it may be directed at an interim decision, such as a decision not to grant an adjournment.²⁶⁷ Although the Court of Appeal stressed that a defendant who did not attend the trial may face greater difficulties on appeal than one who did attend, it is hardly likely to deter determined parties.

Proceedings for possession

22. 154

In possession claims under [CPR 55](#), the procedure governing non-attendance has been rendered even more cumbersome by the Court of Appeal's decision in *Forcelux Ltd v Binnie*.²⁶⁸ There the court held that the hearing of a possession claim under [CPR 55](#) was not a trial and that therefore [CPR 39.3](#) did not apply. [CPR 55](#) sets out an accelerated procedure for claimants who seek expeditious recovery of their land. Thus, the court will fix a date for a hearing when it issues the claim form ([CPR 55.5\(1\)](#)). In a possession claim against trespassers the defendant must be served with the claim form, particulars of claim and any witness statements not less than five days before the hearing in residential property claims, and not less than two days in other claims ([CPR 55.5\(2\)](#)).²⁶⁹ In claims other than against trespassers the hearing date will be not less than 28 days from the date of issue of the claim form, the standard period between the issue of the claim form and the hearing will be not more than eight weeks, and the defendant must be served with the claim form and particulars of claim not less than 21 days before the hearing date ([CPR 55.5\(3\)](#)).

22. 155

The hearing of an application (unlike a trial) comes under CPR 23.11, which empowers the court to proceed in the absence of a party. If the court has made an order in such a situation, CPR 23.11(2) empowers it to relist the application—i.e. to set aside the order and rehear the application. This power is not subject to the constraints of CPR 39.3(5), though the two situations have been described as “closely analogous” and the CPR 39.3(5) factors may be taken into account as part of the exercise of discretion under CPR 23.11(2).²⁷⁰ Oddly, the court in *Forcelux Ltd* did not mention CPR 23.11 but instead held that CPR 3.1(2)(p) and 3.1(7) gave the court power to set aside a possession order if, in its discretion, it considered that the interests of justice demanded it. In exercising its discretion under this rule, the court should have regard to the considerations listed in CPR 3.9. In the event the Court of Appeal held that although the defendant did not act promptly or have good reason for the failure to attend, he had a strong claim for relief from forfeiture given the comparatively small amount of money outstanding, which the defendant was able and willing to pay.

22. 156

If defendants could obtain relief from forfeiture and a relisting of the CPR 55 application merely upon showing a good case on the merits, it would be only too easy to defeat the purpose of the CPR 55 procedure, which was designed to expedite recovery of land by means of a possession claim. This was recognised by the Court of Appeal in *Hackney LBC v Findlay*.²⁷¹ The court explained that once a possession order was made, it would form a proper basis for execution unless the tenant made an application under the Housing Act 1985 s.85(2) during the period provided for in that provision. In the absence of some unusual and highly compelling factor, as in *Forcelux Ltd*, the court should, in general, apply the requirements of CPR 39.3(5) by analogy.²⁷² However, the Court of Appeal qualified this by saying that since the Housing Act 1985 s.85(2) had clearly provided that a secure tenant should have a chance of persuading the court to modify an outright possession order, the requirements of CPR 39.3(5) did not need to be applied with the same rigour as in the case of other orders.

Footnotes

211 Chapter 12 Case Management Part I paras 12.8 ff, especially paras 12.12 ff.

212 *Nelson v Clearsprings (Management) Ltd* [2006] EWCA Civ 1252; [2007] 1 W.L.R. 962; and see Ch.3 Fair Trial para.3.200. The concept of waiver more generally is discussed at paras 3.36 ff.

213 See, *R (Watkins) v Newcastle Upon Tyne County Court* [2018] EWHC 1029 (Admin) [19]–[20]; and *General Medical Council v Theodoropoulos* [2017] EWHC 1984 (Admin) [21]–[26].

214 *Probst v Germany*, App. No.19913/92 (11 January 1995, unreported, ECtHR). For an analogy see *Poitrimol v France* [1993] 18 EHRR 130. See also *London Borough of Hackney v Driscoll* [2003] EWCA Civ 1037.

215 See the discussion in Ch.5 Service paras 5.1–5.2 of notice of proceedings being a fundamental requirement of fairness.

216 *Akram v Adam* [2004] EWCA Civ 1601; [2005] 1 All ER 741; see the criticism of this decision in Ch.5 Service paras 5.78 ff, especially paras 5.81 ff.

217 *Nelson v Clearsprings* [2006] EWCA Civ 1252; and *Estate Acquisition and Development Ltd v Wiltshire* [2006] EWCA Civ 533. See Ch.5 Service paras 5.84–5.87; and Ch.3 Fair Trial para.3.193.

218 *London Borough of Hackney v Driscoll* [2003] EWCA Civ 1037.

219 *Estate Acquisition and Development Ltd v Wiltshire* [2006] EWCA Civ 533 [21]–[22]; and see to similar effect *Perihan and Mezopotamya Basin Yayin A.Ş. v Turkey* [2014] ECHR 67.

220 *Estate Acquisition and Development Ltd v Wiltshire* [2006] EWCA Civ 533.

221 See also the discussion of this aspect in Ch.8 Interim Applications paras 8.26 ff. Note that the position as described here is different from the situation where an application is expressly permitted to be made without notice. Such applications are discussed in Ch.8 Interim Applications paras 8.30 ff; and Ch.10 Interim Remedies para.10.216 ff.

222 Although the rule does not expressly mention the possibility of granting or dismissing the application, this is necessarily implicit in the statement that the court “may proceed in [a party’s] absence” (CPR 23.11(1)). Moreover, the court must have the power to dismiss an application where the applicant, or neither party, attends, by virtue of its inherent power to regulate its proceedings. Indeed, under the old RSC Ord.32 r.5(4) an application could be dismissed merely by virtue of the applicant’s failure to appear.

223 *Yeganeh v Freese* [2015] EWHC 2032 (Ch).

224 See for example *Gankin v Russia* [2016] ECHR 461.

- 225 This was an express requirement under RSC Ord.32 r.5(2); see also *Gankin v Russia* [2016] ECHR 461; and see 2025
WB 23.11.2.
- 226 *Fox v Graham Group Ltd, The Times*, 3 August 2001.
- 227 *R (Idubo) v Secretary of State for Home Department* [2003] EWCA Civ 1203 [7]; this accords with the approach taken
to applications to set aside under CPR 39.3(5), discussed below at paras 22.142 ff: *De Ferranti v Execuzen Ltd* [2013]
EWCA Civ 592. However, while the approach taken to applications under CPR 39.3(5) is a useful guide when considering
an application under CPR 23.11, CPR 39.3(5) does not strictly apply and the court is not bound by it: *Tubelike Ltd (in
Liquidation) and Others v Visitjourneys.com Ltd* [2016] EWHC 43 (Ch); *Phonographic Performance Ltd v Balgun (t/
a Mama Africa)* [2018] EWHC 1327 (Ch); and *Morgan v Dooner* [2019] EWHC 679 (Comm) [24]. See Ch.8 Interim
Applications paras 8.27–8.28.
- 228 *Riverpath Properties Ltd v Brammall, The Times* 16 February 2000.
- 229 *Dhillon v Asiedu* [2012] EWCA Civ 1020; see also *Fitzroy Robinson Ltd v Mentmore Towers Ltd* [2009] EWHC 3070
(TCC); and PD 29 para.7.4(5).
- 230 *Seiko Epson Corp v Dynamic Cassette International Ltd* [2012] EWHC 1906 (Pat).
- 231 *Bilta (UK) Ltd v Tradition Financial Services Ltd* [2021] EWCA Civ 221.
- 232 See for instance *Garland v Stedman* (7 December 2000, unreported, CA); *St Ermin's Property Co Ltd v Draper* [2004]
EWHC 697 (Ch); and *Thakerar v Northwich Park Hospital NHS Trust* [2002] EWCA Civ 617.
- 233 *Levy v Ellis-Carr* [2012] EWHC 63 (Ch) [33].
- 234 C.f. CPR 3.4(2)(c) and CPR 3.5.
- 235 The doctrine of res judicata is discussed in Ch.26 Finality of Litigation at paras 26.91 ff. See paras 26.104 ff for the
principle that only a decision on the substance of a claim gives rise to res judicata.
- 236 Note that prior to the 104th update to the CPR (which took effect on 6 April 2019), PD 39A provided for this possibility
expressly, in that it stated that in the absence of the defendant, the claimant may “prove his claim at trial and obtain
judgment on his claim and for costs” (former PD 39A 2.2(1)(a)). The 104th update revoked PD 39A, so there is now
no express provision for this possibility in the rules.
- 237 *Mander v Evans* [2001] 3 All ER 811; [2001] 1 W.L.R. 2378.
- 238 See for example *Mohun-Smith v TBO Investments Ltd* [2016] EWCA Civ 403.
- 239 Overwhelmingly, the court deals with CPR 39.3(3) applications on the basis of the written evidence. Only in exceptional
circumstances will the court consider hearing oral evidence: *Bank of Scotland v Pereira* [2011] EWCA Civ 241 [54].
- 240 *Howard v Stanton* [2011] EWCA Civ 1481 [5].
- 241 *Forcelux Ltd v Binnie* [2009] EWCA Civ 854; *Deng v Zhang* [2024] EWHC 2392 (KB).
- 242 *Gupta v Shah* [2024] EWHC 1189 (Ch) [15] ff.
- 243 *Nelson v Clearsprings (Management) Ltd* [2006] EWCA Civ 1252.
- 244 *Forcelux Ltd v Binnie* [2009] EWCA Civ 854 [50]–[58]. Cf. *Howard v Stanton* [2011] EWCA Civ 1481.
- 245 *Regency Rolls Ltd v Carnall* [2000] EWCA Civ 379; *Bank of Scotland v Pereira* [2011] EWCA Civ 241; [2011] 3 All
ER 392 [24]; and *Tinkler v Elliot* [2012] EWCA Civ 1289.
- 246 *Thakerar v Northwich Park Hospital NHS Trust* [2002] EWCA Civ 617; and *Bank of Scotland v Pereira* [2011] EWCA
Civ 241; [2011] 3 All ER 392 [25].
- 247 See RSC Ord.35 r.2; and CCR Ord.21 and Ord.37 r.2.
- 248 *Barclays Bank Plc v Travert Linford Ellis* [2001] C.P. Rep. 50, CA; *Bank of Credit and Commerce v Zafar* (2 November
2001, unreported, ChD); *Thomson Directories Ltd v Planet Telecom Plc* [2003] EWHC 1882 (Ch).
- 249 *Bank of Credit and Commerce v Zafar* (2 November 2001, unreported, ChD).
- 250 *Bank of Scotland v Pereira* [2011] EWCA Civ 241; [2011] 3 All ER 392 [26].
- 251 *Estate Acquisition and Development Ltd v Wiltshire* [2006] EWCA Civ 533 [21].
- 252 *Brazil v Brazil* [2002] EWCA Civ 1135; [2002] All ER (D) 508 (Jul).
- 253 *Attorney General of Zambia v Meer Care & Desai (A Firm)* [2008] EWCA Civ 754.
- 254 *Sir John Fitzgerald Ltd v Macarthur* [2009] EWHC 2659 (QB).
- 255 *St Ermin's Property Co Ltd v Draper* [2004] EWHC 697 (Ch). C.f. *Levy v Ellis-Carr* [2012] EWHC 63 (Ch); and
Forrester Ketley and Co v Brent [2012] EWCA Civ 324.
- 256 *Regency Rolls Ltd v Carnall* [2000] All ER (D) 1417 (Oct), CA; and *Bank of Scotland v Pereira* [2011] EWCA Civ 241;
[2011] 3 All ER 392. In determining whether an applicant has acted promptly—that is whether they have “acted with
all reasonable celerity in the circumstances”, and not whether they engaged in no unnecessary delay whatsoever—the
court is making an evaluation and not exercising a discretion: *Tinkler v Elliot* [2012] EWCA Civ 1289 [25], [28].

- 257 *Barclays Bank Plc v Ellis*, *The Times* 24 October 2000, CA.
- 258 *London Borough of Hackney v Driscoll* [2003] EWCA Civ 1037 [27] (16 July 2003, unreported). Cf. *Akram v Adam* [2004] EWCA Civ 1601; [2005] 1 All ER 741.
- 259 Chapter 9 Disposal Without Trial paras 9.60 ff; see paras 9.33 ff for discussion of the test in the context of applications to set aside default judgment.
- 260 C.f. *Thakerar v Northwich Park Hospital NHS Trust* [2002] EWCA Civ 617.
- 261 *Shocked v Goldschmidt* [1998] 1 All ER 372.
- 262 *Shocked v Goldschmidt* [1998] 1 All ER 372, at 381.
- 263 *Tennero Ltd v Arnold* [2006] EWHC 1530 (QB); [2007] 1 W.L.R. 1025.
- 264 *Bank of Scotland v Pereira* [2011] EWCA Civ 241; [2011] 3 All ER 392 [38]. See also *Williams v Hinton* [2011] EWCA Civ 1123.
- 265 See Ch.25 Appeal paras 25.104 ff for discussion of this test.
- 266 *Ladd v Marshall* [1954] 1 W.L.R. 1489.
- 267 *Bank of Scotland v Pereira* [2011] EWCA Civ 241; [2011] 3 All ER 392 [41].
- 268 *Forcelux Ltd v Binnie* [2009] EWCA Civ 854.
- 269 Note, however, that short notice will not be necessarily be fatal: in *Sun Street Property Ltd v Persons Unknown* [2011] EWHC 3432 (Ch), the court dismissed an application to set aside a final possession order as of right on the basis that the trespassers did not have adequate notice of the hearing, having been served only 45 minutes prior to the making of the order at 22.00 in the evening. The court held that even though notice was inadequate there was no justification to set aside the order in view of the overriding objective and the underlying merits of the applicants' case: see [23]–[26].
- 270 *Morgan v Dooner* [2019] EWHC 679 (Comm) [24]; see also *Tubelike Ltd (in Liquidation) v Visitjourneys.com Ltd* [2016] EWHC 43 (Ch); and *Phonographic Performance Ltd v Balgun (t/a Mama Africa)* [2018] EWHC 1327 (Ch). See Ch.8 Interim Applications para.8.28; and paras 22.133–22.135.
- 271 *Hackney LBC v Findlay* [2011] EWCA Civ 8.
- 272 See also *Salix Homes v Mantato* [2019] EWCA Civ 445; [2019] 1 W.L.R. 3609.

Introduction

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Mainwork

Chapter 27 - Offers to Settle

Introduction

27. 1

Litigation costs tend to be both high and unpredictable. First, clients are normally charged for legal services on an hourly basis, with the result that the more complex and intense the process, the higher the final bill. This model of billable hours creates a perverse incentive for lawyers to engage in expensive and drawn-out procedural activity. Further, because it is difficult to predict the time and effort that might be involved in litigating a particular dispute, it is commensurately difficult to estimate in advance the amount of money that a party would have to invest in the process.¹ Second, under the English costs-shifting rule, the unsuccessful party will normally be ordered to pay the successful party's litigation costs, albeit limited to costs that were reasonably incurred, reasonable in amount and proportionate.² Each party therefore runs the risk of having to pay not only its own costs but also its opponent's, which are doubly hard to estimate in advance. In multi-track litigation, costs are subject to some degree of court control in the shape of court-approved budgets, but these are not knowable in advance of proceedings, and may be adjusted both during and at the conclusion of proceedings.³ It follows that litigation carries a largely unpredictable costs burden, which could vastly outstrip the value of the dispute. For a party of modest means, the consequences of losing could well be ruinous.⁴

27. 2

Given that the cost of litigation is high and unpredictable, it is vital that litigants should have some means of limiting their exposure to this risk. In the absence of some form of protection, claimants and defendants would be faced with the stark choice of either giving up their right to sue or defend, or else underwriting an unlimited liability to litigation costs. The position of defendants is exacerbated by the principle that for the purpose of the costs-shifting rule a claimant is generally considered to be the successful party if it recovers *any* damages, no matter how small by comparison with the total amount claimed,⁵ although this principle has softened to some extent under the CPR.⁶ This rule could give claimants an unfair advantage. A claimant who was confident of recovering *something* could inflate their claim, protract the litigation and increase its costs, sure in the knowledge that if they secured a judgment of any amount, however small, they would recover most of their costs from the defendant. The defendant would then feel blackmailed to settle for an inflated amount, which might still be less than the expense of bearing the claimant's costs as well as its own.

27. 3

To ensure that defendants are not put in such a situation, English law for a long time enabled defendants to protect themselves by making payments into court.⁷ Such payments safeguarded defendants from costs liability where the claimant refused to accept the payment in full settlement and subsequently failed to obtain a judgment for a higher amount. In such a case, the claimant would be liable for the defendant's costs. Similarly, under the principles in *Calderbank v Calderbank*,⁸ a party could make an offer of compromise that would be inadmissible in determining the substantive proceedings, but support its argument that it had attempted to resolve the dispute in good faith and should not be liable for its opponent's costs.

27. 4

The CPR 36 system of offers to settle expanded on the previous system in important respects.⁹ CPR 36 formed part of Lord Woolf's policy "to develop measures which will encourage reasonable and early settlement of proceedings".¹⁰ It goes without saying that the court must interpret CPR 36 and apply it so as to further the overriding objective (CPR 1.1).¹¹ In doing so the court should bear in mind two important considerations. First, it is a requirement of practical access to justice that litigants, and especially defendants, should have some means of limiting their exposure to the risk of costs. Second, the court must ensure that the CPR 36 procedure continues to fulfil its purpose of encouraging settlement,¹² which can only be achieved if the consequences of offers and refusals are predictable and can be taken into account by litigants in their decision-making.

- 27.5 The original CPR 36 has been extensively revised in 2007, 2010, 2013, 2015 and 2023. Some care is therefore needed when considering caselaw on offers to settle. Broadly speaking, the system is as follows. A defendant who wishes to obtain costs protection can make an offer to pay a certain amount in settlement. If a claimant accepts a defendant's offer, the claim is stayed and the claimant becomes entitled to its costs up to that point (CPR 36.13(1)).¹³ A claimant who refuses to accept a defendant's offer risks having to pay the defendant's costs from the expiry of the "relevant period"¹⁴ if the claimant fails to recover a more favourable judgment (CPR 36.17(3)). A claimant can also seek protection by making an offer to settle for less than the amount claimed. If the defendant accepts the offer, the claimant is entitled to its costs as well as to the amount of the offer (CPR 36.13(1)). If the defendant declines the offer and the claimant recovers a more favourable judgment, the claimant will normally be entitled to recover costs on the indemnity basis (which is a more generous measure than costs on the standard basis),¹⁵ enhanced interest on costs, enhanced interest on its money award and an additional amount, as payment for the unnecessary trouble to which it has been put (CPR 36.17(4)).¹⁶ In sum, a CPR 36 offer puts the offeree at risk of paying the offeror's costs if the judgment obtained by the offeree is not more favourable than the offer.¹⁷
- 27.6 CPR 36 offers can be made in respect of counterclaims and additional claims (CPR 36.2(3)(a)). They can also be made in respect of appeals and cross-appeals against "a decision made at trial" (CPR 36.2(3)(b)), although not interlocutory appeals.¹⁸ CPR 47.20(4)–(7) applies CPR 36 to detailed assessment costs subject to modifications.¹⁹ CPR 36 does not apply to small claims (CPR 27.2(1)(g)), and applies in an amended form in fast track and intermediate track claims, where fixed recoverable costs apply.
- 27.7 A CPR 36 offer does not entail an admission of liability or acknowledgement that the offeror's claim or defence is ill-founded. Rather, it is treated as "without prejudice except as to costs" (CPR 36.16(1)). The offer must not be communicated to the court until the case has been decided (CPR 36.16(2)).²⁰ A party making an offer is therefore able to protect itself from costs without risking its chances of success on the merits, should the case proceed to trial.
- 27.8 Ensuring fair treatment and promoting settlement depend on the predictability of the consequences of CPR 36 offers. If these consequences became unpredictable, parties would find it difficult to assess the benefits of making or accepting offers made and would be less likely to settle. Uncertainty of outcome would therefore undermine the protection from costs that can be obtained by making a CPR 36 offer, as Moore-Bick LJ recognised in *Gibbon v Manchester City Council* when he said that certainty "is as much to be commended in procedural as in substantive law, especially, perhaps, in a procedural code which must be understood and followed by ordinary citizens who wish to conduct their own litigation".²¹
- 27.9 For a while, the predictability of the CPR 36 costs consequences was undermined by a loose interpretation of what a "more advantageous" judgment meant for the purposes of CPR 36.17.²² However, CPR 36.17(2) now clearly defines it as better in money terms by any amount, however small. Nonetheless, there remains some room for uncertainty resulting from the court's jurisdiction under CPR 36.17(3)–(4) not to apply the normal consequences for failing to beat a CPR 36 offer where it would be "unjust to do so". A further source of uncertainty arises from the fact that there is no obligation on a party to use the special form (N242A) designed for the purpose of making a CPR 36 offer, with the result that disputes may arise as to whether a differently worded offer is within CPR 36.²³

Footnotes

- 1 While difficult, parties in most multi-track claims must attempt to do this in their costs budgets under the costs management regime contained in [CPR 3 s.II](#) and PD 3D. The costs management system is discussed in Ch.28 Costs paras [28.103 ff.](#)
- 2 See Ch.28 Costs paras [28.39 ff](#), [28.86 ff](#) and [28.117](#).
- 3 See Ch.28 Costs paras [28.103 ff.](#)
- 4 This is to some extent ameliorated in personal injury claims which are subject to qualified one-way costs shifting (QOCS), discussed in Ch.28 Costs at paras [28.168 ff](#), and Fixed recoverable costs under [CPR 45](#) in fast track and intermediate track claims (discussed in Ch.28 Costs at para. [28.153 ff.](#))
- 5 See Ch.28 Costs para. [28.40](#).
- 6 See Ch.28 Costs paras [28.41](#) and [28.55 ff](#). Where the claim is primarily for non-monetary relief, the question is which party is the overall winner as a matter of substance and reality: *The Proctor & Gamble Co v Svenska Cellulosa AB SCA [2012] EWHC 2839 (Ch)* [8]–[10].
- 7 See W. Odgers and S. Goulding, Odgers on Civil Court Actions 24th edn (London: Sweet & Maxwell, 1996) paras 17.08–17.23 for discussion of [RSC Ord.62 r.9](#).
- 8 *Calderbank v Calderbank [1975] 3 All ER 333*.
- 9 J. Rowley and S. Middleton (eds), Cook on Costs (London: LexisNexis Butterworths, 2024) Ch.14.
- 10 Lord Woolf, Access to Justice: Interim Report (London: HMSO, 1995, Ch.24 para.1. See also Lord Woolf, Access to Justice: Final Report (London: HMSO, 1996) Ch.11.
- 11 For a discussion of the overriding objective as a tool of interpretation, see [Ch.1 The Overriding Objective](#) paras [1.73–1.74](#).
- 12 *Gibson v Manchester City Council [2010] EWCA Civ 726*, [2], [49].
- 13 These will be fixed recoverable costs on the fast track and intermediate track ([CPR 36.23](#)), and standard basis costs on the multi-track ([CPR 36.13\(3\)](#)).
- 14 The meaning of “relevant period” is set out in [CPR 36.3\(g\)](#), and discussed in greater detail below at para. [27.29](#).
- 15 In fast track and intermediate track claims covered by fixed recoverable costs, the claimant is entitled to additional costs at 35% above the fixed costs applicable after the relevant period ([CPR 36.24\(5\)](#)).
- 16 See below, paras [27.80–27.81](#) and [27.82](#), for discussion of the extent to which this jurisdiction is punitive rather than compensatory.
- 17 *Matthews v Metal Improvements Co Inc [2007] EWCA Civ 215* [33].
- 18 But a composite [CPR 36](#) offer cannot be made in respect of both first instance and appeal proceedings; see 2025 WB 36.2.3.2 and para. [27.15](#) below.
- 19 See [Ch.28 Costs](#) para. [28.141](#).
- 20 See below, paras [27.100 ff.](#)
- 21 *Gibson v Manchester City Council [2010] EWCA Civ 726* [6].
- 22 *Carver v BAA Plc [2008] EWCA Civ 412*, [32]; see below, para. [27.67](#).
- 23 The formal requirements of [CPR 36](#) are discussed below at paras [27.18 ff.](#)

CPR 36 Offers and Contract Rules

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CPR 36 Offers and Contract Rules

- 27. 10** There are terminological and conceptual affinities between contract principles governing offer and acceptance and CPR 36 offer and acceptance, but also fundamental differences in their effect. CPR 36 is a “self-contained procedural code about offers to settle”; offers under it are governed by the provisions of CPR 36, not general contract law (CPR 36.1(1)). Moore-Bick LJ in *Gibbon v Manchester City Council* explained that CPR 36, rather than contract law, prescribes the manner in which a Part 36 offer may be made and accepted, and governs the consequences of accepting or declining it:

“Basic concepts of offer and acceptance clearly underpin Part 36, but that is inevitable given that it contains a voluntary procedure under which either party may take the initiative to bring about a consensual resolution of the dispute. Such concepts are part of the landscape in which everyone conducts their daily life. It does not follow, however, that Part 36 should be understood as incorporating all the rules of law governing the formation of contracts, some of which are quite technical in nature ... Part 36 ... is to be read and understood according to its terms without importing other rules derived from the general law, save where that was clearly intended.”²⁴

- 27. 11** For example, unlike contractual offers, CPR 36 offers remain open despite the offeree’s rejection²⁵ or counter-offer,²⁶ and need not comply with the contractual formalities of (for example) agreements for the sale of land.²⁷ Contract law leaves offerors free to withdraw or change their offer before it has been accepted, whereas a CPR 36 offeror may only do so after the expiry of the relevant period. Before the expiry of the relevant period, as we shall see, CPR 36.10 prevents an offer from being unilaterally withdrawn or varied so as to give less advantageous terms. Rather, the purported withdrawal or variation is held in suspense until the end of the relevant period,²⁸ and if the offeree purports to accept during that time, the offeror must persuade the court that it would be in the interests of justice to let them resist the acceptance.²⁹

- 27. 12** However, general principles of contract law may still be relevant in interpreting and applying the CPR 36 provisions. Thus, principles of contract are used to determine whether a communication amounted to an offer, or whether it constituted a counter-offer.³⁰ Further, acceptance of a CPR 36 offer takes effect as a contract between private parties like any other.³¹ As such, the parties are free to determine the form and content of their agreement, although if they wish the specified consequences of CPR 36 to flow from it, it must not be inconsistent with any of the requirements of CPR 36.³² If for some reason the CPR 36 consequences do not flow (for example, because the offer contained some term inconsistent with the strictures of CPR 36),³³ the agreement nonetheless takes effect as a binding contract of settlement.³⁴

Footnotes

- ²⁴ *Gibbon v Manchester City Council* [2010] EWCA Civ 726 [6]; see also *Flynn v Scougall* [2004] EWCA Civ 873; [2004] 1 W.L.R. 3069 [26].
- ²⁵ *Gibbon v Manchester City Council* [2010] EWCA Civ 726 [16].
- ²⁶ CPR 36.11(2).
- ²⁷ *Orton v Collins* [2007] EWHC 803 (Ch) [53]–[61].

28 CPR 36.10(2)(a).

29 CPR 36.10.(2)(b). This aspect is discussed below, at paras 27.33 ff.

30 *Rosario v Nadell Patisserie Ltd [2010] EWHC 1886 (QB)* [34].

31 *Calonne Construction Ltd v Dawnus Southern Ltd [2019] EWCA Civ 754* [44]; cf. *Flynn v Scougall [2004] EWCA Civ 873; [2004] 1 W.L.R. 3069* [26].

32 *Shaw v Merthyr Tydfil County Borough [2014] EWCA Civ 1678*; and *King v City of London Corporation [2019] EWCA Civ 2266* [35].

33 See below, paras 27.18 ff.

34 CPR 36.2(2); and *Shaw v Merthyr Tydfil County Borough [2014] EWCA Civ 1678*. And see below, paras 27.13-27.14 and 27.18.

The Difference Between Settlement Offers Inside and Outside CPR 36

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The Difference Between Settlement Offers Inside and Outside CPR 36

- 27.13 As already mentioned, before the CPR, litigants could obtain protection from costs using a procedure known as a *Calderbank* offer. The need to use this procedure was reduced by CPR 36, which allows for a wider variety of offers and more predictable consequences than before. Nevertheless, *Calderbank* offers and other types of offers to settle that are strictly outside CPR 36 are still of considerable importance. CPR 36.2(2) states:

“Nothing in this Section prevents a party making an offer to settle in whatever way that party chooses, but if the offer is not made in accordance with rule 36.5, it will not have the consequences specified in this Section.”

- 27.14 The court possesses a general discretion in making any costs order, and in exercising it the court must have regard to the conduct of the parties (CPR 44.2(a)) and “any admissible offer to settle made by a party which is drawn to the court’s attention, and which is not an offer to which costs consequences under Part 36 apply” (CPR 44.2(4)(c)). Accordingly, the CPR 36 regime does not oust the court’s discretion under CPR 44.³⁵ and the court may take non-CPR 36 settlement offers into consideration in awarding costs.³⁶ This includes offers which sought to invoke CPR 36 but for some reason did not succeed in doing so—for example, because they contained some term which was inconsistent with the requirements of CPR 36.5.³⁷ However, although the court may give offers outside CPR 36 similar consequences, a party who wishes to ensure the CPR 36 consequences apply must make an offer which complies with this rule’s requirements.³⁸ Only then is the court bound to implement the CPR 36 consequences.³⁹ Where a party has failed to better a CPR 36 offer, the consequences specified in CPR 36.17 will follow unless the court considers them unjust in the circumstances (CPR 36.17(3)–(4)). By contrast, where a party has failed to better a *Calderbank* offer, much wider discretion is exercised and there is not as strong a presumption favouring the offeror.⁴⁰

Footnotes

- 35 *Stokes Pension Fund Trustees v Western Power Distribution (South West) Plc* [2005] EWCA Civ 854 [12]. See also *MEF v St George’s Healthcare NHS Trust* [2020] EWHC 1300 (QB): Calderbank offers continue to be governed by common law contract principles and are unaffected by CPR 36.
- 36 *Mitchell v James* [2002] EWCA Civ 997 [34] per Gibson LJ; and *Charles v NTL Group Ltd* [2002] EWCA Civ 2004 [43].
- 37 CPR 36.2(2); *Shaw v Merthyr Tydfil County Borough* [2014] EWCA Civ 1678; see also *PHI Group Ltd v Robert West Consulting Ltd* [2012] EWCA Civ 588. See below, paras 27.18 ff.
- 38 *King v City of London Corporation* [2019] EWCA Civ 2266 [35].
- 39 *Rio Properties Inc v Gibson Dunn & Crutcher* [2005] EWCA Civ 534 [22]; and *French v Groupama Insurance Co Ltd* [2011] EWCA Civ 1119 [44].
- 40 *French v Groupama Insurance Co Ltd* [2011] EWCA Civ 1119 [44], [47]. For the court’s general discretion as to costs in the absence of a CPR 36 offer, see Ch.28 Costs paras 28.54 ff, especially paras 28.58 ff (discretion to depart from the normal rule that costs follow the event) and paras 28.118 ff (indemnity costs).

The Time for Making CPR 36 Offers

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The Time for Making CPR 36 Offers

- 27.15 A **CPR 36** offer to settle may be made at any time, including before the commencement of proceedings (**CPR 36.7(1)**), before the claim or counterclaim has been pleaded,⁴¹ in appeal proceedings (**CPR 36.2(3)(b)**) and in detailed assessment proceedings (**CPR 47.20(4)–(7)**).⁴² A **CPR 36** offer has the consequences set out in **CPR 36.17** only in relation to the costs of the proceedings in respect of which it is made and not in relation to the costs of any appeal from the final decision in those proceedings (**CPR 36.4(1)**). A party who wishes to obtain protection for the costs of an appeal must make an offer specifically for the appeal process.⁴³ The offer may be in relation to the whole claim, part of it or particular issues, such as liability (**CPR 36.2(3)**).
- 27.16 Where a **CPR 36** offer has been made before commencement of proceedings and proceedings then follow, clearly **CPR 36** governs the consequences of accepting or rejecting the offer. The language of **CPR 36** is less clear about the consequences where a **CPR 36** offer is made and accepted before proceedings have commenced. Nevertheless, “the costs of the proceedings” which **CPR 36.13(1)** requires to be paid to the claimant on acceptance, has been held to include steps taken in contemplation of proceedings where the offer was made and accepted before proceedings were issued.⁴⁴
- 27.17 Regarding **CPR 36.13(1)** as the source of a right to pre-action costs is not without difficulty, because it is unclear from where the court derives its jurisdiction to order costs where proceedings have not commenced. To say that a person who has never commenced proceedings is entitled to costs under **CPR 36.13** is tantamount to regarding this provision as giving rise to a substantive right, which as a purely procedural provision it clearly cannot do.⁴⁵ One view is that the court derives jurisdiction from **CPR 46.14**, which deals with costs-only proceedings. But this rule only applies where “the parties to a dispute have reached an agreement on all issues (including which party is to pay the costs)” (**CPR 46.14(1)(a)**). A better explanation is that a person who makes a pre-action **CPR 36** offer is invoking the **CPR 36** regime, which is then incorporated into the contract that is created by the acceptance of the offer. The right to costs is based on the contract, but the contours of that right are prescribed by **CPR 36**.

Footnotes

41 *Calonne Construction Ltd v Dawnus Southern Ltd [2019] EWCA Civ 754* [32].

42 See Ch.28 Costs para.28.141.

43 *P&O Nedlloyd BV v Utaniko Ltd [2003] EWCA Civ 174* [5]–[6]; and *Rowlands v Bryn Alyn Community (Holdings) Ltd [2003] EWCA Civ 383* [13]–[14].

44 *Solomon v Cromwell Group Plc [2011] EWCA Civ 1584* [15].

45 *Dunhill v Burgin [2014] UKSC 18* [27].

Requirements that CPR 36 Offers must Meet

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Requirements that CPR 36 Offers must Meet

General conditions

- 27.18 A settlement agreement takes effect as a contract between private parties like any other; accordingly, parties are generally free to determine the form and substance of their agreement as they choose.⁴⁶ However, to have the consequences set out in [CPR 36](#), an offer of settlement must comply with the regime's relatively inflexible rules.⁴⁷ The basic conditions are set out in [CPR 36.5\(1\)](#). In particular, the offer must:

Rule 36_5:(1)

- “(a) be in writing;
- “(b) make clear that it is made pursuant to Part 36;
- “(c) specify a period of not less than 21 days [the ‘relevant period’] within which the defendant will be liable for the claimant’s costs in accordance with rule 36.13 or 36.20 if the offer is accepted⁴⁸;
- “(d) state whether it relates to the whole of the claim or to part of it or to an issue that arises in it and if so to which part or issue; and
- “(e) state whether it takes into account any counterclaim.”

- 27.19 Paragraph (b) previously required the offer to state on its face that it was intended to have the consequences of [CPR 36 s.I](#). The current version of the rule is less prescriptive. Form N242A meets the requirement by stating “Take notice that [name of offeror] makes this offer pursuant to [Part 36 of the Civil Procedure Rules 1998](#)”. The White Book suggests it could be satisfied by a simple statement that the offer is made pursuant to [Pt 36](#) or the heading “PART 36 OFFER”,⁴⁹ although spelling out the consequences in more detail may encourage offerees to accept. Paragraph (c) means the offer may not specify cost consequences other than those set out in [CPR 36](#).⁵⁰ Offers containing other terms as to costs, such as provisions that the claimant will bear its own costs,⁵¹ or that the sum offered is inclusive of costs,⁵² are inconsistent with the [CPR 36](#) regime and will fall outside it.

- 27.20 A [CPR 36](#) offer which offers to pay or offers to accept a sum of money will be treated as inclusive of all interest until the date on which the period stated under [CPR 36.5\(4\)\(a\)](#) expires; or if the offer is made less than 21 days before the start of the trial, 21 days after the date the offer was made ([CPR 36.5\(4\)\(b\)](#)). Consequently, a statement in a purported [CPR 36](#) offer that the amount offered is exclusive of interest, at least during the relevant period, will take the offer outside the ambit of [CPR 36](#).⁵³ A [Part 36](#) offer may be accepted after the relevant period. To avoid unfairness to the claimant, a [Part 36](#) offer to accept a sum of money may include provision for accrual of interest after the relevant period.⁵⁴

- 27.21

Where a **CPR 36** offer relates only to certain issues, care must be taken to identify the issue with specificity. If the claim has been pleaded, **CPR 36** offers in respect of issues in that claim must be made by reference to the pleaded issues.⁵⁵ It was valid for a **CPR 36** claim made in detailed assessment proceedings to relate to the receiving party's solicitor's hourly rates.⁵⁶ In addition to the information required under paragraphs (d)–(e), further particulars may be required in personal injury claims for future pecuniary loss (**CPR 36.18**),⁵⁷ claims for provisional damages (**CPR 36.19**)⁵⁸ and claims where benefits will be deducted (**CPR 36.20**).⁵⁹

- 27.22 **CPR 36**'s formal requirements are in addition to the need, which arises as a matter of ordinary contractual principles, for the offer to state its terms with sufficient precision so that the settlement ensuing from its acceptance will be clear and certain. Where the offer is of a certain amount of money, there will normally be no ambiguity as to what the offeree would be entitled to upon acceptance. But, for example, where the offer is to accept partial liability, it must state the percentage of liability that is accepted. Where the dispute concerns a number of distinct matters (such as claims and counterclaims), the offer must clearly identify the matters to which it relates. As long as these basic requirements are complied with, the offer will be valid as a **CPR 36** offer, even if the offeree considers that it contains insufficient information for them to make an informed commercial decision as to whether to accept it. However, as we shall see in due course, it is open to the offeree in such circumstances to seek clarification under **CPR 36.8**.⁶⁰
- 27.23 Not every minor deviation from the requirements of **CPR 36** will take an offer outside the regime. This is because the court has a general discretion under **CPR 3.10** to cure procedural defects and may use it to treat an offer as a **CPR 36** offer to settle even if it deviates from the rules' formal requirements in certain respects. The court has sought to overlook technical defects if they caused no confusion and no prejudice to the offeree,⁶¹ although some decisions have sought to limit this to trivial errors and obvious slips which could mislead nobody.⁶² In particular, the court will treat the offer as a **CPR 36** offer if the offeree was aware of the offeror's intention but refrained from informing the offeror of the defect in order to take advantage of the latter's mistake.⁶³ In such a situation, an offeree would be in breach of **CPR 1.3**, which requires parties to help the court to further the overriding objective, including by co-operating with each other.⁶⁴ Similarly, the court may validate an invalidly served offer, acceptance or withdrawal, provided the offeree has actually received it and been provided with all the information necessary to decide how to respond.⁶⁵ In any event, defective offers may still be taken into account when the court exercises its usual discretion as to costs.

Defendants' **CPR 36** offers

- 27.24 A defendant's **CPR 36** offer to pay a sum of money in settlement of a claim must be an offer to pay a single sum of money (**CPR 36.6(1)**). Money payable under a **CPR 36** offer must generally be paid within 14 days of acceptance (**CPR 36.14(6)(a)**). **CPR 36.6(2)** states that an offer which includes an offer to pay all or part of the sum, if accepted, at a date later than 14 days following the date of acceptance will not be treated as a **CPR 36** offer unless the offeree accepts the offer. The reason for insisting on a short payment period is to render the offer's value easy to calculate and make acceptance more attractive.

Provisional damages

- 27.25 Offers in respect of claims for provisional damages require special rules. Provisional damages are awarded on the assumption that the claimant will not develop a specified disease or condition but leave the door open for an application for further damages in the event that that disease or condition does occur.⁶⁶ Plainly, a defendant is not obliged to agree to a provisional damages award. It can make an offer in full and final settlement by making a **CPR 36** offer in the normal way. But there would be little point in making such an offer in a case that is clearly suitable for a provisional damages award since the offer will be rejected

and will provide no protection in the event that the court makes a provisional damages order. Accordingly, [CPR 36.19](#) sets out special rules for [CPR 36](#) offers in respect of provisional damages.

- 27.26 An offeror may make a [CPR 36](#) offer in respect of a claim which includes a claim for provisional damages ([CPR 36.19\(1\)](#)). The offer must specify whether the offeror is proposing that the settlement shall include an award of provisional damages. Where the offeror is offering to agree to the making of an award of provisional damages the [CPR 36](#) offer must also state ([CPR 36.19\(3\)](#)):

Rule 36_19

- “(a) that the sum offered is in satisfaction of the claim for damages on the assumption that the injured person will not develop the disease or suffer the type of deterioration specified in the offer;
- (b) that the offer is subject to the condition that the claimant must make any claim for further damages within a limited period; and
- (c) what that period is.”

If the offeree accepts the [CPR 36](#) offer, the claimant must, within seven days of the date of acceptance, apply to the court for an order for an award of provisional damages under [CPR 41.2 \(CPR 36.19\(5\)\)](#).

Future pecuniary loss in personal injury claims

- 27.27 The [Damages Act 1996 s.2](#) governs claims for future pecuniary loss arising in personal injury cases. [CPR 36.18\(2\)](#) provides that an offer to settle such a claim will not have the consequences set out in [CPR 36](#) unless it complies with [CPR 36.18](#). An offer under this rule may contain an offer to pay, or an offer to accept ([CPR 36.18\(3\)](#)):

- (a) the whole or part of the damages for future pecuniary loss in the form of—
- (i) a lump sum; or
 - (ii) periodical payments; or
 - (iii) both a lump sum and periodical payments;
- (b) the whole or part of any other damages in the form of a lump sum.

There are a number of elements that the offer must specify, such as the amount of any offer to pay the whole or part of any damages in the form of a lump sum ([CPR 36.18\(4\)\(a\)](#)); what part of the offer relates to damages for future pecuniary loss to be paid or accepted in the form of periodical payments ([CPR 36.18\(4\)\(c\)](#)); the amount and duration of the periodical payments ([CPR 36.18\(4\)\(c\)\(i\)](#)); the amount of payments for capital purchases and when they are to be made ([CPR 36.18\(4\)\(c\)\(ii\)](#)); how each amount is to vary by reference to the retail prices index or some other named index ([CPR 36.18\(4\)\(c\)\(iii\)](#)); and how periodical payments will be funded in a way which ensures continuity of payment ([CPR 36.18\(4\)\(d\)](#)).

- 27.28 Where the offeror makes an offer under [CPR 36.18](#) to pay or to accept damages in the form of both a lump sum and periodical payments, the offeree may only give notice of acceptance of the offer as a whole ([CPR 36.18\(6\)](#)). If the offeree accepts an offer which includes payment of damages in the form of periodical payments, the claimant must, within seven days of the date

of acceptance, apply to the court for an order for an award of damages in the form of periodical payments under [CPR 41.8](#) ([CPR 36.18\(7\)](#)).

Footnotes

46 [Calonne Construction Ltd v Dawnus Southern Ltd \[2019\] EWCA Civ 754](#) [44].

47 [King v City of London Corporation \[2019\] EWCA Civ 2266](#) [35]. A [CPR 36](#) offer may be made using Form N242A, as specified in PD 36 para.1.1. The use of the form is not compulsory, but is highly advisable given the technicality of the formal requirements.

48 Paragraph (c) does not apply if the offer is made less than 21 days before the start of the trial ([CPR 36.5\(2\)](#)).

49 2025 WB 36.5.1.1.

50 [King v City of London Corporation \[2019\] EWCA Civ 2266](#) [40]. See also [Akinola v Oyadare \[2020\] EWHC 2038 \(Ch\)](#), where a “drop hands” offer was held not to be a valid [CPR 36](#) offer. An offer to discontinue on the basis that both sides bear their own costs is inconsistent with the costs provisions of [CPR 36](#), and with the provision in [CPR 36.14](#) that the effect of acceptance of an offer relating to the whole claim is that the claim is stayed.

51 [Mitchell v James \[2002\] EWCA Civ 997](#) [29]–[34] per Gibson LJ.

52 [French v Groupama Ltd \[2011\] EWCA Civ 1119](#) [39] per Rix LJ.

53 [King v City of London Corporation \[2019\] EWCA Civ 2266](#) [41].

54 [CPR 36.5\(5\)](#).

55 [Hertel v Saunders \[2018\] EWCA Civ 1831](#).

56 [White v Wincott Galliford Ltd \[2019\] EWHC B6 \(Costs\)](#).

57 See below, paras [27.27](#) ff.

58 See below, paras [27.25](#) ff.

59 See below, para [27.70](#).

60 See below, paras [27.31–27.32](#).

61 See for instance [Mitchell v James \[2002\] EWCA Civ 997](#) [24]–[25]; and [Huntley v Simmonds \(Costs\) \[2009\] EWHC 406 \(QB\)](#) [7].

62 [F&C Alternative Investments \(Holdings\) Ltd v Barthelemy \(Costs\) \[2012\] EWCA Civ 843](#) [63]. But see [Essex County Council v UBB Waste \(Essex\) Ltd \(No.3\) \[2020\] EWHC 2387 \(TCC\)](#), holding that even de minimis errors cannot be accommodated if they are within the scope of [CPR 36.5](#).

63 [Hertsmere Primary Care Trust v Rabindra-Anandh \[2005\] EWHC 320 \(Ch\)](#) [11].

64 For discussion of the parties’ duty to cooperate, see Ch.1 The Overriding Objective paras 1.94 ff.

65 [Thompson v Reeve \(20 March 2017, unreported, QBD\)](#) [21].

66 Provisional damages are discussed further in Ch.23 Judgment and Orders paras 23.73 ff.

The Relevant Period

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Chapter 27 - Offers to Settle

The Relevant Period

Definition of the relevant period

- 27.29 As noted above, a [CPR 36](#) offer must specify a period of not less than 21 days within which the defendant will be liable for the claimant's costs in accordance with [CPR 36.13](#) if the offer is accepted ([CPR 36.5\(1\)\(c\)](#)). This is known as "the relevant period" and is defined by [CPR 36.3\(g\)](#) to mean:

Rule 36_3

- "**(i)** in the case of an offer made not less than 21 days before trial, the period stated under rule 36.5(1)(c) or such longer period as the parties agree;
- (ii)** otherwise, the period up to end of the trial."

The definition of "the relevant period" is crucial since it arises in various contexts. In particular, it sets the time from which an offer can be withdrawn or changed so as to give less advantageous terms, discussed below.⁶⁷

Start time

- 27.30 A [CPR 36](#) offer is made when it is served on the offeree ([CPR 36.7\(2\)](#)). A valid withdrawal or variation of the terms of a [CPR 36](#) offer will be effective when notice of the change is served on the offeree ([CPR 36.9\(2\)](#)) (though if served before the end of the relevant period, it will only take effect upon expiry of the period: [CPR 36.10\(2\)\(a\)](#)). A [CPR 36](#) offer must be served, which means that an offeror must follow the rules of service if the offer is to be effective.⁶⁸

Footnotes

⁶⁷ See below, paras [27.33](#) ff.

⁶⁸ The position was different under the pre-2007 [CPR 36](#): see *Charles v NTL Group [2002] EWCA Civ 2004* [51]. The relevant service rules are discussed in [Ch.5 Service at paras 5.160](#) ff. Note that if a [CPR 36](#) offer is not validly served, the court may exercise its discretion to cure the defect: *Thompson v Reeve (20 March 2017, unreported, QBD)* [21]; and above, para [27.23](#).

Clarification of CPR 36 Offers

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Chapter 27 - Offers to Settle

Clarification of CPR 36 Offers

- 27.31 The acceptability of a settlement offer crucially depends on whether the offeree can fully appreciate its nature, its implications and therefore its value. CPR 36 seeks to promote mutual understanding by allowing an offeree who is uncertain about the precise terms of the offer to request clarification within seven days of the offer (CPR 36.8(1)). If the offeror does not provide the requested clarification within seven days of receiving the request, the offeree may apply for an order directing the offeror to comply, unless the trial has started (CPR 36.8(2)). If the court makes an order directing the offeror to provide clarification, it must also specify the date when the offer is to be treated as having been made so that the acceptance time will run from that date and not the date on which notice of the offer was served ((CPR 36.8(3))). Once the trial has started, clarification may be sought directly from the offeror.
- 27.32 Where the offer is not just for the payment of a sum of money, an offeree would do well to seek clarification if the offer is in any way ambiguous because the consequences of non-acceptance turn on whether the judgment is more or less advantageous than the offer. If the offer is unclear and capable of different interpretations, the parties run the risk of exposure to costs orders if the court puts an unexpected interpretation on the offer and its value.⁶⁹

Footnotes

69 See, for instance, *AB v CD [2011] EWHC 602 (Ch)*.

Withdrawal of CPR 36 Offers

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Withdrawal of CPR 36 Offers

Withdrawal during the relevant period

- 27.33 As noted above, before the expiry of the relevant period, an offeror may not simply withdraw a [CPR 36](#) offer, or change its terms to be less advantageous to the offeree. [CPR 36.9\(4\)\(a\)](#) provides that the offeror may do so *after* expiry of the relevant period, provided of course that the offeree has not previously served notice of acceptance. [CPR 36.9\(4\)\(b\)](#) provides that offers may be withdrawn automatically in accordance with their terms after the relevant period expires, but express wording to this effect is required. But *before* the expiry of the relevant period, a purported withdrawal or disadvantageous variation of the offer will not have any effect until the end of the relevant period. At that point, it will take effect unless the offeree has served notice of acceptance in the interim ([CPR 36.10\(2\)\(a\)](#)). If that occurs, the offeror may seek the court's permission to withdraw the offer or change its terms ([CPR 36.10\(2\)\(b\)](#)).
- 27.34 The reason for the scheme is to give the offeree at least the initial period of the offer, usually 21 days, to consider the merits of the offer without the pressure-inducing anxiety that it may be withdrawn at any moment.⁷⁰ For this reason, even before the [CPR](#) (in relation to defendant payments into court), the court always followed a policy of permitting withdrawal only where the offeror satisfied the court that there were good reasons for the withdrawal.⁷¹
- 27.35 The key question in an application under [CPR 36.10\(2\)\(b\)](#) to resist an offeree's notice of acceptance is whether there has been a change of circumstances such that it would be unjust to hold the offeror bound to its offer ([CPR 36.10\(3\)](#)). In this respect, [CPR 36.10\(3\)](#) adopts the approach that the court took before 2015 to applications to withdraw offers before the expiry of the relevant period, and so pre-2015 authorities have not lost their relevance.⁷² It is for the offeror to satisfy the court that there has been a sufficient change of circumstances, since their application seeks to deprive the offeree of what would otherwise be an unfettered right to accept the offer.⁷³ Given the short lapse of time between the offer and the time when the application would be made, the burden on the offeror is heavy.
- 27.36 In *Flynn v Scougall*, for instance, (decided under the pre-2015 scheme), the defendants sought permission to withdraw during the relevant period upon receiving a favourable expert report. Permission was denied for, as May LJ explained, the defendants chose to make the offer before receiving their expert's report to secure the advantage of an early offer, but in so doing took the risk that they would not be able to withdraw the offer even if the report improved their evidential position.⁷⁴ Similarly, the fact that the defendant has changed their mind or re-evaluated evidence that had been available to them all along would not justify withdrawal.⁷⁵ On the other hand, if documents revealed in disclosure substantially reduce the claimant's chances of success, it would be wrong to hold the defendant bound to an offer which was based on deficient information.⁷⁶

Withdrawal after the relevant period

- 27.37 There is no restriction on the offeror's freedom to withdraw the offer after the expiry of the relevant period ([CPR 36.9](#)). However, to do so the offeror must serve written notice of the withdrawal or change of terms on the offeree ([CPR 36.9\(2\)](#)). As the Court of Appeal in *Gibson v Manchester City Council* was at pains to stress, [CPR 36](#) leaves no room for other forms of withdrawal, such as implied withdrawal. In that case, the claimant made an offer to accept £2,500. The defendants subsequently made a number of counter-offers, culminating in their making an offer of the same amount, but the claimant rejected these offers without formally withdrawing her own offer. The defendants purported to accept the offer of £2,500 and sought a declaration that the claim had been compromised accordingly. The Court of Appeal held that the defendants had validly accepted the claimant's offer.⁷⁷ To avoid disputes and ensure certainty, the court explained, [CPR 36](#) required that withdrawal must be express and take the form of service of a written notice to that effect. An offeror cannot therefore rely on the offeree's rejection or counter-offer to terminate the offer, in contradistinction to ordinary contractual principles: it must do so itself, with due attention to the formal requirements.
- 27.38 An issue-based offer which relates only to issues determined at a preliminary trial cannot be accepted once those issues are decided, and the offeror can then rely on that offer for the purposes of [CPR 36.17](#) ([CPR 36.12\(2\)](#)). This prevents an offeree from receiving an unfavourable judgment at a trial of preliminary issues, and then seeking to subvert that decision by accepting an earlier [CPR 36](#) offer concerning those issues. Where a [CPR 36](#) offer relates to both determined and undetermined issues, it does not automatically lapse, but by [CPR 36.12\(3\)](#) the offeror is given a grace period of seven days after the judgment on the preliminary issues is handed down, to consider whether to withdraw the offer.
- 27.39 Once withdrawn, the offer ceases to entitle the offeror to the benefits of [CPR 36](#). However, since [CPR 44.2\(4\)\(c\)](#) requires the court to consider offers to settle that are outside [CPR 36](#) when deciding what costs order to make, the court may attach to a withdrawn offer such consequences as it sees fit. In appropriate cases, these may be similar to those that would flow from a valid and open [CPR 36](#) offer.⁷⁸

Footnotes

- 70 At the same time, the offeree's ability under [CPR 36.10\(2\)\(a\)](#) to serve on the offeror notice of an impending withdrawal or variation, which is to take effect at the end of the relevant period, is a useful way of further encouraging the offeree to accept the offer promptly.
- 71 See, for instance, *Pearl Furniture Co Ltd v Adrian Share Interiors Ltd* [1977] 1 W.L.R. 464, 469, CA.
- 72 See for example *Capital Bank Plc v Stickland* [2004] EWCA Civ 1677 [14]; *Flynn v Scougall* [2004] EWCA Civ 873; [2004] 1 W.L.R. 3069; and *Evans v Royal Wolverhampton Hospitals NHS Foundation Trust* [2014] EWHC 3185 (QB); [2015] 1 W.L.R. 4659. Indeed, this approach also mirrors that taken in relation to defendants' applications to withdraw payments into court under the pre-CPR scheme, where the court similarly had to exercise its discretion to reconcile competing interests. Accordingly, despite occasional suggestions that a more flexible approach should be adopted under the CPR (see for instance *Marsh v Frenchay Healthcare NHS Trust*, *The Times*, 13 March 2001, QB), pre-CPR authorities also continue to be of relevance.
- 73 *Flynn v Scougall* [2004] EWCA Civ 873; [2004] 1 W.L.R. 3069 [33].
- 74 *Flynn v Scougall* [2004] EWCA Civ 873; [2004] 1 W.L.R. 3069 [42].
- 75 *Manku v Seehra* [1985] 7 ConLR 90, 96, QB. Suffering a heart attack, materially affecting future damages in a personal injuries claim, is another example. See *Wormald v Ahmed* [2021] EWHC 973 (QB).
- 76 *Cumper v Pothecary* [1941] 2 All ER 516, 521, CA; but see *Evans v Royal Wolverhampton Hospitals NHS Foundation Trust* [2014] EWHC 3185 (QB); [2015] 1 W.L.R. 4659.
- 77 *Gibson v Manchester City Council* [2010] EWCA Civ 726 [29].

- 78 See for instance *Stokes Pension Fund Trustees v Western Power Distribution (South West) Plc [2005] EWCA Civ 854* [12], [23]–[24].
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Acceptance of CPR 36 Offers

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Chapter 27 - Offers to Settle

Acceptance of CPR 36 Offers

Form and time of acceptance

- 27.40 A [CPR 36](#) offer is accepted by serving notice of acceptance on the offeror ([CPR 36.11\(1\)](#)). As with the [CPR 36](#) offer itself, the rule requires service and accordingly the service rules must be complied with.⁷⁹ Again, however, it is suggested that failure to comply with service requirements should not necessarily invalidate the acceptance if it was received by the offeror and the latter has suffered no disadvantage.⁸⁰
- 27.41 A [CPR 36](#) offer may be accepted at any time, unless the offeror has served notice of withdrawal on the offeree, and subject to certain other limitations ([CPR 36.11\(2\)](#)). Unlike under the general law of contract, an earlier offer may be accepted even where the offeror or offeree made a later and different offer, provided that no withdrawal notice has been served in respect of the earlier offer. There are, however, some important limits on acceptance set out in [CPR 36.11\(3\)](#), which provides that court permission is required in certain situations.
- 27.42 First, and most important, once the trial has started the offeree can no longer accept the offer unilaterally but must seek permission to do so ([CPR 36.11\(3\)\(d\)](#)). Permission would normally be refused in cases where the offeree seeks to accept the offer after the trial has begun simply because the trial goes less well than it might have hoped.⁸¹ Second, permission is required where [CPR 36.15\(4\)](#) applies—that is, where there are several defendants, but only some made a [CPR 36](#) offer ([CPR 36.11\(3\)\(a\)](#)).⁸² Third, permission is required where [CPR 36.20\(3\)\(b\)](#) applies (that is, where the settlement payment would qualify as a compensation payment under ss.1(4)(b) or 1A(5)(b) of the Social Security (Recovery of Benefits) Act 1997), the relevant period has expired and further deductible amounts have been paid to the claimant since the date of the offer ([CPR 36.11\(3\)\(b\)](#)). Finally, permission must be obtained where an apportionment of money between claims arising under the Fatal Accidents Act 1976 and the Law Reform (Miscellaneous Provisions) Act 1934 is required under [CPR 41.3A](#) ([CPR 36.11\(3\)\(c\)](#)).
- 27.43 An application for permission to accept the offer must be made to a judge other than the trial judge, unless the parties agree otherwise (PD 36 para.3.2). Where the offeror resists the application, the main issue will be whether there has been such a change of circumstances as to render it unjust to allow the offeree to benefit from the offer. The court may take into consideration whether the offeree has complied with its process obligations, the extent to which it has been co-operative and, in the case of a defendant offeree, whether the defendant is offering the claimant ready cash.⁸³ However, certain procedural mechanisms prevent an offer from being accepted. When two claims are split into separate proceedings, any [CPR 36](#) offer for the claims in total lapses.⁸⁴ Where a claim has been struck out, including for procedural default, it is at an end and any [CPR 36](#) offer lapses.⁸⁵

Costs consequences and the effect of acceptance

Acceptance of a CPR 36 offer relating to the whole claim within the relevant period

27. 44 Where a [CPR 36](#) offer is accepted within the relevant period, the claimant is entitled to the costs of the proceedings up to the date on which notice of acceptance was served on the offeror, subject to certain exceptions mentioned below ([CPR 36.13\(1\)](#)). The claimant's costs include any costs incurred in dealing with the defendant's counterclaim if the [CPR 36](#) offer states that it takes into account the counterclaim ([CPR 36.13\(7\)](#)).
27. 45 Acceptance within the relevant period has the great advantage that it automatically entitles the claimant to its costs. [CPR 36.13\(1\)](#) takes precedence over the general discretion on costs under [CPR 44](#). [CPR 44.9\(1\)\(b\)](#) provides that where "a right to costs arises under... [rule 36.13\(1\)](#) ... a costs order will be deemed to have been made on the standard basis". However, automatic standard basis assessment does not apply if the offer was accepted before the commencement of proceedings,⁸⁶ or the claim is on the small claims track,⁸⁷ or if fixed costs applies⁸⁸, or if costs are agreed.⁸⁹ In cases governed by fixed recoverable costs, the claimant is entitled to the fixed costs in PD 45 Table 12, 14 or 15 for the stage applicable at the date of the notice of acceptance.⁹⁰
27. 46 It was held under the pre-2007 [CPR 36](#) that once a claimant accepted a payment into court, the court had no discretion to order costs other than on the standard basis.⁹¹ The jurisdiction to disallow costs under [CPR 44](#) is similarly excluded and the claimant becomes entitled to 100 per cent of its costs as assessed, subject of course to any residual discretion that the court may have under [CPR 36.13](#).⁹²

Acceptance of a CPR 36 offer relating to part of the claim within the relevant period

27. 47 Where a defendant's [CPR 36](#) offer relates to part only of the claim, and at the time of serving notice of acceptance within the relevant period the claimant abandons the balance of the claim, the claimant will be entitled to the costs of the part of the claim to which the [CPR 36](#) offer relates ([CPR 36.13\(2\)](#)). This reverses the default position prior to 2015, and is intended to accord more closely with "simple justice".⁹³ By way of contrast, in cases governed by fixed recoverable costs, a claimant who abandons the balance of the claim is entitled to the whole of the fixed costs in PD 45 Table 12, 14 or 15 for the stage applicable at the date of the notice of acceptance.⁹⁴
27. 48 As with costs under [CPR 36.13\(1\)](#), the costs awarded to a claimant under [CPR 36.13\(2\)](#) in multi-track claims will be assessed on the standard basis if not agreed ([CPR 36.13\(3\)](#) and [CPR 44.9\(1\)\(b\)](#)). The court may order costs in respect of steps taken prior to issue, which would ordinarily be recoverable under normal assessment.⁹⁵

Acceptance less than 21 days before the trial, or after the relevant period

27. 49 It is up to the parties to agree liability for costs where: a [CPR 36](#) offer that was made less than 21 days before the start of trial is accepted; a [CPR 36](#) offer is accepted after the expiry of the relevant period; or the claimant accepts a [CPR 36](#) offer

relating to part of the claim within the relevant period but does not abandon the balance of the claim so as to trigger [CPR 36.13\(2\)](#). If they do not agree, the court will make an order as to costs ([CPR 36.13\(4\)](#)). The court's discretion is unfettered in this regard and as such it will decide liability in accordance with its general discretion as to costs,⁹⁶ except where the offer was accepted after the expiry of the relevant period. In such circumstances, [CPR 36.13\(5\)](#) provides that the court must, unless it considers it unjust to do so, order that:

the claimant will be entitled to the costs of the proceedings up to the date on which the relevant period expired; and

the offeree will be liable for the offeror's costs for the period from the date of expiry of the relevant period to the date of acceptance.

27.50 The intention of [CPR 36.13\(5\)](#) is to place the offeree at risk of costs after the expiry of the relevant period. Therefore, the offeree will normally be ordered to pay the offeror's costs thereafter, and the court should not consider whether it was reasonable for the offeree to fail to accept within the relevant period.⁹⁷ However, the court may make different orders if it would be unjust to make these default orders, having regard to all the circumstances of the case, including the factors set out in [CPR 36.17\(5\)](#) (discussed below).⁹⁸ The costs payable by the late-accepting party are on the standard basis, unless the circumstances justify indemnity costs—for example, by reason of that party's unacceptable conduct.⁹⁹

27.51 In cases governed by fixed recoverable costs, the claimant is entitled to the fixed costs in PD 45 Table 12, 14 or 15 for the stage applicable at the expiry of the relevant period, but is liable for the defendant's costs thereafter.¹⁰⁰ The defendant's fixed costs for this purpose are the fixed recoverable costs for the stage when the [Part 36](#) offer is accepted, less the claimant's fixed costs as at the end of the relevant period.¹⁰¹

Acceptance by children and protected parties

27.52 In proceedings involving vulnerable persons, such as children or protected parties who lack the capacity to conduct proceedings, court permission is necessary before any settlement can take effect ([CPR 21.10\(1\)](#)). This means an acceptance of a [CPR 36](#) offer on behalf of a child or protected person is not binding unless and until it is approved by the court under [CPR 21.10](#), and a defendant may be able to withdraw its [CPR 36](#) offer in the period between acceptance and approval.¹⁰² If a party settles a claim, and is only later discovered to be a protected party, the settlement can be re-opened even if the opponent could not have known of the party's protected status.¹⁰³

Effect of acceptance—staying the claim

27.53 If a [CPR 36](#) offer is accepted, the claim will be stayed ([CPR 36.14\(1\)](#)). If the offer relates to the whole claim, the stay will be upon the terms of the offer ([CPR 36.14\(2\)](#)). If the offer relates to only part of the claim, the claim will be stayed as to that part upon the terms of the offer ([CPR 36.14\(3\)](#)).

27.54 However, a stay under [CPR 36.14](#) does not affect the court's power to enforce the terms of the [CPR 36](#) offer or to deal with any question of costs (including interest on costs). In particular, as noted above, where the parties have settled part of the claim but the remainder remains live, the liability for costs shall be decided by the court unless agreed by the parties ([CPR 36.13\(4\)\(c\)](#)). In such circumstances, the court may prefer to postpone the decision on costs until the whole claim has been resolved, because only at that stage will it be in a position to have regard to all the relevant factors.¹⁰⁴ If the court does decide to make a costs order confined to the stayed part of the claim, it may make a summary assessment. If the approval of the court is required before a settlement can be binding, any stay which would otherwise arise on the acceptance will take effect only when that approval has been given ([CPR 36.14\(4\)](#)).

27. 55 Where a [CPR 36](#) offer to pay a single sum of money is accepted, that sum must be paid to the offeree within 14 days of the date of the acceptance, unless the parties agree otherwise ([CPR 36.14\(6\)\(a\)](#)).¹⁰⁵ Similarly, payment must be made within 14 days of an order under [CPR 41.2](#) in respect of provisional damages, or of an order under [CPR 41.8](#) in respect of periodical payments. If the accepted sum is not paid within 14 days or such other period as has been agreed, the offeree may enter judgment for the unpaid sum ([CPR 36.14\(7\)](#)). Where an offer is accepted which does not involve payment of a single sum, the party alleging that the other party has not honoured the terms of the offer may apply to enforce the terms of the offer without the need for a new claim ([CPR 36.14\(8\)](#)). The ease of entering judgment and of enforcement gives the offeree a real advantage since it can proceed with execution proceedings without delay.¹⁰⁶

Acceptance of CPR 36 offers made only by some of the defendants

27. 56 Special provisions are necessary for situations where there are multiple defendants, some of whom have made offers and some of whom have not. The position in such cases depends on whether the defendants are sued jointly or in the alternative, on the one hand, or whether they are sued severally, on the other ([CPR 36.15\(2\)–\(3\)](#)).

27. 57 The [CPR](#) Glossary explains “joint” liability by reference to parties sharing a single liability, such that each party can be held liable for the whole of it.¹⁰⁷ Vicarious liability provides an example of joint liability. If an employee is sued for negligence in the course of their employment, their employer may also be sued as vicariously liable for the same harm. There is only one cause of action in this case: once it is exhausted, there is nothing left. If the claimant has failed to join one of two jointly liable persons to the proceedings in which the cause of action was adjudicated, there will be no cause of action left to pursue against the other. Where defendants are sued in the alternative, there is also only one cause of action. But in this situation, only one of them can be liable, though at the time of commencing proceedings it might not be known which. For example, a pedestrian may sue drivers A and B claiming that one of them, but not both, knocked them down and is solely liable for their injuries.

27. 58 In these circumstances, because there is only one cause of action, no purpose would be achieved by staying the action against some defendants and allowing it to continue against the others. Accordingly, [CPR 36.15\(2\)](#) provides that if the defendants are sued jointly or in the alternative, the claimant may only accept the offer if they discontinue their claim against those defendants who have not made the offer, and obtained written consent from those defendants to the acceptance of the offer. Thus, suppose that the claimant sues five defendants jointly and accepts the offer that one of the five made, discontinuing the claim against the other four with their consent. The claimant would then be entitled to recover their costs of the proceedings from the paying defendant, but these would presumably be limited to the costs incurred in bringing the claim against that defendant, and exclude costs that they incurred exclusively in pursuing the non-paying defendants.¹⁰⁸

27. 59 By contrast, the [CPR](#) Glossary explains “several” liability by reference to parties remaining liable for the whole claim, even when judgment has been obtained against other parties. Unlike in cases of joint liability, here there is a separate cause of action against each defendant. For instance, the owner of a building may have separate causes of action against the architect for faulty design and against the builders for defective work, even though some of the damage attributable to one defendant is the same as that attributable to the other.¹⁰⁹ However, since a person cannot be compensated twice for the same harm, the owner cannot obtain payment from the architect if they have been fully compensated for all their losses by the builder.

27. 60 Where liability is several against a number of different defendants, the claimant may accept one defendant’s offer and continue with their claims against the other defendants if they have not been fully compensated ([CPR 36.15\(3\)](#)). In all other cases involving settlement with some but not all defendants, the claimant must apply to the court for an order permitting them to accept the [CPR 36](#) offer ([CPR 36.15\(4\)](#)).

Footnotes

- 79 The rules of service are discussed in Ch.5 Service at paras 5.160 ff.
- 80 *Thompson v Reeve* [20 March 2017, unreported, QBD] [21]; and above, para.27.23.
- 81 *Houghton v Donoghue* [2017] EWHC 1738 (Ch) [10].
- 82 See further below, paras 27.56 ff.
- 83 *Capital Bank Plc v Stickland* [2004] EWCA Civ 1677 [16].
- 84 *Newland Shipping & Forwarding Ltd v Toba Trading FZC* [2014] EWHC 864 (Comm) [16].
- 85 *Joyce v West Bus Coach Services Ltd* [2012] EWHC 404 (QB) [41].
- 86 CPR 44.9(2).
- 87 CPR 44.9(1), because of the no costs rule on the small claims track in CPR 27.14(2).
- 88 CPR 44.9(1), because fixed recoverable costs applies. Costs on acceptance of a Part 36 offer in fast track and intermediate track claims is dealt with by CPR 36.23.
- 89 CPR 36.13(3).
- 90 CPR 36.23(1).
- 91 *Dyson Appliances Ltd v Hoover Ltd (Costs)* [2002] EWHC 2229 (Pat) [30].
- 92 *Lahey v Pirelli Tyres Ltd* [2007] EWCA Civ 91 [19].
- 93 See *Hertel v Saunders* [2018] EWCA Civ 1831 [8].
- 94 CPR 36.23(2). This reflects the benefit of bringing the claim to an end, which might be a justifiable basis for the different approach given the lower value of cases on the fast and intermediate tracks.
- 95 *Thompson v Bruce* [2011] EWHC 2228 (QB) [37].
- 96 See Ch.28 Costs paras 28.39 ff for the general costs-shifting rule, and 28.54 ff for the court's discretion to depart from the norm.
- 97 *Matthews v Metal Improvements Co Inc* [2007] EWCA Civ 215 [32]–[33]. But see *Factortame Ltd v Secretary of State for the Environment, Transport and the Regions* [2002] EWCA Civ 22 [27]–[28].
- 98 CPR 36.13(6). The CPR 36.17(5) factors are addressed below at paras 28.82 ff.
- 99 *Fitzpatrick Contractors Ltd v Tyco Fire and Integrated Solutions (UK) Ltd* [2009] EWHC 274 (TCC) [30]–[31]. See further Ch.28 Costs paras 28.118–28.120.
- 100 CPR 36.23(4) and (8).
- 101 CPR 36.23(8). The court does not have the power to make a different order on the grounds of "justice". Nor does it have a power to award indemnity costs: *Hislop v Perde* [2018] EWCA Civ 1726.
- 102 *Wormald v Ahmed* [2021] EWHC 973 (QB). Primary considerations in considering whether to approve the acceptance are the protection of the party under disability, and ensuring the defendant obtains a proper discharge. However, wider considerations based on the overriding objective, such as ensuring the parties are on an equal footing, are also relevant.
- 103 *Dunhill v Burgin* [2014] UKSC 18 [19]–[20], [34].
- 104 *Shepherds Investments Ltd v Walters* [2007] EWCA Civ 292 [18].
- 105 The period may not be extended by court order: *Titmus v General Motors UK Ltd* [2016] EWHC 2021 (QB).
- 106 Methods of enforcement are discussed in Ch.24 Enforcement.
- 107 See also *Hudson v Elmbridge Borough Council* [1991] 1 W.L.R. 880, 886, CA.
- 108 This was the position under the pre-CPR system: see *Kamenou (t/a Regency Developments) v Pariser* [1999] 2 All ER 764 (TCC) [39].
- 109 *Townsend v Stone Toms & Partners* [1981] 1 W.L.R. 1153, 1160, CA.

Costs Consequences of Non-Acceptance

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 27 - Offers to Settle

Costs Consequences of Non-Acceptance

General principles

- 27.61 At the core of the CPR 36 system lies a simple idea: a party who declines a CPR 36 offer and subsequently fails to do better at trial should bear the costs burden from the end of the relevant period. This idea is spelt out in CPR 36.17(1), which applies where a claimant fails to obtain a judgment more advantageous than the defendant's CPR 36 offer, or where the claimant obtains a judgment at least as advantageous as its own CPR 36 offer.¹¹⁰
- 27.62 When dealing with the consequences of non-acceptance, the court has to balance a number of objectives. It must ensure that the system remains an effective vehicle for compromise. This requires that the consequences of refusing a CPR 36 offer should be predictable, so that the parties can assess the value of CPR 36 offers with accuracy and make well-informed decisions about making or accepting them. The court must also ensure that the consequences are fair to both parties. Chadwick LJ stated in *Neave v Neave*:

“The purpose of CPR [36.17(4)] is to encourage a claimant to make a Part 36 offer. CPR [36.17(3)] serves the same purpose in relation to a defendant. The benefit to a party in making a Part 36 offer lies in the costs consequences which follow if the offer is not accepted. The risk, of course, is that if the offer is accepted the party will lose the opportunity to argue the case; but that is the nature of compromise. In making the offer the party risks doing worse than if no offer were made. It is important, therefore, that where the claimant's offer is not accepted, the claimant should not be deprived of the benefit which has been held out to it as an inducement to make the offer, without good reasons. If claimants and their advisers come to think that Part 36 offers will not have the costs consequences for which [CPR 36.17] provides, they will be that much the less likely to make such offers. The making of Part 36 offers – which, if accepted, lead to the settlement of the litigation and the saving of costs – is to be encouraged, as the authorities to which I have just referred make clear. It is for that reason, as it seems to me, that [CPR 36.17(3)] enjoins the court to make an order under [CPR 36.17(3)–(4)] unless satisfied that it is unjust to do so. An order under the rule should be the usual consequence where a Part 36 offer has been made; has not been accepted; and has been beaten at trial.”¹¹¹

The imperatives of predictability and fairness are not always compatible with each other. Predictability is only achieved by applying the consequences that the rules dictate where an offeree has failed to better the offer at the trial. Fairness, by contrast, must take into account many other factors, which may point in a quite different direction.

- 27.63 Where a court has determined some issues but not others, and there is an unaccepted CPR 36 offer relating to issues both determined and undetermined, the court may be told of the existence of the offer but not its terms (CPR 36.16(4)).¹¹² The appropriate course in such circumstances is for the court to reserve costs until all the issues are determined, when it can take the CPR 36 offer fully into account, together with all of the relevant factors which may affect the determination of the consequences that flow from it.¹¹³ But where there is an unaccepted CPR 36 offer which relates *only* to issues which have been determined at a preliminary trial, the court may be told of both its existence *and* its terms (CPR 36.16(3)(d)). In this case it is open to the

court to make a costs order in respect of the trial of the preliminary issues, rather than reserving the question of costs to the end of proceedings.

Consequences where claimant beats the defendant's CPR 36 offer

- 27.64 CPR 36 does not stipulate the costs consequences where a claimant has beaten a defendant's CPR 36 offer (but not their own): this will be determined under the general costs principles.¹¹⁴ Where the claimant has declined a defendant's CPR 36 offer and obtained a more favourable judgment than the offer, they will in the normal way be considered the successful party, and will generally be entitled to recover their costs.¹¹⁵ A successful claimant may be deprived of their costs, or even ordered to pay the defendant's costs, if it is found that they conducted the litigation in an unreasonable manner.¹¹⁶
- 27.65 It must be remembered that under the current costs practice, the court may adopt an issue-by-issue approach to making costs orders.¹¹⁷ The court may decide that a party is entitled to its costs of issues on which it was successful, regardless of overall success. This means that a claimant who obtained a more advantageous judgment than the defendant's CPR 36 offer may nonetheless be deprived of some of its costs, or even ordered to pay the defendant's costs in respect of issues on which it was unsuccessful,¹¹⁸ especially if the court finds that it was unreasonable in pressing those issues. At the same time, however, the issue-by-issue approach is not to be applied over-liberally. A successful party's costs are not automatically reduced merely because it loses on one particular issue.¹¹⁹

Consequences where a party beats its own CPR 36 offer—ascertaining whether judgment is “more advantageous”

- 27.66 Since the consequences of a CPR 36 offer depend on a comparison between what was offered and what was achieved in the judgment, the standard for comparison must be as clear as possible. What is now CPR 36.17(2) was introduced to minimise the scope for disputes concerning money offers by providing that:
- “in relation to any money claim or money element of a claim, *more advantageous* means better in money terms by any amount, however small, and ‘at least as advantageous’ shall be construed accordingly.”
- 27.67 This provision reversed the effect of the Court of Appeal decision in *Carver v BAA Plc*,¹²⁰ where it was held that beating a CPR 36 by £51 was in reality not more advantageous than accepting the offer and avoiding many more months of litigation. Thus, the present position is that if a claimant obtains a money judgment which is exactly the same as their own offer, they are entitled to the cost consequences set out in CPR 36.17(4); and, as we shall presently see, the size of the difference may not even be taken into account in determining whether applying those consequences would be unjust.¹²¹ Conversely, if the claimant obtains judgment for the amount offered by the defendant or any less, they are liable for the defendant's costs from the expiry of the relevant period under CPR 36.17(3).¹²² However, it would seem that the *Carver* test still applies to non-money claims, such as claims for injunctive relief.¹²³

- 27.68 Despite the advantages of CPR 36.17(2), the comparison may not be straightforward even in money claims. CPR 36.5(4) provides that a CPR 36 offer to pay or accept a sum of money “will be treated as inclusive of all interest until” the end of, effectively, the relevant period. Where the offer has been declined and the case has proceeded, judgment will have been given

some considerable time later. The judgment sum will include interest which will also be in respect of the period since the relevant period ended. To ensure that the court compares like with like, this extra interest which has accrued since must be ignored.¹²⁴ Similarly, where the offer is made in a foreign currency, the relevant exchange rate is the exchange rate at judgment rather than the exchange rate when the offer was made, on the basis that it is usually open to the offeree to accept the offer right up until the end of the trial.¹²⁵ However, this reasoning may be doubted, given the court's reluctance to grant permission for offers to be accepted once the trial has commenced.

- 27.69 In applying the "more advantageous" test, the court must ignore any terms in the claimant's **CPR 36** offer concerning costs, indemnity costs or enhanced interest.¹²⁶ Similarly, any admitted payments (for example, where particular parts of the claimant's claim are admitted) are presumed to be on account of, rather than in addition to, the **CPR 36** offer.¹²⁷ Where a claimant makes a **CPR 36** offer to settle two claims, which are subsequently heard in separate proceedings, it is impermissible to "aggregate" the amounts received in each proceeding to determine whether they exceed the offer—rather, the offer is treated as having lapsed.¹²⁸ Judgment in a case where there is a claimant's **CPR 36** offer that combines a lump sum and a periodical payment order is only as advantageous as the offer if this is so both for the lump sum and the multiplicand of the periodical payment order.¹²⁹
- 27.70 Under the **Social Security (Recovery of Benefits) Act 1997**, the Department of Work and Pensions can recover from the defendant the social security benefits likely to be paid to the claimant in respect of injuries sustained in workplace accidents.¹³⁰ To ensure that like is compared with like, **CPR 36.20(3)** requires that a defendant who makes a **CPR 36** offer should state either that the offer is made without regard to any liability for recoverable amounts, or that it is intended to include any such amounts. In the latter situation the offer must state: (a) the gross amount of compensation; (b) the name and amount of any deductible amount by which the gross amount is reduced; and (c) the net amount of compensation (**CPR 36.20(6)**). A claimant will have failed to obtain a more advantageous judgment than the defendant's offer if they fail to recover a sum greater than the net amount of compensation stated under paragraph **CPR 36.20(6)(c)** once deductible amounts identified in the judgment have been stripped out.

Consequences where claimant fails to beat defendant's **CPR 36** offer

- 27.71 Where a claimant fails to obtain a judgment more advantageous than a defendant's **CPR 36** offer—i.e. where a defendant equals or beats its own offer—the court will order that the defendant is entitled to its costs from the date on which the relevant period expired plus interest on those costs, unless it considers it unjust to do so (**CPR 36.17(3)**). In principle, the defendant will be entitled to all its costs from the expiry of the relevant period, even if the **CPR 36** offer related to only part of the claim. The court is empowered to make a different order if it considers that it would be unjust to follow the normal costs consequences. The **CPR 36.17(3)** costs consequences do not follow where a defendant's **CPR 36** offer has been withdrawn, or where it has been varied so that its terms are less advantageous to the claimant, and the claimant has beaten the less advantageous offer. Nor does it apply where the offer was made less than 21 days before trial, unless the court has shortened the relevant period (**CPR 36.17(7)**).
- 27.72 A defendant who is awarded costs under **CPR 36.17(3)** will usually be awarded costs on the standard basis.¹³¹ Indemnity costs can be awarded where there is some factor which takes the case outside the norm.¹³² For example, indemnity costs may be awarded if the court considers that the claimant has acted unreasonably by persisting with a hopeless claim.¹³³ In addition to costs from the end of the relevant period the defendant will also be entitled to interest on those costs (**CPR 36.17(3)(b)**). However, unlike a successful claimant who (as we shall presently see) would be entitled to enhanced interest on costs and on damages as well as an uplift on damages under **CPR 36.17(4)**, the court has no power to order enhanced interest or additional amounts to successful defendants.¹³⁴
- 27.73

Where a claimant fails to beat a defendant's [Part 36](#) offer at trial in a case governed by fixed recoverable costs, the claimant is entitled to the fixed costs in PD 45 Table 12, 14 or 15 for the stage applicable at the expiry of the relevant period, but is liable for the defendant's costs thereafter.¹³⁵ The defendant's fixed costs for this purpose are the fixed recoverable costs applicable at the date of judgment, less the claimant's fixed costs as at the end of the relevant period.¹³⁶

Consequences where claimant equals or beats own CPR 36 offer

- 27.74 A defendant who refuses a claimant's offer and who suffers an adverse judgment less advantageous than the offer will have unnecessarily prolonged the litigation and will be required to pay the claimant for the trouble and expense to which they have been put. A claimant becomes entitled to enhanced costs, enhanced interest and even an uplift on their damages (or costs, where there is no monetary award), when the judgment they obtain "is at least as advantageous to the claimant as the proposals contained in a claimant's [Part 36](#) offer" ([CPR 36.17\(1\)\(b\)](#)).
- 27.75 These consequences are set out in [CPR 36.17\(4\)](#) which states¹³⁷:

[Rule 36_17:\(4\)](#)

"(4) Subject to paragraph (7), where paragraph (1)(b) applies, the court must, unless it considers it unjust to do so, order that the claimant is entitled to—

(a) interest on the whole or part of any sum of money (excluding interest) awarded, at a rate not exceeding 10% above base rate for some or all of the period starting with the date on which the relevant period expired;

(b) costs (including any recoverable pre-action costs) on the indemnity basis from the date on which the relevant period expired;

(c) interest on those costs at a rate not exceeding 10% above base rate; and

(d) provided that the case has been decided and there has not been a previous order under this subparagraph, an additional amount, which shall not exceed £75,000, calculated by applying the prescribed percentage set out below to an amount which is—

(i) the sum awarded to the claimant by the court; or

(ii) where there is no monetary award, the sum awarded to the claimant by the court in respect of costs—

Amount awarded by the court:	Prescribed percentage:
up to £500,000	10% of the amount awarded;
above £500,000 up to £1,000,000	10% of the first £500,000 and (subject to a limit of £75,000) 5% of any amount above that figure"

- 27.76 It follows that a defendant who fails to beat the claimant's offer is exposed to heavy penalties: indemnity costs, interest on the money award of up to 10 per cent above base rate, interest on costs up to 10 per cent above base rate and an additional amount calculated as a percentage of the damages (or costs, if there is no money award) up to a maximum of £75,000. As with the

situation where a defendant equals or beats its own offer, a successful claimant in principle becomes entitled to all its costs (and interest thereon) from the expiry of the relevant period, even where the offer related only to part of the claim or certain issues. The court may make different provision where it considers that it would be unjust to impose the consequences envisaged by CPR 36.17(4); this is discussed below.¹³⁸

27. 77 However, as where a defendant equals or beats its own offer,¹³⁹ the CPR 36.17(4) benefits are not available where the claimant withdrew their CPR 36 offer, where they varied it so as to give less advantageous terms and defendant has at least beaten the new terms or where the offer was made less than 21 days before trial (unless the court has shortened the relevant period) (CPR 36.17(7)).

Indemnity costs

27. 78 Under CPR 36.17(4)(b), the court should normally order indemnity costs unless it is unjust to do so. The court's approach to the injustice test, particularly in relation to indemnity costs orders where the claimant has succeeded on some issues but failed on others, or otherwise acted unreasonably, is discussed below.¹⁴⁰ There are no indemnity basis costs in cases governed by fixed recoverable costs. In these cases the court instead awards additional costs, being 35% of the difference between the fixed costs applicable at the stage the relevant period for the claimant's Part 36 offer expired and the stage applicable at the date of judgment.¹⁴¹

Enhanced interest

27. 79 Enhanced interest is calculated by reference to a period of time and an interest rate. As to the period of time, interest accumulates until the trial judgment, and not a later judgment on appeal.¹⁴² However, the starting date for the interest is discretionary, and depends on all the features of the particular litigation.¹⁴³ Where a claimant amends its claim after making a CPR 36 offer, enhanced interest may be appropriate only from the time of the amendment, since it may have been only then that the defendant was in a position to assess the offer. But what happens when the loss has not yet been realised—for example, when the court awards sums in respect of future losses? In principle, enhanced interest should not be available.¹⁴⁴ Instead, when capitalising a future loss, a discount should apply to reflect the fact that an amount due in future is paid now and can earn interest between now and the future point in time when it will be due.¹⁴⁵

27. 80 As to the interest rate, the court has considerable flexibility in determining the rate of enhanced interest under CPR 36.17(4) (a) and (c). Ten per cent over base rate is the maximum, not the norm. The traditional view was that, just as both damages and costs are compensatory rather than punitive,¹⁴⁶ interest on these sums is meant to compensate the claimant for the loss of the use of its money between the time it was expended and the date on which the costs order was made, and thus should reflect (albeit generously) that loss of use.¹⁴⁷ It also compensates for any other real disadvantages, including anxiety and inconvenience, experienced as a result of needlessly being forced to pursue the case all the way to trial.¹⁴⁸ Thus, in a low-value claim, enhanced interest has to be at a higher rate than if the claim was large. Otherwise, the relatively small interest payment would not fully compensate for these other disadvantages.¹⁴⁹ On the traditional view, the court should be careful to avoid over-compensation. A claimant was denied enhanced interest on damages in a defamation case, because the damages already reflected the inconvenience and distress suffered by the claimant as a result of the litigation.¹⁵⁰ Even if interest is regarded as purely compensatory rather than penal, awards of compensation also operate as a practical incentive to encourage defendants to accept appropriate offers of settlement.¹⁵¹

27. 81

However, to regard the [CPR 36.17](#) consequences as purely compensatory is no longer the full picture, following Jackson LJ's review of civil litigation costs and the resultant changes to [CPR 36](#). Before Jackson LJ's Final Report, the court would readily find it would be unjust to make full use of its powers under what is now [CPR 36.17\(4\)](#), with the result that a claimant who obtained a more advantageous judgment than its offer did not, on the whole, greatly benefit from doing so.¹⁵² Jackson LJ's view was that claimants who beat their own offers should get enhanced costs and interest, compared with those available to defendants who did better than their own offers at trial.¹⁵³ Thus, in *OMV Petrom SA v Glencore International AG*, the Court of Appeal clarified that while the award of interest should be primarily compensatory, the court has discretion to include a non-compensatory element as a reward for the claimant for making the offer, and a sanction for the defendant for failing to accept it.¹⁵⁴ The level of interest must still, however, be proportionate, bearing in mind factors such as the length of time between the offer and judgment, whether the defendant behaved reasonably in pursuing its defence and the general level of disruption caused to the claimant by the defendant's refusal to accept the [CPR 36](#) offer.

The additional amount

27.82

The additional amount is not compensatory, but solely intended to encourage claimants to make and defendants to accept appropriate [CPR 36](#) offers,¹⁵⁵ and to penalise defendants for failing to do so.¹⁵⁶ The additional amount is calculated by reference to the total amount of damages awarded to the claimant, including the amount of interest that would have been awarded but for the [CPR 36](#) offer (such as contractual interest),¹⁵⁷ but not the enhanced rate of interest.¹⁵⁸ Where legislation provides for a cap on general damages, the additional amount will not count towards that cap.¹⁵⁹ Where there is no monetary award—for example, because the court has only ordered injunctive relief—the additional amount will instead be calculated by reference to the amount of costs awarded in accordance with the table at [CPR 36.17\(4\)\(d\)\(ii\)](#). For these purposes, it does not matter whether the claim was “mixed”—i.e. sought both damages and non-monetary relief—as long as there was ultimately no monetary award.¹⁶⁰

Discretion where the CPR 36 consequences would be unjust

27.83

The consequences of failure to better a defendant's offer or a claimant's offer are spelt out in [CPR 36.17\(3\)–\(4\)](#). Both are subject to the court's discretion; the court will apply the consequences of failure to better an offer “unless it considers it unjust to do so”.¹⁶¹ A (non-exhaustive)¹⁶² list of considerations to be taken into account in the exercise of this discretion is set out in [CPR 36.17\(5\)](#):

Rule 36_17

“In considering whether it would be unjust to make the orders referred to in paragraphs (3) and (4) above, the court will take into account all the circumstances of the case including—

- (a) the terms of any Part 36 offer;
- (b) the stage in the proceedings when any Part 36 offer was made, including in particular how long before the trial started the offer was made;
- (c) the information available to the parties at the time when the Part 36 offer was made;
- (d) the conduct of the parties with regard to the giving or refusing to give information for the purposes of enabling the offer to be made or evaluated; and

(e) whether the offer was a genuine attempt to settle the proceedings.”

- 27.84 The court does not have an unfettered discretion in deciding whether it would be unjust to apply the consequences of CPR 36.17(3) or (4).¹⁶³ The starting point is that the successful offeror is entitled to the stipulated consequences from the end of the relevant period. The party wishing to avoid such consequences bears the burden of establishing injustice, and this is a “formidable obstacle”¹⁶⁴ which requires something which “takes [the case] out of the norm”.¹⁶⁵ It is insufficient to show that the decision to refuse the offer was reasonable.¹⁶⁶ Nor does the margin by which an offeree beat its own offer matter¹⁶⁷: if the fact that an offeree beat its own offer by only a small amount could justify disapplication of the CPR 36.17 consequences, this would in effect re-introduce the approach taken by the Court of Appeal in *Carver v BAA plc* and its progeny.¹⁶⁸
- 27.85 The case law reveals seven broad types of situation where “injustice” has been found. First, it may be unjust to apply the default consequences where the party wishing to rely on the CPR 36 offer failed to disclose material matters which prevented the other party from properly assessing whether to make an offer or accept an offer which had been made.¹⁶⁹ For example, the offeror may have failed to disclose key documents at trial or failed to plead a key allegation.¹⁷⁰ Similarly, the offeror may be deprived of the fruits of its success where a late amendment, based on information which it has always possessed, presented a considerably stronger case than previously.¹⁷¹ It might be said that in such situations, by presenting a weak case, the offeror in effect misled the offeree about the value of the offer.¹⁷²
- 27.86 Second, it may be unjust to apply the consequences of CPR 36.17 where the offeror only beat its own offer because of some unforeseen externality. Thus, in *Novus Aviation Ltd v Alubaf Arab International Bank BSC(C)*,¹⁷³ an offer made in US dollars would have exceeded the amount awarded at trial on the exchange rate when the offer was made, but was less on the exchange rate when judgment was awarded. In such circumstances, applying the standard consequences would have been adventitious and inconsistent with the principle of predictable risk allocation.¹⁷⁴
- 27.87 Third, it may be unjust to apply CPR 36’s consequences where the beneficiary has deliberately run up its own costs or behaved in a reprehensible manner. An illustration is provided by *Johnson v Gore Wood & Co (No.3)*,¹⁷⁵ which involved expensive and protracted litigation in which the claimant failed to better the defendant’s improved payment in. The Court of Appeal overturned the judge’s decision that the claimant should pay the defendants’ costs because the defendants had vigorously contested every issue. Having taken “account of the circumstances of the claim and the litigation history” the court decided that the claimant should pay only half of the defendant’s costs.¹⁷⁶ In *Walsh v Singh*, the Court of Appeal upheld a decision to deny the defendant costs even though the claimant failed to beat her offer, on the grounds that the defendant had lied and had used unlawful methods to obtain evidence.¹⁷⁷
- 27.88 Fourth, and related, the court might consider it unjust to apply the CPR 36.17 consequences, or all of them, where but for the rule an issue-based costs order would have been appropriate. For example, what should happen where a claimant has succeeded on issue A and consequently bettered its own CPR 36 offer, but needlessly pursued a hopeless issue, B, such that (but for the CPR 36 offer), the court would only award the claimant costs on issue A? Previously, the default approach was that the claimant would only recover indemnity costs and interest in relation to issue A, not issue B.¹⁷⁸ This approach had the advantage of discouraging parties from taking up weak points and avoided the injustice of imposing the costs of litigating a bad point on the defendant who won that point. However, under the current CPR 36, the default position is that the claimant is entitled to indemnity costs and interest in respect of all the issues. The rationale for this approach is that the defendant could have avoided all the costs of trial (and thus of both issues A and B) by accepting the claimant’s favourable CPR 36 offer. The difficulty with this rationale is that the claimant could equally have avoided the costs of issue B by not taking up the weak point. Accordingly, the court may depart from the default position, and decline to award the offeror its costs of the issue (or award the offeree its

costs relating to the issue), where this would be the just result.¹⁷⁹ Similarly, where the **CPR 36** offer related only to a narrow issue, it might be unjust to award the successful offeree all of its costs after the expiry of the relevant period, particularly where acceptance of the offer would have made little difference to the conduct or cost of the litigation because the other issues would need to have been ventilated in any event.¹⁸⁰

- 27.89** Fifth, it may be unjust to apply the default costs consequences where a party's **CPR 36** offer made no real concession, and was therefore not a genuine attempt to compromise, but a tactical device to place the offeree at risk without offering any real benefit to them or incentive to compromise.¹⁸¹ This might be the case, for example, where a claimant makes an offer amounting to 99.9 per cent of the claim. **Paragraph (e) of CPR 36.17(5)** was introduced to address this very situation.¹⁸² The underlying idea is that since **CPR 36** is designed to incentivise settlement, an offeror should not be able to subvert that aim by making an offer that is not genuine, while still claiming the advantages of **CPR 36.17**. This reasoning is curious, however. By definition, the **CPR 36.17** consequences will only be engaged where the offeror has beaten its own offer. If this occurs, it will have turned out that the offer was a good one, which (everything else being equal) should have been taken up even if it only made a small concession. To enable a defendant to avoid the **CPR 36.17(4)** consequences, for example, merely because the offer represented a very high proportion of the claim, which the claimant still managed to beat, is tantamount to rewarding the defendant for sticking to a weak defence. At the same time, this possibility undermines the certainty and predictability of the **CPR 36.17** regime.
- 27.90** The courts have to some extent moderated the malign potential of **CPR 36.17(5)(e)** by holding that a **CPR 36** offer will not be presumed to be other than genuine merely because the concession made was very limited or, indeed, purely hypothetical.¹⁸³ The fact that the claimant offered only a small discount is, in principle, no reason to deny it the fruits of its labours—indeed, such awards have been made for offers as high as 95 per cent of the claim.¹⁸⁴ Moreover, in determining whether the offer was sufficiently "genuine", the court will not embark on a "mini-trial", but rather will take a broad-brush view informed by its own assessment of the strength of the case it has just tried.¹⁸⁵
- 27.91** Sixth, there may be some limited circumstances where a party who was offered an extremely favourable settlement was nonetheless justified in going to trial to seek vindication. The egregious facts of *Yentob v MGN Ltd* provide an illustration.¹⁸⁶ A claimant sued a newspaper for phone-hacking. The newspaper refused to admit the extent of the phone-hacking or what personal information it had obtained about the claimant, and would probably have refused offers to make a statement in open court admitting its wrongdoing. Although the claimant was eventually awarded a judgment less advantageous than the newspaper's **CPR 36** offer, it would have been unjust to punish the claimant for seeking vindication.¹⁸⁷ However, in an ordinary personal injury case, it is insufficient that a claimant, perhaps understandably, wishes to have a trial to expose the defendant's carelessness.
- 27.92** Seventh, it may be unjust to apply **CPR 36**'s consequences against a defendant who failed to better the claimant's offer because of its limited resources or because of the serious financial consequences that such an order would have on the defendant, as in *Jameel v Dow Jones & Co Inc*.¹⁸⁸ It may be doubted whether such considerations are appropriate, however. The offeree's financial circumstances cannot be considered part of "the circumstances of the case"; this view gains support from the fact that the considerations mentioned in **CPR 36.17(5)(a)–(e)** are all concerned with the conduct of the proceedings. Moreover, costs orders remain predominantly compensatory, despite there being some scope for punitive elements post-Jackson LJ's reforms. As with tort law, the measure of compensation in costs should not depend on the opponent's ability to pay. As Eady J explained, a judge "should not be tempted to make an exception [to the norm] merely because he or she thinks the regime itself harsh or unjust".¹⁸⁹
- 27.93** Whatever the ground for departure from the default costs consequences stipulated by **CPR 36.17** where an offeror has beaten its own offer, it must be remembered that exercise of this discretion undermines the certainty and predictability of **CPR 36** offers. Ultimately, bar exceptional circumstances, a party who has beaten its own **CPR 36** offer should get its costs from the end of the relevant period.¹⁹⁰

- 27.94 Finally, it is important to stress that even when the court finds that it would be unjust to apply the consequences of CPR 36.17(3) or (4), that does not necessarily mean it will apply the general law of costs. Rather, it has a discretion to apply some of the provisions of CPR 36.17, but not others.¹⁹¹ For example, it might award a successful claimant indemnity costs from the end of the relevant period, but decline to award interest or the additional amount.¹⁹² However, it has been suggested it would be an unusual case where some of the cost consequences are unjust but not others,¹⁹³ and certainly the courts must be astute not to water down the effect of CPR 36.17 by over-use of this facility.¹⁹⁴
- 27.95 In the same vein, the court will have regard to all the circumstances of the case when setting the level of the CPR 36.17 consequences. For example, as we have seen, it might consider it unjust to award all of the offeree's costs after the end of the relevant period (or all of those costs on the indemnity basis, if the offeree is the claimant), where the CPR 36 offer only related to a narrow issue. Or it might consider it unjust to do so where the offeree unreasonably pursued hopeless issues on which it lost at trial.¹⁹⁵ Similarly, the court might consider that it would be unjust to award the maximum amount of interest on damages and costs (i.e. 10 per cent above base rate), but that a lower amount of interest (say, 5 per cent) would not be unjust.¹⁹⁶ In relation to the additional amount under CPR 36.17(4)(d), it has been said that there is no discretion to award a lower amount: i.e. the award is all or nothing.¹⁹⁷ It is true that at first blush, the language of CPR 36.17(4)(d) suggests that the method of calculating the additional amount is fixed; but it would be perverse, and could undermine the use and effectiveness of CPR 36.17(4)(d), if the court could choose the level at which to set the other CPR 36.17 consequences, while being bound to take an all or nothing approach to the additional amount.¹⁹⁸ Again, when setting the level of the CPR 36.17 consequences, the court must be careful not to water them down just because the outcome seems "harsh" to the offeree,¹⁹⁹ since this would undermine the utility of the rule in the long run.²⁰⁰

Costs consequences where both parties fail to beat compromise offers

- 27.96 CPR 36 does not expressly deal with situations in which both claimant and defendant have made CPR 36 offers to settle, but both have failed to better their respective offers. However, there is no justification in reducing the costs to which the claimant would otherwise be entitled just because they made a CPR 36 offer.²⁰¹

Footnotes

- 110 CPR 36.17(3) does not apply to claims which are subject to the fixed costs regime in CPR 45 s.IIIA, since CPR 36.21 applies a modified version of this provision to such claims (CPR 36.17(8)). But CPR 36.17(4) does apply, with the result that an award of indemnity costs under CPR 36.17(4)(b) will result in the claimant receiving fixed costs up to the last appropriate "stage" in CPR 45 s.IIIA Tables 6B, 6C or 6D (as the case may be), with indemnity costs assessed in the usual way for the period covered by the indemnity costs order: *Broadhurst v Tan [2016] EWCA Civ 94*.
- 111 *Neave v Neave [2003] EWCA Civ 325* [41]; see also *Gibbon v Manchester City Council [2010] EWCA Civ 726*, [4].
- 112 See further below, paras 27.100 ff, in relation to disclosure of CPR 36 offers to the court, and para.27.103 in the context of split trials.
- 113 *Interactive Technology Corporation Ltd v Ferster [2017] EWHC 1510 (Ch)* [9]–[10], [17].
- 114 Or the fixed recoverable costs regimes contained in CPR 45, if applicable. These are discussed in Ch.28 Costs, especially paras 28.153 ff.
- 115 *Johnsey Estates (1990) Ltd v Secretary of State for the Environment, Transport and the Regions [2001] EWCA Civ 535* [31]–[32]. For the principles governing the court's exercise of its discretion, see Ch.28 Costs paras 28.39 ff, 28.54 ff, 28.77 ff, 28.86 ff, 28.117 and 28.118 ff.

- 116 See Ch.28 Costs, especially paras 28.58 ff.
- 117 See *Johnsey Estates (1990) Ltd v Secretary of State for the Environment, Transport and the Regions* [2001] EWCA Civ 535; and Ch.28 Costs, especially paras 28.64 ff.
- 118 *Painting v University of Oxford* [2005] EWCA Civ 161 [22].
- 119 *Fox v Foundation Piling Ltd* [2011] EWCA Civ 790; and *Sugar Hut Group Ltd v AJ Insurance* [2014] EWHC 3775 (Comm) [8].
- 120 *Carver v BAA Plc* [2008] EWCA Civ 412 [32]. See J. Sorabji, “W(h)ither Carver?: CPR 36, the Law of Contract and Certainty in Gibbon v Manchester City Council” (2011) 30(2) C.J.Q. 124.
- 121 *JLE (A Child) v Warrington and Halton Hospitals NHS Foundation Trust* [2019] EWHC 1582 (QB) [44]; see below, para.27.84.
- 122 *Acre 1127 Ltd (in liq) (formerly Castle Galleries Ltd) v De Montfort Fine Art Ltd* [2011] EWCA Civ 130 [12].
- 123 *Diageo North America Inc v Intercontinental Brands (ICB) Ltd (Costs)* [2010] EWHC 172, (Pat). Cf. *Essex County Council v UBB Waste (Essex) Ltd (No.3)* [2020] EWHC 2387 (TCC) [39].
- 124 *Blackham v Entrepose UK* [2004] EWCA Civ 1109 [10]–[13]; and *Purrusing v A'Court & Co (a firm)* [2016] EWHC 1528 (Ch) [15]–[16].
- 125 *Novus Aviation Ltd v Alubaf Arab International Bank BSC(C)* [2016] EWHC 1937 (Comm) [22]–[23].
- 126 *Mitchell v James* [2002] EWCA Civ 997 [31]; and *Ali Reza-Delta Transport Co Ltd v United Arab Shipping Co SAG (Costs)* [2003] EWCA Civ 811, [9].
- 127 *Littlestone v Macleish* [2016] EWCA Civ 127 [23].
- 128 *Newland Shipping & Forwarding Ltd v Toba Trading FZC* [2014] EWHC 864 (Comm) [14]–[15].
- 129 *CCC v Sheffield Teaching Hospitals NHS Foundation Trust* [2023] EWHC 1905 (KB).
- 130 See *Crooks v Hendricks Lovell Ltd* [2016] EWCA Civ 8 [6].
- 131 *Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hannah Aspden & Johnson (a firm)* [2002] EWCA Civ 879 [19].
- 132 *Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hammer Aspden & Johnson (a firm)* [2002] EWCA Civ 879 [32]; and *IPC Media Ltd v Highbury Leisure Publishing Ltd (indemnity costs)* [2005] EWHC 283 (Ch), [16]. See further discussion of indemnity costs in Ch.28 Costs paras 28.118 ff.
- 133 *Reid Minty (a firm) v Taylor* [2001] EWCA Civ 1723 [32], [37]; *Kiam v MGN Ltd (No.2)* [2002] EWCA Civ 66 [12]; and *Balmoral Group Ltd v Borealis (UK) Ltd* [2006] EWHC 2531 (Comm).
- 134 *J Murphy & Sons Ltd v Johnston Precast Ltd* [2008] EWHC 3104 (TCC) [40]–[41].
- 135 CPR 36.24(2) and (9).
- 136 CPR 36.24(9).
- 137 CPR 36.17(4) was enacted in substantially its present form under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 s.55, which authorised the making of rules of court enabling the court to order a defendant to pay an “additional amount” where the claimant beats its own CPR 36 offer. This was in turn introduced following Jackson LJ’s recommendations in his review of civil litigation costs: Jackson LJ, Review of Civil Litigation Costs: Final Report (London: HMSO, 2010) Ch.41 paras 3.1–3.16 (hereinafter “Jackson LJ, Final Report”).
- 138 See below, paras 27.83 ff.
- 139 See above, paras 27.71 ff.
- 140 See below, paras 27.83 ff.
- 141 CPR 36.24(4) and (5).
- 142 *Rowlands v Bryn Alyn Community (Holdings) Ltd* [2003] EWCA Civ 383 [15].
- 143 *Petrotrade Inc v Texaco Ltd* [2002] 1 W.L.R. 947, [60], CA.
- 144 *Pankhurst v White* [2010] EWHC 311 (QB) [58]; and *Andrews v Alyott* [2010] EWHC 597 (QB) [37].
- 145 Cf. the Damages Act 1996 (as amended by the Civil Liability Act 2018) ss A1 and 1, which requires the court to take into account a rate of return on investment prescribed by the Lord Chancellor (known as the “discount rate”), in determining the return to be expected from the investment of damages awarded for future pecuniary loss in personal injury claims.
- 146 See Ch.28 Costs paras 28.42 ff and 28.77 ff.
- 147 *McPhilemy v Times Newspapers Ltd (No.2) (Costs)* [2001] EWCA Civ 933 [19]–[24].
- 148 *Petrotrade Inc v Texaco Ltd* [2002] 1 W.L.R. 947 [63].
- 149 *Petrotrade Inc v Texaco Ltd* [2002] 1 W.L.R. 947 [77].
- 150 *McPhilemy v Times Newspapers Ltd (No.2) (Costs)* [2001] EWCA Civ 933 [17]–[18].
- 151 *McPhilemy v Times Newspapers Ltd (No.2) (Costs)* [2001] EWCA Civ 933 [28].

- 152 S. Sime and D. French, Blackstone's Guide to the Civil Justice Reforms 2013 (Oxford: Oxford University Press, 2013) paras 11.21–11.28.
- 153 Jackson LJ, Final Report Ch.41 paras 3.5–3.12.
- 154 *OMV Petrom SA v Glencore International AG* [2017] EWCA Civ 195; [2017] 1 W.L.R. 3465 [30]–[38]. See also *Cashman v Mid Essex Hospital Services NHS Trust* [2015] EWHC 1312 (QB) [9]; and *Sony/ATV Music Publishing LLC v WPMC Ltd* [2017] EWHC 456 (Ch) [10].
- 155 *Abbott v Design & Display Ltd* [2014] EWHC 3234 (IPEC) [22].
- 156 *Cashman v Mid Essex Hospital Services NHS Trust* [2015] EWHC 1312 (QB), [9]; and *Bolt Burdon Solicitors v Tariq* [2016] EWHC 1507 (QB) [22].
- 157 *Bolt Burdon Solicitors v Tariq* [2016] EWHC 1507 (QB) [18]–[19].
- 158 *Mohammed v Home Office* [2017] EWHC 3051 (QB) [27].
- 159 *Abbott v Design & Display Ltd* [2014] EWHC 3234 (IPEC) [22].
- 160 *Elsevier v Munro* [2014] EWHC 2728 (QB).
- 161 For convenience, reference is made here only to the default consequences under CPR 36.17. However, the discretion also arises where the court is considering whether to depart from the normal rule that a late-accepting offeree should pay the offeror's costs from the end of the relevant period up to the point of acceptance: CPR 36.13(5)–(6); and see above, paras 27.49–27.51. Here, a particularly important consideration will be what has changed since the expiry of the relevant period, to cause the offer to be accepted late? A change in the offeree's appraisal of the merits will not generally suffice, unless there has been a significant amendment so as to change the nature of the case. A material non-disclosure by the offeror which was later exposed might also suffice, though not where the CPR 36 offer was accepted unconditionally in full knowledge of the non-disclosure.
- 162 *Webb v Liverpool Women's NHS Foundation Trust* [2016] EWCA Civ 365 [38].
- 163 *Tuson v Murphy* [2018] EWCA Civ 1461 [29].
- 164 *Webb v Liverpool Women's NHS Foundation Trust* [2016] EWCA Civ 365 [38].
- 165 *Downing v Peterborough & Stamford Hospitals NHS Foundation Trust* [2014] EWHC 4216 (QB) [61].
- 166 *Matthews v Metal Improvements Co Inc* [2007] EWCA Civ 215, [32]; *Yentob v MGN Ltd* [2015] EWCA Civ 1292 [22].
- 167 *JLE (A Child) v Warrington and Halton Hospitals NHS Foundation Trust* [2019] EWHC 1582 [44].
- 168 *Carver v BAA Plc* [2008] EWCA Civ 412 [32]; discussed above at para. 27.67.
- 169 *Ford v GKR Construction Ltd* [2000] 1 W.L.R. 1397, 1403, CA.
- 170 *Lorraine Feltham v Freer Bouskell* [2013] EWHC 3086 (Ch) [13]–[15].
- 171 *Factortame Ltd v Secretary of State for the Environment, Transport and the Regions* [2002] EWCA Civ 22 [25].
- 172 *Downing v Peterborough & Stamford Hospitals NHS Foundation Trust* [2014] EWHC 4216 (QB) [62].
- 173 *Novus Aviation Ltd v Alubaf Arab International Bank BSC(C)* [2016] EWHC 1937 (Comm).
- 174 *Novus Aviation Ltd v Alubaf Arab International Bank BSC(C)* [2016] EWHC 1937 (Comm) [26].
- 175 *Johnson v Gore Wood & Co (No.3)* [2004] EWCA Civ 14.
- 176 *Johnson v Gore Wood & Co (No.3)* [2004] EWCA Civ 14 [16].
- 177 *Walsh v Singh (Costs)* [2011] EWCA Civ 80 [11]–[12], [31].
- 178 *Kastor Navigation Co Ltd v Axa Global Risks (UK) Ltd (The Kastor Too)* [2004] EWCA Civ 277 [149].
- 179 *Webb v Liverpool Women's NHS Foundation Trust* [2016] EWCA Civ 365 [38]–[39].
- 180 *White v Wincock Galliford Ltd* [2019] EWHC B6 (Costs).
- 181 *AB v CD* [2011] EWHC 602 (Ch) [22].
- 182 *JMX (A child by its Mother and Litigation Friend, FMX) v Norfolk and Norwich Hospitals NHS Foundation Trust* [2018] EWHC 185 (QB) [8].
- 183 *Jockey Club Racecourse Ltd v Willmott Dixon Construction Ltd* [2016] EWHC 167 (TCC), where a claimant's offer that the defendant accept 95 per cent liability was acceptable, notwithstanding that contributory negligence was not alleged and so 95:5 was not an available outcome at trial.
- 184 See for example *Huck v Robson* [2002] EWCA Civ 398 [69]–[70], [79]–[80].
- 185 *JMX (A child by its Mother and Litigation Friend, FMX) v Norfolk and Norwich Hospitals NHS Foundation Trust* [2018] EWHC 185 (QB) [12].
- 186 *Yentob v MGN Ltd* [2015] EWCA Civ 1292.
- 187 *Yentob v MGN Ltd* [2015] EWCA Civ 1292 [11]–[15].
- 188 *Jameel v Dow Jones & Co Inc* [2005] EWCA Civ 75; [2005] QB 946 [16].

189 *Downing v Peterborough & Stamford Hospitals NHS Foundation Trust [2014] EWHC 4216 (QB) [61]*.

190 See for instance *Burgess v British Steel [2000] PIQR Q240, Q247, Q252-3, CA*.

191 In this regard, the Court of Appeal in *OMV Petrom SA v Glencore International AG [2017] EWCA Civ 195; [2017] 1 W.L.R. 3465* highlighted that the court should assess whether it would be unjust to award each of the CPR 36.17(4) consequences individually, rather than globally.

192 *Abbott v Design & Display Ltd [2014] EWHC 3234 (IPEC) [22]; RXDX v Northampton Borough Council [2015] EWHC 2938 (QB) [8]-[9]*; and *White v Wincott Galliford Ltd [2019] EWHC B6 (Costs) [20]*.

193 *JLE (A Child) v Warrington and Halton Hospitals NHS Foundation Trust [2019] EWHC 1582 (QB) [23]*. Thus, in *Telefonica UK Ltd v The Office of Communications [2020] EWCA Civ 1374*, the Court of Appeal held that a judge had erred in treating the application of some of the consequences of CPR 36.17(4) as a reason not to apply others. The rule “provides for the successful claimant … to receive each of the four enhancements and there is no suggestion that the award of one in any way undermines or lessens entitlement to the others”: at [46].

194 *White v Wincott Galliford Ltd [2019] EWHC B6 (Costs) [33]*.

195 See above, para.27.88.

196 See above, paras 27.79–27.81.

197 *JLE (A Child) v Warrington and Halton Hospitals NHS Foundation Trust [2019] EWHC 1582 (QB) [78]*, per Stewart J, obiter.

198 *White v Wincott Galliford Ltd [2019] EWHC B6 (Costs) [22]-[32]*.

199 *Downing v Peterborough & Stamford Hospitals NHS Foundation Trust [2014] EWHC 4216 (QB) [61]*.

200 *White v Wincott Galliford Ltd [2019] EWHC B6 (Costs) [33]*.

201 *Quorum A/S v Schramm (No.2) (Costs) [2002] 2 All ER (Comm) 179 [30]-[31]*; and *Rolf v De Guerin [2011] EWCA Civ 78 [34]-[35]*.

CPR 36 Offers to Settle in RTA Protocol and EL/PL Protocol Claims

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 27 - Offers to Settle

CPR 36 Offers to Settle in RTA Protocol and EL/PL Protocol Claims

- 27. 97** The Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents (the RTA Protocol) applies to personal injury claims arising from road traffic accidents (RTAs) having a value between £1,000 and £25,000, in which liability is admitted. Similarly employers' and public liability claims²⁰² worth between £1,000 and £25,000, and in which liability is admitted, are subject to the Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims (the EL/PL Protocol). The procedure followed in such cases is discussed in more detail in Ch.28; suffice it for present purposes to say that it consists of three stages intended to determine quantum as speedily and efficiently as possible, with modest fixed costs available: Stage 1 (concerned with the intimation of the claim), Stage 2 (during which the parties attempt to negotiate a settlement) and Stage 3 (in which, in the absence of agreement, the claimant may start proceedings under CPR 8 in accordance with PD 49F in order for quantum to be determined at a disposal hearing).²⁰³
- 27. 98** In these cases, CPR 36 s.I does not apply. Instead, under s.III, offers to settle generally do not have any costs consequences unless they are "Protocol offers" (CPR 36.25(4)). Both parties must make a Protocol offer, which consists of the "final total amount" offered by each party (i.e. at the end of the structured negotiations which take place at Stage 2) (CPR 36.26(2)).²⁰⁴ The Protocol offers must be set out in the court proceedings pack (that is, the form produced by the claimant at the conclusion of the Stage 2 negotiations, and in advance of issuing Stage 3 proceedings under CPR 8). Since the aim is to encourage settlement as early as possible, the Protocol offers are deemed to be made on the first business day after the court proceedings pack is sent to the defendant (CPR 36.27(1)). A Protocol offer can only be communicated to the court after the claim has been determined (CPR 36.29(1)); other offers must not be communicated to the court at all (CPR 36.29(2)).²⁰⁵
- 27. 99** The costs consequences of a Protocol offer are set out in CPR 36.30 as follows. If the claimant obtains judgment against the defendant for an amount of damages that is:
- (a)less than or equal to the amount of the defendant's Protocol offer²⁰⁶: the court must order the claimant to pay the defendant the fixed costs in CPR 45.37 and interest on those fixed costs from the first business day after the deemed date of the Protocol offer under CPR 36.27 (CPR 36.30(1)(a) and 36.30(2)). The fixed costs in CPR 45.37 are essentially the fixed costs for the Stage 3 procedure;
 - (b)more than the defendant's Protocol offer but less than the claimant's Protocol offer: the court must order the defendant to pay the fixed costs in CPR 45.30 (CPR 36.30(1)(b) and 36.30(3)). The costs referred to in CPR 45.30 are the fixed costs applicable to Stages 1, 2 and 3; or
 - (c)equal to or more than the claimant's own Protocol offer: the court must order the defendant to pay:
 - i.interest on the whole of the damages awarded at a rate not exceeding 10% above base rate for some or all of the period starting with the deemed date of the Protocol offer under CPR 36.27;
 - ii.the fixed costs in rule 45.30;
 - iii.interest on those fixed costs at a rate not exceeding 10% above base rate; and

iv.an additional amount calculated in accordance with [CPR 36.17\(4\)\(d\)](#)—that is to say 10 per cent of the damages awarded ([CPR 36.30\(1\)\(c\)](#) and [36.30\(4\)](#)).

There is no power to make different awards on the basis that the consequences stipulated in [CPR 36.30](#) would be “unjust”, although the court will of course have regard to the circumstances of the case when setting the level of interest on damages and costs. [207](#)

Footnotes

[202](#) Employers' liability claims are claims against the claimant's employer for personal injuries arising out of workplace accidents, and industrial disease claims (EL/PL Protocol para.1.1(14)). Public liability claims are claims for personal injuries arising out of a breach of a common law or statutory duty of care (excluding disease claims), either other than against the claimant's employer, or against the claimant's employer but not arising out of a workplace accident (EL/PL Protocol para.1.1(18)).

[203](#) See [Ch.28 Costs paras 28.151–28.152](#).

[204](#) These amounts are treated as exclusive of interest: [CPR 36.28\(a\)](#).

[205](#) To ensure this, the Protocol offer is set out on a separate part of the court proceedings pack form, Part B, which is to be filed with the rest of the form in a sealed envelope so that the court does not inadvertently see it before the claim is determined: PD 49F para.6.1(2).

[206](#) For the purposes of calculating whether the amount of damages awarded is less than or equal to the amount of the defendant's Protocol offer, the deductible amounts specified in [CPR 36.20\(1\)\(d\)](#) are to be stripped out of the judgment sum: [CPR 36.31](#).

[207](#) See above, paras [27.79–27.81](#) and [27.95](#).

Restrictions on Disclosure of CPR 36 Offers

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 27 - Offers to Settle

Restrictions on Disclosure of CPR 36 Offers

27. 100 The [CPR 36](#) system is founded on the idea that a party who has declined an offer to settle is taking the risk of adverse costs consequences if it fails to better the offer at the trial. This system can only work fairly if the court decides the merits of the dispute independently of any costs consequences. For this reason, [CPR 36.16\(1\)](#) provides that a “[Part 36](#) offer will be treated as ‘without prejudice except as to costs’”. The without prejudice rule holds that the statements made during settlement negotiations are inadmissible in evidence and may not be revealed to the court.²⁰⁸ “Without prejudice except as to costs” means that the content of such communications may only be brought to the court’s attention when it considers what costs order to make. Therefore [CPR 36.16\(2\)](#) spells out that:

Rule 36_16

The fact that a Part 36 offer has been made and the terms of such offer must not be communicated to the trial judge until the case has been decided.”

27. 101 The fact of a [CPR 36](#) offer may only be referred to in argument relating to costs, after the case has been decided.²⁰⁹ Similar rules apply on appeal ([CPR 52.22](#)).²¹⁰ Exceptions to the general rule are set out in [CPR 36.16\(3\)](#), which states that disclosure of a payment is permissible in four situations:
- (a)where the defence of tender before claim has been raised (i.e. a defence that the defendant unconditionally offered the claimant the amount due before the claimant started proceedings);
 - (b)where the proceedings have been stayed under [CPR 36.14](#) following acceptance of a [CPR 36](#) offer;
 - (c)where the offeror and the offeree agree in writing that it should not apply²¹¹; or
 - (d)where, although the case has not been decided, any part of or issue in the case has been decided, and the [CPR 36](#) offer relates only to those parts or issues that have been decided.
27. 102 The fact that a party has made a [CPR 36](#) offer is disclosable in an interim application if it is relevant to an issue arising in such an application.²¹² For instance, a [CPR 36](#) offer could be relevant to the issue of irreparable harm in an application for an interim injunction.²¹³ Indeed, failure to disclose such a fact in a without-notice application could amount to breach of the obligation to make full and frank disclosure of all material facts.²¹⁴ In some circumstances, [CPR 36](#) offers will be relevant to case management decisions, such as a decision whether to split the trial of liability from the trial of quantum. However, great care must be taken to ensure that disclosure at an interim stage is not communicated to the trial judge and that it in no way affects the decision on the merits.
27. 103 Where there is a split trial, [CPR 36.16\(3\)\(d\)](#) makes clear that a [CPR 36](#) offer relating only to the preliminary issues that have been determined may be disclosed for the purposes of the costs decision relating to the preliminary stage. The court may therefore decide to make a costs order in respect of that stage, rather than reserving the question of costs to the end of proceedings. Where a court has determined some issues but not others, and there is an unaccepted [CPR 36](#) offer relating to issues both determined and undetermined, the court may be told of the existence of the offer but not its terms ([CPR 36.16\(4\)](#)).²¹⁵ The appropriate

course in such circumstances will generally be for the court to reserve costs until all the issues are determined, when it can take the terms of the **CPR 36** offer into account, together with all of the relevant factors which may affect the determination of the consequences that flow from it.²¹⁶

- 27. 104** Disclosure of a **CPR 36** offer contrary to the rule amounts to a procedural irregularity. This does not necessarily mean that a recusal must follow or that a judgment must be set aside. Where the judge becomes aware of such offer, the judge is obliged to determine whether a fair trial before them is still possible, or whether justice requires the judge to recuse themselves. In reaching a decision, the judge should ask themselves first and foremost whether they can put the **CPR 36** offer out of their mind. If so, they may consider the additional time, cost and difficulty for all concerned if the hearing were to be aborted.²¹⁷ This is somewhat at odds with the normal approach, that judicial resources and inconvenience to the parties are not taken into account in determining applications for recusal for apprehended bias.²¹⁸

Footnotes

208 See generally [Ch.17 Without Prejudice](#).

209 *Johnson v Gore Wood & Co (No.3) [2004] EWCA Civ 14* [7]. See, under the RSC, *Millensted v Grosvenor House (Park Lane) Ltd [1937] 1 KB 717, 725*.

210 **CPR 52.22(1)**, which generally prevents disclosure of **Part 36** payments in appeals until all questions other than costs have been determined, is subject to the court ordering otherwise, and to exceptions in **CPR 52.22(2), (3)** where the **Part 36** payment is relevant to the issues in the appeal. An appeal court may order otherwise under **CPR 52.22(1)** where it deals with both substantive and costs issues as part of a “rolled-up” hearing.

211 In *Virgin Atlantic Airways Ltd v Jet Airways (India) Ltd [2012] EWHC 3318 (Pat)*, both parties agreed the judge could be told about a **CPR 36** offer, which the judge regarded as either a waiver of their procedural rights, or an agreement in writing under **CPR 36.13(3)(c)**: [19]. Having waived the “without prejudice save as to costs” privilege by referring to the existence of the **CPR 36** offer, the parties were held to waive their privilege over the entirety of the offer: [20].

212 *Williams v Boag [1941] 1 KB 1 (CA)*, 4 (Goddard LJ), 4 per Du Parcq LJ.

213 For discussion of the irreparable harm test see [Ch.10 Interim Remedies paras 10.51 ff.](#)

214 For the duty to make full and frank disclosure see [Ch.10 Interim Remedies paras 10.225 ff.](#)

215 Prior to 2015, there was a blanket restriction on disclosure of both the existence of the offer and its terms in such circumstances, unless of course the parties agreed to waive this: *HSS Hire Services Group Plc v BMB Builders Merchants Ltd [2005] EWCA Civ 626*; *Beasley v Alexander [2012] EWHC 2715 (QB)*; and *Ted Baker Plc v AXA Insurance UK Plc [2012] EWHC 1779 (Comm)*. The upshot was that the court was often paralysed from deciding whether it would be appropriate to determine the costs of the preliminary issue stage, in case there was a **CPR 36** offer relevant to that stage: see *Ted Baker Plc v AXA Insurance UK Plc* at [19].

216 *Interactive Technology Corporation Ltd v Ferster [2017] EWHC 1510 (Ch)* [9]–[10], [17].

217 *Garratt v Saxby [2004] EWCA Civ 341* [20] per Dyson LJ. See also *Berg v IML London Ltd [2002] 4 All ER 87 (QB)* [27] per Burnton J.

218 See [Ch.3 Fair Trial para.3.90](#) for the approach where “without prejudice” material comes to the judge’s attention; and see [para.3.58](#) for the principle that inconvenience and expense are not normally relevant where an allegation of bias is raised.

“Offers of Amends” in Defamation Cases

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 27 - Offers to Settle

“Offers of Amends” in Defamation Cases

27. 105 A special procedure for making offers to settle in defamation claims exists under the [Defamation Act 1996 ss.2–4](#). The procedure applies where a complaint of defamation is made against a defendant who accepts that the allegations were false and wishes to make amends. The offer is to consist of an offer to sufficiently apologise for the publication and to make a suitable correction, and to pay damages and costs as appropriate ([s.2\(4\)](#)). An offer under these provisions can be made at any stage up to the time when a defence becomes due ([s.2\(5\)](#)).
27. 106 Once an offer is accepted, the defendant may not resile from it except in rare and special circumstances.²¹⁹ For their part, the claimant may not bring or continue defamation proceedings, but is entitled to apply to the court for the appropriate remedies to be determined (if not agreed) and enforced ([s.3](#)).²²⁰ Where the court is required to determine financial compensation and costs, nothing in the rules explicitly prevents parties from revealing to the court what has been offered. But Eady J said that “if the judge does see the figures offered it can create difficulties of a similar kind to those which are generally avoided under the [Part 36](#) practice of non-disclosure. For that reason, I believe that for the future it would ordinarily be preferable for the figures not to be disclosed to the judge.”²²¹
27. 107 If the offer is rejected, the defendant will have a complete defence to any defamation claim ([s.4\(2\)](#)), unless the claimant proves the defendant knew or had reason to believe that the statement complained of referred to the claimant or was likely to be understood as referring to the claimant, and was both false and defamatory of the claimant ([s.4\(3\)](#)).²²²

Footnotes

219 *Warren v The Random House Group Ltd [2008] EWCA Civ 834* [18]–[29].

220 In one case, a claimant was also permitted to read a unilateral statement in open court following her acceptance of an offer of amends: *Winslet v Associated Newspapers Ltd [2009] EWHC 2735 (QB)* [24].

221 *Cleese v Clark [2003] EWHC 137 (QB)* [17].

222 *Milne v Express Newspapers Ltd (No.1) [2004] EWCA Civ 664* [27]–[37], [47]–[52].

Basic Concepts

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 28 - Costs

Basic Concepts

Introduction

28. 1 The subject of costs, which would deserve only modest attention in a well-balanced system, requires extensive treatment in England. Far from being of incidental importance, the various aspects of litigation costs occupy a central place in the administration of civil justice. England is unique in this regard as there is no other country where courts and litigants devote so much time, effort, resources and study to questions of costs. The sheer volume of litigation over costs and its expense to parties and courts is without parallel.
28. 2 The reason for this systemic preoccupation with costs is twofold. First, the cost of litigation is very high, and not infrequently out of proportion to the amount claimed. Second, the unsuccessful party normally has to pay the successful party's costs. As a result, an unsuccessful litigant may face a costs bill which is out of all proportion to the value of the dispute and which could prove financially ruinous. Even a successful litigant, to the extent that their costs may not be recoverable from the losing party, may find that the costs they must pay to their own lawyers may make the litigation unaffordable or economically irrational.¹ Today the fear of costs is no longer confined to litigants of modest means. It affects even the rich and preoccupies mighty government departments.² Excessive costs contributed to the decision to remove public funding in the form of legal aid from most areas of civil litigation. The resultant funding gap has generated its own problems as successive governments have sought to find alternative ways to provide access to justice, particularly for litigants of modest means. The complexity of the costs rules is compounded by the extensive court discretion whether to order a party to pay costs and how much to pay. The exercise of this discretion has proved fertile ground for disputes, which can turn out to be as extensive and costly as the resolution of the substantive claim.
28. 3 Before discussing the attempts that have been made to reduce the cost of litigation, it is important to be aware of the economic factors at work in this area. There are three principal factors at play here; one is universal and the others are specific to the English litigation system. The universal factor is that economic activity follows the most rewarding path. The providers of legal services, just like the providers of any other service, have an economic incentive to maximise profits. Under open market conditions, the interest of service providers to maximise profit is counterbalanced by consumer interest in minimising the price they pay for the service. In an efficient market, the price will settle at a level that accommodates the interests of both users and providers. This is not, however, the case in respect of litigation legal services. Market efficiency requires transparency and competition. Both these requirements are difficult to satisfy. The market for legal representation in litigation is inherently opaque because of the difficulty of comparing prices or quality of service. A comparison of hourly fees charged by different lawyers is largely meaningless since the client is not usually in a good position to know the grades of the fee earners who will or should be doing the chargeable work, and has limited control over the number of billable hours that the lawyer may charge. Nor are clients able to compare the quality of service offered by different providers since there is no transparent standard for comparison. Clients have to rely on their legal representative in the conduct of litigation and have little means of assessing their advice. Other factors also contribute to market inefficiency, such as the monopolistic features of the organisation of the legal profession and the restrictions on rights of audience, though they are not as powerful as the absence of transparent competition.
28. 4

A market imbalance is therefore embedded in the provision of legal services from the start. This imbalance is further exacerbated by two features that are specific to the English litigation system: hourly pay and costs shifting. In England lawyers typically charge for their services by the hour, with only broad upper limits on their billable hours, and commonly (though not universally) regardless of outcome. The costs-shifting principle (also known as the “costs follow the event” principle) holds that the successful litigant is normally entitled to recover their litigation costs from the unsuccessful litigant. Once litigation is under way litigants have reason to believe that the more they invest in the litigation the greater their chances of winning on the merits and recovering their costs. This reduces litigant resistance to investing ever increasing amounts in the process. The combined effect of these two factors is to create a ratcheting effect, whereby litigants caught in litigation feel compelled to invest ever greater resource in prosecuting or defending the case.

- 28.5** Solicitors' costs are divided into *contentious costs* and *non-contentious costs*.³ The *Solicitors Act 1974* makes different provision for these two types of business. Contentious costs applies in proceedings conducted before a court (including pre-commencement costs), while non-contentious costs relate to work done for the client where no proceedings are commenced, where proceedings are conducted before tribunals or after proceedings are concluded.⁴ This dividing line is no longer sustainable with the advent of pre-action protocols and the increased use of *ADR*,⁵ and needs to be replaced by legislation abolishing the distinction, at least for work connected with dispute resolution.⁶
- 28.6** The allocation of costs between parties to litigation is governed by traditional principles. First, the successful party is normally entitled to recover their litigation costs from the unsuccessful party.⁷ Second, unless fixed costs apply (and other technical exceptions), the receiving party is not entitled to claim as costs more than they have actually spent or are duty-bound to pay.⁸ Third, the receiving party is only entitled to recover costs that were reasonably incurred and that are reasonable in amount and, above all, proportionate.⁹ There are two bases for calculating costs: the *standard* basis and the *indemnity* basis. Both bases are subject to the conditions of reasonableness, but only the standard basis is subject to an additional requirement of proportionality. When costs are assessed on the standard basis, costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred (*CPR 44.3(2)*).
- 28.7** As explained by *Federal Republic of Nigeria v Process & Industrial Developments Ltd*, an order for costs is a statutorily authorised award of a contribution towards the costs incurred in litigating in the courts.¹⁰ It is therefore different in kind from substantive money awards whether in debt, damages or by way of indemnity. A successful party in a tort or contract claim is entitled to damages as a common law remedy as of right, and the purpose of damages is to restore a successful claimant to the position they would have been in if they had not had to litigate to establish their rights. In contrast, awards of costs are discretionary, and are a component of the court process itself.¹¹ A court making a costs order is not seeking to provide full compensation for the successful party, but to find the reasonable amount that the losing party should pay towards the successful party's costs. It follows that authorities on awarding judgments in a foreign currency do not generally apply to costs orders, partly because costs orders are different in kind from substantive money remedies; partly to prevent satellite litigation; and partly to prevent currency speculation undermining costs management arrangements under the CPR.¹²
- 28.8** Keeping down the cost of litigation forms a central part of the overriding objective and is therefore one of the principal aims of court control of litigation. Although economy of costs was always part of the overriding objective, since 2013 this has been made explicit by adding the words “and at proportionate cost” to the overriding objective. *CPR 1.1* now reads:

(1) These Rules are a procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.

(2) Dealing with a case justly and at proportionate cost includes, so far as is practicable...
 (b) saving expense;
 (c) dealing with the case in ways which are proportionate...
 (d) ensuring that it is dealt with expeditiously and fairly.

- 28. 9** Litigants' legal representatives, motivated by professional rigour, or perhaps by economic self-interest, until 2023¹³ had little incentive to simplify or expedite litigation. One of the objectives of the Woolf reforms, incorporated in the [CPR](#) in 1998, was to reduce costs by means of increasing the efficiency of the litigation process. In his Interim and Final Reports, Lord Woolf found that the cost of litigation was too high and largely unpredictable and that there was a pressing need to bring it under control in order to combat distortions of access to justice.¹⁴ The report accepted that costs could not be left merely to market forces and recommended a number of measures designed to keep litigation costs under control. The principal strategy for exercising downward pressure on costs was through court control of litigation (discussed in [Chs 1](#) and [11](#)). It was hoped that if the court managed litigation, the process would become more efficient and expeditious and therefore more economical. The idea was that court control of litigation would allow lawyers less scope for inflating billable hours. As experience since the introduction of the [CPR](#) has proved, court control of litigation alone did little for costs; as we shall presently see, if anything costs continued to rise thereafter.¹⁵
- 28. 10** Reform of litigation funding has contributed considerably to the complexity and expense of the costs system. Before 1990, litigants of modest means were, if they met the statutory criteria, able to take part in proceedings with their costs being met by the state and with protection against adverse costs orders if they lost.¹⁶ Prior to the virtual abolition of legal aid, the [Courts and Legal Services Act 1990 \(CLSA 1990\)](#) was passed with the general objective of making provision for new and better ways of providing legal services and a wider choice of persons providing them.¹⁷ One of its innovations was to permit conditional fee agreements (CFAs),¹⁸ also known as "no win, no fee" agreements, under which a lawyer would agree to conduct litigation and not charge the client if the claim was unsuccessful, but allowing the lawyer to charge their normal, or base, fees, together with a success fee if the claim was successful. This was controversial on a number of levels, not least the long-standing opposition to contingency fees by lawyers in England and Wales.¹⁹ Under the version of CFAs available between 1995 and 2000,²⁰ the success fee was paid by the client out of their damages. This had a number of disadvantages. These included successful claimants losing part of their damages in payment of success fees, and in practical terms restricting CFAs to fairly substantial money claims, because otherwise there would be no viable fund to pay the success fee.
- 28. 11** Changes made to the regulation of CFAs in 2000 to address these problems resulted in success fees and after-the-event insurance (ATE) premiums being recoverable from the unsuccessful party.²¹ Provided the losing party was able to pay, viable CFAs became available to anyone involved in litigation. A number of significant problems emerged with this scheme: recoverable success fees and ATE premiums were available to any party regardless of means; no control over costs; the chilling effect on access to justice by putting considerable economic pressure on parties to avoid trial; and effectively encouraging lawyers to cherry-pick winning cases to take advantage of the CFA cost rules.²²
- 28. 12** Another innovation under the Woolf reforms is the use of costs as a means of disciplining party conduct in the litigation. As a result the predictability of the "loser pays" principle had to give way to greater court discretion over how party behaviour should affect the order for costs. Costs orders became more fact-based and therefore liable to dispute. When he came to write his Preliminary Report in 2009, Jackson LJ found that litigation over costs had increased dramatically under the [CPR](#) and remained largely unpredictable.
- 28. 13** Following Jackson LJ's Review of Litigation Costs, revised costs rules came into effect in April 2013, with the aim of bringing litigation costs under control. One of the decisions was to keep the costs-shifting rule. The economic incentives inherent in hourly charging for legal services were not directly addressed. Instead, the strategy was a combination of court management

of costs,²³ fixed costs in most fast-track personal injury claims²⁴, the long established no costs rule for small claims,²⁵ and experimenting with scale costs in some specialist claims.²⁶

28. 14 The 2013 civil justice reforms left costs in non-personal injury fast track claims largely unrestrained until after the end of the case, and it became clear that cases in the lower value range of the multi-track were not best suited to the time and costs inherent in the costs budgeting system. Jackson LJ was asked to look into extending fixed costs into these types of case. His conclusion as set out in his report of 2017²⁷ was that the only effective way of controlling litigation costs would be to do this *before* the costs are incurred. Mechanisms for achieving this are the extension of fixed costs to most claims with values up to £100,000,²⁸ and the continued use of costs budgeting for multi-track claims. As discussed later in this chapter, the 2023 fixed recoverable costs (FRC) scheme, which broadly applies to claims with values between £10,000 and £100,000, has the right intentions, but has so many variables that it fails to achieve the predictability that a fixed costs system should provide. Further, while the prescribed FRC for simple claims that settle early are reasonably proportionate, the amounts prescribed for claims in the higher complexity bands that reach trial can exceed the value of the claim, which by definition ought to mean they are disproportionate. Excessive and unpredictable costs continue to be major problems.

The court's power to award costs

28. 15 Unless the parties have agreed the costs consequences, an entitlement to costs can only arise from a court order.²⁹ The court has a wide discretionary jurisdiction to determine by whom and to what extent the costs of proceedings should be paid. The power of the court to award costs is derived from the [Senior Courts Act 1981 s.51](#):

Section 51

(1) Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings in (a) the civil division of the Court of Appeal; (b) the High Court; (ba) the family court; (c) the county court, shall be in the discretion of the court.

(2) Without prejudice to any general power to make rules of court, such rules may make provision for regulating matters relating to the costs of those proceedings including, in particular, prescribing scales of costs to be paid to legal or other representatives or for securing that the amount awarded to a party in respect of the costs to be paid by him to such representatives is not limited to what would have been payable by him to them if he had not been awarded costs.

(3) The court shall have full power to determine by whom and to what extent the costs are to be paid."

Applicability of the CPR costs rules

28. 16 The main body of costs rules is to be found in [CPR 44–48](#) and in practice directions supplementing these rules. They apply primarily to costs ordered by the court in favour of a party to litigation.³⁰ However, they also govern other situations in which the court may assess the costs. Principal among these are costs of proceedings before an arbitrator, costs of proceedings before a tribunal³¹ and costs payable by a client to their solicitor. The court has some supervisory jurisdiction concerning solicitor and own client costs in order to ensure that clients are treated fairly. In addition, the court may assess the costs payable by one party to another party following settlement or under the terms of an agreement.

General Principles

28. 17 The main principle is that the court has a wide discretion on whether or not to make an order for costs, the amount of those costs, and when they are to be paid.³² The court may even order a non-party to pay the litigation costs of a party.³³ In deciding what order to make on costs, the court will consider all the circumstances.³⁴ This wide discretion in turn means there is a very heavy burden on any appellant seeking to appeal an order for costs.³⁵ It also means that previous authorities on costs have limited value, and Lord Woolf CJ has pointed out that ‘... it is dangerous for the court to try and add to the requirements of the CPR which are not spelt out in the relevant parts of the CPR.’³⁶ Despite this clear guidance, the appellate courts have been beset by appeals relying on so-called court-based rules, default positions, presumptions and starting points which are relied on by appellants seeking to overturn costs decisions.³⁷ While costs are discretionary, the general rule is that the unsuccessful party is ordered to pay the costs of the successful party.³⁸ This is often expressed as “costs follow the event”. Partial success is one of the relevant circumstances to be taken into account,³⁹ and has resulted in a “salutary” rule that costs generally follow the issue rather than the event.⁴⁰ This is to discourage parties from taking every conceivable point, and means that the overall winner might be deprived of their costs, or ordered to pay the other side’s costs, on points or discrete hearings or applications, that they lose.

Terminology

28. 18 The subject of costs has a terminology of its own. The term “costs” is used to describe a variety of items that the court may include in a costs order. A “costs order” is an order made in favour of one party, known as the “receiving party”, requiring another party (or sometimes a non-party) known as the “paying party”, to pay the receiving party or their solicitors certain sums of money connected with the conduct of litigation. A receiving party and a paying party may be an “assisted person”—i.e. a person supported by legal aid.
28. 19 Costs is defined in CPR 44 as including “fees, charges, disbursements, expenses, remuneration, reimbursement allowed to a litigant in person under CPR 46.5 and any fee or reward charged by a lay representative for acting on behalf of a party in proceedings allocated to the small claims track”.⁴¹ Costs can therefore include very different items of expense. The term encompasses both expenses that are incurred by a solicitor in the conduct of litigation on behalf of the client, usually referred to as “disbursements” (a term which includes counsel’s fees), and the solicitor’s own professional fees, which are normally charged as hourly fees. Both professional fees and expenses are payable by the client to the solicitor under the contract of retainer. While most lawyers are registered for VAT, the VAT charged on a bill is not part of the costs.⁴² Lastly, costs can refer to the fee or award payable to a successful litigant in person (LiP), for loss of time or earnings as a result of their conduct of litigation.⁴³

Types of costs orders

28. 20 The court has wide discretion in allocating litigation costs as between the parties, and occasionally non-parties. It may decline to make any order, in which case each party would bear their own costs. If it does decide to order costs to be paid, it may do so in a variety of ways. For example, it may award a party all their costs or only part of them. Where the court orders only part of the costs, it may, for instance, order that one party pay to another a proportion of the whole costs, or the costs incurred in litigating particular issues or the costs of particular stages in the proceedings. Moreover, the court may make an outright

award or make the award conditional on some future event, such as the outcome of the proceedings, where they have not been concluded at the time of the order.

28. 21 Some of the orders that the court may make at the end of an interim hearing are set out in PD 44 para.4.2. The court may decide not to deal with the incidence of costs at that stage but leave it to be determined at a later stage, in which case it will make an order of *costs reserved*.⁴⁴ It may award the costs of the hearing to one party outright, in which case the court will make an order of costs, or *costs in any event*, in favour of one of the parties. The party in whose favour such an order is made is thereby entitled to recover their costs in respect of the part of the proceedings to which the order relates, regardless of whether that party obtains a favourable judgment at the end of the proceedings and regardless of any subsequent costs orders that the court may make. If the court decides that no party is entitled to a costs order, it may direct *no order as to costs*, or *each party to pay their own costs*, in which case each party would have to bear their own costs of the application; again, regardless of the final result of the proceedings and of any final costs order.
28. 22 The court may decide that liability for the costs of an interim application should depend on the eventual outcome of the case. The court may order *costs in the case*, or *costs in the application*, which means that whichever party is awarded costs at the end of the proceedings will also be entitled to their costs in the application to which the costs order relates. There is a further option in this regard. The court may make an order of *claimant's/defendant's costs in the case/application*, which means that if the party in whose favour this order is made is awarded costs at the end of the proceedings, that party will also be entitled to their costs for the part of the proceedings to which the order relates. If any other party is awarded costs at the end of the proceedings, the party in whose favour the final costs order is made is not liable to pay the costs of any other party in respect of the part of the proceedings to which the order relates, but they will have to bear their own costs.
28. 23 There are a number of orders that the court may make when an interim decision has certain consequential effects. One such order is costs thrown away, which may be made, for example, where a judgment or order is set aside. Suppose that the claimant obtains a judgment in default of a defence, but the defendant successfully applies to have the default judgment set aside.⁴⁵ The court may order the defendant to pay the claimant's costs in obtaining the default judgment, attending the hearing of the application to have it set aside and in trying to enforce the default judgment. The court may similarly make an order of *costs of and caused by* a particular interim decision. For example, where it gives the claimant permission to amend their statement of case, it may order them to pay the defendant's costs of preparing for and attending the application and the costs of any consequential amendment to their defence.
28. 24 An order on an appeal of *costs here and below* means that the party in whose favour the order is made is entitled not only to their costs in respect of the proceedings in which the court makes the order but also to their costs of the proceedings in any lower court. However, in the case of an appeal from a Divisional Court the party is not entitled to any costs incurred in any court below the Divisional Court (PD 44 para.4.2).

Determination of entitlement and criteria for quantification

28. 25 Unless the parties have agreed the incidence of costs, the process of costs recovery involves three steps. A party who wishes to recover costs must first obtain an order directing another party (or occasionally a non-party) to pay their litigation costs.⁴⁶ The second step involves the determination of the criterion for quantifying the recoverable costs.⁴⁷ Where fixed costs apply, the amounts recoverable are those stated in PD 45, neither more nor less.⁴⁸ For cases outside the fixed costs regimes, there are essentially two criteria: costs on *the standard basis (standard costs)*⁴⁹ and costs on *the indemnity basis (indemnity costs)*.⁵⁰ Like the entitlement to costs, the criterion of quantification is a matter for court decision. The presumption is that unless the court has indicated otherwise, costs will be deemed to have been ordered on the standard basis. The third and final step in the recovery process consists of calculating the amount of money that the paying party is liable to pay to the receiving party. The

parties are of course free to agree the amount payable in respect of costs. However, in the absence of agreement, the costs may be determined (fixed recoverable costs) or assessed (multi-track costs) by the court.

- 28.26 There are three judicial methods for quantifying costs: *fixed costs determination*, *summary assessment* and *detailed assessment*.⁵¹ A court may make a summary determination of the amount of fixed costs at the end of a hearing of a fast track or intermediate track claim.⁵² Where the court orders a party to pay costs to another party (other than fixed costs) it may make a summary assessment of the costs and determine the amount to be paid. Alternatively, it may order detailed assessment of the costs by a costs officer, unless there is some provision to the contrary ([CPR 44.6\(1\)](#)). Summary assessment will normally be made at the conclusion of any hearing that lasted no more than a day (PD 44 para.9.2). But the court has discretion to order detailed assessment before a costs officer where there are good reasons for doing so, such as the presence of substantial grounds for disputing the costs claimed. A detailed assessment involves a close scrutiny of every item of costs claimed by the receiving party, who has therefore to provide a detailed and itemised statement of their costs. The detailed assessment is carried out by a costs officer, who could be a *costs judge* (i.e. a taxing master of the Senior Courts) or a district judge, or an authorised court officer (which means any officer of the court whom the Lord Chancellor has authorised to assess costs ([CPR 44.1\(1\)](#))).

Costs incidental to proceedings

- 28.27 An inter partes costs order will typically cover “the costs of and incidental to [the] proceedings”.⁵³ Costs “of” the proceedings will cover the work done between the issue of the originating process and the final disposal of the proceedings. Whether costs incurred are “incidental” to the proceedings is a question of fact and degree.
- 28.28 Costs reasonably incurred in preparation for proceedings are capable of being incidental to those proceedings, the question being whether they were reasonably incurred for the purposes of the litigation as it came to be framed.⁵⁴ Costs of other proceedings are not usually incidental to the current proceedings.⁵⁵ However, attending an inquest may be incidental to subsequent civil proceedings if the issues raised at the inquest are relevant to the subsequent proceedings.⁵⁶ Likewise, attendance at a personal injury claimant’s rehabilitation medical meetings may be recoverable if reasonable and proportionate.⁵⁷ It is also possible for expenses incurred in obtaining and servicing a bank guarantee to provide security for a claim to be incidental to the claim and recoverable as costs.⁵⁸ However, costs incurred by solicitors in negotiating the terms on which they are to be engaged by a party are not incurred by the client for the purpose of the litigation nor are costs incurred in referring to the ATE insurers during the litigation.⁵⁹
- 28.29 Costs may be incidental to the proceedings even if they were incurred before commencement, provided the work (a) proved to be of use in the proceedings; (b) was relevant to an issue; and (c) was attributable to the defendant’s conduct.⁶⁰ Costs incurred on an issue which the defendant persuades the claimant to abandon at the pre-action protocol stage are not regarded as costs incidental to any subsequent proceedings if, in those proceedings, such claim did not feature at all.⁶¹ Costs incurred in complying with a relevant pre-action protocol are capable of being incidental to proceedings which are subsequently issued.⁶² Costs may be incidental to the proceedings even if they were incurred before the appointment of a litigation friend where that is required.⁶³ The expense of bringing or dealing with ancillary proceedings in another jurisdiction may be recoverable as costs in English proceedings.⁶⁴
- 28.30 Costs of a stand-alone alternative dispute resolution (ADR) process will not normally be regarded as being incidental to later proceedings.⁶⁵ This is particularly the case where the parties agree that the costs of the ADR process are to be split between them on an agreed basis,⁶⁶ or where the parties have agreed that each will bear its own costs of the ADR process.⁶⁷

Maintenance and champerty

- 28.31 Costs will be disallowed where they are claimed in respect of fees or expenses incurred in consequence of an agreement that is contrary to public policy.⁶⁸ Maintenance and champerty are the main instances where costs may be disallowed on grounds of public policy. Maintenance consists in supporting the litigation of another person without a legitimate reason or just cause. Champerty has traditionally been regarded as consisting in the maintenance of another's litigation for a share in the proceeds of the action. Modern authorities have developed a theory that it is possible to find champerty without maintenance.⁶⁹ Maintenance and champerty both amounted to criminal offences and torts, but the [Criminal Law Act 1967 ss.13\(1\)](#) and [14\(1\)](#) abolished both the crime and the tort. However, the [Criminal Law Act 1967 s.14\(2\)](#) left unaffected any rule of law under which certain contracts are considered to be contrary to public policy or otherwise illegal. Maintenance and champerty therefore survived as rules of public policy capable of rendering a contract unenforceable.⁷⁰ Since public policy is context-relative, maintenance and champerty must adapt to accommodate changing social and economic conditions, and depend on the circumstances of particular cases.⁷¹ In his Final Report, Jackson LJ expressed the view that the [Criminal Law Act 1967 s.14\(2\)](#) should not be repealed. However, his Preliminary Report recognised that the underlying public policy has changed:

“The funding of litigation by third parties, who have no interest in the dispute, has traditionally been characterised as maintenance or champerty and such funding arrangements have been held to be unlawful. In recent years there has been a sea change in the approach of the courts, both in the UK and elsewhere. It is now recognised that many claimants cannot afford to pursue valid claims without third party funding; that it is better for such claimants to forfeit a percentage of their damages than to recover nothing at all; and that third party funding has a part to play in promoting access to justice.”⁷²

- 28.32 English law traditionally outlawed champerty and maintenance because of the risk of abuse. It was feared that the prospect of personal gain would tempt champertous maintainers to inflame claims for damages, to suppress evidence, or to suborn witnesses.⁷³ Such concerns have become wholly outdated in view of the widespread use of CFAAs. In today's circumstances a solicitor who undertakes to indemnify their client in the event that the client has to pay an adverse costs order can hardly be said to be engaging in wanton and officious intermeddling.⁷⁴ Public policy considerations aimed at discouraging strangers from financing parties' litigation, at times in exchange for a portion of the expected recovery,⁷⁵ have been largely displaced by considerations of access to justice, as Jackson LJ pointed out in the above-quoted observation. It is accepted that litigants may well require outside help in order to be able to gain meaningful access to justice.⁷⁶
- 28.33 Nevertheless, the rule of public policy has not disappeared, which means that CFAAs or DBAs, under which a lawyer acquires an interest in the outcome, are enforceable only to the extent that they comply with the conditions of the legislation that permits their use.⁷⁷ It has been said that the legislation on litigation funding has created islands of legality in a sea of illegality, with the legislation carefully balancing difficult and competing policy considerations.⁷⁸
- 28.34 Broadly speaking, public policy renders champertous agreements illegal if they endanger the integrity of public justice. “Ultimately”, Steyn LJ has said:

“It is necessary to consider the questions posed in this case [concerning champerty] in the light of contemporary public policy. The correct approach is not to ask whether, in accordance with contemporary public policy, the agreement has in fact caused the corruption of public justice. The court must consider the tendency of the agreement. The question is whether the agreement has the tendency to corrupt public justice. This question requires the closest attention to be given to the nature and surrounding circumstances of a particular agreement.”⁷⁹

To determine enforceability, it is necessary to look at the agreement in question and at the context in which it was entered and consider whether it tends to undermine the due administration of justice.⁸⁰ In *Sajja Ahmed v P Powell*,⁸¹ for example, Chief Master Hurst found the use of cost negotiators paid by results to be unlawful. On the other hand, in *Sibthorpe v Southwark London Borough Council*,⁸² an indemnity clause in a CFA under which the solicitor agreed to indemnify the client against any costs liability to the other side if the claim failed was held not to be champertous. In this case, the Court of Appeal distinguished earlier cases holding similar agreements to be champertous on the grounds that, in these cases, the lawyer stood to gain if the claim succeeded. By contrast, in *Sibthorpe* the indemnity clause would have resulted in a loss to the lawyer if the claim failed. While the Court of Appeal was aware that the distinction was tenuous it felt that it would be wrong to extend the scope of champerty at a time when public policy favoured restricting its reach.

28. 35 Certain types of agreements are expressly prohibited by legislation. The [CLSA 1990 s.58](#), together with the [Conditional Fee Agreements \(Revocation\) Regulations 2005](#),⁸³ permits CFAs in a large variety of cases.⁸⁴ A DBA is defined in the [CPR Glossary](#) as “an agreement which complies with the provisions of the [Damages-Based Agreements Regulations 2013](#)”. Outside these rules, solicitors may not agree fees in contentious business which are conditional on the outcome of the proceedings. There is nothing to prevent the court from deciding that changes of public policy have rendered legitimate at common law contingency fees that have not been expressly precluded by the rules.⁸⁵ However, for the present this is unlikely to happen because the very fact that the law expressly regulates CFAs and DBAs must be taken as an indication of the limits of public policy in analogous situations falling outside the permissive legislation.⁸⁶
28. 36 Under current practice, there is considerable room for lawful agreements that provide for remuneration conditional on the outcome of litigation. In one case the claimants were able to recover the cost of hire cars to replace the cars that were damaged in road accidents even though the hire price depended to some extent on the claimants’ recovery of damages.⁸⁷ It was held that the arrangement posed no risk to the administration of justice because the hire company had no input into the litigation process and could in no way influence its outcome. There is nothing to prevent lawyers from foregoing their fee in the event that their client is unsuccessful.⁸⁸
28. 37 In *Factortame v Secretary of State for the Environment*,⁸⁹ the Court of Appeal accepted that remunerating an expert on a conditional basis posed some threat to the objectivity of the witness. It therefore stressed that it would only be in a rare case that the court would consent to an expert being instructed on such a basis. However, the court was not prepared to ban altogether experts who are instructed on a contingency basis. On the contrary, the Court of Appeal noted that sometimes payment on a contingent basis would be the only way in which a litigant could obtain adequate access to justice. The *Factortame* case accepts that considerations of access to justice require much broader recognition of contingent fee agreements than in the past.
28. 38 These changes to the view taken on how public policy affects litigation funding since the 1990s had led to the widespread belief that third party funding is no longer contrary to public policy.⁹⁰ It was thought that provided the third party funder was to play no role in the management of the litigation, a third party funding agreement would not be contrary to public policy, and would only be self-regulated. Funders were confirmed in this belief by the fact [CLSA 1990 s.58B](#) (which would have regulated third party funding agreements) had not been brought into force. The decision in *PACCAR*, which is that third party funding agreements of the type where the funder can recoup its investment out of the proceeds of the litigation, are DBAs and therefore need to comply with the [DBA Regulations](#), came as something as a shock to the third party funding industry. Most third party funding agreements entered into before *PACCAR* made no attempt to comply with the [DBA Regulations](#), so, unless the funder’s return on their investment was based on a multiple of base costs (or anything other than a return based on the damages awarded), many third party funding agreements were rendered unenforceable as a result of the decision. The decision turned on technical arguments using the rules of statutory interpretation,⁹¹ but it is clear that the logic of the decision seriously disrupts the legislative framework governing the funding of litigation.⁹²

Footnotes

- 1 A noted consequence of the abolition of the recoverability of conditional fee agreement success fees in 2013 has been an increase of solicitor and own client costs disputes, often over the deduction of success fees and other charges from the client's damages. See for example Hurst and others, Costs & Funding following the Civil Justice Reforms: Questions & Answers (Thomson Reuters, 2025), para.2-02.
- 2 An example is the dispute over which public funded party should bear the costs in *R (Davies) v HM Deputy Coroner for Birmingham [2004] EWCA Civ 207*.
- 3 Solicitors Act 1974 s.87(1). See also the **Solicitors (Non-Contentious Business) Remuneration Order 1994** (SI 1994/2616).
- 4 *Bilkus v Stockler Brunton [2010] EWCA Civ 101*.
- 5 *Belsner v CAM Legal Services Ltd [2022] EWCA Civ 1387*.
- 6 See Civil Justice Council Costs Review Final Report (CJC 2023) Ch.3.
- 7 **CPR 44.2(2)(a)**. See further below, paras 28.39 ff.
- 8 This is the “indemnity principle”, for which see further below, paras 28.42 ff.
- 9 **CPR 44.3(1), (2)**. See further below, paras 28.87 ff and 28.91 ff.
- 10 *Federal Republic of Nigeria v Process & Industrial Developments Ltd [2025] UKSC 36; [2025] 3 W.L.R. 681* [16].
- 11 *Federal Republic of Nigeria v Process & Industrial Developments Ltd [2025] UKSC 36; [2025] 3 W.L.R. 681* [17].
- 12 *Federal Republic of Nigeria v Process & Industrial Developments Ltd [2025] UKSC 36; [2025] 3 W.L.R. 681* [25], [26]. For judgments in foreign currency, see *Miliangos v George Frank (Textiles) Ltd [1976] AC 443*.
- 13 Fixed recoverable costs, introduced for most fast track and intermediate track claims with effect from 1 October 2023, have the opposite tendency. With fixed costs the incentive is to do as little work as possible, as long as the claim succeeds.
- 14 Lord Woolf, Access to Justice: Interim Report (London: HMSO, 1995) Ch.25; (hereinafter “Woolf, Interim Report”) and Access to Justice: Final Report (London: HMSO, 1996) (hereinafter “Woolf, Final Report”). See generally **Ch.1 The Overriding Objective**.
- 15 Jackson LJ, Review of Civil Litigation Costs: Preliminary Report (London: HMSO, 2009) Vol.1 Ch.1 para.1.2. (hereinafter “Jackson LJ, Preliminary Report”); and Jackson LJ, Review of Civil Litigation Costs: Final Report (London: HMSO, 2010) (hereinafter “Jackson LJ, Final Report”).
- 16 Under the **Legal Aid Act 1988 s.17** and later by the **Access to Justice Act 1999 s.11**.
- 17 **Courts and Legal Services Act 1990 (CLSA 1990) s.17(1)**.
- 18 **CLSA 1990 s.58** (as originally enacted). After-the-event insurance (ATE), under which an insurer agrees with a potential litigant to insure the risk against having to pay the other side’s costs if the claim is unsuccessful, was developed by the Law Society in conjunction with insurance companies at about the same time.
- 19 Before the **CLSA 1990** it was professional misconduct for a lawyer to take a court case on a contingency fee basis.
- 20 Pursuant to the **Conditional Fee Agreements Order 1995** (SI 1995/1674).
- 21 By the **Access to Justice Act 1999**, replacing **CLSA 1990 s.58** with new ss.58 and 58A, see below paras 28.186 ff.
- 22 *MGN v United Kingdom (2011) 53 EHRR 195*, adopting this set of flaws identified by Jackson LJ’s Final Report.
- 23 See further below, paras 28.103 ff.
- 24 Under the former **CPR 45 s.IIIA**.
- 25 No recovery of the costs of legal representation in small claims pre-dates the **CPR**. It is now in **CPR 27.14**.
- 26 Notably, this includes **CPR 46 s.VII**, providing for scale costs for proceedings in the Intellectual Property Enterprise Court: see further below, para.28.164.
- 27 Jackson LJ, Review of Civil Litigation Costs: Supplementary Report Fixed Recoverable Costs (London: HMSO, 2017).
- 28 In addition to transitional provisions, there are exceptions for claims involving residential property and where a party is a protected party (**CPR 45.1**); and some specialist claims (**CPR 26.9(10)**).
- 29 Including a deemed costs order under **CPR 44.9**.
- 30 They can apply to cases transferred from the county court to a First-Tier Tribunal (FTT), but this depends on the legislation governing such transfers: *Avon Ground Rents Ltd v Child [2018] UKUT 204 (LC)*.

- 31 Costs in tribunals depend on the relevant legislation. For example, the [Employment Tribunal Procedure Rules 2024 \(SI 2024/1155\) r.74](#) give a general discretion to order costs, and set out situations, generally based on misconduct, where costs must be ordered. The [CPR](#) are applied by [r.76](#) if the tribunal orders a detailed assessment.
- 32 [CPR 44.2\(1\)](#).
- 33 SCA 1981 s.51 and [Aiden Shipping Co Ltd v Interbulk Ltd, The Vimeira \[1986\] AC 965; \[1986\] 2 All ER 409](#).
- 34 [CPR 44.2\(4\)](#).
- 35 [SCT Finance Ltd v Bolton \[2002\] EWCA Civ 56; Thakkar v Mican \[2024\] EWCA Civ 552](#) [18].
- 36 [Excelsior Commercial and Industrial Holdings Ltd v Salisbury Hammer Aspden and Johnson \[2002\] EWCA Civ 879](#) [32].
- 37 [Competition and Markets Authority v Flynn Pharma Ltd \[2022\] UKSC 14](#) where the Supreme Court refused to accept an alleged generally applicable costs principle. See also the comments of Coulson LJ in [Thakkar v Mican \[2024\] EWCA Civ 552](#) [20].
- 38 [CPR 44.2\(2\)](#).
- 39 [CPR 44.2\(4\)\(b\)](#).
- 40 [Langer v McKeown \[2021\] EWCA Civ 1792](#) [37].
- 41 [CPR 44.1\(1\)](#).
- 42 [Giambrone v JMC Holidays Ltd \[2002\] EWHC 2932 \(QB\)](#). VAT of course has to be paid and accounted for to HMRC.
- 43 See further below, paras [28.255 ff](#).
- 44 Reserving costs pending the determination of the substantive issue is common in applications for [American Cyanamid injunctions](#) ([Desquenne et Giral UK Ltd v Richardson \[2001\] FSR 1](#)), although an immediate costs order may be made if there are special circumstances ([Picnic at Ascot v Derigs \[2001\] FSR 2](#)). This is because these injunctions are intended to hold the position pending trial, and often turn on the balance of convenience. Costs are usually reserved on without notice applications for freezing injunctions, but an affirmative costs order is typically made on a continuation hearing for a freezing injunction, which is determinative of the question whether assets should be frozen ([Cancrie Investments Ltd v Haider \[2024\] EWHC 2302 \(Comm\)](#)). An affirmative costs order can also be made on a hearing where a defendant is cross-examined on their assets under a freezing injunction ([JSC Mezhdunarodny Promyshlenniy Bank v Pugachev \[2015\] EWHC 1694 \(Ch\)](#)).
- 45 See [Ch.9 Disposal Without Trial](#) paras [9.25 ff](#).
- 46 See further below, paras [28.39 ff](#).
- 47 See further below, paras [28.77 ff](#).
- 48 This is the wording from [CPR 45.1\(3\)\(b\)](#). There are increases for “exceptional circumstances”, London weighting etc.
- 49 See further below, para [28.117](#). Since 2023 this mainly covers multi-track claims.
- 50 See further below, paras [28.118 ff](#).
- 51 See further below, paras [28.121 ff](#).
- 52 [CPR 45.63](#).
- 53 Senior Courts Act 1981 s.51(1).
- 54 [Re Gibson's Settlement Trusts \[1981\] Ch 179](#).
- 55 [Contractreal Ltd v Davies \[2001\] EWCA Civ 928; Malmsten v Bohinc \[2019\] EWHC 1386 \(Ch\)](#).
- 56 [Roach v Home Office \[2009\] EWHC 312 \(QB\); \[2010\] QB 256; Totalise Plc v The Motley Fool Ltd \[2001\] EWCA Civ 1897](#).
- 57 [Hadley v Przybylo \[2024\] EWCA Civ 250](#).
- 58 [Ene Kos v Petroleo Brasileiro SA \[2009\] EWHC 1843 \(Comm\); \[2010\] 1 Lloyd's Rep. 87](#).
- 59 [Motto v Trafigura Ltd \[2011\] EWCA Civ 1150](#).
- 60 [In Re Gibson's Settlement Trusts \[1981\] Ch 179; Hadley v Przybylo \[2024\] EWCA Civ 250](#).
- 61 [McGlinn v Waltham Contractors Ltd \[2005\] EWHC 1419, TCC; \[2005\] 3 All ER 1126](#), though the court may conceivably order such costs in respect of unreasonable conduct; and [Roundstone Nurseries Ltd v Stephenson Holdings Ltd \[2009\] EWHC 1431 \(TCC\)](#).
- 62 [McGlinn v Waltham Contractors Ltd \[2005\] EWHC 1419 \(TCC\); \[2005\] 3 All ER 1126](#).
- 63 [Re Gibson's Settlement Trusts \[1981\] Ch 179](#).
- 64 [Ene Kos v Petroleo Brasileiro SA \(“The Kos”\) \[2009\] EWHC 1843 \(Comm\)](#). See also [National Westminster Bank Plc v Kotonou \[2009\] EWHC 3309 \(Ch\)](#).
- 65 [Roundstone Nurseries Ltd v Stephenson Holdings Ltd \[2009\] EWHC 1431 \(TCC\); \[2009\] 5 Costs L.R. 787](#).

- 66 *National Westminster Bank Plc v Feeney [2006] EWHC 90066 (Costs).*
- 67 *Lobster Group Ltd v Heidelberg Graphic Equipment Ltd [2008] EWHC 413 (TCC); [2008] 2 All ER 1173.*
- 68 For a general account of the subject see *Giles v Thompson [1994] 1 AC 142; [1993] 3 All ER 321, HL*; *R (Factortame) v Secretary of State for the Environment, Transport and the Regions (No.8) [2002] EWCA Civ 932; [2003] QB 381; [2002] 4 All ER 97; Sibthorpe v Southwark LBC [2011] EWCA Civ 25; Lexlaw Ltd v Zuberi [2021] EWCA Civ 16*. See also: P.T. Hurst, Civil Costs, 6th edn (London: Sweet & Maxwell, 2018); A. Walters, “Contingency Fees Arrangements at Common Law” (2000) 116 L.Q.R. 371.
- 69 *Sibthorpe v Southwark London Borough Council [2011] EWCA Civ 25; [2011] 1 W.L.R. 2111* [55], [56].
- 70 *Wallersteiner v Moir (No.2) [1975] QB 373*, per Scarman LJ: “It is to be noted that the rule does not depend on solicitors’ practice or their practising rules, but on public policy”, cited with emphasis by Schiemann LJ in *Awwad v Geraghty & Co [2001] QB 570*.
- 71 *Giles v Thompson [1994] 1 AC 142; [1993] 3 All ER 321, HL*; and *R (Factortame) v Secretary of State for the Environment, Transport and the Regions (No.8) [2002] EWCA Civ 932; [2003] QB 381*. The success of CFAs was a major factor supporting recommendation 14 in Jackson LJ’s Final Report p.464 that lawyers should be able to enter into contingency fee agreements in contentious business.
- 72 Jackson LJ, Preliminary Report Vol.1 p.160.
- 73 *British Cash and Parcel Conveyors Ltd v Lamson Store Service Co Ltd [1908] 1 KB 1006* at 1014, CA.
- 74 *Sibthorpe v Southwark London Borough Council [2011] EWCA Civ 25; [2011] 1 W.L.R. 2111* [53].
- 75 This is sometimes done through assigning the cause of action, with the original party receiving a percentage of any damages recovered. See, for example, *JEB Recoveries LLP v Binstock [2015] EWHC 1063 (Ch)* and *Casehub Ltd v Wolf Cola Ltd [2017] EWHC 1169 (Ch)*.
- 76 *Factortame Ltd v Secretary of State for the Environment, Transport and the Regions (No.2) [2002] 4 All ER 97, CA; Hamilton v Al Fayed (No.2) [2002] EWCA Civ 665; [2002] 3 All ER 641, CA; Arkin v Borchard Lines Ltd (costs order) [2005] EWCA Civ 655; [2005] 1 W.L.R. 3055; London & Regional (St George’s Court) Ltd v Ministry of Defence [2008] EWHC 526 (TCC); and Sibthorpe v Southwark London Borough Council [2011] EWCA Civ 25.*
- 77 See *Sibthorpe v Southwark London Borough Council [2011] EWCA Civ 25* and *Rees v Gately Wareing [2014] EWCA Civ 1351; [2015] 1 W.L.R. 2179*.
- 78 *Candey Ltd v Tonstate Group Ltd [2022] EWCA Civ 936* [49].
- 79 *Giles v Thompson [1994] 1 AC 142; [1993] 3 All ER 321*, at 333 of the Court of Appeal’s decision.
- 80 *R (Factortame) v Secretary of State for the Environment, Transport and the Regions (No.8) [2002] EWCA Civ 932; [2003] QB 381* [44].
- 81 *Saija Ahmed v P Powell (SCCO, unreported, 19 February 2003).*
- 82 *Sibthorpe v Southwark London Borough Council [2011] EWCA Civ 25; [2011] 1 W.L.R. 2111.*
- 83 *Conditional Fee Agreements (Revocation) Regulations 2005 (SI 2005/2305).*
- 84 See the discussion of CFAs below, paras 28.186 ff. See S. Middleton and J. Rowley (eds), Cook on Costs (London: LexisNexis, 2025), Chs 4–5.
- 85 *Benaim (UK) Ltd v Davies Middleton & Davies Ltd (No.1) [2004] EWHC 737 (TCC).*
- 86 *R (Factortame) v Secretary of State for the Environment, Transport and the Regions (No.8) [2002] EWCA Civ 932; [2003] QB 381* [46]; and *Sibthorpe v Southwark London Borough Council [2011] EWCA Civ 25.*
- 87 *Giles v Thompson [1994] 1 AC 142; [1993] 3 All ER 321, HL.*
- 88 *Thai Trading Co (a firm) v Taylor [1998] QB 781; [1998] 3 All ER 65.*
- 89 *R (Factortame) v Secretary of State for the Environment, Transport and the Regions (No.8) [2002] EWCA Civ 932; [2003] QB 381.*
- 90 *R (PACCAR Inc) v Competition Appeal Tribunal [2023] UKSC 28* [11]–[13].
- 91 There is much to commend the opposing view set out in the dissenting speech of Lady Rose JSC.
- 92 The Ministry of Justice proposed adding cl.126 to reverse one effect of *PACCAR* to the Digital Markets, Competition and Consumers Bill, then going through Parliament. This was recognised as not being a complete remedy, so a Litigation Funding Agreements (Enforceability) Bill was introduced to reverse *PACCAR*, but this was lost when Parliament was dissolved in 2024. This was followed by a comprehensive Civil Justice Council Review of Litigation Funding: Final Report (CJC, 2025), which made 58 recommendations. These include recommending legislation to reverse *PACCAR* retrospectively (and prospectively). The CJC further recommended that there should be a clear difference between contingency fee funding, covering CFAs and DBAs where the funding is provided by a party’s legal representative, and litigation funding, where the funding is provided by a person who is not a party’s legal representative.

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General Approach to Making Costs Orders—The Costs-Shifting Rule

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 28 - Costs

General Approach to Making Costs Orders—The Costs-Shifting Rule

Costs follow the event

28. 39 As already noted, the court has discretion whether to order costs to be paid, how much to order and the time of payment ([CPR 44.2\(1\)](#)). But the exercise of this discretion is governed by [CPR 44.2\(2\)](#): if the court decides to make an order about costs, the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but the court may make a different order. This rule represents the long-standing *costs-shifting* principle, also known as the *costs follow the event* principle. The general costs-shifting principle does not apply to proceedings in the Court of Appeal on an application or appeal made in connection with proceedings in the Family Division, or to proceedings in the Court of Appeal from a judgment, direction, decision or order given or made in probate proceedings or family proceedings ([CPR 44.2\(3\)](#)).⁹³

28. 40 The rule that costs follow the event has traditionally gone hand in hand with a further general rule: that a claimant was to be considered the successful party if they obtained any order in their favour, even if the court's award represented only a small proportion of their claim⁹⁴ (unless the defendant successfully protected themselves by payment into court or by a settlement offer).⁹⁵ In each case there was “the winner”, or “the successful party”, on the case as a whole, who would normally be entitled to recover all their litigation costs from the “loser”, or the “unsuccessful party”, who would pay these costs. Put differently, a “winner-takes-all” principle governed the allocation of costs.

28. 41 The [CPR](#) costs system has to some extent moved away from the position that a claimant who recovered any part of their claim is entitled to their litigation costs. This is achieved by reducing the principle that costs follow the event to a mere starting point from which the court may depart for a large number of reasons. Thus [CPR 44.2\(2\)\(a\)](#), which states the general rule that the unsuccessful party will be ordered to pay the costs of the successful party, is immediately qualified by [CPR 44.2\(2\)\(b\)](#) which states that “the court may make a different order”. The court has a very considerable flexibility as to the type of costs order it makes. As a result, the allocation of costs may more closely reflect the extent to which each party has succeeded in their claim or defence, and the responsibility that each party bears for causing expenditure. The main thrust of the court's jurisdiction in relation to costs is to encourage reasonable litigation practice. This objective is achieved at the price of considerable uncertainty about the costs consequences of litigation, which tends in turn to encourage satellite litigation on costs.

The indemnity principle

Only actual expenses may be recovered

28. 42

The rule that costs follow the event has traditionally gone hand in hand with the indemnity principle which holds that a successful party may only recover from the unsuccessful party such costs that the successful party is liable to pay to his own lawyer. The reason for the indemnity principle is bound up with the justification for the costs-shifting rule. If the costs-shifting rule is designed to reimburse the successful party for their litigation expenses, the need for reimbursement does not arise where the successful party has no liability to pay such expenses. The point was explained in *Harold v Smith*:

“Costs as between party and party are given by the law as an indemnity to the person entitled to them: they are not imposed as a punishment on the party who pays them, nor given as a bonus to the party who receives them. Therefore, if the extent of the indemnification can be found out, the extent to which costs ought to be allowed is also ascertained.”⁹⁶

- 28. 43** The common law indemnity rule has had to be modified by legislation to allow for CFAs and for DBAs. A lawyer acting under a CFA or DBA agreement agrees to forego their fees (and sometimes disbursements too) in the event that the client is unsuccessful. Under such an agreement the client has no liability whatever for this lawyer’s fees. To enable a successful client, and in effect their lawyer, to recover costs from the unsuccessful party the *Senior Courts Act 1981 s.51(2)* provides:

Section 51:(2)

“(2) Without prejudice to any general power to make rules of court, such rules may make provision for regulating matters relating to the costs of those proceedings including, in particular, prescribing scales of costs to be paid to legal or other representatives *or for securing that the amount awarded to a party in respect of the costs to be paid by him to such representatives is not limited to what would have been payable by him to them if he had not been awarded costs.*”

The section in italics was added by the *Access to Justice Act 1999 s.31*, and was intended to pave the way for CFAs. The provision is wide enough to allow rules of court to remove the indemnity rule in its entirety. Indeed, in the Final Report, Jackson LJ recommended the abrogation of the common law principle (recommendation 4). Fixed costs,⁹⁷ CFAs, DBAs and pro bono costs orders have made significant inroads into the principle. While the indemnity rule stands, unless a “no win, no fee” agreement complies with the rules governing such agreements, litigation costs in respect of solicitors’ fees would not be recoverable since the client would have no obligation to pay the fees. This gave rise to a great deal of technical litigation about the compliance of solicitor-client agreements with the relevant regulations. The main reason for the recommendation in the Review of Civil Litigation Costs was to put an end to such litigation.⁹⁸ However, the indemnity principle continues in force, and the recoverability of costs under result-based agreements, such as CFAs and DBAs, is dependent on conformity with the relevant regulations.⁹⁹

- 28. 44** Once it is established that a client has retained solicitors there is a presumption that the client is liable to pay the solicitors, and the onus is on the paying party to show there are no circumstances in which the solicitor could look to the client for payment.¹⁰⁰ It is for this reason that the indemnity principle is not usually infringed where a client’s costs are met by an insurance company, a trade union, an employer or a body such as the Royal Automobile Club.¹⁰¹ There will be an infringement of the indemnity principle, however, if there is a bargain between the third party funder and the solicitors, or between the client and the solicitors, that under no circumstances will the client be liable for the costs.¹⁰²

Interest on costs

- 28. 45** Restricting the receiving party to an indemnity in respect of its costs does not prevent interest being payable on the recoverable costs if there is a delay in payment of those costs. This follows from the usual rule that interest will be awarded on judgment from the date on which the judgment is given (*CPR 40.8*). The court has a discretion as to the date from which to order

interest on costs (CPR 44.2(6)(g); CPR 44.9(4), CPR 47.20(6)).¹⁰³ It will look at the dates when the costs were incurred and come to a conclusion that is just in the circumstances.¹⁰⁴ The most important criterion is that any order should reflect what justice requires.¹⁰⁵ Where the bulk of the costs have been paid at a date long after the relevant judgment, justice may require that the date for the commencement of interest be postponed beyond the date of that judgment.¹⁰⁶

Justification of the rule that costs follow the event

28. 46 The basic justification for the rule that costs normally follow the event is that a person should not be out of pocket as a result of having to seek court adjudication to vindicate their rights. The right of a successful party to be indemnified for their legal expenses is all the more important in a system, such as the English system, where litigation costs are high and could well exceed the value of the subject matter in dispute. In the absence of the possibility of recovering one's litigation costs, disputants might be deterred from going to court for fear that even a favourable judgment may be more expensive than giving up the right in question. High and irrecoverable litigation costs may therefore amount to a denial of access to justice.¹⁰⁷
28. 47 It follows from the above that costs are awarded only as a contribution towards the legal expenses of the successful party and not as punishment on the unsuccessful party.¹⁰⁸ Dyson LJ explained in *R v Lord Chancellor, Ex p. Child Poverty Action Group* that the “basic rule that costs follow the event ensures that the assets of the successful party are not depleted by reason of having to go to court to meet a claim by an unsuccessful party”.¹⁰⁹ By stressing the aim of ensuring that the successful party is not worse off as a result of engaging in litigation, the common law gave the costs-shifting rule a purely restorative function; it has enabled the court to see to it that the successful party is in no worse financial position for being obliged to assert or defend their rights in court proceedings.
28. 48 There has, however, been a significant change in the understanding of the purpose of the cost-shifting principle. In *Arkin v Borchard Lines Ltd*, Lord Phillips MR stated:
- “The main principle that underlies the rule is that if one party causes another unreasonably to incur legal costs he ought as a matter of justice to indemnify that party for the costs incurred. A defendant who has wrongfully injured a claimant and who has refused to pay the compensation due should pay the costs that he has caused the claimant to incur, so that the claimant receives a full indemnity. A claimant who brings an unjustified claim against a defendant so that the defendant is forced to incur legal costs in resisting that claim should indemnify the defendant in respect of the costs he has caused the defendant to incur. Causation is usually a vital factor when considering whether to make an award of costs against a party.”¹¹⁰
28. 49 On this view, the unsuccessful party is ordered to pay costs because they are to blame for the successful party's litigation expenses, just as a tortfeasor is blamed for inflicting loss on another. Clearly this represents a shift from a restorative principle, which is morally neutral and blame-free, to a blame-based principle for inflicting unjustifiable loss. A restorative principle does not require an assessment of the unsuccessful party's motives for engaging in the proceedings whereas the blame-based principle does. Consequently, much of costs litigation is now concerned with questions of blame, which are inherently controversial.
28. 50 The blame- or fault-based justification of the costs-shifting principle is questionable. The analogy drawn between an unsuccessful party and a tortfeasor is weak. A tortfeasor has committed an unlawful act whereas a litigant has merely chosen to assert or defend their perceived entitlements by exercising their fundamental civic right of access to court. Although litigation, like any other activity, can be conducted in an improper manner (e.g. malicious prosecution or abuse of process), there is nothing inherently wrong in seeking court adjudication. It may of course happen that a litigant advances a weak or unsustainable case. But existing procedures allow for such cases to be disposed of summarily either by striking out under CPR 3.4(2), or by summary

judgment under [CPR 24](#). Weak cases do not normally involve serious costs. Litigation expenses tend to be high and burdensome in disputes that give rise to difficult or complex issues of fact or law and which need full court adjudication. It cannot, therefore, be said that a party who insists on court determination of a serious dispute is comparable to a wrongdoer. “Every civilised system of government”, Lord Diplock observed, “requires that the state should make available to all its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights.”¹¹¹ There is plainly nothing unlawful, improper or even undesirable in seeking court adjudication.

28. 51 The fault, or blame, approach to costs allocation is now at the very heart of the [CPR](#) system, as we shall see when we come to discuss this aspect in detail.¹¹² For the present, it is sufficient to note that [CPR 44.2\(4\)](#) states that in deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including the conduct of all the parties. Furthermore, [CPR 44.2\(5\)](#) goes on to spell out that the conduct of the parties includes: conduct before and during the proceedings, the extent to which the parties followed the Practice Direction—Pre-Action Conduct or any relevant pre-action protocol; whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue; the manner in which a party has pursued or defended its case or a particular allegation or issue; whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim; and whether a party failed to comply with an [ADR](#) order or unreasonably failed to engage in [ADR](#). Such questions are inherently controversial and the need to address them inevitably deepens adversarial hostility, which in turn tends to lead to further squabbling.

28. 52 Modern jurisprudence emphasises the benefits of the costs-shifting rule in deterring litigation. The rule is said to discourage claimants from bringing, and defendants from defending, unmeritorious claims.¹¹³ An additional modern justification is that the risk of an adverse costs order encourages compromise, as Dyson LJ explained:

“what lies behind the general rule that costs follow the event is the principle that it is an important function of rules as to costs to encourage parties in a sensible approach to increasingly expensive litigation. Where any claim is brought in court, costs have to be incurred on either side against a background of greater or lesser degrees of risk as to the ultimate result. If it transpires that the respondent has acted unlawfully, it is generally right that it should pay the claimant’s costs of establishing that. If it transpires that the claimant’s claim is ill-founded, it is generally right that it should pay the respondent’s costs of having to respond. This general rule promotes discipline within the litigation system, compelling parties to assess carefully for themselves the strength of any claim.”¹¹⁴

28. 53 This observation leads to the further benefit of the cost-shifting rule; that high costs encourage settlement. Agreed settlements are desirable provided they are fair. Settlements are fair if they are reached by parties who negotiate on an equal footing so they can agree an outcome which roughly reflects the strengths of their respective cases on the merits. But a settlement dictated by a party’s inability to run the risk, however small, of having to pay the opponent’s costs on top of their own can hardly be regarded as just. For, plainly, costs sanctions for failure to settle disproportionately disadvantage parties who are financially vulnerable.¹¹⁵ A still more serious criticism is that the use of the costs jurisdiction for the purpose of blame allocation and for the purpose of policy implementation have greatly added to the complexity of the subject and to the expense of litigation as a whole. In this regard, Jackson LJ observed that the desire for “perfect justice in the individual case” had given rise to “huge additional cost to the parties and at huge costs to other litigants because of the uncertainty which such an approach generates”.¹¹⁶

Discretion to depart from the “costs follow the event” principle

Fact-based apportionment of costs

28. 54

As noted, CPR 44.2(2)(a) states that the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party. It is therefore important that the judge decides who has won the case.¹¹⁷ This is normally the party who succeeds on primary liability.¹¹⁸ CPR 44.2(2)(b) qualifies the general rule by stating that the court may make a different order, discussed below.

“Successful party”—a matter of degree

28. 55

Litigation success is not, however, a technical term but “a result in real life” to be determined with the “exercise of common sense”. In interim applications success usually depends on achieving or defeating the orders sought, unless this is achieved only by securing discretionary indulgencies from the court.¹¹⁹ In money claims “the question of who is the unsuccessful party can easily be determined by deciding who has to write the cheque at the end of the case”.¹²⁰ In commercial litigation where each party asserts that a balance is owing in its favour, the party who is found to have a balance owing in its favour is generally regarded as the overall winner.¹²¹ A partial lack of success that has no real impact on the costs of the parties should not result in any departure from the usual rule that costs follow the event.¹²² Where the claimant wins on primary liability, but there is also a finding of contributory negligence, the claimant may still be the overall winner.¹²³ However, a defendant may be held the winner notwithstanding the fact that they were ordered to pay a substantial amount to the claimant, if the sum awarded is more in line with the defendant’s position in the case.¹²⁴ Where the claim is primarily for non-monetary relief, the question is which party is the overall winner as a matter of substance and reality.¹²⁵

Departing from the “costs follow the event” principle

28. 56

Given that all the circumstances must be taken into account when the court exercises its discretion as to costs, every case will depend upon its own facts. It follows that a close analysis of the facts of other decided cases may not be very enlightening.¹²⁶ Waller LJ said in *Straker v Tudor Rose*¹²⁷ that, save for the clear principles they may lay down, reported cases are of limited assistance in this area. This is not an easy distinction to apply. For example, in deciding the costs order to make against an unsuccessful public body, the Supreme Court has said the court may take into account the risk of a chilling effect on the conduct of the public body if costs orders were made against it.¹²⁸ Whether this is a principle, or a piece of non-binding guidance, is not readily apparent.

28. 57

Specific factors that have a bearing on the decision whether and to what extent to depart from the “costs follow the event” rule are set out in CPR 44.2(4): (a) the conduct of all the parties; (b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and (c) any admissible offer to settle made by a party which is drawn to the court’s attention, and which is not an offer to which costs consequences of CPR 36 apply. CPR 44.2(5) elaborates that the “conduct of the parties” includes:

Rule 44.2(5)

- “(a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction—Pre-Action Conduct or any relevant pre-action protocol;
- “(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
- “(c) the manner in which a party has pursued or defended its case or a particular allegation or issue;
- “(d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim; and

(e) whether a party failed to comply with an order for alternative dispute resolution, or unreasonably failed to engage in alternative dispute resolution.”

Conduct of the parties

- 28. 58** Unreasonableness or dishonesty can properly lead to punitive costs orders. However, clear findings are necessary before depriving a party of the benefit of the general rule that costs follow the event. For example, to deprive a party of its costs it is necessary to demonstrate that the party unreasonably pursued an allegation.¹²⁹ Lies maintained and repeated in a complex case which made the litigation more difficult, and the judge’s task more intractable, justified depriving the successful party of two-thirds of their costs.¹³⁰ Making exaggerated or false allegations engages CPR 44.2(5)(b), which requires the court to consider “whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue”. Causing unnecessary complication could justify departure from the normal costs rule.¹³¹
- 28. 59** A distinction needs to be drawn between making an unreasonable allegation and pursuing an issue unreasonably. An unreasonable allegation refers to making and pursuing a factual position which is ill-founded, untenable or downright mendacious. By contrast, an unreasonable pursuit of an issue refers to the manner in which a particular position is developed, rather than to its content.¹³² In *Painting v University of Oxford*,¹³³ Longmore LJ drew a distinction between intentional exaggeration and unintentional exaggeration. The fact that the exaggeration was intended and fraudulent was a very important element when considering costs. Conversely, if the claimant’s exaggeration was no more than to put their case rather high, a defendant who has not made an effective and admissible offer to settle cannot be regarded as the victor.¹³⁴
- 28. 60** Departing from the costs follow the event principle requires a substantial justification, and if one of the parties has succeeded and there is no real basis for departing from the principle, then the costs order can be upset on an appeal.¹³⁵ That said, provided that the court has considered all the relevant factors, it may make any order it deems fit. If the court makes a percentage costs order it will usually do this on the basis that the overall winner is awarded the costs of the issues on which it was successful, and also the costs of issues common to both parties.¹³⁶ The court may even order a successful party to pay the unsuccessful party’s costs, if the successful party’s conduct of the litigation justified it.¹³⁷ In doing so, the court needs to consider to what extent particular conduct caused the incurring or the wasting of costs. The court is entitled to find that misconduct was so egregious that a penalty should be imposed upon the offending party. The court may, therefore, deprive a party of costs by way of punitive sanction, provided the conduct was sufficiently reprehensible.¹³⁸ In grave and exceptional circumstances the court may deny the guilty party its damages.¹³⁹
- 28. 61** Failing to comply with an ADR order, and unreasonably failing to engage in ADR, can constitute conduct impacting on the order made for costs.¹⁴⁰ This codifies and emphasises the impact on costs of not taking ADR seriously. It should be seen as marking a stricter approach than set out in *Halsey*.¹⁴¹ Breach of an ADR order is in itself a basis for penalising a party on costs, whereas other behaviour relating to use or non-use of ADR has to be judged on whether the party’s conduct is unreasonable.¹⁴² Without prejudice privilege can be a significant obstruction in investigating the reasonableness of a party’s stance on ADR,¹⁴³ although this can be alleviated by using Calderbank offers, or where the privilege has been waived.¹⁴⁴ Failure to attend mediation under the small claims track automatic referral to mediation pilot scheme¹⁴⁵ provides grounds for making an unreasonable behaviour costs order in small claims cases.¹⁴⁶
- 28. 62**

The court may not penalise a party for a refusal to accept an offer made under [CPR 36](#) over and above applying the [CPR 36](#) consequences of non-acceptance.¹⁴⁷ Such refusal, the Court of Appeal held, is not included as conduct that could be taken into account under [CPR 44.2\(5\)](#). “I find it difficult to envisage circumstances”, Dyson LJ stated, “in which it would ever be right to deprive a successful defendant of some or all of his costs solely on the grounds that he refused to accept a claimant’s [Part 36](#) offer”.¹⁴⁸ Likewise, it is not open to a defendant who has made a [CPR 36](#) offer which is less than the sum awarded by the court to argue that the claimant should be deprived of part of its costs on the ground that the claimant should have been more reasonable and entered into negotiations.¹⁴⁹ It is a fundamental error to penalise a claimant in costs for failing to recover more than the claimant’s own [CPR 36](#) offer.¹⁵⁰

- 28. 63** Conduct may be relevant at two stages: when the court is deciding what order to make as to costs,¹⁵¹ and at the stage when the amount of costs is assessed.¹⁵² Any express ruling on conduct made by the trial judge on costs will bind the costs judge.¹⁵³ Alternatively, the trial judge may give an indication about conduct which is intended to assist, but not to bind, the costs judge, and a party seeking such an indication should make an express request to the trial judge.¹⁵⁴ The costs judge in assessing the amount must be careful to avoid penalising the paying party twice over.¹⁵⁵ Failing to take a point about conduct at trial does not preclude conduct being raised on the assessment of costs.¹⁵⁶

Issue-based costs orders

- 28. 64** The list of factors mentioned in [CPR 44.2\(5\)](#) is of course not exhaustive. It merely draws attention to those that are of special significance. Lord Woolf MR has explained that the “most significant change of emphasis of the [CPR] is to require courts to be more ready to make separate orders which reflect the outcome of different issues”.¹⁵⁷ The aim, of moving to what has become known as *issue-based* costs orders,¹⁵⁸ is to discourage litigants from raising hopeless points or advancing unnecessary arguments or evidence.¹⁵⁹ But the unintended consequence is to invite more argument and more litigation about costs.
- 28. 65** The court has wide powers to make costs orders that reflect the relative success of the parties on discrete issues.¹⁶⁰ The award of costs under the [CPR](#) has to some extent moved away from a strict winner-takes-all principle to an apportionment principle, whereby the costs may be allocated to the parties according to the degree to which they succeeded in the issues that they raised or contested.¹⁶¹ For example, where a claimant sued the defendant for £80,000 but recovered only £12,000, having failed on most of the issues they advanced, the court regarded the defendant as effectively the winner on most of the important issues, and ordered that each party bear their own costs.¹⁶² Even in determining the costs of an interim application the court may take into account the extent to which each party has been successful and order costs accordingly.¹⁶³

- 28. 66** In *Budgen v Andrew Gardner Partnership*, Simon Brown LJ set out the modern approach:

“For my part I have no doubt whatever that judges nowadays should be altogether readier than in times past to make costs orders which reflect not merely the overall outcome of proceedings but also the loss of particular issues. If, moreover, the ‘winning’ party has not merely lost on an issue but has pursued an issue when clearly he should not have done, then there are two good reasons why that should be reflected in the costs order: first, as a sanction to deter such conduct in future; secondly, to relieve the ‘losing’ party of at least part of his costs liability. It is one thing for the losing party to have to pay the costs of issues properly before the court, another that he should have to pay also for fighting issues which were hopeless and ought never to have been pursued.”¹⁶⁴

- 28. 67**

The issue-based approach has two significant consequences. First, the court needs to assess the costs consequences of issues on which the parties succeeded or failed. Second, the move away from the costs follow the event rule can create considerable unpredictability about costs recovery because an overall success is easier to predict than success on individual issues. In litigation of any complexity it is likely that the overall winner will lose on some issues. There have been occasions when the court has drawn back from an issue-based approach. It has been held that the court is not bound to deprive the overall winning party of costs in respect of the unsuccessful issues.¹⁶⁵ In *Fox v Foundation Piling Ltd*,¹⁶⁶ Jackson LJ held that in a personal injury claim the fact that the claimant has won on some issues and lost on others will not normally provide a reason for depriving the claimant of part of their costs. An issue-based approach to costs is most likely to be followed where the successful party has unreasonably pursued issues on which it failed.

Range of costs orders—percentage orders or issue-based orders

28. 68

The court has at its disposal a flexible set of orders by which to express its conclusions regarding apportionment. This flexibility is provided by [CPR 44.2](#):

Rule 44_2

“(6) The orders which the court may make under this rule include an order that a party must pay—

- (a) a proportion of another party’s costs;
- (b) a stated amount in respect of another party’s costs;
- (c) costs from or until a certain date only;
- (d) costs incurred before proceedings have begun;
- (e) costs relating to particular steps taken in the proceedings;
- (f) costs relating only to a distinct part of the proceedings; and
- (g) interest on costs from or until a certain date, including a date before judgment.

(7) Before the court considers making an order under paragraph (6)(f), it will consider whether it is practicable to make an order under paragraph (6)(a) or (c) instead.”

28. 69

The court must choose the most appropriate order that would do justice in the circumstances of the particular case. Some orders may have certain practical advantages over others, as Lord Phillips MR has explained in *English v Emery Reimbold & Strick Ltd*.¹⁶⁷ A costs order which allows the costs of certain issues but not of others has the disadvantage of requiring costs officers to determine which costs belong to which issue. This may be time-consuming, costly and, in complex cases, altogether impractical. For this reason, [CPR 44.2\(7\)](#) expresses a preference for orders that allow a proportion of another party’s costs, a stated amount of costs or costs between certain dates. “In all the circumstances, contrary to what might be thought to be the case”, Lord Phillips MR has stated, “a ‘percentage’ order ... made by the Judge who heard the application will often produce a fairer result than an ‘issues-based’ order. Moreover, such an order is consistent with the overriding objective of the CPR”.¹⁶⁸ It is important to stress that this does not mean that an issue-by-issue approach is now redundant. Once it has determined their relative success on the issues, the court may express its conclusion by making a percentage order, or by ordering the payment of costs incurred between certain dates.¹⁶⁹

28. 70

The modern approach to costs is not a merely mechanical exercise of counting the issues on which a party won and adding up the costs referable to them. The court must consider all the circumstances and is at liberty to adopt a different approach if it considers it more appropriate. A well-established approach is to identify the costs relating to the issue or issues on which the overall losing party succeeded, double it and deduct that percentage from the costs to be awarded to the winner.¹⁷⁰ Thus, if the losing party won on issues representing 20 per cent of the costs of the action, the winning party should be awarded 100 per cent of its costs less 20 per cent of its own costs and minus a further 20 per cent contribution to the losing party's costs on those issues, resulting in an order that the successful party is awarded 60 per cent of its costs. There is a general tendency to move away from hard and fast rules, and the court will tend to apply a more broad-brush approach when deciding on the correct percentage.¹⁷¹ The court seeks to craft the order that is most appropriate in the circumstances of the individual case. For instance, in *National Westminster Bank Plc v Kotonou*,¹⁷² the claimant had sought to have a bank guarantee set aside on five separate grounds. At trial he lost on four of those grounds, but succeeded on the fifth. An order requiring the claimant to pay 50 per cent of the defendant's costs, and the defendant to pay 50 per cent of the claimant's costs was upheld on appeal.

Departing from costs follow the event in the case of several defendants

28. 71

Where a claimant sues two or more defendants and succeeds against some but not against others, the court has discretion to order an unsuccessful defendant to pay the successful defendant's costs. This is known as the *Sanderson* principle.¹⁷³ The jurisdiction is discretionary and its exercise very much depends on the facts.¹⁷⁴ It would be appropriate to make such an order where several defendants are blaming each other and the claimant cannot reasonably predict which defendant will be found liable. The relevant considerations in deciding whether to make an order under the *Sanderson* principle include whether the claim against the successful defendant had been made "in the alternative", whether the causes of action had been connected with those on which the claimant had been successful and whether it had been reasonable for the claimant to join and pursue a claim against the successful defendant. A significant factor was likely to be whether one defendant blamed another, whether it had been reasonable to join that defendant and pursue the claim against them and whether the claimant could in fact sustain such a claim.¹⁷⁵

Giving effect to costs orders

28. 72

The costs judge assessing the amount of costs is bound by the terms of the costs order, and cannot make decisions in the assessment that contradict the express terms of the costs order, regardless of whether the costs order was made at trial on an interim application, or by consent.¹⁷⁶ If a costs order provides for assessment on the standard basis, it is impermissible to assess costs on the small claims basis¹⁷⁷ or, if the claim was allocated to the multi-track, by assessing costs using fixed costs rates.¹⁷⁸ Nor is it permissible, following acceptance of a CPR 36 offer, for the costs judge to disallow a percentage of the claimant's costs, because that is contrary to the effect of CPR 36.13, which entitles the claimant to 100 per cent of its costs on the standard basis.¹⁷⁹ Any decision on the question of whether environmental protection proceedings are prohibitively expensive has to be made by the court making the costs order, and is beyond the powers of a costs judge on an assessment.¹⁸⁰

28. 73

While the costs judge cannot usurp the costs order, a number of fine distinctions have been drawn. In *Haley v Pirelli Tyres Ltd*,¹⁸¹ a distinction was made between deciding at the start of an assessment that the receiving party will only receive a percentage of its costs, which is impermissible, and deciding as part of the assessment to reduce the bill by a percentage. The latter is permissible because the receiving party is still getting 100 per cent of its assessed costs. It was held in *O'Beirne v Hudson*,¹⁸² that in assessing whether the costs were reasonably incurred and reasonable in amount it was perfectly permissible to take into account that the case would almost certainly have been allocated to the small claims track. Such an assessment is on the standard basis, so does not undermine the costs order, but takes the size of the claim into account as a highly material factor in assessing the reasonableness of individual items on the bill.

Appellate supervision of costs orders

- 28.74 Appellate interference with costs orders is circumscribed by the fact that costs orders are discretionary and the discretion is reserved to the court making the costs order. The Supreme Court also generally defers to the Court of Appeal on costs issues, unless there is an error of law.¹⁸³ Therefore, an appeal court will not interfere with an order of costs unless the lower court based its decision on an incorrect principle or reached a clearly wrong conclusion.¹⁸⁴ “The key issue is whether the judge misdirected himself. It is well known that this court will be loath to interfere with the discretion exercised by a judge in any area, but so far as costs are concerned, that principle has a special significance. The trial judge has the feel of a case which the Court of Appeal cannot hope to replicate and the judge must have gone seriously wrong if this court is to interfere”.¹⁸⁵ Since the discretion of the court making the costs order is not unlimited, an appeal court will interfere if the lower court was wrong in principle, or if the lower court’s decision on costs went outside the generous ambit within which a reasonable disagreement is possible.¹⁸⁶
- 28.75 *English v Emery Reimbold and Strick Ltd*¹⁸⁷ establishes the principle that while the court may reduce costs in respect of unsuccessful issues, it should avoid awarding costs by reference to different issues. The appropriate order to make where the court wishes to give the costs of different issues to different litigants is to state that this is its intention, and to go on to assess the percentages of the total costs that would effectively reflect the costs distribution by issue. Some judge-made costs principles are regarded by appellate courts as rules of law, breach of which may result in costs appeals being allowed.¹⁸⁸ Drawing the line between discretionary guidance and errors of law is not easy. *Bolton Metropolitan District Council v Secretary of State for the Environment* was regarded as deciding that where there is multiple representation in planning law cases the losing party would not normally be required to pay more than one set of costs, unless recovery of further costs was justified in the circumstances of the particular case.¹⁸⁹ Being a House of Lords case, this was regarded as highly authoritative. The Supreme Court has subsequently held that while the *Bolton* principles remain relevant in planning cases, they were no more than guidance, and that there is no general rule limiting the number of parties who can recover their costs of preparing their acknowledgments of service and summary grounds.¹⁹⁰ On the other side of the line is a case where a judge deprived the successful parties of part of their costs because they treated the proceedings as a test case, the result of which would assist them in other similar disputes. It was held on appeal that there was no such principle and the judge’s order was reversed.¹⁹¹ Examples extend even to interim costs orders, such as the rule that the costs of interim injunction orders should generally be reserved.¹⁹²

Discretion and predictability

- 28.76 The extensive discretion that the court has in making costs orders under the **CPR** tends to render the incidence of costs unpredictable. Legal representatives find it difficult to advise prospective litigants of the cost risks of litigation. Court discretion in matters of costs under the **CPR** has made the litigation process extremely hazardous. As we have seen, in its desire to render costs orders more just the court started to make issue-based costs orders, to reflect the litigants’ success on particular issues. But soon judges realised that issue-based orders could rob a successful party of some, or even most, of their costs if that party happened to lose on certain issues which happened to be costly even if such failure did not affect their overall success on the merits. This trend led Jackson LJ to observe that the desire for “perfect justice in the individual case” had given rise to “huge additional cost to the parties and at huge costs to other litigants because of the uncertainty which such an approach generates”.¹⁹³

Footnotes

- 93 It is also disapplied in strategic litigation against public participation (SLAPP) claims within the meaning of the
Economic Crime and Corporate Transparency Act 2023, where the court may only order a defendant to pay a claimant's
costs where the defendant's misconduct justifies such an order: ss.194 and 195, and CPR 44.2(9), (10).
- 94 The more recent approach to this principle is considered below, at paras 28.64 ff.
- 95 That is, by making a payment into court, or under the principles in *Calderbank v Calderbank* [1975] 3 All ER 333. See
Ch.27 Offers to Settle para.27.3.
- 96 *Harold v Smith* (1860) 5 H & N 381.
- 97 The indemnity principle has no application in the context of the fixed costs regimes under CPR 45: *Nizami v Butt* [2006]
EWHC 159 (QB); [2006] 1 W.L.R. 3307.
- 98 Jackson LJ, Final Report Ch.5.
- 99 For discussion see S. Sime and D. French, Blackstone's Guide to the Civil Justice Reforms 2013 (Oxford: Oxford
University Press, 2013) paras 10.51–10.60.
- 100 *Merez Investments NV v ACP Ltd* [2007] EWHC 2635 (Ch).
- 101 *Thornley v Lang* [2004] 1 W.L.R. 378 [6].
- 102 *Adams v London Improved Motor Coach Builders Ltd* [1921] 1 KB 495.
- 103 *Nova Productions Ltd v Bell Fruit Games Ltd* (interest on costs) [2006] EWHC 189 (Ch), but it has no discretion to alter
the statutory rate of interest (*Schlumberger Holdings Ltd v Electromagnetic Geoservices AS* [2009] EWHC 773 (Pat)).
See also *Simcoe v Jacuzzi UK Group Plc* [2012] EWCA Civ 137.
- 104 *Powell v Herefordshire Health Authority* [2002] EWCA Civ 1786; [2003] 3 All ER 253.
- 105 *Fattal v Walbrook Trustees (Jersey) Ltd* [2009] EWHC 1674 (Ch); [2009] Costs L.R. 591.
- 106 *Earl of Malmsbury v Strutt and Parker* [2008] EWHC 616 (QB) [5]–[6].
- 107 *R v Lord Chancellor Ex p. Witham* [1998] QB 575; [1997] 2 All ER 779; see also *R (Unison) v Lord Chancellor* [2017]
UKSC 51; [2020] AC 869; and see the discussion in Ch.3 Fair Trial paras 3.21 ff.
- 108 *Harold v Smith* (1850) 5 H. & N. 381, 385.
- 109 *R v Lord Chancellor Ex p. Child Poverty Action Group* [1998] 2 All ER 755 at 764.
- 110 *Arkin v Borchard Lines Ltd* (costs order) [2005] EWCA Civ 655; [2005] 1 W.L.R. 3055 [23].
- 111 *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corp* [1981] AC 909, HL; [1981] 1 All ER 289,
295.
- 112 A. Zuckerman, "The Costs Indemnity Principle—From Restoration to Blame" (2008) 27 C.J.Q. 281.
- 113 *Roache v News Group Newspapers Ltd* [1998] E.M.L.R. 161, CA. See *Agis Antoniades v United Kingdom* App
No.15434/89 (EComHR, unreported, 15 February 1990); *Hoare v United Kingdom* (2011) 53 E.H.R.R. SE1.
- 114 *R v Lord Chancellor Ex p. Child Poverty Action Group* [1998] 2 All ER 755 at 764. See also *Halsey v Milton Keynes
General NHS Trust* [2004] EWCA Civ 576; [2004] 1 W.L.R. 3002.
- 115 For a criticism of the judicial policy of diverting litigation to mediation see H. Genn, "The Hamlyn Lectures 2008",
Judging Civil Justice (Cambridge: Cambridge University Press, 2009) 20–24 and 52–56. For an alternative viewpoint,
see A.K.C. Koo, "The role of the English courts in alternative dispute resolution" (2018) 38(4) L.S. 666.
- 116 *Fox v Foundation Piling Ltd* [2011] EWCA Civ 790 [62].
- 117 *Zapello v Chief Constable of Sussex Police* [2010] EWCA Civ 1417; *Fox v Foundation Piling Ltd* [2011] EWCA Civ 790.
- 118 *Widlake v BAA Ltd* [2009] EWCA Civ 1256; [2010] P.I.Q.R. P4, where the claimant also beat the defendant's CPR
36 offer.
- 119 For example, *Niprose Investments Ltd v Vincents Solicitors Ltd* [2025] EWHC 2084 (Ch).
- 120 *Day v Day* [2006] EWCA Civ 415 [16]–[17].
- 121 *Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd* [2008] EWHC 2280 (TCC). Where the difference is
insignificant, there is no winner. See *Peakman v Linbrooke Services Ltd* [2008] EWCA Civ 1239, where the difference
was £265 plus interest.
- 122 *Hall v Stone* [2007] EWCA Civ 1354, where the claimants each recovered about one-third of the damages they claimed,
but were awarded all their costs on appeal, largely because the initial exaggeration of their claims had no real impact on
the amount of costs incurred. Contrast *Marcus v Medway Primary Care Trust* [2011] EWCA Civ 750, where the claimant
recovered £2,000 on a claim alleged to be worth £525,000, and was ordered to pay 75 per cent of the defendants' costs.
- 123 *Kry sia Maritime Inc v Intership Ltd* [2008] EWHC 1880 (Admly); [2008] 2 Lloyd's Rep. 707, although a finding of
contributory negligence can be taken into account on costs as a relevant factor: *Owners Demise Charterers and Time
Charterers of Western Neptune v Owners and Demise Charterers of Philadelphia Express* [2009] EWHC 1522 (Admly).
- 124 *Painting v University of Oxford* [2005] EWCA Civ 161; [2005] Costs L.R. 394.
- 125 *The Proctor & Gamble Co v Svenska Cellulosa AB SCA* [2012] EWHC 2839 (Ch) [8]–[10].

- 126 *Widlake v BAA Ltd* [2009] EWCA Civ 1256; [2010] P.I.Q.R. P4 [21].
127 *Straker v Tudor Rose* [2007] EWCA Civ 368; [2007] C.P. Rep. 32.
128 *Competition and Markets Authority v Flynn Pharma Ltd* [2022] UKSC 14. This may also be justified on the blame approach, where an unsuccessful public body may be shielded from an adverse costs order if it was acting in the public interest: *Baxendale-Walker v Law Society* [2007] EWCA Civ 233.
129 *Straker v Tudor Rose* [2007] EWCA Civ 368; [2007] C.P. Rep. 32.
130 *Sulaman v Axa Insurance Plc* [2009] EWCA Civ 1331.
131 *Peakman v Linbrooke Services Ltd* [2008] EWCA Civ 1239, where unsuccessful, complex, issues on a counterclaim resulted in the case being allocated to the multi-track rather than the small claims track.
132 *Widlake v BAA Ltd* [2009] EWCA Civ 1256; [2010] P.I.Q.R. P4 [38].
133 *Painting v University of Oxford* [2005] EWCA Civ 161; [2005] Costs L.R. 394.
134 *Hall v Stone* [2007] EWCA Civ 1354.
135 *Mendes v Southwark London Borough Council* [2009] EWCA Civ 594; [2010] H.L.R. 3.
136 *Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd* [2008] EWHC 2280 (TCC). Issue-based and percentage costs orders are discussed further below, at paras 28.64 ff.
137 *Daniels v Walker* [2000] 1 W.L.R. 1382, CA. And see *Promar International Ltd v Clarke* [2006] EWCA Civ 332, where each party was left to bear their own costs.
138 *Widlake v BAA Ltd* [2009] EWCA Civ 1256; [2010] P.I.Q.R. P4 [39], [41].
139 *Summers v Fairclough Homes Ltd* [2012] UKSC 26; [2012] 1 W.L.R. 2004.
140 CPR 44.2(5)(e), added with effect from 1 October 2024.
141 *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576.
142 The reasonableness of a refusal to use ADR, according to Dyson LJ in *Halsey v Milton Keynes General NHS Trust*, must be judged by reference to all the circumstances, including the following: (i) the nature of the dispute; (ii) the merits of the case (the fact that a party reasonably believes that they have a strong case is relevant to the question whether they have acted reasonably in refusing ADR); (iii) whether other methods of settlement have been attempted; (iv) whether the costs of the ADR would be disproportionately high; (v) delay in suggesting mediation which may have the effect of delaying the trial of the claim; and (vi) whether the mediation had a reasonable prospect of success.
143 *Reed Executive Plc v Reed Business Information Ltd* [2004] EWCA Civ 887.
144 In *Earl of Malmesbury v Strutt & Parker* [2008] EWHC 424 (QB), privilege was waived and the court determined that one of the parties had taken an unreasonable position, which was equivalent to unreasonably refusing to consider ADR at all.
145 PD 51ZE,
146 CPR 27.14(2)(g) and 27.14(2A). The court is encouraged to make these orders on its own initiative (CPR 45.13(2A)).
147 But the court may do so where there are factors going beyond the mere non-acceptance of the CPR 36 offer: see for example *DSN v Blackpool Football Club Ltd* [2020] EWHC 670 (QB).
148 *Daniels v Commissioner of Police of the Metropolis* [2005] EWCA Civ 1312 [22].
149 *Straker v Tudor Rose* [2007] EWCA Civ 368; [2007] Costs C.P. 32; and CPR 36.17(2).
150 *Rolf v De Guerin* [2011] EWCA Civ 78; [2011] B.L.R. 221.
151 CPR 44.2(4).
152 CPR 44.4(3)(a).
153 *Drew v Whitbread Plc* [2010] EWCA Civ 53; [2010] 1 W.L.R. 1725 [36].
154 *Drew v Whitbread Plc* [2010] EWCA Civ 53; [2010] 1 W.L.R. 1725 [35], [37].
155 *Ultraframe (UK) Ltd v Fielding* [2006] EWCA Civ 1660; [2007] 2 All ER 983.
156 *Drew v Whitbread Plc* at [35], disapproving *Aaron v Shelton* [2004] EWHC 1162 (QB); [2004] 3 All ER 561.
157 *Phonographic Performance Ltd v AEI Rediffusion Music Ltd* [1999] 2 All ER 299 at 312–313, CA. See also *R v Secretary of State for Transport Ex p. Factortame* (July 6, 1998, unreported), CA.
158 *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605; [2002] 1 W.L.R. 2409.
159 See for example *Summit Property Ltd v Pitmans* [2001] EWCA Civ 2020; [2001] All ER (D) 270 (Nov).
160 *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605 [113].
161 See also Brooke LJ in *Winter v Winter* (2002, unreported) quoted in *Budgen v Andrew Gardner Partnership* [2002] EWCA Civ 1125; [2003] C.P. Rep. 8 [25]: “before the Civil Procedure Rules came into effect if a claimant substantially succeeded he was likely to be awarded an order for costs even though he failed on certain issues. The new Rules provide

- a break from that tradition and enable a court to do greater justice if a party has caused court costs to be expended on an issue on which he ultimately fails.”
- 162 *Islam v Ali [2003] EWCA Civ 612*. See also *Douglas v Hello! Ltd (No.9) [2004] EWHC 63; [2004] 2 Cost. L.R. 304*.
- 163 *Jim Ennis Construction Ltd v Thewlis [2003] EWCA Civ 1273*.
- 164 *Budgen v Andrew Gardner Partnership [2002] EWCA Civ 1125; [2003] C.P. Rep. 8 [26]*.
- 165 *Budgen v Andrew Gardner Partnership [2002] EWCA Civ 1125; HLB Kidsons v Lloyds Underwriters [2007] EWHC 2699 (Comm); and Travellers' Casualty v Sun Life [2006] EWHC 2885 (Comm)*.
- 166 *Fox v Foundation Piling Ltd [2011] EWCA Civ 790*. See also *Widlake v BAA and Jackson v MoD [2006] EWCA Civ 46*; and *Gibbon v Manchester City Council [2010] EWCA Civ 726; [2010] 1 W.L.R. 2081*.
- 167 *English v Emery Reimbold & Strick Ltd [2002] EWCA Civ 605; [2002] 1 W.L.R. 2409 [115]*.
- 168 *English v Emery Reimbold & Strick Ltd [2002] EWCA Civ 605; [2002] 1 W.L.R. 2409 [115]*.
- 169 *Budgen v Andrew Gardner Partnership [2002] EWCA Civ 1125; [2003] C.P. Rep. 8 [27]; and Burchell v Bullard [2005] EWCA Civ 358; [2005] All ER (D) 62 (Apr)*.
- 170 *Earl of Malmesbury v Strutt and Parker [2008] EWHC 424 (QB), 118 Con L.R. 68*.
- 171 *HTC Corp v Yozmot 33 Ltd [2010] EWHC 1057 (Pat)*.
- 172 *National Westminster Bank Plc v Kotonou [2007] EWCA Civ 223*.
- 173 *Sanderson v Blyth Theatre Company [1903] 2 KB 533, CA*. A variant is the *Bullock* order, *Bullock v London General Omnibus Co [1907] 1 KB 264*. See 2025 WB 44.2.28 ff.
- 174 *Bankamerica Finance Ltd v Nock [1988] AC 1002; Moon v Garrett [2006] EWCA Civ 1121; [2006] B.L.R. 402*.
- 175 *Irvine v Commissioner of Police of the Metropolis (costs) [2005] EWCA Civ 129; [2005] C.P. Rep. 19*; and *Rackham v Sandy [2005] EWHC 482 (QB)*.
- 176 *O'Beirne v Hudson [2010] EWCA Civ 52; [2010] 1 W.L.R. 1717*.
- 177 *O'Beirne v Hudson [2010] EWCA Civ 52; [2010] 1 W.L.R. 1717*.
- 178 *Drew v Whitbread [2010] EWCA Civ 53; [2010] 1 W.L.R. 1725*.
- 179 *Lahey v Pirelli Tyres Ltd [2007] EWCA Civ 91; [2007] 1 W.L.R. 998*.
- 180 *R (Edwards) v Environment Agency [2010] UKSC 57; [2011] 1 W.L.R. 79*.
- 181 *Lahey v Pirelli Tyres Ltd [2007] EWCA Civ 91; [2007] 1 W.L.R. 998*.
- 182 *O'Beirne v Hudson [2010] EWCA Civ 52; [2010] 1 W.L.R. 1717*.
- 183 *R (Gourlay) v Parole Board [2020] UKSC 50*.
- 184 *Professional Information Technology Consultants Ltd v Jones [2001] EWCA Civ 2103; [2001] All ER (D) 90 (Dec)*; and *R v Secretary of State for Transport Ex p. Factortame (CA, unreported, 6 July 1998)*.
- 185 *Morgan v UPS [2008] EWCA Civ 1476; Straker v Tudor Rose [2007] EWCA Civ 368; [2007] C.P. Rep 32*. Even more caution is exercised when an appeal is not against the original costs order, but against quantum on an assessment of costs: *Mealing-McLeod v Common Professional Examination Board [2002] 2 Costs LR 223*.
- 186 *G v G (Minors: Custody Appeal) [1985] 1 W.L.R. 647*.
- 187 *English v Emery Reimbold and Strick Ltd [2002] EWCA Civ 605; [2002] 1 W.L.R. 2409*, departing from *Shirley v Caswell [2000] Lloyd's Rep. P.N. 955*. See above, para.28.75.
- 188 An example is the guidance in *R (M) v Croydon London Borough Council [2012] EWCA Civ 595* on costs where a judicial review claim is settled. Failure to follow these was regarded as an error of law in *R (RS) v Brent London Borough Council [2020] EWCA Civ 1711*, justifying an appeal being allowed.
- 189 *Bolton Metropolitan District Council v Secretary of State for the Environment (Practice Note) [1995] 1 W.L.R. 1176*.
- 190 *CPRE Kent v Secretary of State for Communities and Local Government [2021] UKSC 36*.
- 191 *Pexton v Wellcome Trust (2000) 82 P. & C.R. 33, CA*.
- 192 *Melford Capital Partners (Holdings) LLP v Wingfield Digby [2020] EWCA Civ 1647*.
- 193 *Fox v Foundation Piling Ltd [2011] EWCA Civ 790 [62]*.

Criteria of Assessment

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Mainwork

Chapter 28 - Costs

Criteria of Assessment

Introduction

28. 77 As noted earlier, the justification for the costs-shifting rule aims at providing a reasonable contribution towards the successful party's litigation expenses.¹⁹⁴ The same reasoning supports the indemnity rule too; that the amount payable to the receiving party should only indemnify that party for their actual expenses and should not confer on them a profit over and above their expenses.¹⁹⁵ "The principle is simply", May LJ observed, "that costs are normally to be paid in compensation for what the receiving party has or is obliged himself to pay. They are not punitive and should not enable the receiving party to make a profit".¹⁹⁶ Subject to legislation concerning CFAAs and DBAs,¹⁹⁷ the receiving party cannot claim more than the expenses they have incurred or are duty-bound to pay.¹⁹⁸ Litigation costs are recoverable only through a costs order in the proceedings in which they were incurred; a party cannot bring subsequent proceedings seeking the costs of earlier proceedings between the same parties by way of damages.¹⁹⁹

28. 78 To establish entitlement to costs it is not enough to show that they have been incurred. The receiving party must also demonstrate that they were necessary for the conduct of the particular litigation. It would be clearly unjust to require a paying party to pay the receiving party for expenses that were unnecessarily incurred. To take an extreme example, it would be unjust to require a paying party to pay the costs that the receiving party spent in preparing to prove a point that the paying party never disputed. Therefore, a receiving party must establish more than a merely causal connection between the expenditure claimed and the litigation. What has to be established was explained by Richard Malins VC:

"It is of great importance to litigants who are unsuccessful that they should not be oppressed into having to pay an excessive amount of costs. I adhere to the rule which has already been laid down, that the costs chargeable under a taxation as between party and party are all that are necessary to enable the adverse party to conduct the litigation and no more. Any charges merely for conducting litigation more conveniently may be called luxuries and must be paid by the party incurring them."²⁰⁰

28. 79 The receiving party must therefore demonstrate that the expenditure complied with the criteria that govern the entitlement to recovering litigation expenses. These criteria are complex and at times call for value judgements since they reflect a number of different concerns. First, the procedural steps for which costs are claimed must be judged reasonable in the light of professional standards of competent litigation practice. Second, the rate of pay for professional services must be reasonable by reference to the relevant market for comparable services. Third, under the CPR it is normally necessary to show that the means of prosecuting the case and their cost were proportionate in the circumstances. Lastly, these criteria of justifying litigation expenditure may call for more or less generous application in individual cases, depending on the parties' conduct in the dispute. For instance, a party who has been unnecessarily dragged through litigation may deserve more generous recovery than a party who was involved in a dispute in which both parties' cases had some merit. For this reason, there are two criteria of costs assessment: the standard basis, or the more generous indemnity basis.

Standard costs and indemnity costs

28. 80 There are two bases on which costs may be calculated: the standard basis and the indemnity basis. [CPR 44.3](#) states:

[Rule 44_3](#)

“Basis of assessment

(1) Where the court is to assess the amounts of costs (whether by summary or detailed assessment) it will assess those costs—

(a) on the standard basis; ²⁰¹ or

(b) on the indemnity basis,

but the court will not in either case allow costs which have been unreasonably incurred or are unreasonable in amount.

(2) Where the amount of costs is to be assessed on the standard basis, the court will—

(a) only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred; and

(b) resolve any doubt which it may have as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favour of the paying party.

(Factors which the court may take into account are set out in rule 44.4.)

(3) Where the amount of costs is to be assessed on the indemnity basis, the court will resolve any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party.”

28. 81 In practice there can be a considerable difference between standard and indemnity costs, the differences lying in the concept of proportionality and in the burden of proof. Standard costs involve three tests: reasonableness, proportionality ²⁰² and (where costs budgeting applies) adhering to the last approved or agreed costs budget. ²⁰³ The burden of satisfying the court as to the first two counts lies on the receiving party, because any doubt on these must be resolved in favour of the paying party. However, the fact that doubt must be resolved in favour of the paying party “does not mean”, Lord Scott has stressed in *Callery v Gray (Nos 1–2)*, “that in every case where a decision as to reasonableness or as to proportionality is a difficult one to reach, with something to be said on each side, the paying party must win. The costs judge must endeavour to reach a conclusion on the issue, taking account of all the circumstances and of the factors that the rules and practice directions require to be taken into account. If, having done so, the costs judge remains uncertain whether the item of costs under review is reasonable and proportionate, then the paying party should win”. ²⁰⁴

28. 82 Indemnity costs, just like standard costs, must have been reasonably incurred and be reasonable in amount. However, the onus is on the paying party to demonstrate unreasonableness, since [CPR 44.3\(3\)](#) states that where costs are to be assessed on the indemnity basis, “the court will resolve any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party”. Second, unlike standard costs, indemnity costs are not subject to a requirement of proportionality. Third, the restrictions imposed by costs budgeting do not apply to assessments on the indemnity

basis.²⁰⁵ The second aspect of the indemnity basis is puzzling, because it is difficult to see how it could be justified to order the paying party to pay disproportionate costs, especially now that the overriding objective requires the court to deal with cases justly and at proportionate cost.²⁰⁶ We shall have to return to this point shortly. A further puzzle concerning proportionality arises from CPR 44.3(2)(a), which directs the court when assessing costs on the standard basis to “only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred”. This wording gives rise to the question as to how costs that were reasonably incurred and were reasonable in amount could still be considered disproportionate? At the root of the problem lies the fact that the rule-maker chose to graft the new test of proportionality onto the old test of reasonableness. The difficulty of accommodating reasonableness with proportionality was made acutely clear by the decision in *Lownds v Home Office*,²⁰⁷ where the Court of Appeal held that costs necessarily incurred were recoverable notwithstanding that they were disproportionate. Although the position has now been reversed by the CPR 44.3(2)(a), just quoted, the underlying tension between reasonableness and proportionality has by no means gone, as we shall see in due course.

The reason for the distinction between standard and indemnity costs

28. 83 The key to understanding the difference between standard costs and indemnity costs lies in appreciating that an award of standard costs is not meant to fully compensate the receiving party for their litigation expenses and for the inconvenience and stress that litigation may have involved. By contrast, the purpose of indemnity costs is to compensate the receiving party more closely for the costs, the inconvenience and the stress involved in the litigation, as Lord Woolf MR made plain in *Petrotrade v Texaco*:

“The ability of the court to award costs on an indemnity basis and interest at an enhanced rate should not be regarded as penal because orders for costs, even when made on an indemnity basis, never actually compensate a claimant for having to come to court to bring proceedings. The very process of being involved in court proceedings inevitably has an impact on a claimant, whether he is a private individual or a multi-national corporation. A claimant would be better off had he not become involved in court proceedings. In the case of an individual, proceedings necessarily involve inconvenience and frequently involve anxiety and distress. These are not taken into account when assessing costs on the normal basis. In the case of a corporation, corporation senior officials and other staff inevitably will be diverted from their normal duties as a consequence of the proceedings. The disruption this causes to a corporation is not recoverable under an order for costs.”²⁰⁸

28. 84 Lord Woolf CJ reiterated in *Lownds v Home Office*²⁰⁹ that the purpose of indemnity costs is to provide full or nearly full compensation for the outlay and the trouble of litigation and that the “advantages of an indemnity order over a standard order are now far more significant”. It could therefore be said that when assessing costs on an indemnity basis the starting assumption is that the receiving party is entitled to full compensation for their expenses. However, like any other form of compensation, indemnity costs must not be more than what the receiving party lost and must not be unreasonable or unfair. Thus, for example, a party who chooses to engage the highest charging solicitors in the City of London and the highest paid counsel to prosecute a trivial dispute would not be entitled to throw the burden of their excesses on their adversary even if they obtain an indemnity costs order. Similarly, a non-party who is required to make disclosure concerning the assets of a judgment debtor is entitled to recover from the judgment creditor all the costs reasonably incurred on an indemnity basis, but it would still be required to prove their reasonableness.²¹⁰

The indemnity principle—a party is not entitled to recover more costs than they incurred

28. 85

The [Solicitors Act 1974](#) (the 1974 Act) s.60(3) states:

Section 60:(3)

“A client shall not be entitled to recover from any other person under an order for the payment of any costs to which a contentious business agreement relates more than the amount payable by him to his solicitor in respect of those costs under the agreement.”

A cap is therefore placed on the recoverable amount, which is equivalent to the maximum payable by the client to their solicitor “in respect of those costs”. But the words “those costs” are ambiguous. Should the cap be assessed on a global basis or on an item-by-item basis? The difference could be very considerable. Suppose, for example, that the costs judge considers that the total liability of the client to their solicitors represents a reasonable payment (i.e. the case is “worth” the amount claimed). However, on an item-by-item assessment the costs judge reduces the costs for certain items so that when all the items are added up, the total is less than what the judge considered reasonable on a global assessment. If the global basis is adopted, the receiving party would be entitled to the entire sum claimed; but if an item-by-item approach is taken, the receiving party will get less than they paid their solicitors and less than the case is “worth”. It was held in [General of Berne Insurance Co v Jardine Reinsurance Management Ltd](#)²¹¹ that the term “those costs” refers not to the overall costs payable by the receiving party to their own solicitor but to the items of costs identified on the detailed assessment between the parties as the proper and recoverable costs.

Footnotes

- 194 See above, paras [28.39](#) ff.
- 195 See above, paras [28.42](#) ff.
- 196 [General of Berne Insurance Co v Jardine Reinsurance Management Ltd](#) [1998] 2 All ER 301 at 304, CA. Costs are not technically compensatory, see [Federal Republic of Nigeria v Process & Industrial Developments Ltd](#) [2025] UKSC 36; [2025] 3 W.L.R. 681.
- 197 See above, para.[28.43](#).
- 198 [Petrotrade Inc v Texaco Ltd](#) [2001] 4 All ER 853; [2002] 1 W.L.R. 947, CA.
- 199 [Carroll v Kynaston](#) [2010] EWCA Civ 1404.
- 200 [Smith v Buller](#) (1875) L.R. 19 Eq. 473, 473.
- 201 There is no need for a standard costs order to include the word “reasonable” as that is an essential part of the definition of standard costs in any event, and if the word is included it will be regarded as mere surplusage: [Ruttle Plant Hire Ltd v Department for Environment Food and Rural Affairs](#) [2007] EWHC 1633 (QB).
- 202 From [CPR 44.3](#).
- 203 [CPR 3.18](#).
- 204 [Callery v Gray \(Nos 1–2\)](#) [2002] UKHL 28; [2002] 1 W.L.R. 2000 [126].
- 205 [Denton v TH White Ltd](#) [2014] EWCA Civ 906; [2014] 1 W.L.R. 3926.
- 206 In [Lownds v Home Office](#) [2002] EWCA Civ 365; [2002] 4 All ER 775 [3], Lord Woolf CJ said: “The requirement of proportionality now applies to decisions as to whether an order for costs should be made and to the assessment of the costs which should be paid when an order has been made.”
- 207 [Lownds v Home Office](#) [2002] EWCA Civ 365.
- 208 [Petrotrade Inc v Texaco Ltd](#) [2001] 4 All ER 853; [2002] 1 W.L.R. 947 [63], CA. See also [Burridge v Stafford](#) [1999] 4 All ER 660; [2000] 1 W.L.R. 927 [21], CA.
- 209 [Lownds v Home Office](#) [2002] EWCA Civ 365; [2002] 4 All ER 775 [6]–[7].
- 210 [Westminster City Council v Porter \(third party disclosure: costs basis\)](#) [2003] EWHC 2373 (Ch); [2005] 2 Costs L.R. 186.
- 211 [General of Berne Insurance Co v Jardine Reinsurance Management Ltd](#) [1998] 2 All ER 301; [1998] 1 W.L.R. 1231, CA.

Application of the Criteria of Assessment

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Mainwork

Chapter 28 - Costs

Application of the Criteria of Assessment

28. 86 As already noted, the reasonableness test applies both to the question of whether the costs of particular procedural steps are recoverable at all (i.e. whether they were reasonably incurred), and to the amount to be paid in respect of recoverable costs (i.e. reasonable in amount). The same is true of the proportionality test, when it is applied to costs on the standard basis. Both the procedural activity and the amount claimed must be proportionate. CPR 44.4(1) requires the court to have regard to all the circumstances in deciding whether costs that were ordered to be paid on the standard basis were: (i) proportionately and reasonably incurred; and (ii) proportionate and reasonable in amount.

Costs reasonably incurred

28. 87 Whether the costs claimed were reasonably incurred depends on the justification for carrying out the particular process and on the justification for investing the amount of time claimed in doing so. Accordingly, if a certain number of hours is claimed in respect of attendance and communication with witnesses, the paying party may question whether it was reasonable to interview 10 witnesses and to produce 10 witness statements, when they all told the same story. The court may decide that it was unreasonable to interview more than three witnesses and thus disallow the hours claimed in respect of the remaining seven witnesses. The reasonableness of pursuing a particular procedural activity depends on the needs of the case and its difficulty or complexity. It is inevitably influenced by the manner in which the litigation process unfolds and must be judged against the general professional standards current at the time. For example, costs incurred by the receiving party in advancing what the trial judge decides is a dishonest case cannot be said to have been reasonably incurred, and will be disallowed on assessment.²¹²

Costs reasonable in amount

28. 88 Whether costs are reasonable in amount depends on the reasonableness of the hourly rate claimed by the solicitors and on the reasonableness of disbursements, such as experts' and barristers' fees. This in turn raises two closely related questions: whether it was reasonable to engage solicitors and counsel of particular expertise or seniority and, if so, whether their fees were reasonable.²¹³ The first question has to be decided by reference to the complexity and importance of the issues in dispute. For example, where four different commercial interests commenced separate proceedings against the same defendant, which were not consolidated, the costs judge may decide that it was unreasonable for the claimants to maintain separate representation and separate expert witnesses for some or all of the proceedings.²¹⁴ The reasonableness of the fees is judged by looking at the market for the particular services, and asking what is usual for solicitors engaged in a comparable practice and operating in a comparable locality to charge for similar work.²¹⁵
28. 89 It should be stressed that while market information influences the level of the hourly rate, it has no bearing on the question of whether employing the particular level of expertise was justified.²¹⁶ It has been decided, for example, that it was not reasonable for a defamation claimant to select a London-based firm when a local firm could have been adequate.²¹⁷ It was held in the same case that the reasonableness of employing lawyers of particular level or expertise must be determined by reference to the

situation known to claimant at the time they first gave instructions, without taking into account any details of subsequent offers or the final settlement. A prospective litigant is not obliged to shop around for the cheapest services, but can only be expected to do what is reasonable for them in the circumstances.²¹⁸ When deciding whether it is reasonable to instruct distant solicitors, the court should take into account not only the distance but also whether the solicitors were usually instructed on the particular type of case (e.g. infringement of trade mark), whether the solicitors had knowledge of the client's products, the skill and resources available to them to operate speedily and whether the solicitors had some special background knowledge.²¹⁹

- 28.90 Solicitors' fees for the conduct of litigation are normally calculated according to the number of hours spent in carrying out litigation work.²²⁰ A bill of costs submitted for assessment must set out each aspect of the work done for the client (be it communication with the client or others on their behalf, attendance on the court or the perusal of documents) and must itemise the number of hours spent in conducting that process. The rate billed for each hour must be indicated. The rate may be the same for each hour, or it may differ according to the seniority and skills of the solicitors or their employees handling particular aspects of the process, and it may be increased for inflation if the work covers several years.

Proportionality

- 28.91 The reasonableness test has been in operation for a long time and is fairly well understood. The proportionality test introduced by the CPR proved more difficult to fathom. The Court of Appeal decision in *Lownds v Home Office*²²¹ remains important to the understanding of proportionality even if its central conclusion has been reversed. The court explained:

“Proportionality played no part in the taxation of costs under the Rules of the Supreme Court. The only test was that of reasonableness. The problem with that test, standing on its own, was that it institutionalised, as reasonable, the level of costs which were generally charged by the profession at the time when the professional services were rendered. If a rate of charges was commonly adopted it was taken to be reasonable and so allowed on taxation even though the result was far from reasonable.”²²²

- 28.92 The Court of Appeal in *Lownds* held that the “reference in 11.2 to costs which are necessary²²³ is the key to how judges in assessing costs should give effect to the requirement of proportionality. If the appropriate conduct of the proceedings makes costs necessary then the requirement of proportionality does not prevent all the costs being recovered either on an item-by-item approach or on a global approach.”²²⁴ Accordingly, the court must decide “whether, in order to conduct the litigation successfully, it was necessary to incur each item of costs. When an item of costs is necessarily incurred then a reasonable amount for the item should normally be allowed”.²²⁵ This introduced a test of *necessity* on top of the traditional reasonableness test. The court had first to make a preliminary assessment whether the costs as a whole were proportionate. If they were found proportionate, then the court had to assess reasonableness by the established standard. If the costs were found to be disproportionate overall, the court would then have to proceed to scrutinise each item of costs applying a stringent dual test of sensible necessity and reasonableness.²²⁶ Although the standard of necessity was stricter than that of reasonableness, the difference has never been clear.²²⁷

- 28.93 In his Final Report, Jackson LJ recommended the reversal of *Lownds*. “If the level of costs incurred is out of proportion to the circumstances of the case,” he said, “they cannot become proportionate simply because they were ‘necessary’ in order to bring or defend the claim”.²²⁸ This recommendation is now reflected in CPR 44.3(2)(a), which states that costs “which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred”. Whether the costs claimed are proportionate requires an objective assessment and an objective balance to be struck between two policy aims. First, that of compensating the receiving party for their expenditure on the case.²²⁹ Second, to do so without requiring the paying party to pay more than the litigation warrants.²³⁰ Jackson LJ stressed that the “test of proportionality does not ...

replace the requirement for the court to consider the bill in detail on an item-by-item basis. The application of any reduction for proportionality should only take place when each item on the bill has been assessed individually”.²³¹

28. 94 In *West v Stockport NHS Foundation Trust*, in the context of detailed assessment following costs management, the Court of Appeal gave the following guidance:²³²

“88. First, the judge should go through the bill line-by-line, assessing the reasonableness of each item of cost. If the judge considers it possible, appropriate and convenient when undertaking that exercise, he or she may also address the proportionality of any particular item at the same time. That is because, although reasonableness and proportionality are conceptually distinct, there can be an overlap between them, not least because reasonableness may be a necessary condition of proportionality ... [This] will apply, for example, when the judge considers an item to be clearly disproportionate, irrespective of the final figures.

89. At the conclusion of the line-by-line exercise, there will be a total figure which the judge considers to be reasonable (and which may, as indicated, also take into account at least some aspects of proportionality) ...

90. The proportionality of that total figure must be assessed by reference to both r.44.3(5) and r.44.4(1). If that total figure is found to be proportionate, then no further assessment is required. If the judge regards the overall figure as disproportionate, then a further assessment is required. That should not be line-by-line, but should instead consider various categories of cost, such as disclosure or expert’s reports, or specific periods where particular costs were incurred, or particular parts of the profit costs ...

92. The judge will undertake the proportionality assessment by looking at the different categories of costs ... and considering, in respect of each such category, whether the costs incurred were disproportionate. If yes, then the judge will make such reduction as is appropriate ...

93. Once any further reductions have been made, the resulting figure will be the final amount of the costs assessment. There would be no further stage of standing back and, if necessary, undertaking a yet further review by reference to proportionality. That would introduce the risk of double-counting.”²³³

28. 95 Although the intention is that the court should consider whether the total figure of costs claimed is proportionate, proportionality is not a simple correlation between known values. As CPR 44.3(5) makes clear:

Rule 44_3

“Costs incurred are proportionate if they bear a reasonable relationship to—

- (a) the sums in issue in the proceedings;
- (b) the value of any non-monetary relief in issue in the proceedings;
- (c) the complexity of the litigation;
- (d) any additional work generated by the conduct of the paying party;
- (e) any wider factors involved in the proceedings, such as reputation or public importance; and
- (f) any additional work undertaken or expense incurred due to the vulnerability of a party or any witness.”

Clearly, the correlation between the value of the dispute and the costs incurred in obtaining a resolution is not the sole consideration.

28. 96 CPR 44.3(5)(a)–(b) involve relatively comprehensible and quantifiable considerations capable of comparison with the overall figure of costs. Another factor capable of fair quantification, though with far less confidence, is reputation, mentioned in (e). The value of a defamation action to the claimant may not consist just in the expected damages but also in the prospect of vindicating reputation and rescuing one's career, which in turn is capable of monetary evaluation.²³⁴ There would, however, be situations where the value of a favourable judgment would not be easily gauged, as where a terminally ill and wholly incapacitated claimant seeks a declaration that would allow their doctors to assist in their suicide. Nor would it be easy to get a handle on the financial value to a public authority to have the law clarified on a particular issue in dispute. The further we move away from ascertainable comparators, the more likely it is that proportionality would involve subjective value judgment.
28. 97 Assessing proportionality by reference to knowable monetary values appeals to common sense notions of proportionality. The reasoning involved in such an exercise is illustrated by the comment made by Senior Costs Judge Hurst *King v Telegraph Group Ltd*:
- “One way of testing the proportionality of the costs is to ask whether a litigant, paying the costs out of his own pocket, would have been prepared to pay that level of costs in order to achieve success. For the purpose of the test the Claimant must be deemed to be a person of adequate means. That is someone whose means are neither inadequate nor super abundant (see *Francis v Francis & Dickerson [1956] P 87*). If such a person were informed by his solicitors that the cost of bringing the case to a satisfactory conclusion with an award of damages of £130,000 plus a judgment in his favour was likely to be £317,523 (the actual base costs in this case) it is inconceivable that the claimant would wish to go ahead.”²³⁵
28. 98 The Senior Costs Judge’s appeal to what a self-financed litigant would consider rational or proportionate expense makes good sense because it connects with normal perceptions of cost–benefit analysis. For example, most people would consider it unreasonable to invest £50,000 to recover £50,000 in damages when there is a risk of failing to make out the case and having to pay the opponent’s costs. Were proportionality confined to such precepts, it would soon become accepted that it was disproportionate to invest anything like £50,000 in order to recover £50,000. Kerry Underwood advocated a similar approach, suggesting that it would be legitimate for a judge to say: “I have spoken with my judicial colleagues and reviewed the evidence and unless factors (d) and/or (e) apply I would expect a party never to recover more in costs than a sum equal to 40 per cent of damages in a personal injury claim, 20 per cent in a commercial claim.”²³⁶ Dr Sorabji perceptively pointed out that such an approach would in effect amount to the imposition of a fixed costs regime similar to that employed in Germany.²³⁷
28. 99 The ordinary common sense approach to proportionality is incompatible with CPR 44.3(5)(c)–(e). Factor (c) requires the court to consider, in addition to monetary values, the complexity of litigation. Factor (d) is primarily concerned with cases where the paying party has behaved in an unreasonable way, generating extra costs for the receiving party. A party who defends a claim, even without a good basis for doing so, should be ordered to pay costs, but such behaviour does not engage factor (d) at the assessment stage.²³⁸ Consideration (e) is concerned with wider factors, such as public importance.
28. 100 Factors (c)–(e) are generally unlikely to enter the calculation of an ordinary self-funding litigant considering whether to engage in litigation. To revert to Senior Costs Judge Hurst’s example, a person who considered it irrational to risk £317,523 for the sake of recovering £130,000 would hardly be likely to change their mind and consider such expense proportionate on being told that the proceedings were complex and of public importance. Most persons paying for their own litigation would be influenced predominantly by considerations of cost relative to gain, not by what lawyers tell them about the complexity of the proceedings or their importance.
28. 101 These factors thus place proportionality on quite a different plane from common sense proportionality. It is undoubtedly the case that the greater the complexity of the issues, the more expensive litigation is likely to be. The question of whether the effort

invested by legal representatives in litigating such issues was proportionate inevitably involves assessing whether the steps in question were reasonable, or necessary, given the complexity of the issues. Put differently, the question becomes whether a reasonably competent legal representative would have done what the receiving party's representatives did and would have charged as much. These questions boil down to the traditional tests of reasonably incurred and reasonable in amount, which in turn are inherently forensic and incapable of evaluation by lay litigants.

- 28. 102** Here lies the conceptual difficulty involved in the proportionality test, already hinted at earlier. [CPR 44.3\(2\)\(a\)](#) lays down that costs “which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred”. However, as we have just seen, whether costs are proportionate to the complexity of the litigation or to its public importance are in reality questions of whether the costs were reasonably incurred and reasonable in amount. This gives rise to the question: how can costs be disproportionate notwithstanding the fact that they are reasonable and necessary? We cannot limit the test of proportionality to the view that would be taken by a rational and prudent self-funded litigant, because this is incompatible with [CPR 44.3\(5\)](#), which includes complexity in the proportionality standard. The solution to the conundrum is to move away from the layperson's concept of proportionality to a judicial one. In *Giambrone v JMC Holidays Ltd*, Morland J said that “even in very complex group litigation an experienced costs judge if provided with succinct skeletons of the parties' contentions beforehand should be able to determine overall proportionality within an hour or less”.²³⁹ Such determination involves a broad-brush judicial assessment of a sensible relationship between expense, the value of the litigation to the parties and, crucially, a reasonable reward for the legal representatives. This was the approach taken in *Malmsten v Bohinc*,²⁴⁰ where Marcus Smith J reduced the costs allowed on a detailed assessment for a straightforward Companies Act 2006 application from £47,500 to £15,000 by taking a broad-brush view of the maximum figure that could be reasonably justified for the type of case based on experience and costs allowed in similar cases.²⁴¹

Costs management

- 28. 103** One of the defects of the costs system has been its unpredictability. A party could not know in advance what they would need to invest in prosecuting their case nor the liability it would incur to the opponent should the party be unsuccessful. This uncertainty was an inescapable feature of the system because the tests of reasonableness and proportionality applied only after the expenses were incurred, on assessment of costs after judgment (or an interim decision). By their very nature, costs orders were backward-looking. To overcome this problem Jackson LJ recommended the adoption of court management of costs intended to ensure that at each stage of the litigation parties are informed of the costs incurred up to that date and of future projected costs.²⁴²
- 28. 104** Costs management rules are to be found in [CPR 3.12–3.18](#) and PD 3D. One of the aims of the rules is to remove the element of uncertainty for clients over the amount of costs likely to be awarded in the case. Another is to bring forward the time when the court considers the reasonableness and proportionality of the estimated costs to the time when it makes a costs management order, and a third, assuming that this has been done, is to reduce the need for and scope of detailed assessments.²⁴³ On a detailed assessment the costs judge has to start with the budgeted figures.²⁴⁴ While a costs management order does not dispense with the need for detailed assessment, it does influence the way a detailed assessment is conducted.²⁴⁵
- 28. 105** Costs management applies in all [CPR 7](#) multi-track cases, except where the claim is worth £10 million or more, where any of the parties is a child, where fixed or scale costs apply or where the court otherwise orders.²⁴⁶ Costs management also applies to any other proceedings, including applications, where the court makes a specific order.²⁴⁷ An appeal court may make an order that “the recoverable costs of an appeal will be limited to the extent which the court specifies” in any proceedings in which costs recovery is normally limited or excluded at first instance ([CPR 52.19\(1\)](#)). When considering whether to make such an order an appeal court must have regard to the means of the parties and the need to facilitate access to justice. It may, however, decline to make such an order if the appeal raises an issue of principle upon which substantial sums may depend ([CPR 52.19\(2\)](#)).²⁴⁸

28. 106 “The purpose of costs management is that the court should manage both the steps to be taken and the costs to be incurred by the parties to any proceedings ... so as to further the overriding objective” ([CPR 3.12\(2\)](#)). Where costs management applies, the parties (except for LIPs) must file and exchange costs budgets before the first case management conference (in a prescribed form, namely Precedent H) ([CPR 3.13\(1\)](#)).²⁴⁹ A party who fails to file a budget despite being required to do so will be treated as having filed a budget comprising only the applicable court fees, unless the court otherwise orders ([CPR 3.14](#)).²⁵⁰ The parties are also required to file a budget discussion report²⁵¹ no later than seven days before the first case management conference ([CPR 3.13\(2\)](#)).
28. 107 The court may at any time make a costs management order,²⁵² in which it records the extent to which past incurred costs are agreed by the parties and, in respect of future budgeted costs, records either the extent of the parties’ agreement or the court’s approval after making appropriate revisions ([CPR 3.15\(2\)](#)). Where a costs management order has been made, the court will thereafter control the parties’ budgets in respect of recoverable costs ([CPR 3.15\(3\)](#)) and it may set a timetable for future reviews of the parties’ budgets ([CPR 3.15\(6\)](#)). The court may at any time convene a costs management conference,²⁵³ which may be conducted by telephone or in writing ([CPR 3.16](#)), with points made in correspondence instead of using skeleton arguments.²⁵⁴
28. 108 Parties are encouraged to discuss and agree budgets among themselves. It is envisaged that the budgets should be set at the beginning in conjunction with deciding on the appropriate case management steps. The case should then be run on the basis of that budget, so that detailed assessment of costs is rendered unnecessary or is reduced to a limited number of issues. However, the scheme must cater for significant developments in the litigation, and as such the parties may revise budgets upwards or downwards if significant developments in the litigation warrant it.²⁵⁵ This is to be done in accordance with the procedure provided by [CPR 3.15A](#) and in a prescribed form, namely Precedent T.
28. 109 When approving a budget, the court must consider whether the future budgeted costs fall within the range of reasonable and proportionate costs (PD 3D para.12). The court may have regard to previously incurred costs, as these may impact on what might be reasonable and proportionate in the future. While the court cannot approve past costs,²⁵⁶ it is permitted to record its comments, which will be taken into account at the later assessment stage.²⁵⁷ Court approval of budgets will relate only to the total figure for each phase of the proceedings. Although the court will have regard to the constituent elements in each total figure, it will not undertake a detailed assessment at this stage ([CPR 3.15\(8\)](#)). Where costs budgets are filed but a costs management order is not made, the costs budgets are taken into account when the court is deciding the amount to allow on an assessment of costs.²⁵⁸ Costs budgets will lead to consequences if there is a difference of 20 per cent or more between the costs claimed and the costs budget.²⁵⁹
28. 110 Budgets will influence court decisions in different contexts, besides the assessment of recoverable costs. The court will seek, as far as practicable, to give case management directions that are compatible with known budgets. [CPR 3.17\(1\)](#) states that when “making any case management decision, the court will have regard to any available budgets of the parties and will take into account the costs involved in each procedural step” (though it will do so regardless of whether a costs management order has been made; [CPR 3.17\(2\)](#)). [CPR 3.17\(4\)](#) makes provision for treating the costs of interim applications as additional to the budgeted costs, where these could not have reasonably been foreseen at the time the budgets were drawn up and approved. The most significant effect of budgets is when the court is assessing costs on the standard basis in a case where a costs management order has been made. In this situation the court will “(a) have regard to the receiving party’s last approved or agreed budgeted costs for each phase of the proceedings; and (b) not depart from such approved or agreed budgeted costs unless satisfied that there is good reason to do so” ([CPR 3.18](#)). Given the wording of [CPR 3.18](#), the requirement to show a good reason applies only to future budgeted costs as at the date of approval, not to past incurred costs.²⁶⁰ Accordingly, past costs are subject to detailed assessment in the usual way, however the court will take into account any comments about incurred costs recorded on the face of the budget ([CPR 3.18\(c\)](#)).

28. 111 The claimant in *Henry v News Group Newspapers Ltd* brought proceedings for defamation.²⁶¹ Both parties filed costs budgets which were approved at the first costs management conference. The case was settled before trial, but in the absence of agreement the claimant's costs were subject to detailed assessment. The claimant submitted a bill of costs which was well in excess of the approved budget.²⁶² The defendant objected on the grounds that the claimant had not notified the court and the defendants of the increase in costs nor sought court approval for a revised budget. Although the judge accepted that it was strongly arguable that the claimant's costs were reasonable and proportionate, he disallowed the excess over the budget. Moore-Bick LJ set out his views concerning the approach to be taken when considering whether there was a good reason to depart from a costs budget. He started by noting that it was implicit in what is now CPR 3.18(a)–(b), “that the approved costs budget is intended to provide the framework for a detailed assessment and that the court should not normally allow costs in an amount which exceeds what has been budgeted for in each section”.²⁶³ Costs budgets, Moore-Bick LJ explained, did not amount of a fixed cap on recoverable costs because the court may depart from a budget when there was good reason for doing so. He explained that budgets fall somewhere on the scale between, at one end, costs estimates and, at the other end, costs caps. Although budgets do not provide a fixed cap, Moore-Bick LJ stressed “it will rarely, if ever, be appropriate to depart from the budget if to do so would undermine the essential object of the scheme”.²⁶⁴
28. 112 Regarding the costs management rules now in **CPR 3 s.II**, Moore-Bick LJ explained:
- “... they impose greater responsibility on the court for the management of the costs of proceedings and greater responsibility on the parties for keeping budgets under review as the proceedings progress. Read as a whole they lay greater emphasis on the importance of the approved or agreed budget as providing a *prima facie* limit on the amount of recoverable costs. In those circumstances, although the court will still have the power to depart from the approved or agreed budget if it is satisfied that there is good reason to do so, and may for that purpose take into consideration all the circumstances of the case, I should expect it to place particular emphasis on the function of the budget as imposing a limit on recoverable costs. The primary function of the budget is to ensure that the costs incurred are not only reasonable but proportionate to what is at stake in the proceedings. If, as is the intention of the rule, budgets are approved by the court and revised at regular intervals, the receiving party is unlikely to persuade the court that costs incurred in excess of the budget are reasonable and proportionate to what is at stake.”²⁶⁵
28. 113 Thus, costs judges are not to adopt too lax or over-indulgent an approach to finding a good reason: doing so would subvert the purpose of costs management,²⁶⁶ which is both to ensure that the costs of litigation remain reasonable and proportionate, and to provide parties with a degree of certainty in advance about the costs that they are likely to recover or to have to pay out (as the case may be). What constitutes a good reason will inevitably be fact-sensitive. In *Harrison v University Hospitals Coventry & Warwickshire NHS Trust*, the Court of Appeal declined to elaborate what **CPR 3.18(b)** meant by a “good reason” to depart from agreed or approved budgeted costs; that could “safely be left to the individual appraisal and evaluation of costs judges by reference to the circumstances of each individual case”.²⁶⁷ It has been held that the good reason requirement is not confined to the situation where the receiving party claims in excess of their budget, but also where the paying party seeks to persuade the court to award less than the budgeted sum (for example, on the basis that the budget turned out to be over-generous because the issues subsequently narrowed).²⁶⁸ Where costs are to be assessed on the indemnity basis, **CPR 3.18** does not apply and the court will not be constrained by the existence of an approved or agreed costs budget.²⁶⁹
28. 114 It is clear, therefore, that costs management confers a good deal of discretion on the court both in terms of approving budgets and departing from them. It is thus unsurprising that the costs management system has created considerable scope for tactical devices²⁷⁰ and has given rise to satellite litigation about compliance and about departure from budgets.²⁷¹
28. 115

Following a wide-ranging review of options on the future of cost budgeting, the Civil Justice Council found that costs budgeting has produced real and sustained progress in the discipline and understanding of costs, which has improved case management and the proportionality of costs.²⁷² It recommended that:

“Costs budgeting should be retained, however coupled with its retention should be acceptance of the hypothesis that ‘one size does not necessarily fit all’. We suggest that it should be possible to permit a more tailored approach to costs management, to suit different work types and/or venues where the litigation is conducted.”

- 28. 116** Based on the Civil Justice Council’s 2023 report recommendations, three pilot schemes²⁷³ will operate between 6 April 2025 and 5 April 2028, which provide targeted simplifications of the costs budgeting process for particular types of claim where full costs budgeting might not be needed. Under each pilot, unless the court orders otherwise, all parties except litigants in person must file and serve a simplified costs budget no later than 21 days before the first case management conference.²⁷⁴ Under PD 51ZG1 and PD 51ZG2, in claims under £1 million each party must file and serve a simplified budget discussion report no later than 7 days before the first case management conference.²⁷⁵ Under QOCS the claimant is unlikely to be ordered to pay the defendant’s costs,²⁷⁶ so in PD 51ZG3 it is only the defendant who needs to file and serve the simplified budget discussion report.²⁷⁷ In claims under £1 million on the BPC pilot, in claims on PD 51ZG2 (claims under £1 million), and for the claimant on the QOCS pilot, the court will make a costs management order by reference to the simplified costs budget, unless satisfied that a costs management order is not required.²⁷⁸ In claims of £1 million or more on the BPC pilot, the court will not manage costs unless satisfied that the litigation can only be conducted justly and proportionately if a costs management order is made.²⁷⁹ In cases under all three pilots, where the court does not make a costs management order, unless the court orders otherwise, the parties must file and serve updated simplified costs budgets before any pre-trial review or the trial,²⁸⁰ and the simplified costs budget is treated as a costs budget for the purposes of assessing costs.²⁸¹ Adopting another of the CJC recommendations, any breach of the requirements of the pilots may result in sanctions, including limiting recovery of costs to court fees.²⁸²

Footnotes

212 *Ultraframe (UK) Ltd v Fielding* [2006] EWCA Civ 1660; [2007] 2 All ER 983.

213 *Global Marine Drillships Ltd v La Bella* [2010] EWHC 2498 (Ch).

214 *Cipla Ltd v Glaxo Group Ltd (costs)* [2004] EWHC 819 (Pat).

215 Costs judges are assisted by Guideline Hourly Rates published at <https://www.gov.uk/guidance/solicitors-guideline-hourly-rates>. These provide rates for different grades of fee earner, and for different parts of the country. Guideline rates should only be exceeded if there is a clear and compelling justification: *Samsung Electronics Co Ltd v LG Display Co Ltd* [2022] EWCA Civ 466; *Saipem SpA v Petrofac Ltd* [2025] EWCA Civ 1106. The Civil Justice Council Costs Review Final Report (CJC 2023) recommended retaining these, with regular updates to take account of inflation.

216 *A v Chief Constable of South Yorkshire* [2008] EWHC 1658 (Comm); and *Global Marine Drillships Ltd v La Bella* [2010] EWHC 2498 (Ch).

217 *Gazley v Wade* [2004] EWHC 2675 (QB); [2005] 1 Costs L.R. 129. Contrast *Higgins v Ministry of Defence* [2010] EWHC 654 (QB), where it was held to have been reasonable for an 82-year-old claimant to instruct a London firm on an asbestos claim.

218 *Higgins v Ministry of Defence* [2010] EWHC 654 (QB).

219 *Mattel Inc v RSW Group Plc* [2004] EWHC 1610 (Ch); [2005] F.S.R. 5.

220 It is wrong in principle to assume that the receiving party’s costs are reasonable in amount purely because the total is similar to those of the paying party: *Machinery Developments Ltd v St Merryn Meat Ltd* [2005] EWCA Civ 29.

221 *Lownds v Home Office* [2002] EWCA Civ 365; [2002] 4 All ER 775.

222 *Lownds v Home Office* [2002] EWCA Civ 365; [2002] 4 All ER 775 [2].

223 Costs PD para.11.2 (since revoked) provided: “In any proceedings there will be costs which will inevitably be incurred and which are necessary for the successful conduct of the case. Solicitors are not required to conduct litigation at rates

which are uneconomic. Thus in a modest claim the proportion of costs is likely to be higher than in a large claim, and may even equal or possibly exceed the amount in dispute.”

224 *Lownds v Home Office* [2002] EWCA Civ 365; [2002] 4 All ER 775 [28].

225 *Lownds v Home Office* [2002] EWCA Civ 365; [2002] 4 All ER 775 [29].

226 *Giambrone v JMC Holidays Ltd* [2002] EWHC 2932 (QB); [2003] 1 All ER 982 [33].

227 *Motto v Trafigura Ltd* [2011] EWCA Civ 1150 [51].

228 Jackson LJ, Final Report p.37.

229 Costs are not technically compensation, as made clear by *Federal Republic of Nigeria v Process & Industrial Developments Ltd* [2025] UKSC 36; [2025] 3 W.L.R. 681, and the purpose of a costs order is not to provide full recompense for the legal expenses of the successful party.

230 *Kazakhstan Kagazy Plc v Zhunus* [2015] EWHC 404 (Comm); *Bloomberg LP v Sandberg* [2016] EWHC 488 (TCC); and *May v Wavell Group plc* [2016] EWHC B16 (Costs).

231 Jackson LJ, Final Report p.37 fn.62.

232 *West v Stockport NHS Foundation Trust* [2019] EWCA Civ 1220.

233 The Court of Appeal also clarified, approving Marcus Smith J’s approach in *Malmsten v Bohinc* [2019] EWHC 1386 (Ch), that at the second stage, “any reductions for proportionality should exclude those elements of costs which are properly regarded as unavoidable, such as court fees, the reasonable element of the ATE premium in clinical negligence cases, and the like” (at [91]). It emphasized that since such costs are both unavoidable and are set at an “irreducible minimum”, this caveat did not “re-introduce the *Lownds* test, by which necessity always trumped proportionality” (at [85]–[86]).

234 See for instance *Rackham v Sandy* [2005] EWHC 482 (QB), where the claimant obtained £2,000 in damages and was seeking £600,000 in costs; and *Jameel v Dow Jones & Co Inc* [2005] EWCA Civ 75; [2005] QB 946.

235 *King v Telegraph Group Ltd* [2005] EWHC 90015 (Costs) [54]. In the event, of the £700,418 claimed (including the success fee), only £429,321 was allowed.

236 K. Underwood, “Proportionality: The Emperor’s New Clothes”, (Wordpress Blog, 23 June 2016), <https://kerryunderwood.wordpress.com/2015/11/27/proportionality-the-emperors-new-clothes> [Accessed 13 September 2025].

237 *J. Sorabji, “Prospects for proportionality: Jackson implementation”* (2013) 32 C.J.Q. 213, 227.

238 *Malmsten v Bohinc* [2019] EWHC 1386 (Ch) [64].

239 *Giambrone v JMC Holidays Ltd* [2002] EWHC 2932 (QB); [2003] 1 All ER 982 [38].

240 *Malmsten v Bohinc* [2019] EWHC 1386 (Ch) [69].

241 A number of cases give an indication of judicial attitudes to this issue. For example, *Vitol Bahrain EC v Nasdec General Trading LLC* (Comm, unreported, 5 November 2013) (where Males J reduced the costs of a straightforward contested jurisdiction hearing from £165,000 to £75,000 on the grounds that the costs claimed were “grossly disproportionate”, notwithstanding that the underlying dispute was worth some US\$119 million); *Marks and Spencer plc v Asda Stores Ltd* [2016] EWHC 2081 (Pat) (where it was suggested that there is a rebuttable presumption that costs should not exceed 50 per cent of the amount in dispute); *Kazakhstan Kagazy plc v Zhunus* [2015] EWHC 404 (Comm) (where Leggatt J emphasised that the fact that a dispute was worth many millions did not give the parties license to conduct litigation immoderately, even if the resultant costs were still only a small proportion of the sum in issue); *BNM v MGN Ltd* [2016] EWHC B13 (Costs) (damages were agreed at £20,000 and reasonable costs were assessed at £167,389; however, in subsequently assessing proportionality the judge reduced the overall recoverable costs by 50 per cent, save for court fees); and *May v Wavell Group plc* [2016] EWHC B16 (Costs). Such decisions, applying a broad-brush approach based on judicial experience, accord with decisions taken before the 2013 rules came into force: see for example *Willis v MRJ Rundell & Associates Ltd* [2013] EWHC 2923 (TCC) (where Coulson J considered that it was of itself disproportionate that a costs budget came to £1.6 million in a claim worth £1.1 million).

242 Jackson LJ, Final Report p.45.

243 *Harrison v University Hospitals Coventry & Warwickshire NHS Trust* [2017] EWCA Civ 792; [2017] 1 W.L.R. 4456 [32]–[34].

244 *MacInnes v Gross* [2017] EWHC 127 (QB); [2017] 4 W.L.R. 49 [25].

245 *Merrix v Heart of England NHS Foundation Trust* [2017] EWHC 346 (QB); [2017] 1 W.L.R. 3399; and *Harrison v University Hospitals Coventry & Warwickshire NHS Trust* [2017] EWCA Civ 792; [2017] 1 W.L.R. 4456 [27]. For the approach to assessing proportionality on detailed assessment in a costs-budgeted case, see *West v Stockport NHS Foundation Trust* [2019] EWCA Civ 1220, and para.28.94 above.

246 CPR 3.12(1). The court may also order that costs budgets only be filed and exchanged for part of the proceedings, in “substantial cases”. It may then extend costs management to other parts or the whole of the proceedings later: *CPR 3.13(4)*.

- 247 CPR 3.12(1A). CPR 3.13(3)(a) provides that in cases which are outside the normal scope of the costs management provisions, the court may order the parties to file and exchange costs budgets, and it shall do so if all the parties agree (CPR 13.3(b)). PD 3D para.2 provides a list of cases where such a direction, with a view to making a discretionary costs management order, may be “particularly appropriate”.
- 248 *Eweida v British Airways Plc [2009] EWCA Civ 1025*. See Ch.25 Appeal para.25.270.
- 249 The deadline is the date for filing directions questionnaires where the value of the claim is less than £50,000. For higher value claims it is 21 days before the first case management conference. See CPR 3.13(1)(a) and (b).
- 250 The rule also applies to late filing of budgets (*Mitchell v News Group Newspapers Ltd [2013] EWCA Civ 1537; [2013] 1 W.L.R. 795*) and to incomplete costs budgets (*Page v RGC Restaurants Ltd [2018] EWHC 2699 (QB); [2019] 1 W.L.R. 22*).
- 251 Complying with PD 3D para.11.
- 252 A costs management order has to be made where the court is not satisfied the litigation is being conducted at proportionate cost: *Hegglin v Person(s) Unknown [2014] EWHC 3793 (QB)*. If the court refuses to approve the budgeted costs it cannot make a costs management order: *Willis v MRJ Rundell & Associates Ltd [2013] EWHC 2923 (TCC)*.
- 253 This is often combined with the case management conference, with the court listing a case and costs management conference (CCMC).
- 254 *Yeo v Times Newspapers Ltd (No 2) [2015] EWHC 209 (QB); [2015] 1 W.L.R. 3031*.
- 255 An application to revise made at the end of the trial is too late: *Elvanite Full Circle Ltd v AMEC Earth & Environmental UK) Ltd [2013] EWHC 1643 (TCC)*. This is underlined by CPR 3.15A(2) and (4), which state that proposed revisions must be submitted to the other party for discussion, and to the court for approval, “promptly”.
- 256 CPR 3.17(3)(a).
- 257 *Harrison v University Hospitals Coventry & Warwickshire NHS Trust [2017] EWCA Civ 792; [2017] 1 W.L.R. 4456 [46]; CPR 3.17(3)(b).*
- 258 CPR 44.4(3)(h).
- 259 PD 44 para.3.2: “If there is a difference of 20 per cent or more between the costs claimed by a receiving party on detailed assessment and the costs shown in a budget filed by that party, the receiving party must provide a statement of the reasons for the difference with the bill of costs.”
- 260 *Harrison v University Hospitals Coventry & Warwickshire NHS Trust [2017] EWCA Civ 792; [2017] 1 W.L.R. 4456, [49]*. In that case, the Court of Appeal disapproved the obiter comments of Sales LJ in *SARPD Oil International Ltd v Addax Energy SA & Anor [2016] EWCA Civ 120*, to the effect that parties should contest incurred costs at the CCMC if they wished to later challenge them as being disproportionate at detailed assessment (since at that time, CPR 3.18 purported to restrict departure from “approved or agreed budgets” rather than “approved or agreed budgeted costs”). *Harrison* made clear that this understanding of the former CPR 3.18 was incorrect, but in any event the wording of CPR 3.18 was clarified with effect from 6 April 2017, by the Civil Procedure (Amendment) Rules 2017 (SI 2017/95) r.5.
- 261 *Henry v News Group Newspapers Ltd [2013] EWCA Civ 19; [2013] 2 All ER 840*. Costs budgeting was under a pilot scheme, the former PD 51D, which had a provision in para.5.6 in almost identical terms to CPR 3.18.
- 262 The claimant’s costs were in the order of £1.5m including disbursements, CFA success fee and ATE premium. The excess over the budget was in the order of £250,000.
- 263 *Henry v News Group Newspapers Ltd [2013] EWCA Civ 19; [2013] 2 All ER 840* [16].
- 264 *Henry v News Group Newspapers Ltd [2013] EWCA Civ 19; [2013] 2 All ER 840* [24].
- 265 *Henry v News Group Newspapers Ltd [2013] EWCA Civ 19; [2013] 2 All ER 840* [28].
- 266 *Harrison v University Hospitals Coventry & Warwickshire NHS Trust [2017] EWCA Civ 792; [2017] 1 W.L.R. 4456 [44]*. See also *Churchill v Boot [2016] EWHC 1322 (QB)*; and *Jallow v Ministry of Defence [2018] EWHC B7 (Costs)*.
- 267 *Harrison v University Hospitals Coventry & Warwickshire NHS Trust [2017] EWCA Civ 792; [2017] 1 W.L.R. 4456 [44]*; see also *Merrix v Heart of England NHS Foundation Trust [2017] EWHC 346 (QB); [2017] 1 W.L.R. 3399 [78]*.
- 268 *Merrix v Heart of England NHS Foundation Trust [2017] EWHC 346 (QB); [2017] 1 W.L.R. 3399*; and *Harrison v University Hospitals Coventry & Warwickshire NHS Trust [2017] EWCA Civ 792; [2017] 1 W.L.R. 4456*. There has been some debate in the case law concerning the approach to be taken where the receiving party has “underspent” in respect of a Precedent H phase. Plainly the operation of the indemnity principle means that a party cannot recover more than they have actually spent. On one view, this of itself constitutes a “good reason” to depart from the budgeted sum for that phase, and there is no need for the paying party to identify further good reasons to justify awarding an even lower sum: *Salmon v Barts Health NHS Trust (County Court at Central London, unreported, 17 January 2019)*. This approach was disapproved in *Utting v City College Norwich (SCCO, unreported, 22 May 2020)* on the basis that it would create perverse incentives; see also *Merrix* at [74], where it was suggested that if a receiving party claimed a sum lower than the budgeted sum for a phase, then the sum claimed would presumably be “even more reasonable and proportionate than

the approved amount” (at [74]). Common sense, rather than bright-line distinctions, is called for. If a party has spent an egregious sum on a particular item of work, but still come in under budget for a Precedent H phase, they should not be able to simply rely on that fact in order to avoid a reduction on the item of work in question. Similarly, if a case settled while work on the “witness statements” phase was barely under way, but the receiving party had nevertheless already managed to spend close to the budgeted sum for that phase, then the court would be justified in awarding a lower sum. On the other hand, if a party was simply economical and came in under budget for a phase, then this fact alone should plainly not have the effect of setting the issue at large as suggested in *Salmon*.

269 *Lejonvarn v Burgess and Burgess [2020] EWCA Civ 114*, approving *Kellie v Wheatley and Lloyd Architects Ltd [2014] 5 Costs LR 854; [2014] EWHC 2886 (TCC)*.

270 In *Findcharm Ltd v Churchill Group Ltd [2017] EWHC 1108 (TCC)*, the judge deplored the unrealistically low figures in a costs budget, describing them as an abuse of the costs budgeting process.

271 There have been a large number of decisions taking technical points on the costs management scheme. These include *Bank of Ireland v Philip Pank Partnership [2014] EWHC 284 (TCC)*; *Simpson v MGN Ltd [2015] EWHC 126 (QB)*; *Group Seven Ltd v Notable Services LLP [2016] EWHC 620 (Ch)*; and *Sony Communications International AB v Sony Mobile Communications AB [2016] EWHC 2985 (Pat)*; *Sharp v Blank [2017] EWHC 3390 (Ch)*. The decision in *Sharp v Blank* has been incorporated into CPR 3.15A(6).

272 Civil Justice Council Costs Review Final Report (CJC 2023), para.1.9.

273 PD 51ZG1 applies to claims in the Business and Property Courts in London, Manchester, Leeds and the County Court at Central London; PD 51ZG2 applies to Part 7 claims in the County Court at Central London and the district registries in Leeds and Bristol, where the claim has a value under £1 million; and PD 51ZG3 applies to personal injury claims to which QOCS applies in the district registries at Manchester and Birmingham.

274 PD 51ZG1 para.4; PD 51ZG2 para 4; PD 51ZG3 para.4. Precedent Z is used for this purpose, and only requires figures for time costs, counsel’s fees and disbursements for the 10 stages of litigation, plus comments on any assumptions.

275 PD 51ZG1 para.7(a); PD 51ZG2 para.5, using Precedent RZ.

276 **CPR 44.14.**

277 PD 51ZG3 para.6.

278 PD 51ZG1 para.7(a); PD 51ZG2 para.6; PD 51ZG3 paras 7 and 8(b). So, in a case covered by QOCS, there will not normally be a costs management order for the defendant’s costs.

279 PD 51ZG1 para.6(a),

280 The deadline is seven days before any PTR, or 28 days before the trial or trial window, whichever is the earlier.

281 PD 51ZG1 para.9; PD 51ZG2 para.8; PD 51ZG3 para.10. The assessment provisions are in PD 44 paras 3.2–3.7.

282 PD 51ZG1 para.10; PD 51ZG2 para.9; PD 51ZG3 para.11. For claims outside the pilots, the automatic sanction of limiting a defaulting party to court fees in **CPR 3.14** only applies to failure to file the costs budget. Under the pilots this sanction is not automatic, but applies to all breaches of the relevant pilot.

Costs on the Standard Basis

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 28 - Costs

Costs on the Standard Basis

28. 117 As a general rule, party to party costs are to be assessed on the standard basis, unless there are special circumstances that justify an award on the indemnity basis.²⁸³ Where the court makes an order of costs without indicating the basis of assessment, the costs will be assessed on the standard basis ([CPR 44.3\(4\)](#)). It is important to appreciate that standard costs do not, by and large, compensate the receiving party for all the expense they incurred in the litigation and are not meant to do so. “The general policy stance traditionally adopted in this country”, Schiemann LJ has explained, “is that a claimant who obtains all he asks for should be awarded his costs on a basis which does not amount to full recovery”.²⁸⁴ It is therefore natural that successful parties should continually press for indemnity costs. Succumbing to this pressure would result in a fundamental reversal of the policy concerning costs recovery and the courts have therefore strenuously resisted the pressure. It must be stressed that the decision whether to order costs on the standard or on the indemnity basis is largely for the trial judge and an appeal court will not lightly interfere with the judge’s exercise of discretion.²⁸⁵

Footnotes

283 *McPhilemy v Times Newspapers (No.2) (costs)* [2001] EWCA Civ 993; [2002] 1 W.L.R. 934 [28].

284 *Huck v Robson* [2002] EWCA Civ 398; [2002] 3 All ER 263 [73].

285 *Excelsior Commercial and Industrial Holdings Ltd v Salisbury Hamer Aspden and Johnson* [2002] EWCA Civ 879; [2002] C.P. Rep. 67, CA.

Costs on the Indemnity Basis

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Mainwork

Chapter 28 - Costs

Costs on the Indemnity Basis

- 28. 118** Apart from costs awards made under CPR 36 (as a consequence of offers to settle) indemnity costs may, generally speaking, be awarded only where the court finds fault with a party's conduct of the litigation. An indemnity costs order made under CPR 44, unlike one made under CPR 36, carries some stigma, some connotation of court disapproval of the conduct of a party's case, and is in the nature of a penal or exhortatory order.²⁸⁶ The fact that a party advanced a weak case or rejected an adequate compromise offer is not sufficient to justify indemnity costs.²⁸⁷ It would be contrary to the overriding objective to order indemnity costs against a party who withdrew from a weak case. The dismissal of a weak case by summary judgment does not justify indemnity costs.²⁸⁸ To order indemnity costs there must have been a significant level of unreasonableness or otherwise inappropriate conduct in its wider sense in relation to that party's pre-litigation dealings with the winning party, or in relation to the commencement or conduct of the litigation itself.²⁸⁹ It must be stressed, though, that indemnity costs may not exceed the amount that the receiving party has actually incurred; their object is to ensure that the receiving party does not recover less than it spent.²⁹⁰
- 28. 119** Indemnity costs orders are discretionary. To justify an indemnity order the litigant's conduct must either amount to misconduct deserving moral condemnation or be unreasonable to a high degree, and not just wrong or misguided in hindsight.²⁹¹ Persisting with a hopeless case in the face of reasonable offers to settle may justify an order of costs on an indemnity basis.²⁹² A defendant who fails in an allegation of dishonesty runs a very significant risk of indemnity costs.²⁹³ Serious failure to adequately clarify one's case may justify an indemnity costs order.²⁹⁴ Conducting a case in a manner likely to bring the administration of justice into disrepute could justify an indemnity order.²⁹⁵ Calling a wholly inadequate expert may justify an indemnity order, at least in respect of the time lost through the expert's incompetence.²⁹⁶ Simon Brown LJ thought that "it will be a rare case indeed where the refusal of a settlement offer will attract under Pt 44 not merely an adverse order for costs, but an order on an indemnity rather than standard basis".²⁹⁷ Consequently, refusing a settlement offer outside CPR 36 would not justify the award of indemnity costs, unless persistence with litigation in the face of willingness on the part of the opponent to accommodate one's claim is, in the circumstances, unreasonable to a high degree.²⁹⁸
- 28. 120** It merits reiterating that the main basis for ordering indemnity costs is that a party has been guilty of misconduct.²⁹⁹ Indemnity costs have been ordered against a defendant who delayed admitting liability for five years and did so only shortly before trial.³⁰⁰ The court ordered indemnity costs against a firm of solicitors who had given unreliable evidence and had launched an unwarranted attack on the integrity of a former client.³⁰¹ Indemnity costs were ordered where a party resorted to unscrupulous conduct in attempting to extricate itself from a valid contract, and a large part of its evidence had been rejected.³⁰² Such costs may be ordered in respect of only part of the proceedings. In one case, Lightman J ordered indemnity costs to reflect his disapproval of cross-examination that was improper and abusive.³⁰³ Similarly, the court may award indemnity costs in respect of certain issues, as where a party persisted with an unreasonable challenge of expert evidence. In *Brawley v Marczynski (No.2)*,³⁰⁴ the Court of Appeal stressed that in deciding whether to order indemnity costs, the court should focus on the question whether the conduct of the paying party justified such an order and not allow itself to be distracted by the question of whether the receiving party's lawyers deserved a higher reward. In that case, the court ordered indemnity costs in favour of a legally aided party even though the party could not personally benefit from the higher award. Conduct that is both unreasonable and to a high degree out of the norm will justify an indemnity costs order.³⁰⁵

Footnotes

- 286 *Kiam v MGN Ltd* (No.2) [2002] EWCA Civ 66; [2002] 2 All ER 242 [12]; and *Simms v Law Society* [2005] EWCA Civ 849.
- 287 *Reid Minty (a firm) v Taylor* [2002] EWCA Civ 1723; [2002] 2 All ER 150 [32]. *Shaina Investment Cor v Standard Bank London Ltd* [2002] C.P.L.R. 14.
- 288 *Easy Air Ltd v Opal Telecom Ltd* [2009] EWHC 779 (Ch).
- 289 *Catalyst Investment Group v Lewishon* [2009] EWHC 16 (Ch). See also *National Westminster Bank Plc v Rabobank Nederland* [2007] EWHC 1742 (Comm).
- 290 *Petrotrade Inc v Texaco Ltd* [2001] 4 All ER 86; [2002] 1 W.L.R. 947, CA.
- 291 *Kiam v MGN Ltd* (No.2) [2002] EWCA Civ 66; [2002] 2 All ER 242 [12]; cf. *Reid Minty (a firm) v Taylor* [2002] EWCA Civ 1723; [2002] 2 All ER 150; and *Franks v Sinclair (Costs)* [2006] EWHC 3656 (Ch).
- 292 *Noorani v Calver* (No.2) (Costs) [2009] EWHC 592 (QB).
- 293 *Thakkar v Mican* [2024] EWCA Civ 552, where standard basis costs were ordered.
- 294 *Select Healthcare (UK) Ltd v Cromptons Health Care Ltd* [2010] EWHC 3055 (Pat).
- 295 *McPhilemy v Times Newspapers* (No.2) (costs) [2001] EWCA Civ 993; [2002] 1 W.L.R. 934 [29].
- 296 *Williams v Jervis* [2009] EWHC 1837 (QB)
- 297 *Kiam v MGN Ltd* (No.2) [2002] EWCA Civ 66; [2002] 2 All ER 242 [13].
- 298 *Kiam v MGN Ltd* (No.2) [2002] EWCA Civ 66; [2002] 2 All ER 242 [13]; *Reid Minty (a firm) v Taylor* [2002] EWCA Civ 1723; [2002] 2 All ER 150; and cf. *D Morgan Plc v Mace & Jones (a firm)* [2011] EWHC 26 (TCC).
- 299 *Brawley v Marczynski* (No.2) [2002] EWCA Civ 1453; [2002] 4 All ER 1067, CA.
- 300 *Craig v Railtrack Plc* [2002] EWHC 168 (QB); [2002] All ER (D) 212 (Feb).
- 301 *Somatra Ltd v Sinclair Roche & Temperley* [2002] EWHC 1627 (Comm).
- 302 *Amoco (UK) Exploration Co v British American Offshore Ltd* [2002] B.L.R. 135.
- 303 *Clark v Associated Newspapers Ltd* [1998] 1 All ER 959; [1998] 1 W.L.R. 1558.
- 304 *Brawley v Marczynski* (No.2) [2002] EWCA Civ 1453; [2002] 4 All ER 1067.
- 305 *Noorani v Calver* (No.2) (Costs) [2009] EWHC 592 (QB).

Deciding the Amount of Costs

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 28 - Costs

Deciding the Amount of Costs

28. 121 A distinction is made between a ‘fixed costs determination’, where a court is asked to decide the amount of fixed costs recoverable under [CPR 45](#),³⁰⁶ and a costs ‘assessment’, which is the procedure used for assessing party to party costs on the multi-track and solicitor and own client costs. Where a court makes an order for costs at the conclusion of a hearing in a case governed by fixed costs, in the absence of agreement between the parties, it shall make a summary determination ([CPR 45.63\(1\)](#)). Where the court makes a costs order in a claim not governed by fixed costs it may at the same time make a summary assessment ([CPR 44.6\(1\)\(a\)](#)). Alternatively, the court may order a detailed assessment of costs by a costs officer ([CPR 44.6\(1\)\(c\)](#)).

Summary determination

28. 122 Any party intending to claim fixed costs or disbursements is required to file and serve a statement of fixed costs, using Precedent U, no later than 24 hours before a hearing where a costs order will be sought.³⁰⁷ Precedent U is an Excel spreadsheet with three tabs. Tab A is used to set out information such as the relevant track, complexity band and relevant Tables of fixed costs from PD 45, and then itemises all the fixed costs and disbursements claimed. Tab B is a simple Scott schedule with columns for the amounts claimed, the other side’s response, and for the court’s decision on each item. Tab C is for any claims under [CPR 45.9, 45.10, 45.13](#) and/or [45.50\(3\)](#).³⁰⁸ The court may make the summary determination at the conclusion of the hearing, or may direct that the determination be made thereafter either with or without a further hearing.³⁰⁹

Summary assessment

28. 123 Summary assessment³¹⁰ involves the court making the costs order deciding the amount of costs payable by the paying party. It is intended to provide a rough and ready method of quantifying costs in straightforward cases, so that the parties may be spared the costs and delay involved in the detailed assessment procedure. It is usually carried out by the judge who decided the case or application immediately after the hearing at which the costs order is made.³¹¹ Alternatively, if there is good reason for doing so, the court may give directions for the summary assessment to be made at a later date.³¹² Normally a later assessment should be by the judge who made the costs order,³¹³ but another judge who could have decided the claim or application may make the summary assessment if there is good reason.³¹⁴ The court awarding costs cannot make an order for a summary assessment of costs by a costs officer.³¹⁵ A trial judge may not summarily assess the costs of a pre-trial application for which a costs order had already been made by another judge. A costs order that has been summarily assessed is payable within 14 days of the order specifying the amount due, unless the court makes a different order ([CPR 44.7](#)).

28. 124 Summary assessment is appropriate where the assessment is sufficiently straightforward. PD 44 para.9.2 sets out the situations in which the court should normally make a summary assessment. It should do so at the conclusion of the trial of any fast track claim not governed by FRC, and at the conclusion of any other hearing, including appeals, which has lasted not more than one day. There is, however, no rule against summary assessment at the end of hearings that lasted more than one day. On the

contrary, PD 44 para.9.1 states that whenever a court makes an order about costs which does not provide only for fixed costs the court should consider whether to make a summary assessment of costs.³¹⁶ The presumption in favour of summary assessment does not apply to a mortgagee's costs incurred in mortgage possession proceedings or other proceedings relating to a mortgage (PD 44 para.9.3).

28. 125 Summary assessment hearings are meant to be brief. In cases where costs are likely to be summarily assessed the parties are required to be prepared for the summary assessment. It is the duty of the parties and their legal representatives to assist the judge in making a summary assessment of costs (PD 44 para.9.5(1)). Each party must prepare a written statement of the costs claimed showing the number of hours to be claimed, the hourly rate to be claimed, the grade of fee earner, the amount and nature of any disbursement to be claimed, counsel's fees and some other matters specified in PD 44 para.9.5(2). The statement of costs must be filed as soon as possible and, in any event, (a) for a fast-track trial not governed by FRC, not less than two days before the trial; and (b) for all other hearings, not less than 24 hours before the time fixed for the hearing (PD 44 para.9.5(4)).

28. 126 The failure by a party, without reasonable excuse, to comply with PD 44 para.9.5 will be taken into account by the court in deciding what order to make about the costs of the claim, hearing or application, and about the costs of any further hearing or detailed assessment hearing that may be necessary as a result of that failure (PD 44 para.9.6).

28. 127 The court is encouraged to take a robust approach to summary assessment.³¹⁷ Such assessment must focus on the actual costs incurred, as shown in the statement of costs provided by the receiving party.³¹⁸ The court is entitled to draw on its general experience but the jurisdiction to summarily assess costs must not be used as a means of introducing a range of judicial tariffs for different categories of case.³¹⁹

Detailed assessment

28. 128 Detailed assessment is a much more rigorous process. It is more demanding in terms of judicial resources. It requires much more extensive and detailed preparation and as a result can be far more expensive than summary assessment. The general rule is that the costs of any proceedings or any part of the proceedings are assessed by the detailed procedure only after the conclusion of the proceedings, but the court has the power to order them to be assessed immediately ([CPR 47.1](#)).³²⁰ Where an order for detailed assessment is made in respect of an interim hearing, the assessment will normally be carried out only after the end of the entire proceedings.

28. 129 Detailed assessment proceedings must be initiated by the receiving party by serving notice of commencement and a bill of costs on the paying party ([CPR 47.6](#)). Notification of what is claimed against the paying party is provided by the bill of costs.³²¹ If this omits any of the costs that could be claimed, once the bill is assessed it is then too late to start again.³²² There is a three-month time limit, starting on the date of judgment, for commencement ([CPR 47.7](#)). If the receiving party has failed to initiate the process, the paying party may apply for an order requiring the receiving party to commence the assessment proceedings ([CPR 47.8\(1\)](#)). Upon such application, “the Court may direct that, unless the receiving party commences detailed assessment proceedings within the time specified by the Court, all or part of the costs to which the receiving party would otherwise be entitled will be disallowed” ([CPR 47.8\(2\)](#)). Notably, the rule refers to disallowing costs, not interest on costs. Since the paying party can effectively cause the assessment proceedings to be initiated, even a long delay is unlikely to be fatal to the application for detailed assessment on grounds of delay alone. It has been held that delay in commencing assessment proceedings does not amount to a violation of the right to adjudication within reasonable time under the European Convention on Human Rights (ECHR) art.6, or to abuse of process, because the paying party can always force the receiving party's hand in this regard.³²³

28. 130

By contrast, [CPR 47.8\(3\)](#) provides that if the paying party has not made an application under [CPR 47.8\(1\)](#) for an order requiring the receiving party to commence assessment, and the receiving party commences the proceedings later than the period specified in 47.7, “the Court may disallow all or part of the interest otherwise payable to the receiving party under, (a) [section 17 of the Judgments Act 1838](#); or (b) [section 74 of the County Courts Act 1984](#); but will not impose any other sanction except in accordance with [rule 44.11](#) (powers in relation to misconduct)”. Thus, there is no power under [CPR 47.8\(3\)](#) for the court to deny a receiving party their costs on grounds of delay alone, though it could deny interest. But such a power exists under [CPR 44.11](#), which empowers the court to disallow all or part of the costs if “(a) a party or his legal representative, ³²⁴ in connection with a summary or detailed assessment, fails to comply with a rule, practice direction or Court Order; or (b) it appears to the Court that the conduct of a party or his legal representative, before or during the proceedings which gave rise to the assessment proceedings, was unreasonable or improper”.

- 28. 131** It has been held that the key to resolving the apparent tension between [CPR 47.8\(3\)](#) and [CPR 44.11](#) lies in the concept of misconduct. While a breach of the three-month rule in [CPR 47.7](#) potentially comes within [CPR 44.11](#), not every failure to commence within three months will amount to misconduct. It will normally be appropriate to limit sanctions for breach of [CPR 47.7](#) where the paying party has not applied under [CPR 47.8\(1\)](#) to the loss of interest, but a bad breach of [CPR 47.7](#) might justify the disallowance of costs under [CPR 44.11](#). In particular this may be justified where the delay is inordinate, inexcusable and prejudicial to the paying party. If a penalty beyond disallowing interest is imposed, it is important to ensure that the penalty remains proportionate to the breach. ³²⁵
- 28. 132** Where the court orders a detailed assessment, the assessment is carried out by a costs officer. A “costs officer” is defined to include a costs judge (which means a taxing master of the Senior Courts) a district judge or an authorised court officer (i.e. a civil servant in a district registry, the Principal Registry of the Family Division, the Senior Courts Costs Office or the county court, who is authorised by the Lord Chancellor to assess costs) ([CPR 44.1](#)). Where the costs claimed do not exceed £75,000, when the receiving party files their request for a detailed assessment they must also request a provisional assessment of their bill under [CPR 47.15](#). On receipt of the papers ³²⁶ the court will proceed to making a provisional assessment within the next six weeks. ³²⁷ None of the parties are permitted to attend. ³²⁸ The provisional assessment is carried out on the same basis as a detailed assessment, ³²⁹ but is based on the information in the bill and supporting papers, together with any contentions in points of dispute filed by the paying party, with no oral hearing. ³³⁰ Once the provisional assessment has been carried out, the court sends the provisionally assessed bill to each of the parties, who have 21 days to dispute the outcome by filing and serving a written request for an oral hearing. ³³¹ A disputing party has to identify the items they wish to be reviewed, ³³² and will usually be penalised in costs if they fail to have the provisional assessment adjusted by more than 20 per cent. ³³³ This beguilingly simple rule has revolutionised detailed assessments, because achieving a 20 per cent adjustment is rather ambitious, so many provisional assessments end up being the final detailed assessment of the receiving party’s costs.
- 28. 133** The paying party may dispute any item in the bill of costs by serving points of dispute on the receiving party within 21 days after notice of commencement ([CPR 47.9\(2\)](#)). If the paying party serves points of dispute after that period, they may not be heard further in the detailed assessment proceedings, unless the court gives permission ([CPR 47.9\(3\)](#)). Where the paying party has failed to serve points of dispute, the receiving party may request a default costs certificate ([CPR 47.9\(4\)](#)). A default costs certificate may be set aside on grounds similar to those governing the setting aside of default judgments. Accordingly, a distinction is drawn between setting aside as a matter of right and setting aside as a matter of discretion. A default certificate will be set aside if the receiving party was not entitled to obtain it, as where it was obtained before the time of serving points of dispute expired. Otherwise the court has discretion to set aside a default certificate if it appears to the court that there is some good reason why detailed assessment proceedings should continue ([CPR 47.12](#)).
- 28. 134** The parties may reach an agreement about the amount of payable costs and avoid involving the court any further. If they have agreed the costs, they will apply for a costs certificate in the amount agreed ([CPR 47.10](#)). Where points of dispute have been served and the parties cannot agree, the receiving party may apply for a detailed assessment hearing within three months of the expiry of the period for commencing detailed assessment proceedings (i.e. normally six months after the judgment) ([CPR 47.14\(1\)](#)). Failing such an application, the paying party may apply for an order requiring the receiving party to apply for a hearing by a certain date on pain of having their costs disallowed in whole or in part ([CPR 47.14\(2\)–\(4\)](#)).

28. 135 At a detailed assessment hearing the court will only consider the items specified in the points of dispute, though the court may give a party permission to raise other points ([CPR 47.14\(6\)](#)). The hearing itself is informal and is held in private. Normally the judge will indicate their decision orally at the conclusion of the argument concerning each particular dispute. It is the responsibility of the receiving party to re-calculate the bill of costs in the light of the judge's decisions during the assessment hearing. The receiving party must file a completed bill within 14 days of the end of the detailed assessment ([CPR 47.17](#)). Only after that will a court issue a final costs certificate, which will include an order to pay the costs to which it relates.³³⁴ Where the receiving party is also liable to pay costs, the certificate may include a set-off between the costs liabilities and direct payment of the balance, or the court may delay the issue of the certificate until the receiving party has paid its liability for costs.³³⁵

Disclosure of privileged information in assessment proceedings

28. 136 As a matter of general principle, a paying party is entitled to require the receiving party to prove their right to recover the items for which they claim costs. A bill of costs is required to contain a certificate of accuracy, which should normally suffice to guarantee the reliability and completeness of the information necessary for assessment. The court will normally assume that the bill represents the true state of affairs, unless there is something in the circumstances to suggest otherwise.³³⁶ Sometimes a closer look may be required and this may necessitate an intrusive examination of the receiving party's communications with their lawyers. The principle to be followed was explained by Hobhouse J:

“The [costs judge] does not have any power to order discovery to be given: he does not have any power to override a right of privilege. But it is the duty of the [costs judge] if the respondent raises a factual issue, which is real and relevant and not a sham or fanciful dispute to require the claimant to prove the facts on which he relies. The claimant then has to choose what evidence and to what extent he will waive his privilege. That is a choice for the claimant alone. The [costs judge] then has to decide the issue of fact on the evidence. In considering whether he is satisfied by the evidence, the [costs judge] will no doubt take into account that the claimant may have a legitimate interest in not adducing the most obvious or complete evidence and may prefer to rely on oral evidence rather than producing privileged legal documents.”³³⁷

28. 137 The privilege cannot be overridden by the court, but it may be waived by the party entitled to assert it. Where a document is of sufficient importance to be taken into account in assessing the recoverability of costs, it has to be shown to the paying party, or the receiving party will have to content itself with other evidence.³³⁸ Where an issue is taken concerning the correctness of the bill, the receiving party should first be directed to produce the relevant privileged documents to the costs judge alone, who will inspect the documents in private and then decide whether the receiving party should be put to their election whether to disclose the documents in order to rely upon their contents or to decline to do so.³³⁹ A receiving party would be put to their election only where it was necessary and proportionate to do so. Where a doubt has arisen, “the fairest result was that either both or neither could deploy the privileged material”, Pumfrey J observed.³⁴⁰ Where privilege has been waived, the disclosure is limited to the assessment proceedings and the documents cannot be used for any other purpose without court permission.³⁴¹

Interim payments on account of costs

28. 138 After the receiving party has filed a request for a detailed assessment, the court may issue an interim costs certificate ordering the paying party to pay costs on account of the eventual final costs certificate ([CPR 47.16](#)). There are related powers to order an interim payment on account of costs where the court makes a costs order subject to detailed assessment ([CPR 44.2\(8\)](#)) or on

the determination of a preliminary issue or split trial in cases governed by fixed recoverable costs.³⁴² These are useful where there is likely to be a delay before the final amount of costs is decided. The presumption is that a party is entitled to realise the benefit of a costs order in its favour by having an interim payment on account, though before proceeding on this assumption the court must take all the circumstances into account.³⁴³

- 28. 139** Instead of ordering interim costs to be paid to the party, the court may order interim costs to be paid into court. This might be appropriate where the paying party is likely to prove evasive and there is some uncertainty about the amount that the paying party is likely to be ordered to pay, as where there are some costs orders in favour of the paying party, and others in favour of the receiving party.³⁴⁴ A court faced with a failure to comply with an interim costs order may impose a suitable sanction, including barring the paying party from participating in the detailed assessment unless they pay the interim costs, or even proceeding directly to a final costs certificate.³⁴⁵

Costs of the assessment

- 28. 140** A receiving party is entitled to their costs of the detailed assessment proceedings, except where the provisions of any Act, the CPR or any relevant practice direction provide otherwise; or the court makes some other order in relation to all or part of the costs of the detailed assessment proceedings (CPR 47.20(1)).³⁴⁶ The court will usually summarily assess the costs of detailed assessment proceedings at the conclusion of those proceedings (CPR 47.20(5)). The normal expectation is that the receiving party will be paid its costs of the assessment.³⁴⁷ In deciding whether to depart from this general principle, the court must have regard to all the circumstances, including the conduct of all the parties, the amount, if any, by which the bill of costs has been reduced and whether it was reasonable for a party to claim the costs of a particular item or to dispute that item (CPR 47.20(3)).³⁴⁸

- 28. 141** The ability to recover the costs of assessment is important since assessment itself can be very expensive. To protect themselves from an adverse costs order in respect of the detailed assessment costs, a party may make a CPR 36 offer.³⁴⁹ CPR 47.20(4) applies CPR 36 to detailed assessment costs subject to the following modifications. A “claimant” is the *receiving party* and *defendant* refers to “paying party”. Similarly, *trial* refers to “detailed assessment hearing”. A CPR 36 offer made in assessment proceedings may not be accepted after the commencement of the detailed assessment hearing, unless the parties agree. If the accepted sum is not paid within 14 days or such other period as has been agreed, the offeree may apply for a final costs certificate for the unpaid sum. A reference in CPR 36 to “judgment being entered” is to the completion of the detailed assessment, and references to a “judgment” being advantageous or otherwise are to the outcome of the detailed assessment. A CPR 36 offer must not be communicated to the costs officer until the question of the costs of the detailed assessment proceedings comes to be decided. The court will take into account an offer made in accordance with this rule in deciding who should pay the costs of those proceedings.³⁵⁰ If the offeror improves on their own offer, they will normally be entitled to recover their costs of the assessment from the date of the offer. A party who has made no attempt to settle the costs liability may be penalised even if they have beaten the other party’s offer. It is therefore always advisable to engage in a meaningful attempt to agree the costs and make an offer to settle.

Routes and mode of appeal

- 28. 142** Appeals from assessment decisions of costs judges and district judges of the High Court are to a High Court judge; appeals from district judges of the county court are to a circuit judge.³⁵¹ Such appeals are governed by CPR 52 and require permission to appeal. An appeal against a decision of an authorised court officer lies to a costs judge or a district judge of the High Court (CPR 47.22).³⁵² However, no permission to appeal is required for an appeal from a decision of an authorised costs officer who has carried out a detailed assessment (PD 47 para.20.2), and such appeals are not governed by CPR 52 but by PD 47 (CPR

52.1(2)). An appeal against the decision of an authorised costs officer is by way of re-hearing ([CPR 47.24](#)), while all other appeals against assessment decisions are by way of review.³⁵³

Costs-only proceedings

28. 143 Parties who settle their dispute before commencement of proceedings will agree not just the terms of the settlement but also whether costs will be paid by one party to another. However, parties who have agreed that costs would be paid may be unable to agree their amount beyond agreeing to the payment of reasonable costs. In such situations the parties may require a court decision on costs quantum only. Before the [CPR](#), if parties required court resolution of disputes concerning reasonableness they had to bring proceedings for breach of the contract that incorporated the settlement terms. This method is still open. A person can bring a claim (by means of a [CPR 7](#) claim form) founded on the settlement agreement and seek an order for costs or a specified amount of costs (PD 46 para.9.12). However, if the sole issue is the amount of costs, [CPR 46.14](#) must be used. This provides for costs-only proceedings, which enable the parties to have recourse to detailed assessment proceedings without having to start any other proceedings. A modified costs only process applies to claims governed by fixed costs.³⁵⁴
28. 144 Costs-only proceedings are available only where (a) the parties to a dispute have reached an agreement on all issues (including which party is to pay the costs) which is made or confirmed in writing; but (b) they have failed to agree the amount of those costs;³⁵⁵ and (c) no proceedings have been started ([CPR 46.14\(1\)](#)).³⁵⁶ Costs-only proceedings are commenced by issuing a claim form in accordance with [CPR 8](#), which must contain or be accompanied by the agreement. The purpose of the [CPR 8](#) claim under this rule is to empower the court to make an order for costs, so that one or other of the parties can then proceed with a detailed assessment. Where [CPR 8](#) costs-only proceedings have been commenced, and the time for filing the defendant's acknowledgment of service has expired, the claimant may request in writing that the court make an order in the terms of the claim, unless the defendant has filed an acknowledgment of service stating the intention to contest the claim or to seek a different order (PD 46 para.9.7).
28. 145 The court may make an order for the payment of costs subject to assessment, or, where appropriate, for the payment of fixed costs. Where FRC costs apply, the amount recoverable is determined on the papers.³⁵⁷ In cases outside FRC, the court will order a detailed assessment unless the court is in a position to summarily assess costs (PD 46 para.9.9). Where a party failed to follow the costs-only procedure, the party will not be allowed costs greater than those that would have been allowed to that party had the procedure been followed; and the court may award the other party the costs of the proceedings up to the point where an order for the payment of costs is made ([CPR 46.14\(6\)](#)).
28. 146 Unless the parties have expressly agreed that costs would be calculated on the indemnity basis, the standard basis will apply (PD 46 para.9.4). "In effect," Lord Nicholls has explained, "the court is allowing its costs quantification procedures to be used to support an out-of-court settlement under which one party is to pay the reasonable costs and disbursements of another party. It is implicit in such a settlement agreement (unless the contrary is expressly stated) that the costs to be paid should be quantified on the standard basis in accordance with the rules and practice directions that would have been applicable if there had been a court order for the payment of the costs".³⁵⁸ It follows that the court is empowered to make any order that could have been made had substantive proceedings been commenced.
28. 147 If the claim is opposed, the court cannot make a costs order. However, a claim is not considered to be opposed where the defendant to the [CPR 8](#) claim merely disputes the amount claimed since the purpose of the detailed assessment is to resolve such disputes. If the defendant opposes the claim they must file a witness statement with their acknowledgment of service in accordance with [CPR 8.5\(3\)](#). The court will then give directions including, if appropriate, a direction that the claim shall continue as if it were a [CPR 7](#) claim (PD 46 para.9.10). Senior Costs Judge Hurst stated in guidance to Designated Civil Judges that there is evidence of some misuse of this procedure.³⁵⁹ Some receiving parties threaten that if their costs are not paid within 14 days,

costs-only proceedings will be commenced. On their part, some paying parties withhold consent to the [CPR 8](#) claim. He warned that obstructive conduct could have adverse costs consequences. If the court finds that a party was unreasonable in resisting the costs-only claim and thereby forcing the [CPR 7](#) claim, the court would normally order that party to pay indemnity costs.

Footnotes

- 306 Fixed costs mainly apply to claims on the small claims, fast and intermediate tracks.
- 307 [CPR 45.63\(2\)](#).
- 308 These cover adjusting costs for exceptional circumstances; vulnerability; unreasonable behaviour; and non-personal injury intermediate track S1 costs for the period from pre-issue to service of the defence, which are not fixed. Costs under [CPR 45.9](#), [45.10](#) and [45.50\(3\)](#) are subject to assessment, so in the interests of efficiency the court may give directions for these costs to be assessed in conjunction with the underlying fixed costs determination: [CPR 45.65](#).
- 309 [CPR 45.63\(3\)](#). The costs of a later determination are treated as an interim application with fixed costs under [CPR 45.8](#).
- 310 Typically, summary assessment applies to claims on the multi-track. It can apply to fast track and intermediate track claims if they fall outside the scope of FRC in [CPR 45](#), see [28.153](#). Even where fixed costs apply, summary assessment is one of the options where an application is made to exceed FRC for exceptional circumstances ([CPR 45.9\(2\)\(a\)](#)) or to increase costs on account of vulnerability ([CPR 45.10\(2\)\(a\)](#)).
- 311 [CPR 44.1\(1\)](#) and [44.6\(1\)\(a\)](#), and PD 44 para.9.2.
- 312 [CPR 44.6\(1\)\(b\)](#) and PD 44 para.9.2.
- 313 PD44 para.9.7.
- 314 [CPR 44.6\(2\)](#).
- 315 *R (Isah) v Secretary of State for the Home Department [2023] EWCA Civ 268*.
- 316 *Q v Q (family proceedings: costs order) [2002] 2 F.L.R. 668, Fam. Div*, where it was also held that summary assessment was more likely in family cases where the onus was on reducing contention.
- 317 *Gould v Armstrong [2002] EWCA Civ 1159; [2002] All ER (D) 330 (Jul)*.
- 318 Failing to do so will result in the assessment being set aside on an appeal, even where the judge takes what may be regarded as a sensible course, such as allowing the maximum reasonable amount of costs for that type of case *Morgan v Spirit Group Ltd [2011] EWCA Civ 68; [2011] P.I.Q.R. P9*.
- 319 *Flowers (1-800) Inc v Phonenames Ltd [2001] EWCA Civ 721; [2001] 2 Costs L.R. 286*.
- 320 See also *Khaira v Shergill [2017] EWCA Civ 1687; [2018] 1 W.L.R. 175*.
- 321 In [CPR 7](#) multi-track claims, the bill of costs must be in electronic spreadsheet format complying with PD 47 para.5. A bill failing to comply with PD 47 may be struck out: *AKC v Barking, Havering & Redbridge University Hospitals NHS Trust [2021] EWHC 2607 (QB)*.
- 322 *Harris v Moat Housing Group-South Ltd [2007] EWHC 3092 (QB); [2008] 1 W.L.R. 1578*, where the bill omitted the costs of another firm who had acted at an earlier stage.
- 323 *Less v Benedict [2005] EWHC 1643 (Ch)*.
- 324 Including a costs lawyer employed by a solicitor to deal with a detailed assessment: *Gempride Ltd v Bamrah [2018] EWCA Civ 1367; [2019] 1 W.L.R. 1545*.
- 325 *Haji-Ioannou v Frangos [2006] EWCA Civ 1663; [2008] 1 W.L.R. 144*. But see also the different approach in *Burrows v Vauxhall Motors Ltd [1998] P.I.Q.R. P48*, referred to in *Lahey v Pirelli Tyres Ltd [2007] EWCA Civ 91*.
- 326 As required by PD 47 para.14.3.
- 327 Unless the court decides the case is unsuitable for provisional assessment, [CPR 47.15\(6\)](#).
- 328 PD 47 para.14.4(1).
- 329 S. Middleton and J. Rowley (eds), *Cook on Costs* (London: LexisNexis, 2025), Ch.32.
- 330 [CPR 47.15\(4\)](#).
- 331 [CPR 47.15\(7\)](#).
- 332 [CPR 47.15\(8\)](#).
- 333 [CPR 47.15\(10\)](#).
- 334 Costs become due for the purposes of limitation when the assessment is concluded: *Deutsche Bank AG v Sebastian Holdings Inc [2024] EWCA Civ 245*.

- 335 CPR 44.12; *Dadourian Group International Inc v Simms* [2009] EWCA Civ 1327.
- 336 *Bailey v IBC Vehicles Ltd* [1998] 3 All ER 570; and *Hazlett v Sefton Metropolitan Borough Council* [2000] 4 All ER 887.
- 337 *Pamlin v Express Newspapers Ltd* [1985] 2 All ER 185 at 190–191; [1985] 1 W.L.R. 689 at 696–697. See also *Hollins v Russell* [2003] EWCA Civ 718; and see the discussion of limited waiver of LPP in assessment proceedings in Ch.16 Legal Professional Privilege.
- 338 *South Coast Shipping Co Ltd v Havant Borough Council* [2002] 3 All ER 779, Ch.
- 339 *Giambrone v JMC Holidays Ltd (formerly t/a Sunworld Holidays Ltd)* [2002] EWHC 495 (QB); [2002] C.P.L.R. 440. See also *Dickinson v Rushmer* [2002] 1 Costs L.R. 128.
- 340 *South Coast Shipping Co Ltd v Havant Borough Council* [2002] 3 All ER 779 [31].
- 341 *Prudential Assurance Co Ltd v Fountain Page Ltd* [1991] 3 All ER 878; [1991] 1 W.L.R. 756; and *South Coast Shipping Co Ltd v Havant Borough Council* [2002] 3 All ER 779.
- 342 CPR 45.48(4) (fast track) and CPR 45.51(6) (intermediate track).
- 343 *Mars UK Ltd v Teknowledge Ltd* [2000] F.S.R. 138; and *Blackmore v Cummings* [2009] EWCA Civ 1276; [2010] 1 W.L.R. 983. An interim payment under CPR 44.2(8) should be made unless there is a good reason not to do so, and the sum to be awarded should be a “reasonable sum”, namely the amount likely to be awarded on assessment discounted to allow for an appropriate margin of error in the estimation: see *Excalibur Ventures LLC v Texas Keystone Inc* [2015] EWHC 566 (Comm); *Dana Gas v Dana Gas Sudek* [2018] EWHC 332 (Comm); *Mousavi-Khalkali v Abrishamchi & Anor* [2020] EWCA Civ 1493.
- 344 *Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd* [2008] EWCA Civ 133, 118 Con L.R. 16.
- 345 *Days Healthcare UK Ltd v Pihsiang Machinery Manufacturing Co Ltd* [2006] EWHC 1444 (QB); [2006] 4 All ER 233; and *Crystal Decisions (UK) Ltd v Vedatech Corp* [2008] EWCA Civ 848.
- 346 This provision does not apply where the receiving party has pro bono representation in the detailed assessment proceedings but that party may apply for an order in respect of that representation under the 2007 Act s.194(3) (CPR 47.20(2)).
- 347 *Horsford v Bird* [2006] UKPC 55.
- 348 A very large reduction may justify depriving the receiving party of its costs of the assessment: *Stephens v Tesco Stores Ltd* [2010] EWHC (QB) (bill of £50,000 reduced to £6,800).
- 349 As to the general principles governing CPR 36 offers, see Ch.27 Offers to Settle.
- 350 *Wills v Crown Estate Commissioner* [2003] EWHC 1718 (Ch).
- 351 Access to Justice Act 1999 (Destination of Appeals) Order 2000; and PD 52A para.3.5.
- 352 An authorised costs officer is only authorised to deal with claims of costs not exceeding £35,000 in the case of senior executive officers, and £110,000 in the case of principal officers: PD 47 para.3.1.
- 353 For a discussion of the difference see Ch.25 Appeal paras 25.188 ff.
- 354 CPR 45.64.
- 355 It has been recommended that CPR 46.14 be extended to encompass the incidence of costs where a case is settled apart from costs: Civil Justice Council Costs Review Final Report (CJC 2023), para.3.26.
- 356 Costs only proceedings are not available for disputes under the RTA Small Claims Protocol, which is a no costs regime: CPR 46.14(1A).
- 357 CPR 45.64(4),(5).
- 358 *Callery v Gray (Nos 1–2)* [2002] UKHL 28; [2002] 1 W.L.R. 2000 [89]. See also Lord Woolf CJ’s view in the Court of Appeal: *Callery v Gray* [2001] EWCA Civ 1117; [2001] 3 All ER 833 [54]–[55].
- 359 *Bensusan v Freedman* (20 September 2001, unreported, Supreme Court Costs Office) [55]–[59].

Small Claims Costs

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Mainwork

Chapter 28 - Costs

Small Claims Costs

28. 148 Costs on the small claims track are strictly limited.³⁶⁰ Costs in respect of legal representation are not normally recovered, as CPR 27.14 limits costs recovery to the successful party's court fees, fixed costs payable under CPR 45 (that is, fixed solicitors' costs attributable to issuing the claim) and limited sums for expenses (CPR 27.14(2)). With one exception, where a case is reallocated to a different track it is treated for costs purposes as having been on the new track from the outset.³⁶¹ This could cause injustice where, before allocation, the claim had a value above the normal small claims threshold (with an expectation of a party-to-party costs order), but the defendant concedes part of the claim, leaving a residual claim which will be allocated to the small claims track.³⁶² Of course, the claimant and their solicitors would have done the work to achieve the concession in the expectation of a party-to-party costs order, but these are not available in small claims cases. The costs restrictions in CPR 27.14 will apply to the whole claim if the original value of the claim was up to £100,000,³⁶³ but to avoid this injustice the court has a discretion in claims originally above that level to make an order to the effect that the costs prior to the concession shall be assessed on the multi-track basis.³⁶⁴

Footnotes

- ³⁶⁰ The relevant rules are discussed in more detail in Ch.12 Case Management Part I paras 12.137 ff. The rules also apply on appeal (CPR 27.14(2)), including any second appeal (*Akhtar v Boland [2014] EWCA Civ 943* [7]). See also Ch.25 Appeal para.25.270 ff.
- ³⁶¹ CPR 27.15(1) and 45.14(1).
- ³⁶² See Ch.12 Case Management para.12.113.
- ³⁶³ CPR 45.14(1).
- ³⁶⁴ CPR 27.15(2). PD 46 para.7.1(3). The injustice remains for claims under £100,000.

Fixed Costs

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Chapter 28 - Costs

Fixed Costs

Fixed costs for certain standard processes, such as commencement, default judgment and enforcement proceedings

28. 149 Fixed costs may be awarded in certain cases where the disposal of the proceedings is standard, or in respect of certain formal processes. The relevant provisions are to be found in [CPR 45 s.II](#). It is not necessary to go into the detail of these provisions here except to note that the tables provide fixed costs for commencement, default and summary judgment, the costs of entering judgment, and of most enforcement proceedings.³⁶⁵ In the small claims track, a claimant may be awarded fixed commencement costs calculated in accordance with Table 2 of PD 45.³⁶⁶ Where they apply, fixed commencement costs may be included on the claim form in the box for the charges of the claimant's legal representative.³⁶⁷ Where fixed costs do not apply, the claimant should insert 'to be assessed'.³⁶⁸

Fixed costs in Revenue and Customs claims

28. 150 [CPR 45 s.III](#) provides for fixed costs in proceedings where HM Revenue and Customs officers are successful in a claim in the county court for the recovery of a debt payable to the Commissioners for Revenue and Customs. The fixed amounts are set out in PD 45 Table 9.

Fixed costs in RTA Protocol and EL/PL Protocol claims

28. 151 Personal injury claims arising from RTAs having a value between £1,000 and £25,000, and in which liability is admitted, are governed by the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents (the RTA Protocol). Similarly, employers' and public liability claims³⁶⁹ worth between £1,000 and £25,000, and in which liability is admitted, are subject to the Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) (the EL/PL Protocol). They follow a three-stage process set out in the respective protocols and PD 49F,³⁷⁰ and are subject to the fixed costs regime in [CPR 45 s.IV](#). The purpose of this regime is to provide predictability and proportionality for the costs recoverable.³⁷¹ Under the RTA Protocol, Stage 1 of the process consists of sending a claim notification form to the defendant's insurer, who then decides whether to admit liability. If liability is not admitted,³⁷² the claim no longer continues under the RTA Protocol and the claimant may issue [CPR 7](#) proceedings in the normal way.³⁷³ If liability is admitted, the case proceeds to Stage 2, which covers obtaining medical reports through to the negotiation stage after the claimant has compiled the Stage 2 settlement pack. If the parties are unable to agree quantum, the claimant may issue proceedings following the modified [CPR 8](#) procedure set out in PD 49F (known as Stage 3). Stage 3 takes the case from issue of the [Pt 8](#) claim form to the hearing to decide quantum (essentially a disposal hearing where oral evidence is not taken). The costs for all three stages are fixed by [CPR 45 s.IV](#) and PD 45 Table 10.

28. 152 A modified version of CPR 36 is applied by CPR 36.30 and 45.30. CPR 45 s.IV does not apply to proceedings on appeal; in such situations, the costs are in the discretion of the appeal court and may be limited under CPR 52.19.³⁷⁴ If a defendant does not admit liability at Stage 1, the claim no longer continues under the RTA Protocol and the claimant may instead issue CPR 7 proceedings.³⁷⁵ If the claim is allocated to the fast track or intermediate track, FRC in CPR 45 s.VI, VII or VIII will apply.³⁷⁶

Footnotes

365 The amounts are set out in PD 45 Tables 2–9.

366 CPR 27.14(2)(a).

367 CPR 45.16(5).

368 CPR 16.2(1A1).

369 Employers' liability claims are claims against the claimant's employer for personal injuries arising out of workplace accidents, and industrial disease claims (EL/PL Protocol para.1.1(14)). Public liability claims are claims for personal injuries arising out of a breach of a common law or statutory duty of care (excluding disease claims), either other than against the claimant's employer, or against the claimant's employer but not arising out of a workplace accident (EL/PL Protocol para.1.1(18)).

370 PD 49F sets out the procedure for Stage 3, which is a modified form of CPR 8 proceedings for the assessment of damages, initiated where the parties have not been able to agree quantum pre-action at Stages 1 and 2.

371 *Qader v Esure Services Ltd [2016] EWCA Civ 1109* [55]; *Dover v Finsbury Food Group plc [2020] EWHC 2176 (QB) [16]*.

372 And in certain other situations which it is not necessary to recount here: see RTA Protocol para.6.15.

373 Which will then be subject to FRC in CPR 45 s.VI, discussed below. If the claimant unreasonably seeks to evade the RTA Protocol process and issues CPR 7 proceedings, the court may limit the claimant's costs to those they would have recovered under CPR 45.28: CPR 45.35.

374 *Blair v Wickes Building Supplies Ltd (No.2) [2020] EWCA Civ 17; [2020] 1 W.L.R. 1246*, a decision under the EL/PL Protocol. See Ch.25 Appeal para.25.269.

375 The same is true of cases which exit the EL/PL Protocol.

376 But not if the claim is allocated to the multi-track: *Qader v Esure Services Ltd [2016] EWCA Civ 1109*.

Fast Track and Intermediate Track Costs

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Chapter 28 - Costs

Fast Track and Intermediate Track Costs

- 28. 153** The fast track is intended to provide an expeditious and inexpensive means of litigating disputes of modest value and importance.³⁷⁷ Until 1 October 2023 fast track costs were in part controlled by a system of fixed trial costs for non-personal injuries claims,³⁷⁸ and of fixed costs covering the whole claim for most personal injuries claims.³⁷⁹ From 1 October 2023³⁸⁰ this has been replaced for most fast track claims by the more comprehensive system of fixed recoverable costs ('FRC') described below.³⁸¹ There is a separate FRC regime, with higher rates, for fast track noise induced hearing loss claims.³⁸² The intermediate track was carved out of the multi-track from 1 October 2023, and is designed to give effect to Sir Rupert Jackson's proposals³⁸³ to ensure the costs in relatively simple cases with values from the normal fast track limit of £25,000 up to £100,000 are kept under control by subjecting these to a similar a system of FRC.³⁸⁴ The indemnity principle has no application to these fixed recoverable costs provisions. In such cases, the receiving party does not have to demonstrate that there was a valid retainer or CFA between the solicitor and client but merely has to show compliance with the relevant provisions of the CPR.³⁸⁵
- 28. 154** With some exceptions, FRC apply to all claims which are, or which normally would be, allocated to either the fast track³⁸⁶ or the intermediate track.³⁸⁷ Where a claim changes track to the fast track or intermediate track, FRC apply as if the claim had been on that track from the outset.³⁸⁸ Likewise, if there is a change in a claim's complexity band,³⁸⁹ it is treated as having been on the eventual complexity band from the outset.³⁹⁰ Applying the same principle, a claim that leaves the fast or intermediate tracks is considered on the question of costs as having been on the new track from the outset,³⁹¹ so if it moves to the small claims or multi-track it is treated as being outside the FRC regime. Also outside the FRC regime are possession, disrepair and unlawful eviction claims relating to residential property,³⁹² claims where any party is a protected party,³⁹³ low value personal injury claims that are or should have been started under Part 8 in accordance with PD 49F,³⁹⁴ and claims arising from the Pre-action Protocol for Personal Injury Claims Below the Small Claims Limit in Road Traffic Accidents.³⁹⁵ Most clinical negligence claims have temporarily been excluded from FRC³⁹⁶ while a separate review is conducted by the Department of Health and Social Care. Parties are also permitted to contract out of the fixed costs rules. Accordingly, fixed costs do not apply if costs are provided for under the terms of a contract,³⁹⁷ or if the paying party and the receiving party have each expressly agreed that fixed costs should not apply.³⁹⁸
- 28. 155** The beauty of FRC is that the only costs allowed³⁹⁹ are the amounts set out in CPR 45 and the Tables in PD 45, plus disbursements.⁴⁰⁰ As stated in CPR 45.1(3), the court may only award the relevant FRC, 'neither more nor less'. This enhances the predictability of the potential costs exposure of litigants, and reduces the need for a court decision on the amount of costs recoverable by the successful party.⁴⁰¹ Proportionality is supported by tying the amount of recoverable costs to the value of the claim, its level of complexity,⁴⁰² and the stage⁴⁰³ at which the claim is concluded. As stated by Sir Rupert Jackson, '... at the heart of both reviews⁴⁰⁴ has been the same objective of promoting access to justice. Controlling litigation costs (while ensuring proper remuneration for lawyers) is a vital part of promoting access to justice. If the costs are too high, people cannot afford lawyers. If the costs are too low, there will not be any lawyers doing the work.'⁴⁰⁵ It is intended that the amounts specified in PD 45 will be updated from time to time to adjust for inflation using the services producer price index (SPPI).⁴⁰⁶ The relevant Table is the one in force on the date proceedings are issued.⁴⁰⁷

Fast track FRC

28. 156 In accordance with the general scheme for FRC, the costs recoverable by the successful party in fast track proceedings is the amount stated in PD 45, Table 12. This turns on the value of the claim, its complexity band and the stage reached in the claim. For claimants, the value is the agreed damages or the amount awarded at trial.⁴⁰⁸ For defendants it is the amount stated on the claim form.⁴⁰⁹ Non-money claims have a notional value of £10,000 if assigned to complexity band 2; £15,000 if assigned to band 3; or £20,000 if assigned to band 4.⁴¹⁰ On the fast track, FRC stages A, B and C are cumulative totals for costs incurred up to and including that stage.⁴¹¹ Stage A applies if the claim is settled before proceedings are issued; stage B applies if the claim is issued, and is settled before trial; and stage C applies if the claim is disposed of at trial.⁴¹² Stage B is very wide, so is broken down into three sub-stages: B(1) covers claims concluded between issue of the claim and track allocation; B(2) is for claims concluded between track allocation and listing for trial; and B(3) is for claims concluded after listing for trial and before trial. Stage D covers trial advocacy fees, and are additional FRC for claims disposed of at trial.⁴¹³
28. 157 Fast track FRC can be reasonably modest.⁴¹⁴ For example, a non-road traffic accident personal injury claim settled for £3,000⁴¹⁵ before proceedings are issued would attract FRC of £724,⁴¹⁶ which is 24% of the claim value. To which should be added VAT and disbursements. Closer to the other end of the range, a £15,000 complexity band 4 claim that is disposed of at trial would attract FRC of £16,323⁴¹⁷ plus VAT and disbursements. Basic FRC here amount to 109% of the value of the claim. This may be seen as proportionate by members of the legal profession, but is unlikely to be viewed in the same way by members of the public.

Intermediate track FRC

28. 158 Like FRC on the fast track, intermediate track FRC are calculated based on the value of the claim, its complexity band, and the stage at which the claim is concluded. In money claims the value is the amount of the settlement, or the award at trial.⁴¹⁸ For a defendant it is the amount stated on the claim form.⁴¹⁹ Non-money claims are treated as having a value of £25,000 for claims on complexity band 1; £50,000 for claims on band 2; £75,000 on band 3 and £100,000 on band 4.⁴²⁰ The main staging posts for FRC in intermediate track claims are: S1, from pre-issue up to and including the date of service of the defence; S3, from service of the defence up to the earlier of the date set for the first case management conference or the date of the order for directions under CPR 28.2; S4, from the end of S3 through to the date set by the court for inspection of documents; S5, from inspection of documents to the later of the dates set by the court for service of witness statements or expert reports; S6, from stage S5 to the date set for the pre-trial review or 14 days before trial, whichever is earlier; and S8, from stage S6 to the date of the trial.⁴²¹ FRC provided in PD 45 Table 14 for stages S1, S3, S4, S5, S6 and S8 are cumulative totals for the costs incurred up to and including that stage.⁴²² Where a claim which would normally be allocated to the intermediate track is settled before issue of proceedings, the stage S1 costs are fixed if it is personal injuries claim, but for other types of claim the S1 amount is merely the maximum that will be allowed, and is subject to assessment by the court.⁴²³
28. 159 In addition to the FRC recoverable through to the main stage reached in an intermediate track claim, the successful party can recover separate sums for stages S2 (specialist post-issue legal advice or drafting of a statement of claim), S7 (specialist legal advice after filing of the defence), S9 (attendance at trial), S10 and S11 (advocacy fees for trial), S12 (handed down judgment), S13 and S14 (ADR meeting) and S15 (approval of settlement for child other than at trial).⁴²⁴
28. 160

The amounts laid down for intermediate track FRC can be proportionate. The lowest amount, for a £25,000.01 claim in complexity band 1 that settles before service of the defence, is £2,402,⁴²⁵ which is just under 10% of the claim value. This would be £11,601 if the £25,000.01 claim was assigned to band 4. If the £25,000.01 band 4 claim went to trial, with the claimant winning after a 2-day trial, having had trial counsel draft the statement of case, and no interim applications, the FRC would come to £49,684, or nearly twice the value of the claim.⁴²⁶

FRC for interim hearings

28. 161 In any claim to which FRC will apply,⁴²⁷ in addition to FRC on the main claim, costs may be awarded for any pre-action or interim application. These are fixed by CPR 45.8 at modest amounts⁴²⁸ set out in PD 45, Table 1.

Adjustments to FRC

28. 162 The amounts laid down for FRC in CPR 45 ss.VI, VII and VIII may be adjusted if there are exceptional circumstances,⁴²⁹ or if a party or witness is vulnerable,⁴³⁰ or if the London weighting applies,⁴³¹ or if there is unreasonable behaviour.⁴³² An adjustment for vulnerability can only be made if the additional work undertaken is at least 20% greater than the prescribed FRC.⁴³³ Where the criteria for increasing FRC on account of exceptional circumstances or vulnerability are met, the court may summarily assess those costs, or make an order for a detailed assessment.⁴³⁴ As a disincentive against frivolous applications, where the party seeking an increase for exceptional circumstances or vulnerability fails to achieve an assessment at least 20% greater than the FRC, the costs will be assessed either at the FRC or the assessed costs, whichever is lower.⁴³⁵ The London weighting adds 12.5% to the FRC where the party and its legal representative are both in London.⁴³⁶ Unreasonable behaviour is defined as conduct for which there is no reasonable explanation,⁴³⁷ and so is similar to the wasted costs jurisdiction. Where it is the successful party who has behaved unreasonably, their FRC are reduced by 50%.⁴³⁸ Where it is the losing party that has behaved unreasonably, the FRC are increased by 50%.⁴³⁹

Experts and FRC

28. 163 The cost of expert evidence has been problematic in lower value claims. Expert evidence is normally limited to two expert fields in both fast track and intermediate track claims.⁴⁴⁰ The court's general powers to limit the costs of expert evidence are derived from CPR 35.4, 35.6 and 35.8.⁴⁴¹ This is done on the fast track partly by restricting the nature of the expert evidence permitted, with an emphasis on the use of single joint experts (CPR 35.7), defining the issues which the expert evidence should address (CPR 35.4(2)), restricting experts at trial to only one expert per issue (CPR 35.4(3A)) and expert evidence being given in written form rather than from the witness box (CPR 35.5(2)). On the intermediate track oral expert evidence at trial is usually restricted to one expert per party unless oral evidence from a second expert is reasonably required and proportionate.⁴⁴² There are modest set fees for fixed cost medical reports and medical records in soft tissue and whiplash injury road traffic accident claims.⁴⁴³ CPR 35.4(2) requires parties to provide estimates of the costs of expert evidence. CPR 35.4(4) provides: "The court may limit the amount of a party's expert's fees and expenses that may be recovered from any other party," while CPR 35.8(4)(a) states that the court can "limit the amount that can be paid by way of fees and expenses to [a single joint expert]". This combination of provisions should have a downward effect on the overall costs of expert evidence in fast track and intermediate track claims.

Scale costs in intellectual property litigation

28. 164 CPR 46 s.VII provides a special regime for the summary assessment of costs according to a scale in proceedings in the Intellectual Property Enterprise Court. Tables setting out the scale costs are found at PD 46 para.11.1.

Footnotes

- 377 See Ch.12 Case Management Part I paras 12.102–12.103 for the scope of the fast track; and paras 12.140 ff for its procedural features.
- 378 The pre-2023 CPR 45.37, 45.38.
- 379 The pre-2023 CPR ss.II, III and IIIA.
- 380 Generally, fixed recoverable costs for fast track and intermediate track claims apply to claims issued on or after 1 October 2023 (The Civil Procedure (Amendment No. 2) Rules 2023 (SI 2023/572) r.2(1)). For personal injuries claims they only apply where the cause of action accrued on or after 1 October 2023, and for disease claims, only if the letter of claim was sent on or after 1 October 2023: r.2(2).
- 381 Post 2023 CPR 45 s.VI.
- 382 CPR 45 s.VIII.
- 383 Jackson LJ Review of Civil Litigation Costs: Supplemental Report Fixed Recoverable Costs (2017 Judiciary of England and Wales). See also Extending Fixed Recoverable Costs in Civil Cases: Implementing Sir Rupert Jackson's Proposals (2019 Ministry of Justice) and Extending Fixed Recoverable Costs in Civil Cases: The Government's Response (2021 Ministry of Justice).
- 384 Post 2023 CPR 45 s.VII.
- 385 *Nizami v Butt [2006] EWHC 159 (QB); [2006] 1 W.L.R. 3307.*
- 386 CPR 45.43.
- 387 CPR 45.49.
- 388 CPR 45.14(1).
- 389 Complexity bands are considered in Ch.12. There are four complexity bands on each of the fast and intermediate tracks. Reassignment of complexity bands is dealt with by CPR 26.18.
- 390 CPR 45.14(2).
- 391 CPR 45.14(1).
- 392 CPR 45.1(4). Residential property claims are likely to be added to the FRC regime in the future.
- 393 CPR 45.1(6).
- 394 These are cases covered by the Pre-action Protocol for Personal Injury Claims in Road Traffic Accidents or the Pre-action Protocol for Low Value Personal Injury Claims (Employers' Liability and Public Liability Claims, and are governed by a different fixed costs regime in CPR 45 s.IV.
- 395 These are governed by a separate fixed costs system in CPR 45 s.V.
- 396 By allocating these cases to the multi-track, see CPR 26.9(10)(b), unless the claim would normally be allocated to the intermediate track, and only if both liability and causation have been admitted.
- 397 CPR 44.5.
- 398 CPR 45.1(3).
- 399 CPR 45.44 for fast track FRC, and CPR 45.50(1) for FRC on the intermediate track.
- 400 Disbursements are dealt with in CPR 45.59 (fast track) and CPR 45.60 (intermediate track). Legal representatives who are registered for VAT can add this to the FRC, CPR 45.2.
- 401 Provision is made by CPR 45 s.X for the summary determination of FRC after any hearing, and some aspects of FRC may be subject to summary assessment or detailed assessment, such as cases where the court makes an order under CPR 45.9 to exceed FRC on the basis there are exceptional circumstances.

- 402 In accordance with its assigned complexity band as part of the case management process. See [CPR 26.14–26.16](#) and Ch.12.
- 403 There are four main stages for fast track claims (PD 45, Table 12), and fifteen stages for intermediate track claims (PD 45, Table 14).
- 404 The first Review was the main Jackson LJ, Final Report.
- 405 Jackson LJ Review of Civil Litigation Costs: Supplemental Report Fixed Recoverable Costs (2017 Judiciary of England and Wales), para.12, quoted with approval in Extending Fixed Recoverable Costs in Civil Cases: Implementing Sir Rupert Jackson's Proposals (2019 Ministry of Justice) at p.3.
- 406 The original 2023 PD 45 FRC Tables were updated with 2024 Tables by Update 163.
- 407 [CPR 45.1\(8\)](#).
- 408 [CPR 45.45\(1\)\(a\)\(iv\)](#).
- 409 [CPR 45.6\(3\)\(a\)](#), excluding contributory negligence, any amounts not in dispute, interest and costs. If the claimant cannot reasonably say how much the claim is worth, the default position for the defendant in fast track claims is that the claim is worth £25,000 ([CPR 45.6\(3\)\(c\)](#)).
- 410 [CPR 45.45\(1\)\(a\)\(ii\)](#).
- 411 [CPR 45.45\(1\)\(b\)](#).
- 412 *Trial* means the final hearing: [CPR 45.45\(1\)\(d\)](#). Special provision is made for split trials by [CPR 45.48](#).
- 413 [CPR 45.45\(1\)\(c\)](#), and so are in addition to FRC for stage C.
- 414 Fast track FRC start at nil for claims worth no more than £5,000 which are assigned to complexity band 1 and which conclude before proceedings are issued (PD 45, Table 12, stage A). Band 1 includes damage only road traffic claims and defended debt claims ([CPR 26.15](#)).
- 415 The fast track would be the normal track for this claim, see [CPR 26.9\(1\)\(a\)\(ii\)\(cc\)](#) and [26.9\(5\)](#). It would normally be assigned to complexity band 2 by [CPR 26.25](#).
- 416 2024 PD 45 Table 12, stage A, complexity band 2, provides FRC of the greater of £681 or £124 plus 20% of the damages. Here that is £124 + £600 = £724.
- 417 2024 PD 45 Table 12, stage C, complexity band 4 provides FRC of £8,155 plus 40% of damages (£6,000), plus stage D trial advocacy fees of £2,168, totalling £16,323. For band 4 cases only, a further £500 is allowed if the statement of case was drafted by a specialist legal representative or the intended trial advocate, and, where this is justified, a further £1,000 if they provided post-issue advice in writing or in conference ([CPR 45.46](#) and PD 45 Table 13). This would push FRC to £17,823, or 118% of the value of the claim. Assuming the lawyers are registered for VAT, the total is £21,387.60, which is 143% of the value of the claim. If London weighting applies (see [CPR 45.3](#)), FRC are increased by 12.5%, which would bring the total to £24,061.05, equivalent to 160% of the value of the claim. Disbursements, which are also recoverable under [CPR 45.59](#) if reasonably incurred, are likely to include court fees and the fees of experts.
- 418 [CPR 45.50\(2\)\(iv\)](#).
- 419 [CPR 45.6\(3\)](#), which has an extended definition for this.
- 420 [CPR 45.50\(2\)\(b\)\(ii\)](#). For mixed claims the values are added together, [CPR 45.50\(2\)\(b\)\(iii\)](#).
- 421 [CPR 45.50\(2\)\(c\)](#) and PD 45 Table 14. The relevant date in Table 14 is the first date set for the relevant step by the court, and not any agreed extension, unless the court orders otherwise: [CPR 45.50\(2\)\(a\)](#). Like FRC on the fast track, there are special rules for split trials on the intermediate track, see [CPR 45.51](#).
- 422 [CPR 45.50\(2\)\(c\)](#).
- 423 [CPR 45.50\(3\)](#).
- 424 [CPR 45.50\(2\)\(d\)](#) and PD 45 Table 14. The costs for stages S2, S7 and S14 (legal advice and drafting, and attendance at ADR meetings) are only allowed if provided by a specialist legal representative within their area of specialist expertise or by the intended trial advocate, and then only if the cost is justified ([CPR 45.50\(4\)](#)).
- 425 2024 version of PD 45 Table 14, stage S1.
- 426 2024 version of PD 45 Table 14, stage S8 for band 4, FRC through to trial, of £29,938 plus 22% of damages (£5,500), plus S2 for specialist drafting of the statement of case of £2,374, plus S9 solicitor attending trial for two days of £2,890, S10 counsel's brief fee for day 1 of the trial of £5,988 and S11, counsel's refresher for day 2 of £2,994, comes to a total FRC of £49,684, before VAT.
- 427 Claims which are, or which would normally, be allocated to the fast track (including noise induced hearing loss claims) or intermediate track.
- 428 Which are recoverable together with court fees: [CPR 45.8](#).
- 429 [CPR 45.9](#). This escape clause is likely to prove controversial, as attested by the equivalent provision in CPR s.IIIA before 2023, and cases like *Ferri v Gill [2019] EWHC 952 (QB)*; and *Ho v Adelekun [2019] EWCA Civ 1988*.

- 430 CPR 45.10. CPR 1.6 and PD 1A make detailed provision to ensure the overriding objective is met if a party or a witness
is vulnerable.
- 431 CPR 45.3.
- 432 CPR 45.13.
- 433 CPR 45.10(1)(c).
- 434 CPR 45.9(2) and CPR 45.10(2).
- 435 CPR 45.11.
- 436 CPR 45.3. “London” is defined in PD 45 by reference to the areas served by a list of County Court hearing centres.
- 437 CPR 45.13(3)(a).
- 438 CPR 45.13(1).
- 439 CPR 45.13(2).
- 440 CPR 26.9(6)(b) and 26.9(7)(c)(ii).
- 441 See further Ch.21 Experts esp. paras 21.107 ff.
- 442 CPR 28.14(2)(a).
- 443 CPR 45.62.

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Costs in Group Litigation

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 28 - Costs

Costs in Group Litigation

- 28. 165** Group litigation is governed by CPR 19 s.III.⁴⁴⁴ CPR 46.6 lays down general costs rules for cases in which the court has made a group litigation order (GLO) under CPR 19.11. A distinction is drawn between common costs and individual costs. The former are costs incurred in relation to GLO issues—i.e. issues common to all the group members. Common costs also include costs incurred in a claim that is proceeding as a test claim—i.e. a claim in which the issues are litigated for the benefit of the group as a whole—and costs incurred by legal representatives in administering the group litigation. Individual costs are costs incurred in relation to an individual claim on the group register. As a general rule, the common costs are divided equally between members of the group and each member is liable severally, which means that a litigant cannot be made to pay more than their share of the common costs even if some or all other members of the group are unable to pay their share (CPR 46.6(3)). Common costs are not fundamentally different from individual costs, except that they are usually shared between litigants in the group for the purpose of keeping costs down. There is no need for a special solicitor and own client funding contract for the common costs, even before a GLO is made.⁴⁴⁵ In addition, each litigant is entirely liable for costs incurred in relation to individual issues that concern only their claim.⁴⁴⁶
- 28. 166** Where a claim is removed from the group register, the court may make an order for costs in that claim which includes a proportion of the common costs incurred up to the date on which the claim is removed (CPR 46.6(7)). If a claimant accepts a settlement offer before the group claim is concluded, the settlement will normally also deal with the costs. A claimant who discontinues their claim is normally liable for the defendant's costs.⁴⁴⁷ But the application of this rule in group litigation may cause injustice, because at the point of discontinuance it may be unknown whether the claimants as a whole would be successful in the common issues. It would therefore be fairer that both the recoverability of common costs and the liability (if any) of discontinuing claimants for costs of common issues should be determined at the same time as orders for common costs are made in respect of those common issues. The court would then have a full picture and could make whatever order was just in all the circumstances.⁴⁴⁸ Where the court makes a costs order in relation to an interim hearing, it must determine the proportion of the costs that is attributable to common costs and the proportion attributable to individual costs.
- 28. 167** The principle that costs follow the event applies to group claims as it does in any other proceedings. Where claimants recover only part of their claim, the court may apportion the costs between claimants and defendants to reflect their overall success.⁴⁴⁹ However, as in other types of litigation, the court has a discretion and may make a different order, whether prospectively or retrospectively. For example, where the determination of test cases is for the benefit of defendants who are interested in obtaining a definitive ruling, the court may order the defendants to pay the costs even if some of the claimants failed to better a CPR 36 offer.⁴⁵⁰ The court has stressed the importance of controlling costs through the exercise of its case and costs management powers in group litigation, in order to keep costs proportionate.⁴⁵¹

Footnotes

444 See the discussion in Ch.13 Joining Claims and Parties.

445 *Brown v Russell Young & Co [2007] EWCA Civ 43; [2008] 1 W.L.R. 525*. Common costs (as well as individual costs) are therefore covered by the standard forms of CFA.

446 *AB v Liverpool City Council (costs) [2003] EWHC 1539 (QB).*

447 See generally Ch.14 Discontinuance and Stays 14.13 ff.

448 *Sayers v Merck SmithKline Beecham Plc [2002] EWCA Civ 2017; [2002] 1 W.L.R. 2274.*

449 *Nationwide Building Society v Various Solicitors (No.4) [1999] C.P.L.R. 606.*

450 But see *Allen v BREL Ltd (CA, unreported, 6 November 1998).*

451 *Solutia UK Ltd v Griffiths [2001] EWCA Civ 736; [2001] C.P.L.R. 419.*

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Qualified One-way Costs Shifting

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 28 - Costs

Qualified One-way Costs Shifting

Introduction

28. 168 The abolition of the recoverability of CFA success fees and of ATE premiums laid bare the fact that for the vast majority of persons in this country it would be prohibitively expensive to meet an adverse costs order in contested litigation. This feature of the English system could cause special hardship in personal injury litigation. The injustice of, in effect, obliging the victims of personal injury to bear the burden of their loss because they are too poor to afford the risk of an adverse costs order has been considered socially and morally unacceptable, at least since the introduction of the legal aid system. When legal aid proved unaffordable, personal injury claimants were provided with a CFA system which turned them into super-claimants, claimants who could litigate without any expense or risk of an adverse costs order. True, the old CFA system was open to all, not just personal injury claimants. But it was originally introduced for such claimants and when it was subsequently opened to all claimants, it was mainly personal injury claimants who benefited. To fill the gap after the abolition of CFA success fee recoverability, and as recommended in Jackson LJ's Final Report, Qualified One-way Costs Shifting (QOCS) was introduced in 2013. QOCS usually provides personal injury claimants with immunity from an adverse costs order in the event that their claim is unsuccessful. The central rationale of QOCS is that the burden on defendants and their insurers in foregoing their costs in claims defendants win is less than their burden of paying success fees and ATE premiums in CFA cases they lose.⁴⁵² Its purpose is to promote access to justice in personal injury claims, while deterring frivolous claims.⁴⁵³

28. 169 A number of considerations prompted Jackson LJ to recommend this system.⁴⁵⁴ First, the defendant is almost invariably either insured or a large organisation which has adopted the policy of paying personal injury claims as and when they arise, rather than taking out insurance. The parties' positions in personal injury claims are asymmetric in the sense that claimants tend to be poorly resourced and are one-time players, whereas defendant insurers are well-resourced repeat-player organisations. Statistically, claimants are successful in the majority of personal injury claims. When defendants are successful they seldom recover costs in practice and therefore derive little benefit from the bilateral costs-shifting rule. The principal objective of recoverable ATE insurance premiums and CFA success fees was to protect claimants against adverse costs orders. One-way costs shifting would be a less expensive method of achieving the same objective, Jackson LJ concluded. He thought it "inevitable that, provided the costs rules are drafted so as (a) to deter frivolous or fraudulent claims and (b) to encourage acceptance of reasonable offers, the introduction of one-way costs shifting will materially reduce the costs of personal injuries litigation. One layer of activity, namely ATE insurance against adverse costs liability, will have been removed from the personal injuries process".⁴⁵⁵

Effect of QOCS

28. 170 The QOCS system is fleshed out in CPR 44 s.II, which is intended to be a complete code on defendants enforcing costs orders against personal injuries claimants.⁴⁵⁶ It applies to proceedings which include a claim for damages for personal injuries,⁴⁵⁷ a claim under the Fatal Accidents Act 1976 or a claim by the estate of a personal injury victim (CPR 44.13(1)). QOCS applies to all the damages that are consequential on an injury, such as loss of earnings and nursing care, but not to property damage which is not consequent on the actual injury, such as vehicle damage.⁴⁵⁸ It applies in favour of the claimant both at first instance and

on any appeal,⁴⁵⁹ but does not apply in favour of a defendant who is not themselves bringing a personal injuries claim, but who is seeking an indemnity or contribution from a Pt 20 defendant.⁴⁶⁰ Claims for pre-action disclosure are excluded from the scheme. The effect of exemption from costs is defined by CPR 44.14(1) in a convoluted and opaque manner which only the initiated can make out:

“Subject to rules 44.15 and 44.16, orders for costs made against a claimant may be enforced without the permission of the court but only to the extent that the aggregate amount in money terms of such orders does not exceed the aggregate amount in money terms of any orders for or agreements to pay or settle a claim for, damages, costs and interest made in favour of the claimant.”

Put into plain words, this provision means that while an adverse costs order may be made against personal injury claimants, it may not be enforced to recover more than the damages, interest and costs payable to the claimant.⁴⁶¹ Where the claim has been dismissed, the claimant will have received no damages and therefore their actual liability to pay costs would be nil. The reason why the court may nonetheless make a costs order in such circumstances is to create a potential liability which may later be enforced if circumstances radically change.⁴⁶²

28. 171 If the claimant has been only partially successful options available to the court are to award the claimant all or part of their costs, or to make no costs order, or to make an adverse costs order against the claimant. If the court makes a costs order in the claimant's favour, for whatever proportion of their costs, CPR 44.14(1) does not apply because it is confined to cases where orders of costs are “made against a claimant”. If, however, the court makes a costs order against the claimant, ordering them to pay all or part of the defendant's costs, then CPR 44.14(1) applies to limit the amount that may be recovered from the claimant to the total amount of damages, interest and costs that the claimant was awarded in judgment. That means that an unsuccessful claimant cannot be made to pay more than they recovered in judgment. A partially unsuccessful claimant may have their award totally wiped out by an adverse costs order, but cannot be made to use their own resources to pay the costs of the successful party.
28. 172 “The real reason for the byzantine wording of CPR, r 44.14(1),” Sime and French write, “is to deal with split costs orders under CPR 36.17(2) where the defendant has made a [CPR] 36 offer and the claimant has failed to achieve a judgment more advantageous than the offer.”⁴⁶³ According to CPR 36.17(2), where a claimant succeeded on liability but failed to obtain judgment for more than the defendant's CPR 36 offer, the court will, unless it considers it unjust to do so, order the claimant to pay the defendant's costs from the date of the offer and interest on these costs. But the claimant will normally be awarded their costs up to that point under CPR 44.2. In such cases the mutual costs liabilities may be set off against each other with court permission (CPR 44.12).⁴⁶⁴ Where a CPR 36 offer was made early in the proceedings, it could happen that the amount of costs due to the defendant exceeds those due to the claimant, in which case the balance may be enforced against the claimant up to the amount of the award. This interpretation of the combined effect of CPR 44.14(1) and CPR 44.12 has been confirmed by the addition of CPR 44.14(4) in 2023.⁴⁶⁵
28. 173 To ensure the completeness of any set-off, CPR 44.14(3) provides that orders for costs made against a claimant may only be enforced after the proceedings have been concluded and the costs have been assessed or agreed. To ensure that the balance of a costs order which exceeded the permitted recovery is not recorded as an unsatisfied debt, CPR 44.14(5) provides that an order for costs which is enforced only to the extent permitted shall not be treated as an unsatisfied or outstanding judgment for the purposes of any court record.

Circumstances where costs orders against QOCS claimants may be enforced without court permission

28. 174

The QOCS protection from adverse costs is removed in certain circumstances, the common denominator of which is that the claim was fundamentally unmeritorious and should not have been brought. CPR 44.15 creates exceptions to QOCS protection which, if applicable, allow defendants to enforce costs orders against claimants to their full extent without the need for court permission. It provides that orders for costs made against a QOCS claimant may be enforced to the full extent where the proceedings⁴⁶⁶ have been struck out on the grounds that—

Rule 44_15

- “(a) the claimant has disclosed no reasonable grounds for bringing the proceedings;
 - “(b) the proceedings are an abuse of the court’s process; or
 - “(c) the conduct of—
 - “(i) the claimant; or
 - “(ii) a person acting on the claimant’s behalf and with the claimant’s knowledge of such conduct,
- is likely to obstruct the just disposal of the proceedings.”

The wording of these grounds for withdrawing the QOCS protection is similar to the grounds for striking out under CPR 3.4(2).⁴⁶⁷

28. 175 CPR 44.15 has been criticised as being too wide in some respects and too narrow in others.⁴⁶⁸ It is too wide, it has been said, because it may result in the removal of the QOCS protection in situations where no serious blame for bringing unsound proceedings could be attributed to the claimant.⁴⁶⁹ The failure of a statement of case to disclose a cause of action may be due to drafting errors by legal representatives or by an LIP. A statement of case may be struck out where it seeks to break new legal ground, as where the claimant tries to establish a new duty of care. Similarly, it is said, a claim may be struck out as an abuse of process on the grounds that it could and should have been advanced in previous proceedings between the same parties, under the rule in *Henderson v Henderson*.⁴⁷⁰ If the withdrawal of QOCS in such situations were founded purely on considerations of blameworthiness, the criticism would have been justified. But, as Jackson LJ made clear in his Final Report, the scheme seeks to strike a balance between the competing interests of personal injury claimants and defendants. The grounds for withdrawal of the protection do not reflect an attempt to define just desserts. Rather, the grounds capture a policy decision that it would be unjustified to confer on personal injury claimants complete immunity from an adverse costs order because this would encourage speculative claims and impose an unwarranted extra burden on insurers and ultimately on the premium-paying public. It seems therefore reasonable to hold that where a claim has been struck out as groundless, the costs should be borne by those who advanced it and not by those who resisted it. It is perfectly justified to encourage careful consideration in bringing a personal injury claim, especially where the grounds for doing so are unclear.

28. 176 It has been suggested that the CPR 44.15 test be replaced with a different test, under which the court would have to determine whether the claim was totally without merit, similar to the test of CPR 3.4(6) and of CPR 52.20(5)–(6). The purpose of a declaration under CPR 3.4(6) or under CPR 52.20(5)–(6) that the claim or appeal is totally without merit is to alert the court to the necessity of considering a civil restraint order, so as to limit the claimant’s freedom to bring fresh proceedings and thereby prevent harassment.⁴⁷¹ The test is also used in CPR 52.4(3); where the court refuses permission to appeal without a hearing it may certify the application as totally without merit, in which case the applicant will be denied their right to have their application reconsidered at a hearing. In the situations just outlined the test of “totally without merit” is used to prevent a party from pursuing a claim or an issue in further proceedings. But “totally without merit” is unsuitable as a test for the withdrawal of the costs protection. If employed for this purpose, the court would have to consider, in effect, whether the claimant deserves to be denied the protection. Introducing a discretionary element would create further scope for argument and satellite litigation in a field where there is already too much of it. The boundary between cases where costs protection should apply and cases where it should not apply must be drawn as a matter of policy applicable across the board. It must not turn on blameworthiness that has to be determined on a case-by-case basis.

28. 177 A further criticism has been put forward: that the removal of the QOCS protection can operate in a haphazard and arbitrary way.⁴⁷² For example, it has been pointed out that an objection to a claim on the grounds that it is time-barred may be taken on a strike-out application, which if successful would result in the loss of the protection. If, by contrast, the limitation defence is dealt with as a preliminary issue and results in judgment against the claimant, the protection will not be lost because CPR 44.15 applies only where a claim has been struck out. Similarly, a claim may be struck out as groundless, but by the same token it may be dismissed by summary judgment; CPR 44.15 applies to the former case but not the latter. It is, indeed, unjustified to take away the protection from a claimant whose claim has been struck out but not from a claimant whose claim was dismissed on a preliminary issue or by summary judgment for exactly the same reasons. The test should be based on the ground for dismissal of the claim, not on the procedure used. This is particularly so with respect to striking out under CPR 3.4(2)(a) and summary judgment under CPR 24. There is no substantial difference between the question of whether “the statement of case discloses no reasonable grounds for bringing or defending the claim (CPR 3.4(2)(a)) and whether the claimant has a “real prospect of succeeding on the claim” (CPR 24(2)(a)(i)).⁴⁷³ The rule-maker should resolve this anomaly, but in the meantime no real harm will be done by the inconsistent treatment of strike-out applications and applications for summary judgment, because defendants are free to choose the former if they wish to expose the claimant to a costs risk.
28. 178 A more difficult aspect of the CPR 44.15 arrangements concerns the removal of protection from fraudulent litigants. One of the consequences of the old CFA regime was the rise in the number of fraudulent claims, especially fraudulent personal injury claims.⁴⁷⁴ The court has jurisdiction both at common law and under CPR 3.4(2)(b) to strike out a statement of case for abuse of process, and a fraudulent claim may be struck out on these grounds.⁴⁷⁵ In such circumstances, the case would fall within CPR 44.15(b) and the fraudulent litigant would be automatically deprived of QOCS protection. However, the effectiveness of this provision to expose fraudsters to adverse costs orders has been undermined by the Supreme Court’s decision in *Summers v Fairclough Homes Ltd*,⁴⁷⁶ which considerably restricted striking out for fraud. However, as we shall presently see, there is an alternative route to removal of QOCS protection from fraudulent claimants, namely court permission to enforce a costs order under CPR 44.16.

Circumstances where costs orders against QOCS claimants may be enforced with court permission

28. 179 In addition to automatic removal of costs protection, discussed above, CPR 44.16 makes provision for discretionary removal of the protection. CPR 44.16(1) states:

Rule 44_16:(1)

“Orders for costs made against the claimant may be enforced to the full extent of such orders with the permission of the court where the claim is found on the balance of probabilities to be fundamentally dishonest.”

Where a personal injury claim is found to be fraudulent in a judgment on the merits, the protection is not automatically removed because CPR 44.15 applies only to claims that have been struck out. The intention of CPR 44.16(1) is to empower the court in such situations to give permission to the defendant to enforce a costs order against the claimant. The court may do so only where the claim was found on the balance of probabilities to be fundamentally dishonest. It is not enough that the court has dismissed a claim because it did not believe the claimant’s evidence. It has to have made a positive finding that the claim was fundamentally dishonest. A costs order made against a claimant may be on a standard or indemnity basis and may be subject to a summary or detailed assessment (PD 44 para.12.7).

28. 180

A claim can be fundamentally dishonest if there is dishonesty going to the root of the whole case or to a substantial part of the case.⁴⁷⁷ *Summers v Fairclough Homes Ltd*,⁴⁷⁸ provides a good example. The claimant brought proceedings for £800,000 alleging permanent disability as a result of an accident. He was found to have suffered no disability but was awarded £80,000 for genuine loss. It would be open to the court in such a case to permit the defendant to enforce a costs order against the claimant to the full extent, and not just limited to the £80,000.⁴⁷⁹ PD 44 makes it clear that where CPR 44.16(1) or (2)(a) apply the claimant will normally be ordered to pay the defendant's costs even if this exceeds the amount of damages, interest and costs awarded to the claimant (PD 44 para.12.6).

28. 181 It is an elementary aspect of fairness that serious imputations or findings in any litigation should only be made if the claimant is given a proper opportunity of dealing with the allegations and defending themselves.⁴⁸⁰ While formally making an allegation of fundamental dishonesty in the defence is not a requirement in order to invoke CPR 44.16(1),⁴⁸¹ there should be a sufficient statement in the defence denying the truth of the facts which are disputed by the defendant.⁴⁸² If, as will be usual, the claimant gives evidence at trial, the allegation needs to be put in cross-examination.⁴⁸³
28. 182 Where the claimant, faced with incontrovertible evidence of their fraud, abandons their claim by serving a notice of discontinuance, PD 44 para.12.4(c) states that the court may “direct that issues arising out of an allegation that the claim was fundamentally dishonest be determined notwithstanding that the notice has not been set aside pursuant to rule 38.4”.⁴⁸⁴ This provision obviously applies where the claimant discontinues the claim in its entirety. But what if the claimant drastically reduces their claim on being confronted with evidence of their deceit? To revert to the facts of *Summers* above,⁴⁸⁵ suppose a claimant seeks £800,000 for permanent disability. Upon this claim being shown to be false, the claimant reduces their claim to £80,000 for genuine loss. Technically, the claim has not been discontinued. But the reality is that the claimant has so drastically changed the nature of the claim that it can be said that they brought to an end the original claim and substituted it with a very different claim.⁴⁸⁶ There is no reason why in such situations PD 44 para.12.4(c) should not apply.
28. 183 Provision is made in CPR 44.16(2)(a) for cases where a personal injury claim is made for the financial benefit of a person other than the claimant or a defendant within the meaning of the Fatal Accidents Act 1976 s.1(3) (excluding a claim in respect of the gratuitous provision of care, earnings paid by an employer or medical expenses). In such situations the court may make an order for costs against a person, other than the claimant, for whose financial benefit the whole or part of the claim was made (CPR 44.16(3)). Examples of such claims are subrogated claims and claims for credit hire (PD 44 para.12.2). For instance, an insurer who has paid the insured in respect of an injury caused by a third party may sue the third party on behalf of the insured. QOCS applies to such claims, but the court has the power to order the insurer to pay costs if it considers just to do so.
28. 184 Discretionary enforcement is also possible in mixed claims pursuant to CPR 44.16(2)(b).⁴⁸⁷ A flexible approach needs to be taken in these cases. Where a claim can, in the round, be fairly described to be a personal injury claim, a discretionary costs order achieving a costs neutral outcome for the claimant taking into account the damages, interest and costs awarded to the claimant, will probably be the proper outcome. By way of contrast, if the personal injury elements were “tacked on” in an attempt to shelter behind QOCS protection, the claimant is likely to be treated in a similar way to any unprotected party.⁴⁸⁸ An overly technical approach, weighing seven factors, was adopted to this question in *Amjad v UK Insurance Ltd*.⁴⁸⁹

Footnotes

452 *Adelekun v Ho* [2021] UKSC 43 [3]; *Scout Association v Bolt Burdon Kemp LLP* [2023] EWHC 2575 (KB) [22].

453 *Achille v Lawn Tennis Association Services Ltd* [2022] EWCA Civ 1407.

454 Jackson LJ, Final Report Ch.19.

455 Jackson LJ, Final Report Ch.19 para.2.11.

- 456 *Adelekun v Ho [2021] UKSC 43*. This point survives the reversal of the decision by the Civil Procedure (Amendment) Rules 2023, SI 2023/105. QOCS does not apply if there is a pre-commencement funding arrangement (CPR 44.17), which is an expression defined in CPR 48.2. That definition excludes insolvency, publication etc proceedings, being the categories where recoverable CFA success fees and ATE premiums continued after 2013. *Birley v Heritage Independent Living Ltd [2025] EWCA Civ 44; [2025] 1 W.L.R. 2041* held that in these exceptional cases both CFA recoverability and QOCS can apply at the same time.
- 457 This includes a claim against the Motor Insurers' Bureau under the Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003: *Howe v Motor Insurers' Bureau [2017] EWCA Civ 932; [2018] 1 W.L.R. 923*.
- 458 *Brown v Commissioner of Police of the Metropolis [2020] 1 W.L.R. 1257*. Adding a claim such as a vehicle damage claim makes the case a mixed claim within CPR 44.16(2)(b), which means that whether an adverse costs order against the claimant may be enforced is in the discretion of the court.
- 459 *Blair v Wickes Building Supplies Ltd (No.2) [2020] 1 W.L.R. 1246*.
- 460 *Wagenaar v Weekend Travel Ltd [2014] EWCA Civ 1105; [2015] 1 W.L.R. 1968*. Where a defendant counterclaims for their own personal injuries, QOCS only protects the claimant in relation to the costs of the claim, and only protects the defendant on the costs of the counterclaim: *Waring v McDonnell (County Court at Brighton, unreported, 6 November 2018)*. Note, however, the conflicting decision in *Ketchion v McEwan (County Court at Newcastle, unreported, 28 June 2018)*.
- 461 The wording of CPR 44.14(1) was amended by the Civil Procedure (Amendment) Rules 2023 (SI 2023/105) to add “or agreements”, thereby overturning the decision in *Cartwright v Venduct Engineering Ltd [2018] EWCA Civ 1654; [2018] 1 W.L.R. 6137*, which held that the original wording meant CPR 44.14(1) did not apply to compromise agreements, including Tomlin orders.
- 462 The idea was borrowed from the legal aid legislation, where a costs order against a publicly funded party, who is by definition indigent, could become enforceable if for example they won the lottery (such an order used to be described as a football pools order; see further below, paras 28.302 ff).
- 463 S. Sime and D. French (eds), Blackstone's Guide to the Civil Justice Reforms 2013 (Oxford: Oxford University Press, 2013), para.10.30.
- 464 A similar outcome is reached where both sides have costs orders, and they are set off against each other under CPR 44.12: see *Howe v Motor Insurers' Bureau (No.2) (CA, unreported, 6 July 2017)*.
- 465 Added by the Civil Procedure (Amendment) Rules 2023 (SI 2023/105), and reversing *Adelekun v Ho [2021] UKSC 43*, where the Supreme Court applied an overly literalistic interpretation on CPR 44.14(1).
- 466 “Proceedings” in CPR 44.15 means the whole claim. It is not engaged in a claim combining claims for personal injuries and for non-personal injuries damages, even if the personal injuries allegations are struck out, where the non-personal injury claim survives: *Achille v Lawn Tennis Association Services Ltd [2022] EWCA Civ 1407*. In this situation enforcement of any order for costs of the strike out application is deferred to the conclusion of the proceedings under CPR 44.14(3), and either set-off against any award of damages, or dealt with under the discretion in CPR 44.16.
- 467 For discussion of the jurisdiction to strike out on these grounds, see Ch.12 Case Management Pt II paras 12.250 ff.
- 468 S. Sime and D. French (eds), Blackstone's Guide to the Civil Justice Reforms 2013 (Oxford: Oxford University Press, 2013) paras 10.37–10.38.
- 469 S. Sime and D. French (eds), Blackstone's Guide to the Civil Justice Reforms 2013 (Oxford: Oxford University Press, 2013) para.10.37.
- 470 *Henderson v Henderson (1843) 3 Hare 100*. For this rule see Ch.26 Finality of Litigation paras 26.115 ff.
- 471 See Ch.3 Fair Trial paras 3.40 ff.
- 472 S. Sime and D. French (eds), Blackstone's Guide to the Civil Justice Reforms 2013 (Oxford: Oxford University Press, 2013) paras 10.37–10.38.
- 473 See discussion in Ch.9 Disposal Without Trial paras 9.85 ff.
- 474 See Ch.12 Case Management Pt II para.12.292 ff.
- 475 *Arrow Nominees Inc v Blackledge [2000] EWCA Civ 200; [2000] C.P. Rep. 59; Summers v Fairclough Homes Ltd [2012] UKSC 26*; and see Ch.12 Case Management Pt II paras 12.298 ff.
- 476 *Summers v Fairclough Homes Ltd [2012] UKSC 26*.
- 477 *Howlett v Davies [2017] EWCA Civ 1696; [2018] 1 W.L.R. 948*. The fundamental dishonesty aspect is now mirrored in the Criminal Justice and Courts Act 2015 s.57, which allows the court to dismiss the genuine element of a partially successful personal injury claimant's claim, where it is satisfied that the claimant was “fundamentally dishonest in relation to the primary claim or a related claim”. Authorities on the meaning of fundamental dishonesty under s.57 are

therefore likely to be relevant to [CPR 44.16](#), and vice versa. [Section 57](#) and related case law are discussed in [Ch.12 Case Management Pt II](#) paras 12.305 ff.

478 *Summers v Fairclough Homes Ltd [2012] UKSC 26*.

479 PD 44 para.12.4(d) states: “the court may, as it thinks fair and just, determine the costs attributable to the claim having been found to be fundamentally dishonest.”

480 *Vogon International Ltd v Serious Fraud Office [2004] EWCA Civ 104*.

481 *Howlett v Davies [2017] EWCA Civ 1696; [2018] 1 W.L.R. 948* [30], [32].

482 *Kearsley v Klarfeld [2005] EWCA Civ 1510; [2006] 2 All ER 303; Howlett v Davies [2017] EWCA Civ 1696; [2018] 1 W.L.R. 948* [31].

483 *Haringey London Borough Council v Hines [2010] EWCA Civ 1111; [2011] HLR 6*.

484 For guidance on how the court will exercise its discretion whether to make such a direction, see *Alpha Insurance A/S v Roche [2018] EWHC 1342 (QB)*, and [Ch.14 Discontinuance and Stays](#) para.14.29.

485 *Summers v Fairclough Homes Ltd [2012] UKSC 26*.

486 See, by way of analogy, [Ch.14 Discontinuance and Stays](#) para.14.4; and *Galazi v Christoforou [2019] EWHC 670 (Ch)*.

487 CPR 44.16(2)b), applied in: *Jeffreys v Commissioner of Police of the Metropolis [2018] 1 W.L.R. 3633; Siddiqui v University of Oxford [2018] EWHC 536 (QB)*; and *Brown v Commissioner of Police of the Metropolis [2020] 1 W.L.R. 1257*, discussed above at para.28.170.

488 *Brown v Commissioner of Police for the Metropolis [2020] 1 W.L.R. 1257*, Coulson LJ at [57], [58].

489 *Amjad v UK Insurance Ltd [2023] EWHC 2832 (KB)* [96], no doubt to justify interfering with the exercise of discretion.

Funding Arrangements and Costs

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 28 - Costs

Funding Arrangements and Costs

Introduction

- 28. 185** A solicitor will act for a client under a contract of retainer. This will specify the work to be done and how the solicitor is to be remunerated, and other details of the lawyer-client relationship as prescribed by the Solicitors Regulation Authority. Traditionally, clients pay their lawyers as and when they are billed. Work done under the retainer is secured by the solicitor's equitable lien, which is in the nature of an equitable charge enforceable against the proceeds of the litigation up to the amount contractually due to the solicitor, and has priority over the client and anyone claiming through the client.⁴⁹⁰ An important purpose of the solicitor's lien is to promote access to justice for clients with insufficient means to pay their lawyers in the usual way, by enabling the lawyer to act for the client on credit, with reasonable security for their fees against recoveries.⁴⁹¹ Given the high and unpredictable cost of litigation, few could afford litigation at their own expense. Until the end of the twentieth century, lawyers were not permitted to provide representation in litigation on a contingency fee basis; it was prohibited for a lawyer to charge fees depending on the outcome of the case. When it was introduced, publicly funded legal aid was widely available, but the rapid and seemingly inexorable rise in the legal aid budget towards the end of the twentieth century became a matter of concern to successive governments. Resultant cuts have restricted the availability of legal aid to the point where it has virtually disappeared from most fields of civil litigation.⁴⁹² At the same time, however, government felt obliged to make provision for alternative funding arrangements.

Conditional fee agreements

- 28. 186** The first alternative funding method to be put in place was the CFA,⁴⁹³ introduced by the Access to Justice Act 1999.⁴⁹⁴ A CFA is an agreement for advocacy or litigation services which provides that the lawyer's fees and expenses, or any part of them, will be payable only in specified circumstances ([CLSA 1990 s.58\(2\)\(a\)](#)). Under a CFA the lawyer agrees with the client an hourly fee, which the lawyer agrees to forego if the client is unsuccessful. But it is also agreed that if the client is successful the lawyer will recover their base costs (i.e. the total hourly fees chargeable for the proceedings) plus a success fee calculated as a percentage of the base costs, subject to a maximum of 100 per cent of the base costs. Since a claimant is not liable to pay its lawyer if the claim is unsuccessful, a CFA is also known as a "no win, no fee" agreement. A CFA would still leave unsuccessful clients, predominantly claimants, liable for the other party's costs. To safeguard against this risk, the claimant could take out an ATE insurance policy, under which the insurer undertook to meet the claimant's adverse costs order up to a specified limit. Until the reforms of 2013, the base costs, success fee and ATE premium were recoverable as costs from the unsuccessful defendant. This enabled the government to remove legal aid from most civil litigation without denying poor litigants the benefit of cost-free and largely risk-free access to court.⁴⁹⁵ Unfortunately, the policy of seeking to make available cost-free legal services at no public expense had far-reaching implications in terms of increasing the cost to defendants' insurance companies and indirectly the public at large.⁴⁹⁶
- 28. 187** The recoverability of CFA success fees proved indefensible and unsustainable, as Jackson LJ explained in his Preliminary Report.⁴⁹⁷ Jackson LJ concluded that the system was "neither logical nor grounded in any discernible social policy".⁴⁹⁸ He

recommended the abolition of the recoverability of CFA success fees,⁴⁹⁹ and of ATE premiums.⁵⁰⁰ At the same time, Jackson LJ acknowledged in his Final Report that, to maintain access to justice to those who cannot afford an open-ended financial commitment, a variety of funding methods should be made available.⁵⁰¹ In the event, the legislation implemented abolished recoverable CFA success fees and ATE premiums, but left CFAs otherwise available. A form of contingency fees, namely DBAs, has been introduced. And, as we have already seen, QOCS was established to remove the risk of adverse costs orders in personal injury claims.

Retained CFA recoverability and the ECHR

28. 188 The abolition of recoverability does not apply to mesothelioma proceedings.⁵⁰² In such proceedings success fees and ATE premiums remain recoverable. ATE premiums remain recoverable in publication and privacy⁵⁰³ claims, and in clinical negligence claims, but in clinical negligence claims, only for the cost of obtaining reports on liability and causation.⁵⁰⁴ Recoverability of success fees and ATE premiums has raised serious questions over their compatibility with ECHR art.6, which obliges states to maintain equality of arms between opposing parties, and art.10, which protects freedom of expression, concerns which continue to apply to these preserved areas of recoverability.
28. 189 In *Campbell v MGN*⁵⁰⁵ the claimant, a famous supermodel, sued the defendant newspaper for breach of confidence and was awarded £3,500 in damages. Base costs and success fees claimed were just under £500,000 and £365,077 respectively. The ECtHR accepted that the statutory scheme underpinning CFAs performed a legitimate aim in that it promoted the widest public access to legal services for civil litigation funded by the private sector, and thus served the protection of the rights of others within the meaning of art.10(2).⁵⁰⁶ The ECtHR drew attention to Jackson LJ's view that the defects of the CFA system produced in defamation and privacy cases the "most bizarre and expensive system that it is possible to devise",⁵⁰⁷ and failed to achieve the intended objective of extending access to justice to the broadest range of persons. On the facts, ordering the payment of substantial success fees was plainly an interference with the newspaper's right to freedom of expression.⁵⁰⁸ The court decided that requiring the applicant to pay success fees to the claimant was a violation of art.10 because it was not necessary in a democratic society, was disproportionate having regard to the legitimate aims sought to be achieved, and exceeded even the broad margin of appreciation accorded to the state in respect of general measures pursuing social and economic interests.⁵⁰⁹
28. 190 While *MGN Ltd v UK* had little effect in domestic case law,⁵¹⁰ there have been further developments in the ECtHR. Unlike *MGN Ltd v United Kingdom*, where the newspaper could be expected to be insured against its litigation liabilities, *Coventry v United Kingdom* was a noise nuisance claim where both parties were "one-shot" litigants.⁵¹¹ Base costs and success fees again far exceeded the value of the claim. The ECtHR held that while the CFA scheme had a basis in domestic law and pursued a legitimate aim, when viewed as a whole, the excessive and arbitrary burden it imposed on uninsured defendants infringed the principle of equality of arms. It consequently exceeded the wide margin of appreciation accorded to the state, and both the success fee and ATE recovery breached art.6 and Protocol 1 art.1. Both cases were applied in another media law case, *Associated Newspapers Ltd v United Kingdom*.⁵¹² This drew a distinction between CFA success fees, which unless the newspaper's behaviour is particularly egregious, will breach art.10, whereas the proportionality of recovery of ATE premiums should be considered on a case-by-case basis. This has more or less been anticipated by the position in publication and privacy claims, where since 2019 it has only been ATE premiums that remain recoverable. It may be questioned, however, given the decision in *Coventry* whether the continuing recoverability of success fees in mesothelioma claims remains compliant with art.6 and Protocol 1, art.1.

CFAs from April 2013

28. 191

CLSA 1990 ss.58 and 58A (as amended by LASPO 2012 s.44) permit CFAs provided they comply with the requirements of the 1990 Act s.58(3). Any other CFA is unenforceable (CLSA 1990 s 58(1)). To assist practitioners, the Law Society has developed a standard form CFA.⁵¹³ A party represented on a CFA basis agrees to pay a lawyer a success fee in addition to the base costs,⁵¹⁴ which is normally a function of the hourly fee agreed by the lawyer and the client. The success fee is calculated as a percentage of the base costs up to a permissible maximum. As of April 2013, a costs order may not include any payment in respect of a success fee (CLSA 1990 s.58A(6)). A success fee is therefore recoverable only from the lawyer's own client. Permissible CFAs fall into two categories: personal injury CFAs and non-personal injury CFAs.

Non-personal injury CFAs

28. 192 A CFA concerning proceedings other than personal injury claims must comply with the following conditions (CLSA 1990 s.58(3))⁵¹⁵: (1) it must be in writing; (2) it must not relate to proceedings which cannot be the subject of an enforceable CFA (such as family proceedings)⁵¹⁶; and (3) if the agreement includes a success fee, it must (a) relate to proceedings of a description specified by statutory instrument⁵¹⁷ and (b) state the percentage uplift, which must not exceed the percentage specified by order made by the Lord Chancellor (currently 100 per cent).

Personal injury CFAs

28. 193 A CFA in a personal injury claim⁵¹⁸ must comply with the following conditions (CLSA 1990 ss.58(3)–(4)), 58(4A)–(4B)): (1)it must be in writing; (2)it must not relate to proceedings which cannot be the subject of an enforceable conditional fee agreement (family proceedings may not be subject to a CFA); (3)if it provides for a success fee— (a)it must relate to proceedings of a description specified by statutory instrument⁵¹⁹; (b)it must state the percentage uplift which must not exceed a percentage prescribed by statutory instrument (currently 100 per cent); (c)the agreement must provide that the success fee is subject to a maximum limit, which must be expressed as a percentage of the descriptions of damages awarded in the proceedings that are specified in the agreement. These are: (i)general damages for pain, suffering and loss of amenity, and (ii)damages for pecuniary loss, other than future pecuniary loss, net of any sums recoverable by the Compensation Recovery Unit of the Department for Work and Pensions; and (iii)the maximum limit must not exceed 25 per cent in respect of first instance proceedings, or 100 per cent in respect of appeal proceedings.

28. 194 A CFA success fee is therefore subject to two very different caps. First, it is impermissible to agree an uplift success fee which is higher than 100 per cent of the base costs (i.e. the total hourly fees chargeable in respect of the proceedings). Second, the amount of money payable by the client in respect of the uplift success fee is subject to an upper limit, or cap, which is calculated as a percentage of the damages. Consequently, there are four variables that affect the claimant's liability to a success fee: the base costs, the percentage of the uplift of the base costs, the amount of damages awarded in respect of specified heads of damages and, finally, the maximum percentage that may be taken out of such damages.

28. 195 The amount payable by a claimant in respect of the uplift success fee is limited to a maximum of 25 per cent of the specified heads of damages only.⁵²⁰ The specified heads of damages are, as we have just seen, (i) general damages for pain, suffering and loss of amenity and (ii) damages for pecuniary loss, other than future pecuniary loss, net of any sums recoverable by the Compensation Recovery Unit of the Department for Work and Pensions. Thus damages for future pecuniary loss (for instance, for treatment, for meeting special needs and the like) are not taken into account and the claimant can keep them intact. This limitation is designed to ensure that the lawyer's success fee does not consume a disproportionate amount of the damages awarded and does not leave the personal injury claimant with insufficient funds for future care and means of living.
28. 196 The limit on the total amount of a success fee payable by a claimant goes hand in hand with two other measures designed to ensure that personal injury claimants are not deterred from taking proceedings and to safeguard compensation awarded to personal injury claimants from excessive deduction in respect of lawyers' fees. First, as we have seen, the QOCS system in CPR 44 s.11 has been introduced, which effectively relieves personal injury claimants of liability in costs to successful defendants.⁵²¹ This means that claimants do not have to take out ATE insurance. The second measure is a 10 per cent increase in personal injury awards in general damages, which was implemented by *Simmons v Castle*.⁵²²

Damages-based agreements

28. 197 A DBA is an agreement between a party in the position of being a claimant⁵²³ and a legal representative whereby the latter's fee is calculated as a proportion of the value of the judgment recovered by the claimant, normally as a percentage of the damages awarded to the claimant.⁵²⁴ This kind of retainer, common in the US, is known as a contingency fee agreement. Contingency fee agreements were generally unenforceable before LASPO 2012. DBAs are now lawful and enforceable in most types of legal proceedings subject to certain conditions.⁵²⁵ Rules of court may be made for the assessment of costs where the receiving party is represented on a DBA basis.⁵²⁶ Accordingly, DBAs are governed by CLSA 1990 s.58AA, by CPR 44.18 and by the Damages-Based Agreements Regulations 2013 (DBAR 2013).
28. 198 The indemnity rule, whereby a receiving party cannot recover more than they are bound to pay for their litigation services, has been modified to allow for recovery by DBA clients. Hence, the fact that a party has entered into a DBA will not affect the making of any order for costs which otherwise would be made in favour of that party (CPR 44.18(1)). The costs of a successful DBA party are calculated in accordance with CPR 44.3 in the normal way (CPR 44.18(2)(a)). That is to say, the DBA party is entitled to claim their lawyers' base costs subject to the requirements of reasonableness and proportionality. However, a DBA party may not recover more than the total amount payable by that party under the DBA for legal services provided under that agreement (CPR 44.18(2)(b)).
28. 199 A DBA is enforceable only if it complies with the conditions laid down by CLSA 1990 s.58AA.⁵²⁷ A DBA must be in writing and must not relate to proceedings that cannot be subject to an enforceable CFA. It must not provide for payment above the prescribed amount. Its terms and conditions must comply with the requirements of the statute and the relevant rules. The DBA must specify the claim or proceedings to which it relates, the circumstances in which the representatives' payment, expenses and costs will be payable and the reason for setting the amount of the payment at the level agreed. The prescribed level of DBA payment is only applicable to claims at first instance (DBAR 2013 r.4(4)). There is no limit in respect to the proportion of damages that may be agreed as a fee for an appeal. The prescribed payment—i.e. the amount of fees that may be charged under a DBA (other than in employment proceedings)—varies between non-personal injury claims and personal injury claims.

DBA in non-personal injury claims

- 28.200** In non-personal injury claims a DBA must not require an amount to be paid by the client other than (a) the payment, net of: (i) any costs; and (ii) where relevant, any sum in respect of disbursements incurred by the representative in respect of counsel's fees that have been paid or are payable by another party to the proceedings; and (b) any expenses incurred by the representative, net of any amount which has been paid or is payable by another party to the proceedings ([DBAR 2013 r.4\(1\)](#)). A DBA in a non-personal injury claim must not provide for payment above 50 per cent of the sums ultimately recovered by the client ([DBAR 2013 r.4\(3\)](#)).
- 28.201** This somewhat complex phraseology ensures that a DBA lawyer is not paid a contingency fee on top of the recoverable costs. Instead, the recoverable costs go towards meeting the contingency fee.⁵²⁸ Suppose, for example, that a DBA stipulates a contingency fee of 50 per cent. The claimant recovers £100,000 in damages, and £20,000 in costs. The £20,000 will count towards the 50 per cent contingency fee so that the DBA solicitor will receive only £50,000, and the claimant will be left with £70,000. However, to the extent that the claimant is liable for the expenses incurred by the legal representative, including expert reports, these will have to be paid by the client. It must be borne in mind that a DBA claimant who has been unsuccessful will be liable for the defendant's costs.

DBA in personal injury claims

- 28.202** The allowable fees in personal injury claims are different ([DBAR 2013 r.4\(2\)](#)). The only sums recovered by the client from which the contingency payment can be met are—(i) general damages for pain, suffering and loss of amenity; and (ii) damages for pecuniary loss other than future pecuniary loss, net of any sums recoverable by the Compensation Recovery Unit of the Department for Work and Pensions. Crucially, a DBA in a personal injury case must not provide for a payment above 25 per cent of the combined sums in (i) and (ii) above, which are ultimately recovered by the client. Again, recoverable costs go towards meeting the contingency fee. Suppose that a personal injury DBA stipulates a contingency fee of 25 per cent. The claimant recovers £100,000 damages in respect of pain, suffering and loss of amenity, and £20,000 in costs. The £20,000 will count towards the 25 per cent contingency fee, so that the DBA solicitor will receive only £25,000, and the claimant will be left with £95,000. The claimant will, however, be liable for the expenses incurred by the legal representative, including expert reports, if the claimant agreed to bear them. Counsel's fees are not treated as an expense and are therefore within the cap ([DBAR 2013 r.1\(1\)](#)). Unlike a non-personal injury claimant, a personal injury claimant will not ordinarily be liable for the costs of the successful defendant due to QOCS.

Complexity of the DBA regulations

- 28.203** The law governing DBAs is complex and at the same time leaves open some important questions, as Rachael Mulheron has pointed out.⁵²⁹ For instance, the contingency fee is calculated as a percentage of "the sum recovered in respect of the claim or damages awarded". But how is the calculation going to be made when the claimant's award is reduced in respect of counterclaims or set-offs? Problems may arise with the calculation of the percentage in personal injury claims because in a global settlement it may be difficult to identify the amount attributable to pain, suffering and loss of amenity. Mulheron draws attention to serious omissions from the rules and regulations. For instance, there is no provision for the termination of a DBA,⁵³⁰ and no provisions concerning the information that has to be given to a client who enters into a DBA. She also laments the fact that different DBA regimes have been introduced for non-personal injury claims, for personal injury claims and for employment proceedings, which add complexity and increase the scope for disagreement on technical points. Given the number and intricacy of the recoverability conditions to which DBAs are subject and the shortcomings of the regulations, there is plenty of scope for satellite litigation over DBAs.

Litigation funding agreements

28. 204 A litigation funding agreement (LFA) is an agreement whereby a non-party, the funder, agrees to provide a claimant funds to meet the expense of taking legal proceedings or arbitration, in exchange for a share of the proceeds of a successful claim. A Code of Conduct for Litigation Funders has been established.⁵³¹ An LFA must state the extent to which a funder will be liable for an adverse costs order, ATE premiums and any security for costs that may be required. It will make provision for the input that the funder may have in respect of decisions that may need to be taken in the course of litigation, such as whether to settle and on what terms. A costs order may be made against a funder.⁵³² Legislation regulating the enforceability of LFAs is expected in the aftermath of *R (PACCAR Inc) v Competition Appeal Tribunal*.⁵³³

Footnotes

490 *Gavin Edmondson Solicitors Ltd v Haven Insurance Co Ltd [2018] UKSC 21*. The equitable lien can be displaced if new security is taken by the solicitor that is inconsistent with the equitable lien: *In re Peak Hotels and Resorts Ltd [2022] UKSC 35*.

491 *Bott & Co Solicitors Ltd v Ryanair DAC [2022] UKSC 8* [154].

492 See discussion in A.A.S. Zuckerman, “A Reform of Civil Procedure—Rationing Procedure Rather Than Access to Justice” (1995) 22 *Journal of Law and Society* 155.

493 For the background see *Callery v Gray [2001] EWCA Civ 1117; [2001] 3 All ER 833 (CA); Callery v Gray (Nos.1-2) [2002] UKHL 28; [2002] 1 W.L.R. 2000 (HL)*; and *Hollins v Russell [2003] EWCA Civ 718; [2003] 4 All ER 590*. A CFA is an ordinary contract, and has to be construed in the same way as any other contract: *Higgins & Co Lawyers Ltd v Evans [2019] EWHC 2809 (QB); [2020] 1 W.L.R. 141*.

494 CLSA 1990 ss.58, 58A, inserted by the Access to Justice Act 1999.

495 For an extensive discussion of the system see: A. Walters and J. Peysner, “Event Triggering Financing of Civil Claims: Lawyers, Insurers and the Common Law” (1999) 8(1) *Nottingham L.J.* 1; J. Peysner, “Revolution by Degrees: From Costs to Financing and the End of the Indemnity Principle” (2001) 1 *Web J.C.L.I.*; J. Peysner, “What’s Wrong with Contingency Fees” (2001) 10(1) *Nottingham L.J.* 22; See also the discussion in the second edition of this work, at paras 27.141 ff.

496 *Callery v Gray [2001] EWCA Civ 1117; [2001] 3 All ER 833* [94]; and *MGN Ltd v United Kingdom (2011) 53 E.H.R.R. 195*: see the UK government’s observations at [173].

497 Jackson LJ, Preliminary Report Vol.2 Ch.47 paras 3.1 ff.

498 Jackson LJ, Final Report p.89 para.5.6. Although this was said in the context of commercial litigation, it must be generally true.

499 Jackson LJ, Final Report p.133 para.7.1.

500 Jackson LJ, Final Report p.93 para.5.1(i).

501 Jackson LJ, Final Report Ch.12 para.4.2; *CPR 48.2(1)(b); Conditional Fee Agreements Order 2013 (SI 2013/689) art.6*; and PD 48 para.2.1.

502 LASPO 2012 s.48.

503 Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No 13) Order 2018 (SI 2018/1287), bringing LASPO 2012 s.44 into force for publication and privacy claims, but not s.46 on ATE premiums.

504 Recovery of Costs Insurance Premiums in Clinical Negligence Proceedings (No 2) Regulations 2013 (SI 2013/739).

505 *Campbell v MGN Ltd (No.2) [2005] UKHL 61; [2005] 4 All ER 793*.

506 *MGN Ltd v United Kingdom (2011) 53 E.H.R.R. 195* [197].

507 *MGN Ltd v United Kingdom (2011) 53 E.H.R.R. 195* [211].

508 *MGN Ltd v United Kingdom (2011) 53 E.H.R.R. 195* [192].

509 *MGN Ltd v United Kingdom (2011) 53 E.H.R.R. 195* [217], [219], [220].

- 510 Significant cases under the old system included *Sousa v Waltham Forest London Borough Council [2011] EWCA Civ 194*; *Flood v Times Newspapers Ltd (No 2) [2017] UKSC 33*; and *Lawrence v Fen Tigers Ltd (No.3) [2015] UKSC 50*.
 511 *Coventry v United Kingdom 6016/16 (unreported, 11 October 2022)*. This was an appeal from *Lawrence v Fen Tigers Ltd (No.3) [2015] UKSC 50*.
- 512 *Associated Newspapers Ltd v United Kingdom [2025] 81 EHRR 1*.
- 513 A client care letter, which is often sent to the client at about the same time as the formal CFA, is generally intended to be read consistently with the CFA: *Gavin Edmondson Solicitors Ltd v Haven Insurance Co Ltd [2018] UKSC 21; [2018] 1 W.L.R. 2052*.
- 514 There are potentially difficult issues over the construction of “success” in a CFA. For claimants this is usually the recovery of any form of remedy, but for any party it might be the recovery of costs. It is conceivable that for a defendant who has a very weak case, that success might be defined as limiting damages in some way. For discussion of some of the difficulties, see *Marley v Rawlings (No.2) [2014] UKSC 51; [2015] AC 157*.
- 515 Proceedings are defined to include any sort of proceedings for resolving disputes (and not just proceedings in a court), whether commenced or contemplated (*CLSA 1990 s.58A(4)*).
- 516 *CLSA 1990 s.58A(1)(b)*.
- 517 All civil proceedings which can be subject to an enforceable CFA are specified in the *Conditional Fee Agreements Order 2013 (SI 2013/689) art.2*.
- 518 CPR 2.3 states: *claim for personal injuries* means proceedings in which there is a claim for damages in respect of personal injuries to the claimant or any other person or in respect of a person’s death, and *personal injuries* includes any disease and any impairment of a person’s physical or mental condition”.
- 519 All civil proceedings which can be subject to an enforceable CFA are specified in the *Conditional Fee Agreements Order 2013 (SI 2013/689) art.2*.
- 520 See *Herbert v HH Law Ltd [2019] EWCA Civ 527* for the circumstances in which the court may further reduce the claimant’s liability to pay their solicitors the CFA success fee.
- 521 Discussed above at paras 28.168 ff.
- 522 *Simmons v Castle [2012] EWCA Civ 1039*.
- 523 *Candey Ltd v Tonstate Group Ltd [2022] EWCA Civ 936*. This follows from the requirement in *CLSA 1990 s.58AA(3)* that the client has “obtained a specified financial benefit”. A defendant can only enter into a DBA in respect of a counterclaim.
- 524 *R (PACCAR Inc) v Competition Appeal Tribunal [2023] UKSC 28* gave an expansive interpretation of the legislation, holding that third party funding agreements where the funder is paid out of money recovered in the proceedings are DBAs. This is likely to be reversed by legislation. See para.28.38.
- 525 *CLSA 1990 s.58AA* (as amended by *LASPO 2012 s.45*).
- 526 *CLSA 1990 s.58AA(6A)*.
- 527 For the purposes of compliance with the DBAR, it is only the provisions in a contract of retainer which deal with payment out of recoveries that constitute the DBA. A retainer may therefore have alternative provisions dealing with the client’s payment obligations in the event of termination which fall outside the DBAR: *Lexlaw Ltd v Zuberi [2021] EWCA Civ 16*.
- 528 For discussion see *R. Mulheron, “The Damages-Based Agreements Regulations 2013: Some Conundrums in the ‘Brave New World’ of Funding”* (2013) 32 C.J.Q. 241.
- 529 *R. Mulheron, “The Damages-Based Agreements Regulations 2013: Some Conundrums in the ‘Brave New World’ of Funding”* (2013) 32 C.J.Q. 241.
- 530 See now *Lexlaw Ltd v Zuberi [2021] EWCA Civ 16*.
- 531 An Association of Litigation Funders of England and Wales was established in 2011; see Jackson LJ, “Third Party Funding or Litigation Funding: 6th Lecture in the Implementation Programme”, speech delivered at the Royal Courts of Justice, 23 November 2011.
- 532 *Arkin v Borchard Lines Ltd (Costs Order) [2005] EWCA Civ 6551* and see the discussion below at paras 28.265 ff.
- 533 *R (PACCAR Inc) v Competition Appeal Tribunal [2023] UKSC 28*. See para.28.38.

Costs Orders for and Against Non-Parties

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 28 - Costs

Costs Orders for and Against Non-Parties

The jurisdiction to make orders involving non-parties

28. 205 The court has a general jurisdiction under the [Senior Courts Act 1981 \(SCA 1981\) s.51\(1\)](#) to determine “by whom and to what extent the costs are to be paid”. The court may make costs orders for or against persons who were not parties to the proceedings in which the costs were incurred.⁵³⁴ The Crown is amenable to costs orders when it is a party to legal proceedings.⁵³⁵ But in *Steele Ford & Newton (a firm) v Crown Prosecution Service*,⁵³⁶ the House of Lords held that [SCA 1981 s.51](#) does not confer jurisdiction on the court to make a costs order against the Crown when it was not a party to the proceedings. The case concerned a wasted costs order made by the court of its own initiative against solicitors acting for a party in criminal proceedings. The solicitors were successful in their appeal and the Court of Appeal ordered the solicitors’ costs to be paid out of central funds. The House of Lords reversed this decision, principally because it thought that it was wrong to construe [SCA 1981 s.51](#) as enabling the court to decide that, as a matter of general policy, the burden of judicial error should fall on the taxpayer. The House of Lords was of the view that such interpretation amounted to judicial legislation under the guise of statutory interpretation and therefore offended against the constitutional convention that Parliament exercised exclusive control over both the levying and the expenditure of the public revenue. On occasion, the Lord Chancellor has made ex gratia payments out of public funds when litigants complained that they had been put to unnecessary expense in consequence of misadministration in the operation of the courts.⁵³⁷

28. 206 There may, however, be power to order costs against the Crown as a result of the [Human Rights Act 1998 s.7](#), which provides:

Section 7

- “(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may—
 (a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or
 (b) rely on the Convention right or rights concerned in any legal proceedings,
but only if he is (or would be) a victim of the unlawful act”

It is therefore possible that where a litigant has suffered harm as a result of a violation of the right to a fair trial and the harm has not been cured by the courts, the court could order the Crown to pay compensation.⁵³⁸

Exercise of the jurisdiction to impose costs liability on non-parties

28. 207

Notwithstanding the unlimited nature of the jurisdiction under the [SCA 1981 s.51](#), its exercise in relation to non-parties is limited by principles of fairness. The court cannot arbitrarily make a costs order against a person who has had no connection with the proceedings in question. There must be some connection that justifies ordering a non-party to pay costs. *Aiden Shipping Co Ltd v Interbulk Ltd, The Vimeira*⁵³⁹ provides an illustration of the type of situation in which a non-party may be ordered to pay costs. Shipowners sued their charterers in respect of damage to the ship. The charterers sued the sub-charterers in respect of the same damage. Two sets of arbitration proceedings then ensued. The owners were dissatisfied and applied to the High Court seeking remission of the award made in the arbitration between themselves and the charterers. The latter then similarly applied to have the corresponding award made in their arbitration with the sub-charterers remitted. Both applications were heard together and both were dismissed. It was held that the judge was entitled to order the owners to pay the costs that the charterers incurred in their application against the sub-charterers, because this application was inevitable once the application by the owners was made. The ship owners were effectively responsible for the proceedings that the charterers took against the sub-charterers. It was held that the costs in the charterers' application were incidental to the application made by the owners. Lord Goff explained:

“If two separate sets of proceedings are heard together, because they have common features, it may be a matter of pure chance whether the expense of presenting an argument or evidence relevant to the common feature falls within one or other of the two sets of proceedings. Sometimes, indeed, it may be very difficult to attribute costs to one set of proceedings rather than the other. It is surely consistent with the interests of justice that, in such a case, the court’s jurisdiction to make a global order for costs relating to both sets of proceedings should not be fettered by the imposition of an implied limitation on that jurisdiction.”⁵⁴⁰

- 28.208** It has been said that the court can exercise the jurisdiction to make costs orders against non-parties only in exceptional circumstances.⁵⁴¹ However, this cannot be regarded as a test since it is difficult to see how the rarity or otherwise of the particular circumstances can have a bearing on whether it is just to order a non-party to pay costs. Phillips LJ alluded to this point when he said:

“In the context of the insurance industry, the features to which I have just referred may not be extraordinary. But that is not the test. The test is whether they are extraordinary in the context of the entire range of litigation that comes to the courts. I have no doubt that they are. It must be rare for litigation to be funded, controlled and directed by a third party motivated entirely by its own interests.”⁵⁴²

The outcome of an application cannot turn on statistical frequency but must depend on fact-based considerations of justice.⁵⁴³ The factors identified by Phillips LJ, such as whether the non-party controlled the litigation for its own benefit, may provide a justification for ordering costs against a non-party regardless of whether the situation is commonplace or extraordinary.

- 28.209** There are mainly two broad reasons that may justify a costs award against a non-party.⁵⁴⁴ A non-party may be ordered to pay costs if they controlled the proceedings for their own benefit. In such a case the non-party is effectively a party, and since they would benefit from a favourable outcome of the proceedings, they should also bear the costs of an unfavourable outcome. We may refer to this ground of ordering costs as the control–benefit ground.⁵⁴⁵ The second type of justification is more complex and troublesome. It concerns situations where the non-party has helped a party to bring or sustain proceedings by providing financial or other assistance, without which the litigation would not have taken place and the successful party would not have incurred expenses. We may refer to this ground as the funding ground.⁵⁴⁶ Although the two grounds appear distinct they are bound up together because the court would not normally order a funder to pay costs unless the funder stood to benefit from the funding arrangement, as where the funder agrees to fund proceedings in exchange for a share of the recovery.⁵⁴⁷ These two grounds are therefore not mutually exclusive. Furthermore, they are not exhaustive. A costs order may be made where a person has neither controlled nor funded the litigation, as where solicitors failed to obtain legal expenses insurance for their client and failed to inform them of their costs exposure.⁵⁴⁸

Procedure for making costs orders against non-parties

28. 210 It is a requirement of procedural justice that a person against whom a court order is requested should have notice of the procedure and an opportunity to present their case before an order against them is made. It would be unfair to make a costs order against someone who was not party to the proceedings in which the costs were incurred, who had no notice of the possibility that they may be held liable to the costs of those proceedings and who had no opportunity to take steps to avoid liability. Although it was said that such notice is only a consideration to be taken into account before making a costs order against a non-party,⁵⁴⁹ it must be regarded as a crucial consideration, especially where the funder might have acted differently had they been warned of the consequences.⁵⁵⁰ This is spelt out by CPR 46.2(1), which states that where the court is considering whether to make a costs order in favour of or against a person who is not party to the proceedings “that person must: (a) be added as a party to the proceedings for the purposes of costs only; and (b) be given a reasonable opportunity to attend a hearing at which the court will consider the matter further”.
28. 211 It might still be possible to make a costs order against a non-party without adding that person as a party where the person had an involvement in the proceedings and was aware of the costs risk. It has been held, for example, that the undertaking to give expert evidence and knowledge of the duties that an expert owes to court are sufficient notice of the risk of an adverse costs order if the expert behaves improperly.⁵⁵¹ The requirement of CPR 46.2(1), just mentioned, does not apply “(a) where the court is considering whether to: (i) make an order against the Lord Chancellor in proceedings in which the Lord Chancellor has provided legal aid to a party to the proceedings; (ii) make a wasted costs order (as defined in rule 46.8); and (b) in proceedings to which rule 46.1 applies (pre-commencement disclosure and orders for disclosure against a person who is not a party)” (CPR 46.2(2)).
28. 212 CPR 46.2 reflects the general rule that a costs order against a non-party should not be made if the applicant for costs had a claim against the non-party and could have joined them as party to the proceedings. Thus, where the non-party could have been joined to a claim for breach of contract by adding them as a co-defendant for inducing the breach of contract, the claimant was not entitled to claim costs against the non-party after judgment in the claim.⁵⁵² On an application to add a non-party the applicant should explain the nature of the claim and the purpose for adding the non-party. The court should not, at the joinder stage, attempt a preliminary assessment of whether a non-party costs order has a real prospect of success⁵⁵³; it is the trial judge who has jurisdiction to make a non-party costs order.⁵⁵⁴ The judge should determine any application for a non-party costs order by way of a summary process, and should decline to consider the application if in the circumstances it would be disproportionate to do so.⁵⁵⁵

Ordering costs on grounds of control–benefit and funding

28. 213 The Privy Council considered the grounds for ordering costs against a non-party in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd*,⁵⁵⁶ where the unsuccessful defendants were supported by a family holding company. Lord Brown explained that while the ultimate question is whether it was just in all the circumstances to order a non-party to pay costs, certain considerations have been identified in the case law as central to the exercise of this discretion:

“Generally speaking the discretion will not be exercised against ‘pure funders’, described in paragraph 40 of *Hamilton v Al Fayed* as ‘those with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business, and in no way seek to control its course’. In their case the court’s usual approach is to give priority to the public interest in the funded party getting access to justice over that of the successful unfunded party recovering his costs and so not having to bear the expense of vindicating his rights.

Where, however, the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party's costs. The non-party in these cases is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes. He himself is 'the real party' to the litigation, a concept repeatedly invoked throughout the jurisprudence ... Consistently with this approach, Phillips LJ described the non-party underwriters in *TGA Chapman Ltd v Christopher [1998] 1 W.L.R. 12* as 'the defendants in all but name'. Nor, indeed, is it necessary that the non-party be 'the only real party' to the litigation in the sense explained in *Knight*, provided that he is 'a real party in ... very important and critical respects' ..."⁵⁵⁷

The Privy Council upheld the costs order made against the family holding company as it would have been the main beneficiary had the defendants been successful in the litigation. This is the case where the litigation of a company is controlled and funded by its major shareholder or by a director.⁵⁵⁸

28. 214 Control—benefit and funding are not necessarily sufficient to justify a costs order against a non-party. There are situations where control and benefit are of the very nature of a person's office. A company director may have the responsibility of directing litigation on behalf of their company and may profit from its success by keeping their job or getting a bonus from profit. But it does not follow that they should be liable for the opponent's costs should the company be unsuccessful in litigation.⁵⁵⁹ Where it is the responsibility of a non-party to manage litigation on behalf of another, the non-party would be liable for costs only if the non-party acted improperly.⁵⁶⁰ In the absence of any impropriety, a director would be held liable to pay costs ordered against the company only if they initiated and controlled the litigation wholly or principally for their own benefit.⁵⁶¹ The key consideration is whether the company director acted in good faith in the discharge of their duty to the company rather than entirely in their own personal interest. It is normal for a liquidator to try to enforce the company's rights, but a liquidator would not be held personally responsible for the costs, unless they have been guilty of unreasonable conduct of litigation or some impropriety.⁵⁶² It may be justified to order costs against a trustee in bankruptcy where they unreasonably revived a moribund action.⁵⁶³

28. 215 Costs may be ordered against a non-party who has helped to fund the unsuccessful party's litigation. The court has the power to order a party or their solicitors to disclose the names of those who have financed the litigation.⁵⁶⁴ It would, however, be a gross injustice to hold a non-party liable for costs merely because they have helped a litigant in distress. After all, legal aid is designed to do just that, namely, to enable persons of limited means to have access to justice. Individuals or companies who offer help for similar reasons should not be penalised for their charity.⁵⁶⁵ A costs order can be made against a non-party funder only if the non-party's involvement was improper or unreasonable, or if the non-party had an interest in the outcome.

28. 216 Witnesses, too, may be made subject to a costs order if there was some impropriety in the manner in which they gave evidence. It has been held that in principle an expert witness may be ordered to pay the costs of proceeding in appropriate situations.⁵⁶⁶ It is conceivable that a witness whose perjured testimony caused proceedings to be brought or maintained would be ordered to pay the costs of the party who suffered as a result. It should be noted that experts no longer have immunity from suit and may be sued in negligence.⁵⁶⁷ Experts may also be referred to their professional body for disciplinary proceedings.⁵⁶⁸

Costs orders against legal representatives on the grounds of control and contribution

28. 217 A non-party who provides assistance from altruistic motives would not generally be liable for costs.⁵⁶⁹ This is also true of legal representatives. A costs order will not normally be made against legal representatives undertaking a case pro bono, as Rose LJ explained in *Tolstoy-Miloslavsky v Aldington*:

“There is in my judgment no jurisdiction to make an order for costs against a solicitor solely on the ground that he acted without fee. It is in the public interest and it has always been recognised that it is proper for counsel and solicitors to act without fee. The access to justice which this can provide, for example in cases outside the scope of legal aid, confers a benefit on the public. … Whether a solicitor is acting for remuneration or not does not alter the existence or nature of his duty to his client and the court, or affect the absence of any duty to protect the opposing party in the litigation from exposure to the expense of a hopeless claim.”⁵⁷⁰

However, Rose LJ qualified this general position when he said that:

“there are only three categories of conduct which can give rise to an order for costs against a solicitor: (i) if it is within the wasted costs jurisdiction of section 51(6) and (7); (ii) if it is otherwise a breach of duty to the court such as, even before the Judicature Acts, could found an order, e.g. if he acts, even unwittingly, without authority or in breach of an undertaking; (iii) if he acts outside the role of solicitor, e.g. in a private capacity or as a true third party funder for someone else.”⁵⁷¹

28. 218 The first category, the wasted costs jurisdiction, is discussed elsewhere in this chapter.⁵⁷² Here we need to address the remaining categories identified by Rose LJ. The second category consists of cases where a legal representative acted improperly, whether intentionally or otherwise. An example of this kind is provided by *Gulf Azov Shipping Co Ltd v Idisi (costs)*,⁵⁷³ where a costs order was made against a lawyer who funded the defendant’s defence knowing that the defendant had acted unlawfully and had no defence to the claim. Another instance is provided by *Adris v Royal Bank of Scotland*,⁵⁷⁴ where a costs order against solicitors was made because they were in breach of duty to their client in failing to obtain legal costs insurance for unsuccessful claims alleging breach of the *Consumer Credit Act 1974* s.78. But breach of duty to their client would not justify ordering the solicitors to pay the cost of their client’s opponents, unless the opponents can establish that they would not have otherwise incurred the costs.⁵⁷⁵
28. 219 The third ground for ordering costs against a solicitor (if they act outside the role of solicitor—for example, in a private capacity or as a true third party funder for someone else) has proved more problematic. In *Myatt v National Coal Board (No.2)* a powerfully constituted Court of Appeal, consisting of Dyson and Lloyd LJJ and Sir Henry Brooke held that:
- “the third category described by Rose LJ in Tolstoy’s case should be understood as including a solicitor who, to use the words of Lord Brown in *Dymocks* is ‘a real party … in very important and critical respects’ and who ‘not merely funds the proceedings but substantially also contributes, or at any rate, is to benefit from them’.”⁵⁷⁶
28. 220 The principle emerging from the decisions in *Tolstoy-Miloslavsky*, *Dymocks* and *Myatt* was that the court may make a costs order against solicitors conducting litigation on behalf of a client if they were the real party in the sense that they both contributed to funding the proceedings, controlled the proceedings and stood to be the principal beneficiaries from a favourable outcome. This approach is dictated by the more general principle concerning control—benefit and contribution by non-parties discussed above, and by the position concerning professional funders.
28. 221 Unfortunately, that principle has been undermined by the Court of Appeal decision in *Germany v Flatman*.⁵⁷⁷ Personal injuries claims failed, and the defendants were unable to recover costs from the impecunious claimants. The defendants believed that the claimants’ disbursements (amounting to about £2,000 in respect of one claim) had been paid by their solicitors, GMS, and sought disclosure of funding arrangements between the solicitors and their clients so that they could make an application for a non-party costs order. The court concluded that the payment of disbursements was not unlawful under *CSLA 1990* s.58, and did not mean a solicitor had stepped outside the normal role of a solicitor. Without more, this would not justify a non-party costs order against the solicitor under the third category in *Myatt*.⁵⁷⁸ The fact that they acted as solicitors does not alter the

fact that they also acted as third party funders for someone else. To paraphrase Dyson LJ's words in *Myatt*, the solicitors not only funded the proceedings but also stood to benefit from them substantially.⁵⁷⁹ In the event the Court of Appeal upheld the disclosure orders because it transpired that the solicitors were informed that the chances of success were 20–25 per cent and pressed on with litigation without insurance, contrary to one of the client's instructions in circumstances where they hoped to recover a substantial profit. A non-party costs order, the Court of Appeal thought, could therefore be justified on the grounds that the solicitors were taking the lead in the litigation and effectively controlling its course. It is suggested that where solicitors fund a claim with a low prospect of success seeking the recovery of a modest amount, but in which they stand to recover large fees, it should be open to the court to regard such solicitors as a real party to the proceedings. To do so is no more than to accept the reality of the situation. There is no reason for treating solicitors differently than other funders for reward.

- 28.222 A counter-argument is that the third category needs to be kept under control to avoid undermining QOCS, CFAs and DBAs. Funding arrangements such as CFAs and DBAs can only work if lawyers are not readily held liable for the costs of their clients' opponents.⁵⁸⁰

Liability Insurers

- 28.223 A great deal of litigation by either claimants or defendants is funded through pre-existing legal expenses or liability insurance.⁵⁸¹ Insurance law gives insurers, who bear the ultimate cost of the litigation, subrogated rights to conduct the litigation in the name of the insured. Typically, the insurer controls the litigation, including things like tactics, making admissions and offers to settle. The limit is that insurers are not entitled to pursue tactics influenced by a desire to obtain for themselves some advantage altogether outside the litigation.⁵⁸² In most cases with liability insurance the insurer is contractually obliged to indemnify the insured, which usually includes any liability that the insured incurs to pay the costs of the other side. The other side is protected against the possible insolvency of the insured by the *Third Parties (Rights Against Insurers) Act 2010*. Extending from this position, it was held in *Marley v Rawlings (No.2)*⁵⁸³ to be appropriate to make a non-party costs order directly against a liability insurer.
- 28.224 Difficult issues may arise where there is a limit on the insurance cover, or where an insured party faces claims, some of which they are insured for, and some not. Whether a non-party costs order should be made against an insurer where there is limited insurance cover depends on the principles derived from *TGA Chapman Ltd v Christopher*.⁵⁸⁴ These address whether the insurer is the real party, which is one of the established bases for non-party costs liability, by assessing whether: the insurer decided that the claim should be fought; the insurer conducted the defence; and it did so motivated entirely by its own interests.
- 28.225 Where an insured party is defending several claims, some of which are covered by insurance, and some not, the best approach is to consider whether the insurer has intermeddled with the litigation.⁵⁸⁵ There is no need to establish that the insurer had total control of the litigation, but it is necessary to show intermeddling in a way that cannot be justified. Where there is a close connection between the insured and uninsured claims, such as in some GLO situations where a defendant is facing a large number of claims, only some of which are covered by its insurance policy, the insurer may have legitimate interests that justify some involvement in decision-making and even funding the defence of the uninsured claims. Causation remains an essential requirement.⁵⁸⁶ While *XYZ v Travelers Insurance Co Ltd*, the leading case in this area, can produce unbalanced outcomes between the competing parties,⁵⁸⁷ it provides certainty (which is important for insurers in fixing insurance premiums) and is consistent with underlying insurance law.

Professional funders

28. 226 There is a burgeoning industry devoted to providing financial help to fund litigation, known as *third party funding*.⁵⁸⁸ Like lawyers acting under a DBA, such service providers render their assistance in exchange for a portion of the damages that the supported party is expected to recover through litigation. Exposure of third party funders to costs orders was addressed by the Court of Appeal in *Arkin v Borchard Lines Ltd (costs order)*.⁵⁸⁹ An impecunious claimant brought a multi-million pound claim against the defendants based on commercial transactions between the parties. MPC, a company in the business of the management and processing of compensation claims and providing litigation assistance, agreed to fund expert evidence and the cost of organising documents on a contingent fee basis. The funding agreement stipulated that in consideration MPC would receive a share of the damages recovered. When the claim failed, the defendants sought to recover costs from MPC. Colman J refused the application on the grounds that litigation funding furthered access to justice and should be encouraged rather than discouraged by adverse costs orders, provided the funding was not tainted by champerty.
28. 227 The Court of Appeal disagreed. It accepted that it was desirable that funders, like MPC, should be encouraged to help litigants obtain access to justice. But it thought that the judge had not given appropriate weight to the rule that normally costs follow the event. Lord Phillips MR explained that “it is unjust that a funder who purchases a stake in an action for a commercial motive should be protected from all liability for the costs of the opposing party if the funded party fails in the action. Somehow or other a just solution must be devised whereby on the one hand a successful opponent is not denied all his costs while on the other hand commercial funders who provide help to those seeking access to justice which they could not otherwise afford are not deterred by the fear of disproportionate costs consequences if the litigation they are supporting does not succeed”.⁵⁹⁰
28. 228 The Court of Appeal in *Arkin*⁵⁹¹ devised the following solution:

“We consider that a professional funder, who finances part of a claimant’s costs of litigation, should be potentially liable for the costs of the opposing party to the extent of the funding provided. The effect of this will, of course, be that, if the funding is provided on a contingency basis of recovery, the funder will require, as the price of the funding, a greater share of the recovery should the claim succeed. In the individual case, the net recovery of a successful claimant will be diminished. While this is unfortunate, it seems to us that it is a cost that the impecunious claimant can reasonably be expected to bear. Overall justice will be better served than leaving defendants in a position where they have no right to recover any costs from a professional funder whose intervention has permitted the continuation of a claim which has ultimately proved to be without merit.”⁵⁹²

28. 229 Limiting the funder’s costs liability in this way is not a legal rule. The only immutable principle is that the discretion on costs must be exercised justly. Where a funder provided almost all a claimant’s funding in a case where the funder would have recovered many times the costs if the claim succeeded, it was not wrong to order the funder to pay the whole of the winning defendant’s costs.⁵⁹³ A solicitor may be similarly made liable to an adverse costs order where the solicitor funded the proceedings and stood to benefit from them.⁵⁹⁴

Altruistic funders

28. 230

In *Hamilton v Al Fayed (No.2)*,⁵⁹⁵ the Court of Appeal was of the view that a person who for altruistic reasons provides financial assistance to help a party with litigation expenses should not be any more liable for costs than a solicitor acting on a CFA.⁵⁹⁶ Chadwick LJ said:

“The starting point is to recognise that, where there is tension between the principle that a party who is successful in defending a claim made against him ought not to be required to bear the costs of his defence and the principle that a claimant should not be denied access to the courts on the grounds of impecuniosity, that tension has to be resolved in favour of the second of those principles.”⁵⁹⁷

The Court of Appeal held that as a matter of general principle a pure funder is not liable for costs. Simon Brown LJ explained:

“the pure funding of litigation (whether of claims or defences) ought generally to be regarded as being in the public interest providing only and always that its essential motivation is to enable the party funded to litigate what the funders perceive to be a genuine case. This approach ought not to be confined merely to relatives moved by natural affection but rather should extend to anyone—not least those responding to a fund-raising campaign—whose contribution (whether described as charitable, philanthropic, altruistic or merely sympathetic) is animated by a wish to ensure that a genuine dispute is not lost by default (or inadequately contested).”⁵⁹⁸

28. 231 A pure funder is a person with no personal interest in the litigation and who exerts no control over it.⁵⁹⁹ A pure funder, it has been held, could be a lawyer who provides their services pro bono, an expert (for example, an accountant, a valuer or a medical practitioner) who provides their services on a no win no fee basis or a supporter who, having no skill which they can offer in kind, provides support in the form of funding to meet the fees of those who have. In each of these cases, Chadwick LJ said, “the provision of support—whether in kind or in cash—facilitates access to justice by enabling the impecunious claimant to meet the defendant on an equal footing”.⁶⁰⁰
28. 232 Although the general rule is that a pure funder is not liable for costs, the court’s jurisdiction to award costs against such persons remains intact. However, it will only be exercised where the funder acted in bad faith, where they were motivated by malice or by some other improper motive or where they acted in a way that was detrimental to the interests of justice.⁶⁰¹ This is likely to be the case where the funder is guilty of champerty, in the sense of conduct amounting to wanton and officious intermeddling with disputes in which the meddler has no interest whatsoever, and where the assistance they render to one or other party is without justification or excuse.⁶⁰²

Costs orders in favour of non-parties

28. 233 There are a number of situations in which a party may be ordered to pay the costs of a non-party. A party will normally be ordered to pay the costs of a non-party where the party has obtained an order against a non-party requiring the non-party to perform some act. For example, where a party to a dispute applies for a disclosure order against a non-party, the party will normally be ordered to pay the non-party’s costs of the application and of complying with any disclosure order made (CPR 46.1(2)).⁶⁰³ Similarly, where a claimant requires a bank to comply with a freezing injunction and provide information concerning the defendant’s accounts with the bank or to freeze the account, the bank will normally be entitled to look to the claimant for its costs.⁶⁰⁴

Footnotes

- 534 *Aiden Shipping Co Ltd v Interbulk Ltd, The Vimeira* [1986] AC 965; [1986] 2 All ER 409, HL.
- 535 The jurisdiction for doing so was established by the Administration of Justice (Miscellaneous Provisions) Act 1933 s.7.
- 536 *Steele Ford & Newton (a firm) v Crown Prosecution Service (No.2)* [1994] 1 AC 22; [1993] 2 All ER 769, HL.
- 537 *Director-General of Fair Trading v Proprietary Association of Great Britain* [2002] EWCA Civ 1217; [2002] 1 All ER 853.
- 538 *Director-General of Fair Trading v Proprietary Association of Great Britain* [2002] EWCA Civ 1217; [2002] 1 All ER 853.
- 539 *Aiden Shipping Co Ltd v Interbulk Ltd, The Vimeira* [1986] AC 965; [1986] 2 All ER 409, HL.
- 540 *Aiden Shipping Co Ltd v Interbulk Ltd, The Vimeira* [1986] AC 965; [1986] 2 All ER 409 at 416, HL. Note *Johnson v Ribbins (Sir Francis Pittis & Son (a firm), third party)* [1977] 1 All ER 806; [1977] 1 W.L.R. 1458; and *SCT Finance Ltd v Bolton* [2002] EWCA Civ 56; [2003] 3 All ER 434.
- 541 *Symphony Group Plc v Hodgson* [1994] QB 179 at 192–193; [1993] 4 All ER 143 at 152, CA.
- 542 *T G A Chapman Ltd v Christopher* [1998] 1 W.L.R. 12, CA. In *XYZ v Travelers Insurance Co Ltd* [2019] UKSC 48; [2019] 1 W.L.R. 6075 [30] and [108], Lord Briggs JSC and Lord Reed DPSC criticised “exceptional circumstances” as a test as lacking content, principle or precision.
- 543 *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] UKPC 39; [2005] 4 All ER 195 [25].
- 544 For a summary of the authorities see *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] UKPC 39; [2005] 4 All ER 195.
- 545 See further below, paras 28.213 ff.
- 546 See further below, paras 28.213 ff.
- 547 See discussion of professional funders below at paras 28.226 ff.
- 548 *Adris v Royal Bank of Scotland* [2010] EWHC 941 (QB).
- 549 *Symphony Group Plc v Hodgson* [1994] QB 179; [1993] 4 All ER 143, CA; *Metalloy Supplies Ltd (In Liquidation) v MA (UK) Ltd* [1997] 1 All ER 418; [1997] 1 W.L.R. 1613; and *Myatt v National Coal Board (No.2)* [2007] EWCA Civ 307; [2007] 4 All ER 1094.
- 550 *Barndal Ltd v Richmond upon Thames LBC (costs)* [2005] EWHC 1377 (QB); *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] UKPC 39; [2005] 4 All ER 195, [31]; *Brampton Manor (Leisure) v McClean* [2007] EWHC 3340 (Ch); and *Myatt v National Coal Board (No.2)* [2007] EWCA Civ 307; [2007] 4 All ER 1094.
- 551 *Phillips v Symes (a bankrupt) (expert witnesses: costs)* [2004] EWHC 2330 (Ch); [2005] 1 W.L.R. 2043.
- 552 *Symphony Group Plc v Hodgson* [1994] QB 179; [1993] 4 All ER 143, CA; and *Oriakhel v Vickers* [2008] EWCA Civ 748, where witness immunity was also a reason for refusing the order.
- 553 *PR Records Ltd v Vinyl 2000 Ltd* [2007] EWHC 1721 (Ch). This is contrary to the usual principle applied in applications to amend: see *Groveholz Ltd v Hughes* [2010] EWCA Civ 538.
- 554 *Equitas Ltd v Horace Holman & Co Ltd* [2008] EWHC 2287 (Comm).
- 555 *Deepchand v Sooben* [2020] EWCA Civ 1409. In that case the Court of Appeal also warned that in such circumstances, it may well be appropriate to treat the person who made the application as the “loser” for the purposes of determining the costs of the application itself. Parties should be prepared to foot the bill if they make spurious applications for non-party costs orders, which would plainly be disproportionate for the court to entertain.
- 556 *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] UKPC 39; [2005] 4 All ER 195.
- 557 *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] UKPC 39; [2005] 4 All ER 195 [25].
- 558 *Gardiner v FX Music Ltd* [2000] All ER (D) 144; *Secretary of State for Trade and Industry v Aurum Marketing Ltd* [2000] All ER (D) 1009, CA; *Secretary of State for Trade and Industry v Backhouse, The Times*, 23 February 2001, CA; *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] UKPC 39; [2005] 4 All ER 195; *Goodwood Recoveries Ltd v Breen* [2005] EWCA Civ 414; [2006] 2 All ER 533; and *BE Studios Ltd v Smith & Williamson Ltd (Costs)* [2005] EWHC 2730 (Ch); [2006] 2 All ER 811.
- 559 *Lingfield Properties (Darlington) Ltd v Padgett Lavender Associates* [2008] EWHC 2795 (QB).
- 560 *Taylor v Pace Development Co Ltd* [1991] B.C.C. 406, CA. For a review of the authorities see *Gardiner v FX Music Ltd (In Liquidation)* [2000] All ER (D) 144.
- 561 *Goodwood Recoveries Ltd v Breen* [2005] EWCA Civ 414; [2006] 2 All ER 533; and *BE Studios Ltd v Smith & Williamson Ltd (Costs)* [2005] EWHC 2730 (Ch); [2006] 2 All ER 811.
- 562 *Metalloy Supplies Ltd (in liquidation) v MA (UK) Ltd* [1997] 1 All ER 418; [1997] 1 W.L.R. 1613, CA. See also *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] UKPC 39; [2005] 4 All ER 195.
- 563 *Trustee of the Property of Vickery (a bankrupt) v Modern Security Systems Ltd* [1998] 1 B.C.L.C. 428, CA.
- 564 *Germany v Flatman* [2013] EWCA Civ 278.

- 565 *Hamilton v Al Fayed (No.2) [2002] EWCA Civ 665; [2002] 3 All ER 641.*
- 566 *Phillips v Symes (a bankrupt) (expert witnesses: costs) [2004] EWHC 2330 (Ch); [2005] 1 W.L.R. 2043.*
- 567 *Jones v Kaney [2011] UKSC 13; [2011] 2 AC 398.*
- 568 *Meadow v General Medical Council [2006] EWCA Civ 1390; [2007] QB 462.*
- 569 See further below in relation to altruistic funders, at paras 28.230 ff.
- 570 *Tolstoy-Miloslavsky v Aldington [1996] 2 All ER 556 at 565; [1996] 1 W.L.R. 736* at 746, CA.
- 571 *Tolstoy-Miloslavsky v Aldington [1996] 2 All ER 556 at 565; [1996] 1 W.L.R. 736* at 745, CA. See also *Globe Equities Ltd v Globe Legal Services Ltd [1999] B.L.R. 232, CA; Floods of Queensferry Ltd v Shand Construction Ltd (costs) [2002] EWCA Civ 918; [2003] Lloyd's Rep. I.R. 181.*
- 572 See below, paras 28.260 ff.
- 573 *Gulf Azov Shipping Co Ltd v Idisi (costs) [2004] EWCA Civ 292.*
- 574 *Adris v Royal Bank of Scotland [2010] EWHC 941 (QB).*
- 575 *Heron v TNT (UK) Ltd [2013] EWCA Civ 469; [2013] EWCA Civ 469.*
- 576 *Myatt v National Coal Board (No.2) [2007] EWCA Civ 307; [2007] 4 All ER 1094, [8].*
- 577 *Germany v Flatman [2013] EWCA Civ 278.*
- 578 *Germany v Flatman [2013] EWCA Civ 278* [35]–[39], [43]–[47]. A similar approach was taken in *Scout Association v Bolt Burdon Kemp LLP [2023] EWHC 2575 (KB)*, where the court refused to make a non-party costs order against a solicitor who made unsuccessful applications on the assessment of costs in the client's name.
- 579 *Myatt v National Coal Board (No.2) [2007] EWCA Civ 307; [2007] 4 All ER 1094* [8].
- 580 *Germany v Flatman [2013] EWCA Civ 278* [2]. It has accordingly been held that solicitors cannot be held liable for a successful party's costs merely because they acted on a CFA basis for the unsuccessful party: *Hodgson v Imperial Tobacco Ltd [1998] 2 All ER 673; [1998] 1 W.L.R. 1056, CA.*
- 581 These include most RTAs, employers' liability and professional negligence claims, because of compulsory insurance pursuant to the *Road Traffic Act 1988*, and a large number of public liability claims.
- 582 *Groom v Crocker [1939] 1 KB 194.*
- 583 *Marley v Rawlings (No 2) [2014] UKSC 51; [2015] AC 157.*
- 584 *TGA Chapman Ltd v Christopher [1998] 1 W.L.R. 12, CA*, as restated in *Citibank NA v Excess Insurance Co Ltd [1999] Lloyd's Rep IR 122*, and approved in *XYZ v Travelers Insurance Co Ltd [2019] UKSC 48; [2019] 1 W.L.R. 6075.*
- 585 *XYZ v Travelers Insurance Co Ltd [2019] UKSC 48; [2019] 1 W.L.R. 6075.*
- 586 *XYZ v Travelers Insurance Co Ltd [2019] UKSC 48; [2019] 1 W.L.R. 6075* [76]–[83].
- 587 One of the rejected arguments in *XYZ v Travelers Insurance Co Ltd [2019] UKSC 48; [2019] 1 W.L.R. 6075* was that a non-party costs order was just because, with the insured having become insolvent, there was a lack of reciprocity as the claimants with uninsured claims would be required to pay costs if they lost, but the same claimants would be unable to recover their costs from the insolvent defendant if they won.
- 588 Described in Jackson LJ, Preliminary Report Ch.11; and S. Middleton and J. Rowley (eds), *Cook on Costs* (London: LexisNexis, 2025), paras 10.15–10.20.
- 589 *Arkin v Borchard Lines Ltd (costs order) [2005] EWCA Civ 655; [2005] 1 W.L.R. 3055.*
- 590 *Arkin v Borchard Lines Ltd (costs order) [2005] EWCA Civ 655; [2005] 1 W.L.R. 3055* [37]. In Australia it has been held that a third party funder is not liable to pay the other side's costs: *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd [2009] H.C.A. 43.*
- 591 *Arkin v Borchard Lines Ltd (costs order) [2005] EWCA Civ 655; [2005] 1 W.L.R. 3055.*
- 592 *Arkin v Borchard Lines Ltd (costs order) [2005] EWCA Civ 655* [40].
- 593 *Davey v Money [2020] EWCA Civ 246; [2020] 1 W.L.R. 1751.* Joint and several liability with the claimant for the defendant's costs was imposed on the predominant funder in *ECU Group Plc v HSBC Bank Plc [2022] EWHC 1616 (Comm).*
- 594 *Myatt v National Coal Board [2007] EWCA Civ 307; [2007] 1 W.L.R. 1559*, where the solicitor had £200,000 of profit costs depending on the outcome of an appeal. However, compare *Germany v Flatman [2013] EWCA Civ 278*, above.
- 595 *Hamilton v Al Fayed (No.2) [2002] EWCA Civ 665; [2002] 3 All ER 641.*
- 596 See above, paras 28.217 ff.
- 597 *Hamilton v Al Fayed (No.2) [2002] EWCA Civ 665; [2002] 3 All ER 641* [63]. The same approach was followed in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd [2004] UKPC 39; [2005] 4 All ER 195* [25]. See also *Abraham v Thompson [1997] 4 All ER 362, CA.*
- 598 *Hamilton v Al Fayed (No.2) [2002] EWCA Civ 665; [2002] 3 All ER 641* [47].

- 599 *Hamilton v Al Fayed (No.2) [2002] EWCA Civ 665; [2002] 3 All ER 641 [40].*
- 600 *Hamilton v Al Fayed (No.2) [2002] EWCA Civ 665; [2002] 3 All ER 641 [70].*
- 601 *Gulf Azov Shipping Co Ltd v Idisi (costs) [2004] EWCA Civ 292.*
- 602 *Giles v Thompson [1994] 1 AC 142; [1993] 3 All ER 321, HL; Faryab v Smyth (stay of appeal: chancery) [1998] C.L.Y. 411, CA; Faryab v Smyth (CA, unreported, 27 November 2000).*
- 603 Unless opposition to the non-party disclosure application is unreasonable, the non-party will normally be awarded its costs of the application even if it is unsuccessful: *Gorbachev v Guriev [2023] EWCA Civ 327.*
- 604 *Individual Homes Ltd v Macbream Investments Ltd [2002] All ER (D) 345 (Oct), Ch;* and see Ch.11 Freezing Injunctions para.11.22 ff for the principles governing freezing orders.

Protective Costs Orders and Costs Capping Orders

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 28 - Costs

Protective Costs Orders and Costs Capping Orders

Introduction

28. 234 As discussed in the introduction to this chapter, high and unpredictable costs make it difficult for litigants to make informed and rational decisions about the desirability of embarking on litigation. Two distinct imponderables are involved: the amount that each party may spend in the litigation process and the likelihood of a party having to bear both parties' costs. Costs shifting remains a major imponderable. Transparency on the quantum of costs has been addressed on multi-track claims since 2013 by costs budgeting, and for fast track and intermediate track claims since 2023 by fixed recoverable costs. Before these reforms were introduced the courts sought to ameliorate some of the worst effects of the uncertainty over costs exposure of shareholders, trustees or beneficiaries, by providing that costs would be paid out of the company's assets or the funds of the trust; and by protecting charities, interest groups and others in public law claims by limiting a party's liability to pay the costs of other parties in the proceedings. The first type are sometimes referred to as *friendly* prospective costs orders because they do not give rise to a conflict of interest and do not involve adversaries. Such orders are distinguishable from costs orders of the second type, which provide prospective exemption from potential costs liability to opposing parties. Hence such orders are sometimes described as *hostile*.

Friendly prospective costs orders

Derivative claims

28. 235 A derivative claim is brought "where a company, other body corporate or trade union is alleged to be entitled to claim a remedy, and a claim is made by a member of it for it to be given that remedy" (CPR 19.14(1)). This procedure may be used by a shareholder to bring a claim on behalf of the company when the company's officers fail to assert the company's rights in breach of their duty to the company.⁶⁰⁵ Court permission is required to maintain a derivative claim,⁶⁰⁶ and the court may, when giving permission, also order that the claimant's costs should be paid out of the company's funds.⁶⁰⁷ A similar order may be made where a member of a pensions fund or life assurance scheme brings proceedings to enforce the rights of the pension fund or scheme of which they are a member.⁶⁰⁸ A comparable measure is available to trustees, who can apply to court for directions whether to bring proceedings and for an order that their costs should be paid out of the trust fund (PD 64A para.6).

Beddoe orders

28. 236 Generally, trustees and executors are entitled to be indemnified out of the trust fund for expenses that they have properly incurred when conducting litigation on behalf of the trust.⁶⁰⁹ However, trustees are open to challenge from beneficiaries

who might argue that the expenditure was inappropriate or that it was unreasonable to become involved in legal proceedings. Where such an objection is sustained, the trustees are left with personal liability. There are two ways trustees can ensure that they are indemnified: they may seek the agreement of all the beneficiaries that they will be indemnified from the trust fund, or they may apply to court for a prospective costs order to achieve this. In addition, trustees may seek a costs capping order under CPR 3.19–3.21 and PD 3E s.II (discussed below) to determine possible costs liability to opponents.⁶¹⁰ This would be a “hostile application”.

- 28.237 On an application by trustees, executors, receivers of a company in liquidation, beneficiaries or other persons concerned in relation to the administration of a trust, the court may order that their costs shall be paid out of the trust fund (PD 64A para.6.1–6.8). Such a prospective costs order is known as a *Beddoe* order, after the case that gave currency to this process.⁶¹¹ The person who brings the derivative claim or the trustee is not asserting a right of their own, but is asserting the company’s, a trade union’s or a trust’s right and it is therefore just that the body on whose behalf the proceedings are brought should bear the costs.
- 28.238 An application for a *Beddoe* order is a friendly application, in the sense that there is no real dispute between the trustee and the trust, or a receiver and the company whose business the receiver manages. In an application of this kind the court is asked to decide whether it is in the interests of the trust, or the company, that litigation should be conducted on its behalf and at its expense. Before granting such a prospective costs order a judge would have to be satisfied that the eventual trial judge could properly exercise their discretion by ordering the applicant’s costs to be paid out of the fund or by the company.⁶¹² For this reason the court must be provided with full information about the circumstances of the case and its prospects of success.⁶¹³ Where appropriate, the applicant should put in evidence the legal opinion received about the case. A *Beddoe* order will not protect trustees from personal liability if they have not informed the court of all the relevant circumstances. It is therefore important that the beneficiaries should be made parties to the proceedings so that the court may receive views and information from all the persons who are likely to be affected by its decision.⁶¹⁴
- 28.239 Since it may be inappropriate to reveal some of the information to the persons who are likely to be the opponents of the trust in any subsequent litigation a *Beddoe* application must be made in separate proceedings, and it must not be heard by the judge who hears the substantive case. If the *Beddoe* application is made by a trustee who is also a beneficiary and it emerges that the dispute is in reality between the beneficiaries themselves, it might be inappropriate to direct that the applicant should be entitled to recover their costs from the trust fund. The solution in such a case would be to let the beneficiaries litigate among themselves at their own expense.⁶¹⁵

Hostile prospective costs orders

- 28.240 A number of methods have been developed to overcome the costs uncertainty and burden which impedes access to court for charities and similar organisations devoted to public causes. Costs can be restricted by use of the discretionary nature of the power to make party and party costs orders at the end of the case, but that leaves the parties in a state of uncertainty while the case is pending. Judges therefore developed what were termed variously as pre-emptive, prospective, protective or costs capping orders. Orders made under the common law jurisdiction, which are now known as protective costs orders (PCOs), may be granted in advance of, or early in, proceedings whereby a party is either exempted from liability, or has their liability limited, on paying their opponent’s costs in the event that the opponent is successful. The jurisdiction has been partially codified, with costs capping orders now being regulated by CPR 3.19, and the potentially expansive jurisdiction to grant PCOs being halted in judicial review claims by the power to make the confusingly named judicial review costs capping orders (JRCCOs) by the Criminal Justice and Courts Act 2015 ss.88–90.

Protection in final costs orders

28. 241 A number of devices can help protect parties in public law claims when a dispositive costs order is being made. Where there are a number of interested parties, while this is discretionary, the court may decide to allow only one set of additional costs because the interested parties would be expected to make common cause.⁶¹⁶ Public bodies, professional organisations and other voluntary organisations may, on occasion, intervene in public law proceedings or in private law proceedings in order to make representations on matters of general public importance. Such interventions are made in order to ensure that the court is informed of the full implications of the issues before it. An organisation making representations of this kind is not a party to the proceedings but rather acts in a role similar to that of an *amicus curiae*. A body appearing in this capacity can neither apply for costs nor be made liable for the costs of another, even if its submissions favoured one side more than the other.⁶¹⁷

Common law PCOs

28. 242 PCOs were developed to assist voluntary organisations to bring or defend legal proceedings.⁶¹⁸ Leaving such organisations exposed to the vagaries of the normal costs regime would leave vulnerable groups without effective legal redress. The purpose of a PCO “is to allow a claimant of limited means access to the court in order to advance his case without the fear of an order for substantial costs being made against him, a fear which would inhibit him from continuing with the case at all”.⁶¹⁹

28. 243 In *R (Corner House Research) v Secretary of State for Trade (the Corner House case)*⁶²⁰ the Court of Appeal was of the view that a PCO should be made only in exceptional cases.⁶²¹ Lord Phillips MR set out the following principles:

1. A protective costs order may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that:

- (i) The issues raised are of general public importance. This means that the issues must affect a wide community, rather than the whole public;⁶²²
- (ii) The public interest requires that those issues should be resolved;
- (iii) The applicant has no private interest in the outcome of the case;
- (iv) Having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved it is fair and just to make the order;
- (v) If the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.⁶²³

2. If those acting for the applicant are doing so pro bono this will be likely to enhance the merits of the application for a PCO.

3. It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above.”⁶²⁴

28. 244 Although some PCO applications have been successful, not least in the *Corner House* case and *R (Campaign for Nuclear Disarmament) v Prime Minister (Costs)*,⁶²⁵ these conditions impose a high hurdle before a PCO will be granted. The question of public importance is not always easy to separate from the question of whether the public interest requires that the issues in question should be resolved. The two concepts tend to overlap.⁶²⁶ The requirement of general public importance does not

preclude a person who has a personal interest in the outcome provided that it is an interest which they share with other members of the group, as would be the case in proceedings concerning the protection of the environment.⁶²⁷ For instance, a person affected by the closure of a local hospital is not prevented from seeking a PCO when bringing judicial review proceedings to challenge the closure, which affects many other members of the community.⁶²⁸ However, the fact that voluntary organisations are dedicated to furthering the public good does not mean that they should be insulated from the usual risk of meeting the successful party's costs.⁶²⁹ In relation to the "financial resources" consideration, Moore-Bick LJ pointed out in *Goodson v HM Coroner for Bedfordshire and Luton*⁶³⁰ that the court should not simply treat publicly funded litigants as having unlimited resources. Equality of arms is important.⁶³¹ If a PCO is made, it can be unjust to refuse to make a PCO also for respondent or other interested parties.⁶³²

- 28. 245** The intention to apply for a PCO should normally be indicated in the claim form.⁶³³ An application should be supported by the requisite evidence, including a schedule of the claimant's future costs of the proceedings.⁶³⁴ The applicant must establish that the costs of litigation would be prohibitive and provide evidence of inability to meet such expenses.⁶³⁵ The applicant must also provide a schedule of costs for the entire proceedings.⁶³⁶ Where a PCO has been made at first instance, a new application needs to be made in respect of any appeal.⁶³⁷ A defendant who wishes to resist the application should set out the reasons for the objection in or with the acknowledgment of service. A PCO application will be considered on paper in the first instance.⁶³⁸

Judicial review costs capping orders

- 28. 246** In order to forestall further judicial development of PCOs in any direction in judicial review claims, JRCCOs were introduced by the *Criminal Justice and Courts Act 2015 ss.88–90*.⁶³⁹ Procedural rules are in *CPR 46.16–46.19*. JRCCOs replace PCOs in judicial review claims,⁶⁴⁰ though PCOs remain available in other types of proceedings. A JRCCO can be made only if permission to apply for judicial review has been granted.⁶⁴¹ For a JRCCO to be available the following conditions must be satisfied:

- (a)the proceedings must be public interest proceedings. These are cases where an issue that is the subject of the proceedings is of general public importance;⁶⁴² the public interest requires the issue to be resolved; and the proceedings are likely to provide an appropriate means of resolving it;
- (b)in the absence of the order, the applicant for judicial review would withdraw the application for judicial review or cease to participate in the proceedings; and
- (c)it would be reasonable for the applicant for judicial review to do so.⁶⁴³

- 28. 247** An application for a JRCCO is made on notice, supported by written evidence, in accordance with the *CPR 23* application procedure.⁶⁴⁴ It should normally be contained in or accompany the judicial review claim form.⁶⁴⁵ The evidence must address the statutory criteria for granting these orders, and must include a summary of the applicant's financial resources, together with information about the costs and disbursements the parties are likely to incur in the proceedings.⁶⁴⁶

- 28. 248** In deciding whether to make a JRCCO the court must have regard to: (a) the financial resources of the parties to the proceedings, including the financial resources of any person who provides, or may provide, financial support to the parties; (b) the extent to which the applicant for the order is likely to benefit if relief is granted to the applicant for judicial review; (c) the extent to which any person who has provided, or may provide, the applicant with financial support is likely to benefit if relief is granted to the applicant for judicial review; (d) whether legal representatives for the applicant for the order are acting free of charge; (e) whether the applicant for the order is an appropriate person to represent the interests of other persons or

the public interest generally. It is immediately apparent that there is considerable overlap between these requirements and those relevant to PCOs, discussed above.⁶⁴⁷

Costs capping orders

- 28. 249** The costs capping jurisdiction is enshrined in [CPR 3.19](#) and PD 3E. A CCO is defined as “an order limiting the amount of future costs (including disbursements) which a party may recover pursuant to an order for costs subsequently made” ([CPR 3.19\(1\)](#)). “Future costs” refer to costs after the date of the CCO (but excluding the amount of any additional liability) ([CPR 3.19\(1\)\(b\)](#)). A CCO may be made either in respect of the whole litigation, or in respect of any issues which are ordered to be tried separately ([CPR 3.19\(4\)](#)).
- 28. 250** Crucially, [CPR 3.19](#) deals only with CCOs. The rule states expressly that it “does not apply to JRCCOs … or to protective costs orders” ([CPR 3.19\(3\)](#)). PCOs are still governed by common law. But the distinction is tenuous. A PCO may take the form of a cap on recoverable costs, which is exactly what a CCO consists of. Even where a PCO consists of exempting the applicant from paying the respondent’s costs, the order may be regarded as a capping order that caps the respondents’ recoverable costs at nil. The distinction between a CCO and a PCO does not lie in the form of the order but in the grounds on which it is made. While it is clear that the rule-maker meant to allow for the rule-based CCO jurisdiction to run alongside the common law PCO and the statutory JRCCO, it is difficult to see the justifications for doing so.
- 28. 251** A CCO may be made only if three cumulative conditions are satisfied ([CPR 3.19\(5\)](#)):
- (a)it is in the interests of justice to do so;
 - (b)there is a substantial risk that without such an order costs will be disproportionately incurred; and
 - (c)the court is not satisfied that the risk in (b) above can be adequately controlled by—
 - (i)case management directions or orders made under [CPR 3](#); and
 - (ii)detailed assessment of costs.
- 28. 252** A costs capping order will be made only in “exceptional circumstances”,⁶⁴⁸ with relevant considerations set out in [CPR 3.19\(6\)](#), including whether there is a substantial imbalance between the financial position of the parties. The limitation of the costs-capping jurisdiction to cases where there is a risk of costs getting out of control to an extent that cannot be dealt with by case management directions ([CPR 3.19\(5\)](#)) is, on the face of it, puzzling. Standard costs are recoverable only if they are reasonable and proportionate. Whatever might have been the situation before April 2013, today the court will only allow costs which are proportionate. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred ([CPR 44.3\(2\)\(a\)](#)). It follows that no matter how much a successful party has spent, the court cannot order the unsuccessful party to pay more than reasonable and proportionate costs. It is therefore difficult to see how “out of control costs” could not be properly dealt with on detailed assessment, at which point any disproportionate costs are bound to be disallowed. By requiring an applicant for a CCO to show that out-of-control costs cannot be controlled by detailed assessment, the applicant is effectively required to show that a costs judge would be unable to discharge their duty. The introduction of costs management has further called into question the need for the [CPR 3.19](#) CCO jurisdiction (at least as presently framed), given that this also, in essence, involves the submitting of budgets to help the court determine a reasonable and proportionate upper limit on spending in the litigation.⁶⁴⁹
- 28. 253** An application for a CCO must be made in accordance with [CPR 23](#), with special requirements set out in [CPR 3.20](#). The application notice must set out whether the CCO is in respect of the whole of the litigation or a particular issue which is ordered to be tried separately. The applicant must give reasons why a CCO should be made. The application must be accompanied by a budget setting out the costs (and disbursements) incurred by the applicant to date; and the costs (and disbursements)

which the applicant is likely to incur in the future conduct of the proceedings. In preparation for the determination of the application the court may direct any party to the proceedings to file a schedule of costs, and to file written submissions on all or any part of the issues arising. On the basis of such information the court will give directions for the hearing, such as whether the judge hearing the application will sit with an assessor.

Costs limits in Aarhus Convention claims

- 28.254** Under the Aarhus Convention, art.9(4),⁶⁵⁰ members of the public need to be able to access review procedures of environmental decisions⁶⁵¹ through the courts which are “fair, equitable, timely and not prohibitively expensive.” Effect is given to this by CPR 46 s.IX,⁶⁵² which imposes a cap of £5,000 on the costs liability of claimants who are individuals, £10,000 for non-individual claimants, and £35,000 for defendants.⁶⁵³ These amounts can be varied or even removed, but not in a way that would make the costs prohibitively expensive for the claimant.⁶⁵⁴

Footnotes

605 See Ch.13 Joining Claims and Parties; and see 2025 WB 19.14.1.

606 Companies Act 2006 ss.261–262 and 264.

607 This type of order is known as a *Wallersteiner Order* after *Wallersteiner v Moir (No.2) [1975] QB 373; [1975] 1 All ER 849*.

608 *Re AXA Equity and Law Life Assurance Society Plc [2001] 2 B.C.L.C. 447*.

609 PD 64A para.6; 2025 WB 64.2.3.

610 See below, paras 28.249 ff.

611 *Re Beddoe [1893] 1 Ch 547*.

612 *Matter of ING Pension Plan (HR Trustees Ltd) v German & International Management Group (UK) Ltd [2010] EWHC 321 (Ch)*.

613 *Curtis v Pulbrook [2009] EWHC 1370 (Ch)*, a trustee who had wrongly applied money owned by a person to whom he owed a fiduciary duty was ordered to pay costs on the indemnity basis and an enhanced rate of interest, where he had delayed in providing information sought prior to the proceedings.

614 Lightman J outlined the factors that have to be considered when making a *Beddoe* order in *Alsop Wilkinson (a firm) v Neary [1995] 1 All ER 431; [1996] 1 W.L.R. 1220*.

615 *Evans v Evans (succession) [1985] 3 All ER 289; [1986] 1 W.L.R. 101, CA*; and *Trustee Corp Ltd v Nadir [2001] B.P.I.R. 541*.

616 *Bolton Metropolitan District Council v Secretary of State for the Environment (Practice Note) [1995] 1 W.L.R. 1176*; *CPRE Kent v Secretary of State for Communities and Local Government [2021] UKSC 36* makes clear this is no more than guidance.

617 *R (Davies) v HM Deputy Coroner for Birmingham [2004] EWCA Civ 207; [2004] 3 All ER 543*.

618 *R v Lord Chancellor Ex p. Child Poverty Action Group [1998] 2 All ER 755*.

619 *R (Corner House Research) v Secretary of State for Trade [2005] EWCA Civ 192; [2005] 1 W.L.R. 2600* [6]. This case provides a historical survey of the development of the PCO.

620 *R (Corner House Research) v Secretary of State for Trade [2005] EWCA Civ 192; [2005] 1 W.L.R. 2600*.

621 *R (Corner House Research) v Secretary of State for Trade [2005] EWCA Civ 192; [2005] 1 W.L.R. 2600* [144].

622 See *R (Compton) v Wiltshire Primary Care Trust [2008] EWCA Civ 749; [2009] 1 W.L.R. 1436*.

623 This requirement has to be adjusted in an application by a respondent to an appeal, with the question being whether the respondent would be reasonable in ceasing to take part in the appeal: *Weaver v London Quadrant Housing Trust [2009] EWCA Civ 235*.

624 *R (Corner House Research) v Secretary of State for Trade [2005] EWCA Civ 192; [2005] 1 W.L.R. 2600* [74]; endorsed in *R (Buglife: The Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corp [2008] EWCA Civ 1209*.

- 625 *R (Campaign for Nuclear Disarmament) v Prime Minister (costs) [2002] EWHC 2777 (Admin); [2002] All ER (D) 245 (Dec).*
- 626 *R (Compton) v Wiltshire Primary Care Trust [2008] EWCA Civ 749.*
- 627 *R (Burkett) v Hammersmith LBC [2004] EWCA Civ 1342; R (England) v Tower Hamlets LBC [2006] EWCA Civ 1742; and R (Compton) v Wiltshire Primary Care Trust [2008] EWCA Civ 749.*
- 628 *Goodson v HM Coroner for Bedfordshire and Luton (Protective Costs) [2005] EWCA Civ 1172; [2006] C.P. Rep. 6.*
- 629 *R (Smeaton) v Secretary of State for Health (costs) [2002] EWHC 886 (Admin); [2002] F.L.R. 146.*
- 630 *Goodson v HM Coroner for Bedfordshire and Luton (Protective Costs) [2005] EWCA Civ 1172; [2006] C.P. Rep. 6.*
- 631 *Begg v HM Treasury [2016] EWCA Civ 568.*
- 632 *R v London Borough of Hammersmith and Fulham Ex p. CPRE London Branch (costs order) [2000] Env L.R. 544 (QB).* See also Report of the Working Group on Facilitating Public Interest Litigation (London: Liberty, July 2006); UNECE, Report of the Working Group on Access to Environmental Justice (Godalming: WWF-UK, May 2008). Accordingly, there is greater readiness to grant a PCO to the other side once a PCO has been granted to one party: *R (Medical Justice) v Secretary of State for the Home Department [2010] EWHC 1425 (Admin).*
- 633 A defendant should do so when acknowledging service: *R (Buglife: The Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corp [2008] EWCA Civ 1209.*
- 634 There is an obligation on the applicant to be frank, which includes an obligation to be open about the level of costs being incurred; *Badger Trust v Welsh Ministers [2010] EWCA Civ 807.*
- 635 See for example *Austin v Miller Argent (South Wales) Ltd [2011] EWCA Civ 928.*
- 636 *R (Corner House Research) v Secretary of State for Trade and Industry [2005] EWCA Civ 192.*
- 637 *R (Badger Trust) v Welsh Ministers [2010] EWCA Civ 807.*
- 638 In applications for PCOs on appeals, the PCO and any costs capping order should be sought on the papers at the same time as permission to appeal; *R (Buglife: The Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corp [2008] EWCA Civ 1209.*
- 639 *R (Ullah) v National Crime Agency [2023] EWHC 371 (Admin).*
- 640 Criminal Justice and Courts Act 2015 s.88(1). These provisions constitute a complete code on making protective costs orders in judicial review proceedings, *R (Ullah) v National Crime Agency [2023] EWHC 371 (Admin).*
- 641 Criminal Justice and Courts Act 2015 s.88(4). They are also available on judicial review appeals: *s.88(13)(b).*
- 642 Criminal Justice and Courts Act 2015 s.88(7). Factors to be considered include: the number of people likely to be directly affected if relief is granted to the applicant for judicial review; how significant the effect on those people is likely to be; and whether the proceedings involve consideration of a point of law of general public importance (*s.88(8)*).
- 643 Criminal Justice and Courts Act 2015 s.88(6).
- 644 CPR 46.17(1). CPR 23 is addressed in Ch.8 Interim Applications.
- 645 PD 46 para.10.2.
- 646 CPR 46.17(2) and PD 46 para.10.1. The court may dispense with the applicant's statement of financial resources: *CPR 46.17(3).*
- 647 For the approach to be taken when assessing costs that have been subjected to a JRCCO at the conclusion of the claim, see *R (Elan-Cane) v Secretary of State for the Home Department [2020] EWCA Civ 363.*
- 648 PD 3E para.1.1. This is at variance with Jackson LJ, Final Report Ch.40 para.7.18.
- 649 CPR 3, s.II and PD 3D. The costs management regime is discussed above at paras 28.103 ff.
- 650 UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark on 25 June 1998.
- 651 A wide range of environmental issues, listed in Annex I, come within the Convention. *R (Dowley) v Secretary of State for Communities and Local Government [2016] EWHC 2618 (Admin)* confirms that "environment" is given a broad meaning for this purpose. Challenges on whether a claim comes within the Convention are dealt with by *CPR 46.28*.
- 652 For first instance cases. Appeals in Aarhus Convention cases are covered by *CPR 52.19A*.
- 653 CPR 46.26.
- 654 CPR 46.27.

Litigants in Person

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 28 - Costs

Litigants in Person

- 28. 255** Until 1975 a LiP could recover only out-of-pocket expenses. The [Litigants in Person \(Costs and Expenses\) Act 1975](#) empowered the court, subject to certain qualifications, to award a LiP costs in much the same way as a represented litigant. The LiP should be allowed costs for the same categories of work and disbursements which would have been allowed if the work had been done or the disbursements had been made by a legal representative on the LiP's behalf ([CPR 46.5\(3\)\(a\)](#)). These can be FRC,⁶⁵⁵ or where FRC do not apply, costs assessed by a summary or detailed assessment. A LiP should also be allowed payments reasonably made for legal services relating to the conduct of the proceedings, and the costs of obtaining expert assistance in assessing the costs claim ([CPR 46.5\(3\)\(b\)-\(c\)](#)).
- 28. 256** Although the LiP is awarded costs in respect of the work that would have been recoverable if it had been done by a legal representative, the amount allowed will be the financial loss resulting from the fact the LiP had to devote their time to the litigation—for example, their hourly pay or the hourly profit they would have made in the course of their regular employment, if not preoccupied by the litigation ([CPR 46.5\(4\(a\)\)](#)). Alternatively, where financial loss cannot be proved, the amount will be for the time reasonably spent on doing the work at the rate set out in PD 46 para.3.4 ([CPR 46.5\(4\(b\)\)](#)).⁶⁵⁶ A further significant limitation is that the costs allowed are subject to an overall cap, except in the case of a disbursement; namely, they will not exceed two-thirds of the amount which would have been allowed if the LiP had been represented by a legal representative.⁶⁵⁷ These restrictions have given rise to litigation over who is a LiP. A company acting without a legal representative is considered to be a LiP, as are solicitors or barristers who represent themselves ([CPR 46.5\(6\)](#)). But a firm of solicitors which acts for itself is not a LiP, and is therefore not limited to the costs set out in [CPR 46.5](#).⁶⁵⁸ Similarly, a solicitor who is represented by a firm in which they are a partner is not regarded as a LiP and is entitled to recover the firm's profit costs.⁶⁵⁹ A LiP who succeeded on only two short points involved in their appeal will be paid only for the reasonable time needed to research those points and not for the greater amount of time spent in researching the unsuccessful points.⁶⁶⁰
- 28. 257** Traditionally a LiP was someone who conducted litigation themselves, without representation by solicitor and barrister. This is no longer the case, as Dyson LJ explained in *Agassi v Robinson (Inspector of Taxes) (No.2)*.⁶⁶¹ The category of LiP also includes the lay client performing the role of litigator with a directly instructed barrister acting as the advocate (under the Bar's "public access" arrangements, approved by the Lord Chancellor in 2004). In *Agassi*, the appellant, a lay person, used the services of the Chartered Institute of Taxation (the accountant) to assist with his challenge to a tax ruling by the Inland Revenue. The accountant instructed a barrister under the Bar's Licensed Access Scheme. Since counsel's fees were disbursements, they were recoverable under what is now [CPR 46.5](#) in full. However, the appellant was held not to be entitled to recover costs as a disbursement in respect of work done by the accountant that would normally have been done by a solicitor who had been instructed to conduct the appeal, but he was able to recover costs in respect of ancillary assistance provided by the accountant.

McKenzie Friends

- 28. 258** Litigants may lawfully enter into agreements to pay fees to McKenzie Friends for the provision of reasonable assistance in court or out of court.⁶⁶² Fees payable under such agreements are payable by the litigant who engaged the McKenzie Friend.

Such fees are not recoverable under an inter partes party costs order if the fees relate to assistance out of court.⁶⁶³ Where the McKenzie Friend has been granted a right of audience, however, the fees for assistance in court may be recovered under a party and party costs order as a disbursement.⁶⁶⁴

Pro bono costs orders

28. 259 Trainees, pupils at the Bar and students are often willing to act for litigants without charging. Indeed, many established practitioners are, too. Frequently this is done under one of the many well-established pro bono programmes, such as Advocate (formerly the Bar Pro Bono Unit), or one of the programmes run by firms of solicitors and law schools. To put the parties on a more equal footing (the other side otherwise being protected from paying any costs by the indemnity principle), and to provide a source of funding for pro bono schemes, the [Legal Services Act 2007 s.194](#) allows a court to order any person to make a payment to a charity prescribed by the Lord Chancellor in respect of pro bono representation (the [2007 Act s.194\(3\)](#)).⁶⁶⁵ In deciding whether to make such an order the court must have regard to⁶⁶⁶ whether, and if so on what terms, the unsuccessful party would have been ordered to pay costs had the successful party not had free representation (the [2007 Act s.194\(4\)](#)).⁶⁶⁷ An order under [s.194](#) cannot be made where the paying party also had pro bono representation, or if the paying party was publicly funded by the Legal Aid Agency (the [2007 Act s.194\(5\)–\(6\)](#)). The amount allowed cannot exceed the allowable fixed costs in cases where [CPR 45](#) applies and, in cases not covered by [CPR 45](#), the amount allowed cannot exceed the amount that would have been allowed had the representation not been provided free of charge ([CPR 46.7](#)).

Footnotes

655 CPR 45.4.

656 £24 per hour (PD 46 para.3.4). A litigant who is allowed costs for attending at court to conduct the case is not entitled to a witness allowance in respect of such attendance in addition to those costs ([CPR 46.5\(5\)](#)).

657 CPR 45.4(2) and 46.5(2). In *R (Wulfsohn) v Legal Services Commission [2002] EWCA Civ 250; [2002] C.P. Rep. 250*, an applicant for judicial review spent 1,200 hours in preparation for five hearings. The court found that a firm of solicitors would have charged between £15,000 and £20,000 in respect of that work. Applying the two-thirds cap, the court allowed £10,460. See also *R (Lockery) v Medway County Court [2018] EWHC 2496 (Admin)*.

Halborg v EMW Law LLP [2017] EWCA Civ 793; [2018] 1 W.L.R. 52, CA.

659 *Malkinson v Trim [2002] EWCA Civ 1273; [2003] 2 All ER 356; [2003] 1 W.L.R. 463.*

660 *Grand v Param Gill [2011] EWCA Civ 902.*

661 *Agassi v Robinson (Inspector of Taxes) (No.2) [2005] EWCA Civ 1507; [2006] 1 W.L.R. 2126.*

662 *Practice Note (McKenzie Friends: Civil and Family Courts) [2010] 1 W.L.R. 1881* [27]. For discussion of assistance by McKenzie Friends, see Ch.3 Fair Trial paras 3.174 ff.

663 *Uhbi (t/a United Building and Plumbing Contractors) v Kajla [2002] EWCA Civ 628; [2002] All ER (D) 265 (Aug).*

664 CPR 46.5 and *Practice Note (McKenzie Friends: Civil and Family Courts) [2010] 1 W.L.R. 1881* [30].

665 This is the Access to Justice Foundation, as prescribed by the [Legal Services Act \(Prescribed Charity\) Order 2008 \(SI 2008/2680\)](#). The costs order must specify that payment must be to the prescribed charity ([CPR 44.3C\(3\)](#)).

666 Exact parity is not required: *Manolete Partners plc v White (No 2) [2024] EWCA Civ 1558.*

667 [Legal Services Act 2007 s.194\(4\)](#).

Wasted Costs Orders

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 28 - Costs

Wasted Costs Orders

Introduction

28. 260 The wasted costs jurisdiction allows the court to order the costs of legal proceedings to be paid by the parties' legal representatives. The statutory foundation for the jurisdiction is the [SCA 1981 s.51\(6\)](#) (as substituted by the [CLSA 1990 s.4](#)). It provides that the court may order a legal or other representative to meet the whole of any wasted costs or any part of them. A wasted costs order may be made only in respect of "costs incurred by a party, (a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative; or (b) which, in the light of any such act or omission occurring after they were incurred, the court considers it is unreasonable to expect that party to pay" (the [1981 Act s.51\(7\)](#)). A wasted costs order is defined in PD 46 para.5(1) as an order "(a) that the legal representative pay a sum (either specified or to be assessed) in respect of costs to a party; or (b) for costs relating to a specified sum or items of work to be disallowed".
28. 261 Until 1990 only solicitors could be made to pay wasted costs. The 1990 amendment to the [SCA 1981 s.51](#) exposed barristers and other legal representatives to liability for wasted costs. The amended [s.51](#) extended lawyers' liability well beyond serious misconduct. The thinking behind this provision was explained by Brooke J:

"In substituting negligence for serious misconduct as the threshold test for wasted costs orders in both criminal and civil cases, Parliament must have intended to provide redress for all who incurred expenses in civil or criminal cases which was caused by the negligence of lawyers on either side, and been willing to tolerate any adverse consequences of the new policy with equanimity. It is, after all, no more than the risk to which other professional people who do not possess the advocate's immunity in court have customarily exposed themselves. Fears about defensive medicine have not led Parliament to restrict the doctor's duty at common law to compensate those who have suffered loss because he has fallen below the standards of care reasonably to be expected of him."⁶⁶⁸

The wasted costs jurisdiction may therefore be seen not merely as a way of sparing litigants unnecessary or unjustified costs, but also as a means by which the court can establish and enforce adequate professional standards. In doing so the court has to balance two competing public interests. One is to ensure litigants do not suffer loss as a result of the incompetence of legal representatives. The other is to avoid satellite litigation aimed at shifting the responsibility for costs from the unsuccessful party to their lawyers.⁶⁶⁹ Unfortunately, the exercise of the jurisdiction has proved troublesome and expensive.

28. 262 A party may apply for a wasted costs order against the legal representatives of another party, as well as against their own legal representatives when providing litigation services.⁶⁷⁰ The notion of litigation services is quite wide. It includes, of course, the taking of formal steps in proceedings, such as serving documents and appearing in court, and extends to the doing of preparatory work, such as drafting or settling of documents and advising on prospects or procedure.⁶⁷¹
28. 263 The procedure for making wasted costs orders is set out in [CPR 46.8](#) and PD 46 para.5.⁶⁷² Three questions have to be resolved before a wasted costs order can be made (PD 46 para.5.5):

- (a) Has the legal representative of whom complaint is made acted improperly, unreasonably or negligently?
- (b) If so, did such conduct cause the applicant to incur unnecessary costs, or did it cause costs incurred by a party prior to the improper, unreasonable or negligent act or omission to be wasted?
- (c) If so, is it just in all the circumstances to order the legal representative to compensate that party for the whole or part of those costs?

“Improperly, unreasonably or negligently”—determining appropriate standards of representation

28. 264 The primary task of a court contemplating making a wasted costs order is to determine whether a legal representative has fallen so short of the required professional standards as to warrant a wasted costs order. To justify an order the conduct of a legal representative must have been “improper, unreasonable or negligent” ([SCA 1981 s.51\(7\)\(a\)](#)). These terms were considered in the key decision of *Ridehalgh v Horsefield* where Sir Thomas Bingham MR, Rose and Waite LJJ laid down general guidelines for the exercise of this jurisdiction. ⁶⁷³
28. 265 The Court of Appeal held in that case that the terms improper, unreasonable or negligent do not denote mutually exclusive kinds of professional conduct but are somewhat overlapping. The term “improper”, the court observed, “covers, but is not confined to, conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty. It covers any significant breach of substantial duty imposed by a relevant code of professional conduct. But it is not limited to that. Conduct which would be regarded as improper according to the consensus of professional (including judicial) opinion can be fairly stigmatised as such whether or not it violates the letter of a professional code”. ⁶⁷⁴ As this elaboration implies, improper conduct does not require proof of bad faith. ⁶⁷⁵ “Unreasonable”, it was decided in *Ridehalgh*, “describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive”. ⁶⁷⁶ The term “negligent” proved more difficult. The Court of Appeal held that “negligence” is not to be construed here in the technical sense that it bears in the law of negligence. Rather, it must be “understood in an untechnical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession”. ⁶⁷⁷ At the same time the court went out of its way to stress that an applicant for wasted costs would not be able to discharge the burden of proof by showing anything less than would have to be proved in an action for negligence. It would therefore appear that “negligence” in its technical meaning provides a threshold which the applicant must first pass. There is some authority for saying that even “improper, unreasonable or negligent” is not enough and that a breach of the lawyer’s duty to the court must also be shown. ⁶⁷⁸
28. 266 It is important, the Court of Appeal stressed, that the wasted costs jurisdiction should not be allowed to interfere with the duty of barristers and solicitors to represent clients regardless of the merits of their cases. ⁶⁷⁹ It is not their function to judge, only to present their clients’ claims. It is perfectly appropriate for a lawyer to represent a client even if they believe that the client is bound to fail. This point was reiterated by Lord Hobhouse in *Medcalf v Mardell*, where he said that “it is the duty of the advocate to present his client’s case even though he may think that it is hopeless and even though he may have advised his client that it is”. ⁶⁸⁰ Therefore, the very fact that a lawyer has acted (for or without fee) in a hopeless case or even in a case struck out for abuse of process, does not of itself amount to conduct that justifies the making of a wasted costs order. ⁶⁸¹ Peter Gibson LJ said “that there must be something more than negligence for the wasted costs jurisdiction to arise: there must be something akin to an abuse of process if the conduct of the legal representative is to make him liable to a wasted costs order”. ⁶⁸² Where the application is founded on the allegation that the legal representative has pursued a hopeless case, a wasted costs order will be made only if no reasonably competent legal representative would have continued with the action. ⁶⁸³ It has been held that

solicitors who ceased representing a client were not negligent in assuming that the new solicitors to whom they transferred the client's file would attend a hearing.⁶⁸⁴

28. 267 As noted above, to justify a wasted costs order, the lawyer's conduct must be such that no reasonable lawyer would have pursued it.⁶⁸⁵ For example, a solicitor acts improperly if they swear an affidavit in support of a winding-up petition, asserting that a company was insolvent when they did not hold that belief.⁶⁸⁶ Counsel must not allege dishonesty on the part of their client's opponent unless they have grounds for doing so. It has been held that such a plea would justify a wasted costs order only if counsel's belief that there were adequate grounds was unreasonable or reckless in the sense that no reasonable lawyer, properly considering matters, could have formed such belief.⁶⁸⁷ A lawyer will be guilty of improper behaviour if they lend assistance to proceedings that are an abuse of process, in the sense of using "litigious procedures for purposes for which they were not intended, as by issuing or pursuing proceedings for reasons unconnected with success in the litigation or pursuing a case known to be dishonest, nor is he entitled to evade rules intended to safeguard the interests of justice, as by knowingly failing to make full disclosure on an ex parte application or knowingly conniving at incomplete disclosure of documents".⁶⁸⁸ The fact a solicitor brought proceedings which were an abuse of process on the advice of counsel is no excuse, because the solicitor should have formed their own judgement about the soundness of the claim.⁶⁸⁹

28. 268 A number of recurring circumstances were considered in the *Ridehalgh* case, where the Court of Appeal was concerned with six separate appeals. In the first of these cases, *Ridehalgh v Horsefield*, a landlord brought a claim for possession against the tenant. The Court of Appeal expressed dismay that "a straightforward dispute between landlord and tenant should have led to four County Court actions (one still undecided), two appeals to this court and the passing of three years (so far) since the litigation began might well prompt an answer unfavourable to the solicitors".⁶⁹⁰ Yet, the Court of Appeal disapproved of the lower court's ruling that much of this futile procedural activity was due to the solicitors' negligence because:

"(1) This legislation [the *Housing Act 1988 s 34*] is very far from straightforward

(2) The solicitors do not appear to have approached the case in a careless way. There is nothing to contradict their statements that the textbooks they consulted did not give a clear answer to their problem. They could not be expected to bring the expertise of specialist counsel to the case. Nor could they reasonably expect to be remunerated for prolonged research. We do not think that their error was one which no reasonably competent solicitor in general practice could have made"⁶⁹¹

28. 269 It is suggested that it is unreasonable for solicitors to proceed with expensive litigation on the basis of a cursory perusal of a basic textbook. Further, it is to be doubted whether the fact that the legal aid fund, through which the litigation was financed, had not authorised extensive research of or the taking of expert opinion, amounts to an excuse for the failure to conduct a more thorough investigation of the law. Clients pay lawyers for their expertise, not to finance their legal studies. Of course, a client cannot expect their lawyers to be equipped with knowledge of every detail of every branch of the law, but a client is entitled to demand that their lawyers should possess the kind of professional expertise that would enable them to appreciate their own shortcomings.

28. 270 The most problematic of the cases before the Court of Appeal in *Ridehalgh* was the appeal in *Antonelli v Wade Grey Farr (a firm)*. Counsel for the claimant accepted a brief at short notice. After judgment was given against the claimant, the judge ordered the claimant's counsel to pay the costs of a one-day trial, because it was unreasonable for her to accept the brief when she had no time to acquire an adequate grasp of the issues. In making the order the judge referred to what was then para.601 of the Bar's Code of Conduct which provided:

"A practising barrister (b) must not undertake any task which: (i) he knows or ought to know he is not competent to handle; (ii) he does not have adequate time and opportunity to prepare for or perform"⁶⁹²

The Court of Appeal overruled the judge's wasted costs order, mainly because the judge failed to have regard to the duty of barristers to obey the "cab-rank rule", enshrined in the Bar's Code of Conduct para.602, and accept briefs.⁶⁹³ The court held that in the circumstances in which she found herself and in view of the poor preparation of the case before she accepted the brief, the claimant's counsel did as well as she could.⁶⁹⁴

28.271 Attention may, however, be drawn to what is now the Bar Code of Conduct r.C21.9, which provides that a barrister:

"must not accept instructions to act in a particular matter if ... you do not have enough time to deal with the particular matter, unless the circumstances are such that it would nevertheless be in the client's best interests for you to accept".

The version in force at the time of *Ridehalgh*, the Bar's Code of Conduct para.603, was essentially similar. Thus barristers were (and are) forbidden to accept work for which there was not enough time to prepare due to their other professional engagements. But, as is still the case, if barristers receive a brief close to the date of a hearing, they must accept it even if there is insufficient time for adequate preparation. If it were otherwise, clients could be left without legal representation. Although barristers must take instructions at short notice it does not follow that barristers should be obliged to conduct proceedings without preparation. If the case cannot be adequately prepared, the sensible course to pursue is for the barrister to seek an adjournment.⁶⁹⁵

28.272 The jurisdiction does not apply to all aspects of legal services in connection with litigation. It has been held that the court has no power in civil proceedings to make a wasted costs order against a litigant's former solicitors where they had neither issued proceedings nor performed any of the ancillary functions defined as constituting the conduct of litigation in relation to the action.⁶⁹⁶ This has been interpreted to mean that the court could not order a solicitor who missed the deadline for filing a statutory appeal as of right to pay the client's costs in seeking permission to appeal after the expiry of the time for appeal.⁶⁹⁷

Causal connection

28.273 Although the wasted costs jurisdiction is sometimes described as penal,⁶⁹⁸ a costs order against a legal representative is meant to do no more than provide a contribution towards the expense incurred as a result of a legal representative's conduct of the litigation. A court may, therefore, make a wasted costs order only where the improper, unreasonable or negligent conduct complained of was the cause of waste of costs.⁶⁹⁹ In *Ridehalgh*, the Court of Appeal stressed that "[d]emonstration of a causal link is essential. Where the conduct is proved but no waste of costs is shown to have resulted, the case may be one to be referred to the appropriate disciplinary body or the legal aid authorities, but it is not one for exercise of the wasted costs jurisdiction".⁷⁰⁰ It was held in another case that when determining causation the "court should ask itself whether, on the balance of probabilities, the applicant would have incurred the costs which he claims from the legal representatives if they had not acted or advised as they did".⁷⁰¹

28.274 Prior to the **CPR** it was held that a party who chooses to participate as a respondent to an application for permission to apply for judicial review cannot apply for wasted costs because it is not a party to the proceedings within the definition of that term in the **SCA 1981 s.151**, and does not therefore come within **SCA 1981 s.51(7)**.⁷⁰² According to the **SCA 1981 s.151** a *party* "includes any person who pursuant to or by virtue of rules of court or any other statutory provision has been served with notice of, or has intervened in, those proceedings". Under the **CPR**, a person bringing a claim for judicial review has to seek court permission to proceed with the claim (**CPR 54.4**), but the claimant is required to serve the claim form on the defendant (**CPR 54.7**). Therefore, a defendant to an application for permission to proceed with a claim for judicial review is a "party" to the proceeding from the start and there is therefore jurisdiction to make a wasted costs order in its favour.

Collective responsibility for wasted costs

28. 275 Advocates have a collective responsibility to see to it that the case is ready for a hearing. This is especially so in care proceedings, which are not adversarial. Wall J held that in care proceedings advocates on all sides are responsible for ensuring that the issues are properly defined and addressed, that the evidence is ready, that the experts who are going to be called to testify have had all the relevant materials and that all other necessary preparations have been completed in advance of the hearing.⁷⁰³ Where this has not been done, the court is entitled to make a wasted costs order against all the advocates involved. Indeed, the court has a special responsibility to investigate the advocates' likely liability for wasted costs where the litigation is funded at public expense on all sides.

Wasted costs procedure

Fairness and proportionality

28. 276 Wasted costs proceedings may be initiated by the lawyer's own client, by the court of its own initiative or, indeed, by the client's opponent.⁷⁰⁴ The procedure for making a wasted costs order is set out in CPR 46.8 and PD 46 para.5. Its main purpose is to ensure that legal representatives are treated fairly. CPR 46.8(2) requires the court to give the legal representative a reasonable opportunity to make written submissions or, if the legal representative prefers, to attend a hearing before it makes such an order.⁷⁰⁵ The court may direct that notice shall be given to the client of any wasted costs proceedings or of any order made against his legal representative (CPR 46.5(4)).
28. 277 A wasted costs application would normally be heard by the court that heard the case in which the disputed costs were incurred.⁷⁰⁶ As a general rule the court will consider whether to make a wasted costs order in two stages (PD 46 para.5.7–8)). At the first stage the court must be satisfied: (i) that it has before it evidence or other material which, if unanswered, would be likely to lead to a wasted costs order being made; and (ii) the wasted costs proceedings are justified notwithstanding the likely costs involved. At the second stage, the court will consider, after giving the legal representative an opportunity to make representations in writing or at a hearing, whether it is appropriate to make a wasted costs order. The court may proceed to the second stage without first adjourning the hearing, if it is satisfied that the legal representative has already had a reasonable opportunity to make representations (PD 46 para.5.8). The first stage involves two different tests: whether there is a *prima facie* case and, further, whether pushing ahead with the wasted costs investigation is proportionate. The overriding concern is that the procedure should be fair and should be as simple and expeditious as possible. Fairness requires that respondents should be clearly informed of what is alleged against them.
28. 278 The requirement of simplicity and expedition dictates that elaborate pleadings should in general be avoided. A wasted costs order should be made only if the scope of the costs sought was narrow and clear.⁷⁰⁷ No formal process of disclosure will be appropriate and the applicant is not permitted to request further information from the respondent lawyer, or vice versa.⁷⁰⁸ Rather inconsistently, the respondent lawyer may be ordered to attend for cross-examination.⁷⁰⁹ Proportionality requires that the court avoid lengthy and resource-hungry proceedings. The court must not allow the jurisdiction to become a further source of satellite litigation.⁷¹⁰ The court refused to exercise the jurisdiction where the costs of the application amounted to several tens of thousands of pounds on each side, which it considered to be wholly disproportionate to the size of any potentially wasted costs order that might be made.⁷¹¹

Time for making a wasted costs application

- 28. 279** A wasted costs application should not be made before the end of the case. The conduct of a legal representative can be fairly judged only in the context of the proceedings as a whole. Besides, entertaining a wasted costs application while the litigation is continuing could have serious disruptive effects on the case. It is inconceivable that a client would make a wasted costs application against their own lawyer while the latter is conducting the case on their behalf. Nor should a party be allowed to make a wasted costs application against an opponent's lawyer in the course of proceedings, because this may force the lawyer to resign from their representation of the opponent and leave the latter without adequate representation. For this reason, Aldous J explained, a wasted costs application against another party's lawyer while proceedings are pending will be considered an abuse of process, especially if it is calculated to harass the opponent or affect the course of justice.⁷¹² Once judgment has been given, a wasted costs order may be made at any time prior to assessment, even after a costs order has been made at the trial.⁷¹³

Burden of proof

- 28. 280** A wasted costs order should not be made unless the applicant has satisfied the court, or the court itself is satisfied, that an order is necessary. The burden of proof lies on the applicant. A legal representative will not be called on to reply to a wasted costs application unless an apparently strong *prima facie* case has been made against them.⁷¹⁴ The court cannot initiate wasted cost proceedings of its own motion unless it is already convinced of the gravity of the conduct in question. Where legal professional privilege prevents the court from having access to evidence that would enable it to decide whether a legal representative acted unreasonably, the burden will not have been discharged and no wasted costs order can be made.⁷¹⁵

Effect of legal professional privilege

- 28. 281** A client who applies for a wasted costs order against their own lawyer will be assumed to have waived their legal professional privilege as far as communications between themselves and their lawyer are relevant to the exercise of the jurisdiction.⁷¹⁶ Where a party makes a wasted costs application against their opponent's lawyer, it may not be possible to judge the reasonableness of the lawyer's conduct without knowing what passed between them and their own client. A lawyer is not entitled to break their client's privilege, not even in order to defend themselves against a wasted costs application.⁷¹⁷ In such situations the court would be able to fairly determine the application only if the respondent's client is willing to waive legal professional privilege. As Sir Thomas Bingham MR said in *Ridehalgh*:

“Judges who are invited to make or contemplate making a wasted costs order must make full allowance for the inability of respondent lawyers to tell the whole story. Where there is room for doubt, the respondent lawyers are entitled to the benefit of it. It is again only when, with all allowances made, a lawyer's conduct of proceedings is quite plainly unjustifiable that it can be appropriate to make a wasted costs order.”⁷¹⁸

- 28. 282** This problem was brought into the open in *Medcalf v Mardell*.⁷¹⁹ The claimant applied for a wasted costs order against the defendants' counsel on the grounds that they were guilty of impropriety by advancing allegations of fraud without having before them “reasonably credible material which as it stands establishes a *prima facie* case of fraud”, as required by the Code of Conduct of the Bar of England and Wales para.704.⁷²⁰ The defendants declined to waive privilege, so that counsel was unable to place before the court the considerations that led them to draft the disputed documents. The House of Lords held

that since the barristers were prevented from justifying their actions by reference to the information that they had before them at the time of drafting the notice of appeal and skeleton arguments, it would be a denial of justice to convict them of improper behaviour.⁷²¹ Lawyers are entitled to procedural justice like anyone else, Lord Steyn observed, adding that “[d]ue process enhances the possibility of arriving at a just decision. Where due process cannot be observed it places in jeopardy the substantive justice of the outcome”.⁷²²

- 28. 283** The effect of this otherwise unassailable decision is to circumscribe the scope for wasted costs applications by one party against another party’s lawyers, since it would normally be difficult to determine the application without access to privileged material.⁷²³ Such applications can be made only where the impropriety of the lawyers’ conduct can be satisfactorily determined without reference to privileged communications, as where the particular conduct admits of no reasonable explanation other than abuse of process,⁷²⁴ or there has been a clear breach of the lawyer’s duty to the court.

Summary nature of wasted costs procedure

- 28. 284** The wasted costs jurisdiction is essentially a summary jurisdiction, intended to enable the court to make wasted costs orders without extensive investigations or argument. Stressing the summary nature of the wasted costs procedure, the Court of Appeal in *Ridehalgh* expressed the hope that the length of such hearings will “be measured in hours and not in days or weeks”.⁷²⁵
- 28. 285** The House of Lords in *Medcalf v Mardell* has added its authority to the principle that wasted cost proceedings should be limited to situations where the facts are clear. Lord Bingham said:

“Save in the clearest case, applications against the lawyers acting for an opposing party are unlikely to be apt for summary determination, since any hearing to investigate the conduct of a complex action is itself likely to be expensive and time-consuming. The desirability of compensating litigating parties who have been put to unnecessary expense by the unjustified conduct of their opponents’ lawyers is, without doubt, an important public interest, but it is, as the Court of Appeal pointed out in *Ridehalgh* only one of the public interests which have to be considered.”⁷²⁶

“The jurisdiction is discretionary”, Lord Hobhouse added in the same case, “and should be reserved for those cases where the unjustifiable conduct can be demonstrated without recourse to disproportionate procedures”.⁷²⁷

Evaluation of the jurisdiction

- 28. 286** The wasted costs jurisdiction has proved far from straightforward. Due to legal professional privilege it can be almost unworkable where one party makes a wasted costs application against the opponent’s lawyers.⁷²⁸ As Lord Hobhouse observed in *Medcalf v Mardell*:

“Unlike the position between the advocate and his own client where the potential for liability will encourage the performance of the advocate’s duty to his client (see *Arthur Hall v Simons*) and the order would be truly compensatory, the jurisdiction to make orders at the instance of and in favour of the opposing party gives rise to wholly different considerations for the advocate. The risk of such an application can, at best, only provide a distraction in the proper representation of his own client and, at worst, may cause him to put his own interests above those of his client.”⁷²⁹

The jurisdiction has given rise to yet another form of satellite litigation, which can be expensive and wholly out of proportion to the costs that can be recovered from the lawyer or, indeed, to the costs of the substantive proceedings, as is demonstrated by Hugh Evans' work on the subject.⁷³⁰ There is a risk that both parties will make common cause to extract the costs from the lawyers of the unsuccessful party. Where the successful party applies for wasted costs against the lawyers of the unsuccessful client, Lord Hobhouse pointed out, the "client very probably will have no interest in waiving the privilege. Indeed, the client may stand to gain if his opponent can look to the client's lawyer for an indemnity rather than to the client himself".⁷³¹

- 28.287 Despite its shortcomings the wasted costs jurisdiction remains an important tool as a matter of policy. In a litigation system that is liable to generate high costs, much of which are in lawyers' fees, the court cannot be seen to be powerless to protect litigants or, indeed, the public purse, from excessive or unnecessary costs incurred as a result of incompetent conduct by legal representatives. The need for the jurisdiction is dictated by the reality that it is lawyers who often control the conduct of proceedings, not their clients. Furthermore, in many cases lawyers are not disinterested representatives, but participants with a stake of their own in the outcome. The court must therefore have some measures for dealing with professional excesses. But the jurisdiction can serve a useful purpose only if it is kept within proper bounds and if misuse is prevented or kept in check.

Footnotes

- 668 *R v Horsham District Council Ex p. Wenman* [1994] 4 All ER 681; [1995] 1 W.L.R. 680.
- 669 *Hedrich v Standard Bank London Ltd* [2008] EWCA Civ 905; [2009] P.N.L.R. 3.
- 670 *Medcalf v Mardell* (wasted costs order) [2002] UKHL 27; [2003] 1 AC 120; *Brown v Bennett* [2002] 2 All ER 273; [2002] 1 W.L.R. 713, Ch.
- 671 *Medcalf v Mardell* (wasted costs order) [2002] UKHL 27; [2003] 1 AC 120 [45].
- 672 A similar jurisdiction is exercised in criminal cases under the Crown Court's inherent jurisdiction, in the magistrates' courts, in accordance with CLSA 1990 ss.111–112, or in the magistrates' court, Crown Court or Court of Appeal in accordance with the Prosecution of Offences Act 1985 s.19A. Hence, decisions given in such proceedings are of relevance to the exercise of the jurisdiction in civil cases.
- 673 *Ridehalgh v Horsefield* [1994] Ch 205 at 232; [1994] 3 All ER 848 at 861, CA.
- 674 *Ridehalgh v Horsefield* [1994] Ch 205 at 232; [1994] 3 All ER 848 at 861, CA.
- 675 *Medcalf v Mardell* (wasted costs order) [2002] UKHL 27; [2003] 1 AC 120 [38].
- 676 *Ridehalgh v Horsefield* [1994] Ch 205 at 232; [1994] 3 All ER 848 at 861, 862, CA.
- 677 *Ridehalgh v Horsefield* [1994] Ch 205 at 233; [1994] 3 All ER 848 at 862, CA.
- 678 *Persaud v Persaud* [2003] EWCA Civ 394; [2004] 1 Costs L.R. 1 [22]; and *Charles v Gillian Radford & Co* [2003] EWHC 3180 (Ch).
- 679 *Ridehalgh v Horsefield* [1994] Ch 205 at 234; [1994] 3 All ER 848 at 863, CA.
- 680 *Medcalf v Mardell* (wasted costs order) [2002] UKHL 27; [2003] 1 AC 120 [56].
- 681 *Tolstoy-Miloslavsky v Aldington* [1996] 2 All ER 556; [1996] 1 W.L.R. 736, CA; and *Persaud v Persaud* [2003] EWCA Civ 394; [2004] 1 Costs L.R. 1.
- 682 *Persaud v Persaud* [2003] EWCA Civ 394; [2004] 1 Costs L.R. 1 [27].
- 683 *Dempsey v Johnstone* [2003] EWCA Civ 1134; [2004] 1 Costs L.R. 41; *KOO Golden East Mongolia v Bank of Nova Scotia* [2008] EWHC 1120 (QB); failing to foresee that raising a new point might lead to a further issue that would require adjournment does not justify a wasted costs order: *Hallam-Peel & Co v Southwark LBC* [2008] EWCA Civ 1120.
- 684 *Equity Solicitors v Javid* [2009] EWCA Civ 535.
- 685 *Persaud v Persaud* [2003] EWCA Civ 394; [2004] 1 Costs L.R. 1.
- 686 *Re a Company (No.006798 of 1995)* [1996] 2 All ER 417; [1996] 1 W.L.R. 491.
- 687 *Brown v Bennett* [2002] 2 All ER 273; [2002] 1 W.L.R. 713 [113], Ch. See also *Medcalf v Mardell* (wasted costs order) [2002] UKHL 27; [2003] 1 AC 120.
- 688 *Ridehalgh v Horsefield* [1994] Ch 205 at 234; [1994] 3 All ER 848 at 863, CA.

- 689 *Tolstoy-Miloslavsky v Aldington* [1996] 2 All ER 556; [1996] 1 W.L.R. 736. However, solicitors are entitled to expect that specialist counsel instructed would give appropriate advice: *Re G (children) (care proceedings: wasted costs)* [2000] Fam. 104; [1999] 4 All ER 371.
- 690 *Ridehalgh v Horsefield* [1994] Ch 205 at 244; [1994] 3 All ER 848 at 872, CA.
- 691 *Ridehalgh v Horsefield* [1994] Ch 205 at 244; [1994] 3 All ER 848 at 872, CA.
- 692 See now the Bar Code of Conduct r.C18. The wording has changed, so that under r.C18 a barrister is required to inform the professional client as far as reasonably possible in sufficient time to enable steps to be taken to protect the client's interests if it becomes apparent the barrister will not be able to carry out the instructions within the time available.
- 693 The cab-rank rule is now in the Bar Code of Conduct r.C29. This provides that where instructions are addressed specifically to a barrister, and are appropriate taking into account the barrister's experience, seniority and field of practice, the barrister must accept the instructions.
- 694 Guidance in the Bar Code of Conduct r.C83 is that in deciding whether to cease to act and to return existing instructions in accordance with r.C26, the barrister should, where possible and subject to their overriding duty to the court, ensure that the client is not adversely affected because there is not enough time to engage other adequate legal assistance.
- 695 Though in the case before the Court of Appeal in *Ridehalgh v Horsefield* [1994] Ch 205; [1994] 3 All ER 848, the client had instructed the barrister not to seek an adjournment because he was under financial pressure.
- 696 *Byrne v Sefton Health Authority* [2001] EWCA Civ 1904; [2002] 1 W.L.R. 775, CA.
- 697 *Radford & Co v Charles* [2003] EWHC 3180 (Ch); [2004] P.N.L.R. 25.
- 698 *Medcalf v Mardell (wasted costs order)* [2002] UKHL 27; [2003] 1 AC 120 [32], [55]; *D v H* [2008] EWHC 559 (Fam).
- 699 This seems to be the main reason for refusing a wasted costs order in *Regent Leisuretime Ltd v Skerrett* [2006] EWCA Civ 1032.
- 700 *Ridehalgh v Horsefield* [1994] Ch 205 at 237; [1994] 3 All ER 848 at 866, CA. See also *R (Mach) v Secretary of State for the Home Department* [2001] EWCA Civ 645; [2001] All ER (D) 204 (Apr).
- 701 *Brown v Bennett* [2002] 2 All ER 273; [2002] 1 W.L.R. 713 [54], CA.
- 702 *R v Camden London Borough Council Ex p. Martin* [1997] 1 All ER 307; [1997] 1 W.L.R. 359.
- 703 *Re G (children) (care proceedings: wasted costs)* [1999] Fam. 104; [1999] 4 All ER 371.
- 704 *Medcalf v Mardell (wasted costs order)* [2002] UKHL 27 at [19]; [2003] 1 AC 120; [2002] 3 All ER 721 [19].
- 705 *Persaud v Persaud* [2003] EWCA Civ 394; [2004] 1 Costs L.R. 1.
- 706 *Re Merc Property Ltd* [1999] 2 B.C.L.C. 286.
- 707 *Regent Leisuretime Ltd v Skerrett* [2006] EWCA Civ 1032.
- 708 *Ridehalgh v Horsefield* [1994] Ch 205 at 238; [1994] 3 All ER 848 at 867, CA.
- 709 *Hunt v Annolight Ltd* [2020] EWHC 3744 (QB).
- 710 *Ridehalgh v Horsefield* [1994] Ch 205; *Medcalf v Mardell (Wasted Costs Order)* [2002] UKHL 27; [2003] 1 AC 120; and *Hedrich v Standard Bank London Ltd* [2008] EWCA Civ 905.
- 711 *Harrison v Harrison* [2009] EWHC 428 (QB).
- 712 *Filmlab Systems International Ltd v Pennington* [1994] 4 All ER 673; [1995] 1 W.L.R. 673.
- 713 *Melchior v Vettivel* [2002] C.P. Rep. 24.
- 714 *Ridehalgh v Horsefield* [1994] Ch 205 at 239; [1994] 3 All ER 848 at 867–868, CA.
- 715 *Medcalf v Mardell (wasted costs order)* [2002] UKHL 27; [2003] 1 AC 120 [40].
- 716 See the discussion of limited waiver of LPP in Ch.16 Legal Professional Privilege.
- 717 *Ridehalgh v Horsefield* [1994] Ch 205 at 236–237; [1994] 3 All ER 848 at 866, CA; and *Filmlab Systems International Ltd v Pennington* [1994] 4 All ER 673; [1995] 1 W.L.R. 673.
- 718 *Ridehalgh v Horsefield* [1994] Ch 205 at 237; [1994] 3 All ER 848 at 866, CA.
- 719 *Medcalf v Mardell (wasted costs order)* [2002] UKHL 27; [2003] 1 AC 120.
- 720 Now the Bar Code of Conduct r.C9.2, which is in substantially the same terms.
- 721 *Medcalf v Mardell (wasted costs order)* [2002] UKHL 27; [2003] 1 AC 120 [25], [39]–[42].
- 722 *Medcalf v Mardell (wasted costs order)* [2002] UKHL 27; [2003] 1 AC 120 [42].
- 723 *Dempsey v Johnstone* [2003] EWCA Civ 1134; [2004] 1 Costs L.R. 41; *Persaud v Persaud* [2003] EWCA Civ 394; [2004] 1 Costs L.R. 1.
- 724 *Morris v Roberts (HMIT) (Wasted Costs Order)* [2005] EWHC 1040 (Ch).
- 725 *Ridehalgh v Horsefield* [1994] Ch 205 at 238; [1994] 3 All ER 848 at 867, CA.
- 726 *Medcalf v Mardell (wasted costs order)* [2002] UKHL 27; [2003] 1 AC 120 [24].

- 727 *Medcalf v Mardell (wasted costs order) [2002] UKHL 27; [2003] 1 AC 120* [57].
- 728 H. Evans, “The Wasted Costs Jurisdiction” (2001) 64 M.L.R. 51.
- 729 *Medcalf v Mardell (wasted costs order) [2002] UKHL 27; [2003] 1 AC 120* [55].
- 730 H. Evans, “The Wasted Costs Jurisdiction” (2001) 64 M.L.R. 51.
- 731 *Medcalf v Mardell (wasted costs order) [2002] UKHL 27; [2003] 1 AC 120* [59].

Solicitor and Client Costs

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

Mainwork

Chapter 28 - Costs

Solicitor and Client Costs

Introduction

28. 288 The court has jurisdiction to determine not only the amount of costs that one party can recover from another party but also the extent of fees and expenses that solicitors can recover from their own clients. There are good reasons why the court should have jurisdiction to supervise the private contractual arrangements made between solicitors and clients. Where litigation is concerned, there is a potential conflict of interest between solicitors and clients. Solicitors who are retained on an hourly fee basis have an economic incentive to maximise the number of billable hours. On their part, clients lack the expertise and the information needed for assessing the necessity and reasonableness of the procedural activity involved in litigation. Furthermore, persons contemplating litigation might find it difficult to carry out satisfactory market research before engaging a solicitor. They may be able to compare hourly fees, but they have limited means of assessing the performance of different firms or individuals and the cost-effectiveness of the services they offer. Lastly, given that litigation practices and, especially, bills of costs are not always easily comprehensible to the lay litigant, it is important that there should be an independent mechanism of verification. Court supervisory jurisdiction over solicitor and client costs is as much in the interests of the legal profession, since it promotes standards of probity and public confidence. The present regulatory scheme is to be found in the [Solicitors Act 1974](#). The procedure for court assessment of solicitor and client costs is set out in [CPR 46.9](#) and [CPR 46.10](#).

Solicitor's duty to provide client with information

28. 289 Solicitors should provide their clients at the outset of the retainer, and thereafter at appropriate stages as the case develops, with the best possible information about the likely overall cost of their matter to enable their clients to make well-informed decisions about the advisability of litigation.⁷³² This is not least because, as we shall presently see, the better the information provided to the client, the more likely it is that the court will determine that the solicitor's fees were reasonably incurred. The duty encompasses explaining the firm's fees,⁷³³ whether and when they are likely to change⁷³⁴ and also warning about any other payments that the client may be liable to pay.⁷³⁵ Where a solicitor seeks to change the basis on which the client is to be charged, the client should be given an informed opportunity to agree.⁷³⁶ Solicitors should keep their clients updated as the case progresses: they must notify their clients of any costs order made against them ([CPR 44.8](#)); and it is good practice to keep them informed about their potential liability to costs.⁷³⁷ Thus, where costs budgets are required the client should be informed of the incurred and budgeted sums,⁷³⁸ and they must be informed in writing as soon as it appears likely that cost estimates, budgets or agreed upper limits might be exceeded. Solicitors must maintain a full record of the information that they have given to the client, of decisions relating to costs and of any changes in arrangements regarding costs.⁷³⁹

Client's right to apply for assessment of solicitors' bill

28. 290

A client (or anyone else who is liable to pay the solicitors' bill) is entitled to apply for a detailed assessment of the bill. A client may apply for assessment even after paying the bill. The court may order detailed assessment of its own initiative. Solicitors may also apply for assessment, but they may not start proceedings for recovery of their fees within a month of presentation of the bill. This is because detailed assessment may be obtained by a client as a matter of right, provided the application is made within one month from the presentation of the bill ([Solicitors Act 1974 s.70\(2\)](#)). After the expiry of the one-month period, and within 12 months of delivery of the bill, the court will only order detailed assessment in special circumstances (the [1974 Act s.70\(3\)](#)).⁷⁴⁰ Assessment under [s.70](#) is barred from 12 months after payment of the bill ([s.70\(4\)](#)).⁷⁴¹ The time limits in [s.70](#) do not affect the client's right to complain to the Solicitors Regulation Authority about professional misconduct.

28. 291 The [1974 Act](#) constitutes a comprehensive scheme for the ordering of an assessment at a client's behest and the court therefore has no power to grant a late application seeking assessment, save in accordance with the provisions of the Act.⁷⁴² Thus, the fixed time limit of 12 months after payment of the bill by the client cannot be extended. If an aggrieved client is out of time or the court refuses to find special circumstances, they may still challenge the solicitors' bill, but they will be confined to their common law remedies—i.e. contract and tort. Quite independently of the legislation, the law of contract requires a solicitor claiming fees to establish the reasonableness of the number of hours charged. But the solicitor can rely on the contract with regard to the amount payable per hour.⁷⁴³

Rules governing the assessment of solicitor and client costs

28. 292 As between solicitor and client, costs are assessed on the indemnity basis ([CPR 46.9\(3\)](#)). The assessment can address issues, such as negligence or breach of fiduciary duty, if relevant to whether particular items are recoverable, but not free-standing inquiries, such as whether an agreement of the solicitor's bill is vitiated by undue influence.⁷⁴⁴ Solicitors' bills are not subject to the proportionality requirement. But they are very much subject to the reasonableness requirement. Costs are presumed to have been reasonably incurred if they were incurred with the express or implied approval of the client ([CPR 46.9\(3\)\(a\)](#)). Costs are presumed to be reasonable in amount if their amount was expressly or impliedly approved by the client (([CPR 46.9\(3\)\(b\)](#))). In order to benefit from this presumption, the solicitor must adequately inform their client of all the relevant factors before asking for approval.⁷⁴⁵ However, if the costs claimed are of an unusual nature or amount, and the solicitor did not tell their client that they might not be able to recover all of them from the other party, the costs will be presumed to have been unreasonably incurred ([CPR 46.9\(3\)\(c\)](#)). Where the court is considering a percentage increase, the court will have regard to all the relevant factors as they reasonably appeared to the solicitor or counsel when the CFA was entered into or varied ([CPR 46.9\(4\)](#)).
28. 293 To dissuade unmeritorious applications, the [1974 Act s.70\(9\)](#) provides that the costs of assessment "shall be paid according to the event of the assessment, that is to say, if the amount of the bill is reduced by one-fifth, the solicitor shall pay the costs, but otherwise the party chargeable shall pay the costs". In other words, solicitors are liable to pay the costs of the assessment if their bill is reduced by 20 per cent or more, but otherwise the client bears the costs. The amount in respect of which the 20 per cent is calculated includes disbursements.⁷⁴⁶

Footnotes

⁷³² This is enshrined in the SRA Code of Conduct for Solicitors r.8.7, which provides: "You ensure that clients receive the best possible information about how their matter will be priced and, both at the time of engagement and when appropriate as their matter progresses, about the likely overall cost of the matter and any costs incurred". See also *Toms (t/a Goldbergs Solicitors) v Brannan [2020] EWHC 2866 (QB)*.

- 733 Where the litigation is funded by a CFA which provides for a success fee, the information should include the basis upon which the success fee is calculated—for example, whether it is based on an individual risk assessment (which the client is generally entitled to expect), or applied uniformly by the firm: *Herbert v HH Law Ltd* [2019] EWCA Civ 527.
- 734 Fees commonly go up each year in line with inflation or other market factors.
- 735 It is good practice in group litigation for the solicitor to explain in the client care letter that some of the work will be for the benefit of the group, and the costs will be shared between members of the group: *Brown v Russell Young & Co* [2007] EWCA Civ 43; [2008] 1 W.L.R. 525 [34].
- 736 *Bilkus v Stockler Brunton* [2010] EWCA Civ 101; [2011] 1 W.L.R. 2526.
- 737 *Leigh v Michelin Tyre Plc* [2003] EWCA Civ 1766; [2004] 2 All ER 175.
- 738 Costs management is discussed above at paras 28.103 ff.
- 739 *Ralph Hume Garry (a firm) v Gwillim* [2002] EWCA Civ 1500; [2003] 1 All ER 1038, CA.
- 740 Misleading statements made by the solicitors to the client and pressure exerted may amount to special circumstances: *Kundrath v Harry Kwatia & Gooding* [2004] EWHC 2852 (QB).
- 741 Payment in s.70(4) means the client actually paying the solicitor, or the client agreeing to a sum being taken in payment (such as from damages recovered in the litigation): *Menzies v Oakwood Solicitors Ltd* [2024] UKSC 34.
- 742 *Harrison v Tew* [1990] 2 AC 523; [1990] 1 All ER 321, HL.
- 743 *Turner & Co (a firm) v O Palomo Sai* [1999] 4 All ER 353; [2000] 1 W.L.R. 37, CA.
- 744 *Jones v Richard Slade and Co Ltd* [2022] EWHC 1968 (QB).
- 745 *MacDougall v Boote Edgar Esterkin* [2001] 1 Costs L.R. 118, CA.
- 746 The s.70(9) amount is the sum the solicitor has asked the client to pay in the bill of costs, which might be less than the amount calculated by applying the solicitor's hourly rate to the hours worked: *Karatysz v SGI Legal LLP* [2021] EWHC 1608 (QB).

Publicly Funded Legal Services

Zuckerman on Civil Procedure: Principles of Practice 5th Ed.

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Chapter 28 - Costs

Publicly Funded Legal Services

General features of legal aid

- 28.294 The [Access to Justice Act 1999](#) replaced the old legal aid system with the Community Legal Service (CLS) system, which came into effect on 1 April 2000.⁷⁴⁷ The CLS system was itself replaced with effect from 1 April 2013 by the legal aid scheme enacted by [LASPO 2012 Pt I](#). The purpose of the present section is limited to general observations about the scheme and to its costs implications.
- 28.295 The main purpose of the reforms in 2000 and 2013 was to cut the cost of publicly funded legal services in civil cases. Unlike the pre-2000 system, which was demand-led and offered legal assistance at public expense to anyone who qualified, regardless of the likely cost of the individual case and without overall limits, the modern system is meant to operate under budgetary constraints. Unlike the pre-2000 system, which allowed assisted clients a wide measure of freedom in the choice of their solicitors, legal aid is now provided through franchised firms, with which the Legal Aid Agency enters into bulk contracts for the provision of civil legal services. Different arrangements may be made for different regions, different descriptions of case and different classes of person.⁷⁴⁸ There is, in general, no obligation on the Lord Chancellor to ensure publicly funded legal services are provided by the lawyer selected by the client.⁷⁴⁹ In particular, [LASPO s.27\(2\)](#) allows the provision of publicly funded legal services by telephone or other electronic means. By such means, the Legal Aid Agency is able to ensure that legal services are provided in a cost-efficient manner and in accordance with general standards that it is able to impose on the service providers.
- 28.296 Many types of claims are altogether excluded from the civil legal aid.⁷⁵⁰ [LASPO 2012 Sch.1](#) lists the types of proceedings in which legal representation is not provided at public expense. The list includes, for example:
- (a)allegations of negligently caused injury, death or damage to property, apart from clinical negligence and claims brought by severely disabled infants;
 - (b)claims related to conveyancing;
 - (c)claims for trespass to land;
 - (d)claims related to the making of wills;
 - (e)claims concerning matters of trust law;
 - (f)allegations of defamation or malicious falsehood;
 - (g)claims for damage to property; and
 - (h)matters arising out of the establishment, carrying on or termination of a business.
- 28.297 A small measure of flexibility for the provision of funded services in the excluded categories of cases is preserved by [LASPO 2012 s.10](#). This allows for public funding to be made available in an exceptional case (known as “exceptional case funding” or ECF), if this is necessary on the ground that failure to do so would be a breach of the individual’s ECHR rights or assimilated

enforceable rights.⁷⁵¹ Further, there may be cases where the court makes an order that lay advocates to assist a party who lacks legal capacity (by analogy with intermediaries funded in the criminal context) are to be paid for out of public funds, to avoid breaching the party's right to a fair trial.⁷⁵²

28. 298 Eligibility to legal representation at public expense depends on financial criteria relating to earnings and capital.⁷⁵³ Significantly, eligibility to public funding also depends on the client's prospect of success and on a cost–benefit analysis of the prospective litigation. These last two factors reflect the concern of the overriding objective with proportionality and reasonable use of resources. In the context of publicly funded litigation, these considerations are backed by a lengthy and complex set of guidelines. Thus, for example, where the prospects of success are above 80 per cent, the estimated damages must exceed the anticipated costs, but where the prospects of success are between 60 and 80 per cent, the estimated damages must be at least twice more than the anticipated costs.
28. 299 The legal aid scheme funds a variety of services, besides litigation. It funds *legal help*, which consists of basic advisory services. Legal help includes the provision of general information about the law, advice on how the law applies in certain circumstances and help with settling disputes. Legal help can be obtained for all types of disputes. The next service is *help at court*, which is fairly limited and does not offer full support for the client's litigation. Such help could cover advocacy for a particular hearing, for example. Finally, the legal aid scheme may provide *legal representation*. There are two forms of legal representation: *investigative help* and *full representation*. Investigative help is limited to a probing of the strength of a proposed claim. It includes protocol activity and the conduct of proceedings so far as it is necessary to obtain disclosure of the necessary information and to protect the client's position in terms of meeting limitation periods. Full representation consists of any legal representation other than investigative help. Special provision is made for *family help*—i.e. assistance in relation to family disputes—and *family mediation*. The variety of services that the legal aid scheme funds offers flexibility in devising the best way for meeting the community's needs in a cost-efficient manner. This flexibility has probably increased the scheme's administrative complexity.

Costs orders in favour of publicly funded litigants

28. 300 The general principle is that costs orders in favour of publicly funded clients operate in much the same way as for privately funded clients. The [Civil Legal Aid \(Costs\) Regulations 2013 r.21\(1\)](#) states that “the amount of the costs to be paid under a legally aided party's costs order must be determined as if that party were not legally aided”. Under the indemnity principle, costs recovery is normally limited to that which the client is obliged to pay his lawyers. To remove this limitation, [r.21\(3\)](#) provides that “the amount of costs to be paid under a legally aided party's costs order is not limited, by any rule of law which limits the costs recoverable by a party to proceedings to the amount the party is liable to pay their representatives” However, the limitation is removed only to the extent that the Lord Chancellor has authorised the supplier of legal services under [s.28\(2\)\(b\) of the Act](#) to take payment for the relevant work other than that funded by the legal aid scheme. Costs payable to a funded litigant must be paid directly to the funded party's solicitors to defray the cost to the Legal Aid Agency.
28. 301 To the extent that a successful legally aided party funded client is not able to recover costs from the opponent, the party is under an obligation to repay the publicly funded costs out of any money or property recovered in the litigation. [LASPO 2012 s.25](#) gives the Lord Chancellor “a first charge on any property recovered or preserved by the individual in proceedings, or in any compromise or settlement of a dispute, in connection with which the services were provided”.⁷⁵⁴

Costs orders against legally aided litigants

28. 302

Given that legally aided litigants are poor, it would defeat the whole purpose of the legal aid scheme if they were liable to pay the costs of their successful opponents in the normal way. Therefore, the legislation limits the court's jurisdiction to make costs orders against funded litigants. [LASPO 2012 s.26](#) provides that, except in prescribed circumstances, costs ordered against a legally aided party must not exceed the amount which is a reasonable one for them to pay having regard to the financial resources of all the parties to the proceedings, and to their conduct in connection with the dispute.⁷⁵⁵ The limitation only applies for as long as the client is publicly funded.

- 28. 303 A non-funded litigant who seeks costs against a funded litigant may provide detailed information about their own means.⁷⁵⁶ Given that funded litigants are poor, it would be rare for the court to order the funded client to pay even a small proportion of the successful party's costs. However, if the funded party's fortunes drastically change for the better within six years of the date on which the court has made a costs order under [LASPO 2012 s.26](#), the non-funded party may apply for a variation and claim the full costs incurred by them (this type of provision used to be known as a "football pools order").⁷⁵⁷
- 28. 304 Difficult questions may arise where both parties are publicly funded. In *Chaggar v Chaggar*,⁷⁵⁸ in proceedings to establish ownership of a house both parties were legally aided, the court decided that each party owned half of the beneficial interest and ordered the defendants to pay the claimant's costs. The issue was whether the defendants should be required to pay the claimant's costs out of their share of the proceeds of sale. Under the legislation then in force legally assisted persons were not required to sell their dwelling house to meet an adverse costs order. However, if the claimant were unable to recover costs from the defendants, the legal aid fund would have a charge on its share of the proceeds. The court had therefore to decide what was just as between the parties. It held that in the instant case the defendants were able to acquire a mortgage to assist in the purchase of a new dwelling house without their share of the proceeds of sale and therefore their share of the proceeds should be used to discharge the claimant's costs.
- 28. 305 Detailed provisions concerning the operation of the limitation on costs orders against legally aided litigants are contained in the [Civil Legal Aid \(Costs\) Regulations 2013](#). Since the provisions concerning costs recovery from funded litigants are similar to those that prevailed under the old system, the older authorities continue to be of value.

Costs orders against the Lord Chancellor

- 28. 306 Rather than wait for the funded litigant's fortunes to drastically improve (such as winning the lottery), a non-funded litigant may apply for an order that their costs be paid by the Lord Chancellor. The jurisdiction to make a costs order against the Lord Chancellor is to be found in [LASPO 2012 s.26\(6\)\(d\)](#) and the [Civil Legal Aid \(Costs\) Regulations 2013](#). The purpose of the jurisdiction to order costs against the Lord Chancellor is to rectify the injustice that may be caused to a non-funded party who is obliged to finance litigation out of their own pocket and who faces financial hardship even though they have won in the litigation. Among the requirements are that as regards costs incurred at first instance, the court must be satisfied that the non-funded party will suffer financial hardship unless they recover their costs, and it must be just and equitable to make the order against the Lord Chancellor. It has been held that a publicly funded body, such as a government department, is capable of suffering hardship and that a costs order may be made against the Lord Chancellor in favour of such a body.⁷⁵⁹ Orders can only be made by a costs judge or district judge. It is, therefore, not open to the trial court to rule that it was just and equitable to make an order before the prescribed procedure has been completed.⁷⁶⁰

Footnotes

- 747 For a general discussion see *M. Spencer, "The Common Law Legacy and Access to Justice: Contingency Fees and the Birth of Civil Legal Aid"* (2000) 9(2) *Nottingham L.J.* 32. For an outline of present practice see: S. Middleton and J. Rowley (eds), *Cook on Costs* (London: LexisNexis, 2025), paras 10.2–10.9.
- 748 LASPO 2012 s.2(5).
- 749 LASPO 2012 s.27(3), subject to exceptions in s.27(4)–(10).
- 750 There is a separate legal aid scheme for criminal cases. Defending a contempt of court application in a civil case is on the boundary, but ultimately comes within the criminal scheme: *The All England Lawn Tennis Club (Championship) Ltd v McKay* [2020] EWCA Civ 695; [2020] 1 W.L.R. 216.
- 751 LASPO 2012 s.10(2), (3). See also the Lord Chancellor's Exceptional Funding Guidance (Non-Inquests) LCG-ECF 2023.
- 752 In *Re C (Lay Advocates)* [2019] EWHC 3738 (Fam); [2020] 1 W.L.R. 1018. In *Re C (Lay Advocates) (No.2)* [2020] EWHC 1762 (Fam), it was clarified that HMCTS were responsible for funding in-court assistance by a lay advocate (as with, for example, interpreters), and the Legal Aid Agency would be responsible for funding out-of-court assistance.
- 753 LASPO 2012 s.11, and the *Legal Aid (Financial Resources and Payment for Services) Regulations 2013* (SI 2013/480).
- 754 See *Civil Legal Aid (Statutory Charge) Regulations 2013* (SI 2013/503). And see in particular rr.4–6, which set out exceptions to the statutory charge.
- 755 For interpretation of the equivalent provision in the *Access to Justice Act 1999* s.11(1), see *W (A Child) v Portsmouth Hospital NHS Trust (Costs)* [2006] EWCA Civ 529.
- 756 Civil Legal Aid (Costs) Regulations 2013 reg.14.
- 757 Civil Legal Aid (Costs) Regulations 2013 reg.19(2)–(5).
- 758 *Chaggar v Chaggar* [1997] 1 All ER 104, CA.
- 759 *R v Secretary of State for the Home Department Ex p. Gunn* [2001] EWCA Civ 891; [2002] 3 All ER 481.
- 760 *R v Secretary of State for the Home Department Ex p. Gunn* [2001] EWCA Civ 891; [2002] 3 All ER 481.

Costs Reform

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Mainwork

Chapter 28 - Costs

Costs Reform

The problem of high and unpredictable litigation costs

28. 307 Despite periodic reforms the cost of litigation in England continues to be high and unpredictable. One of the symptoms of the malaise has been the extent of costs recovery litigation. “Satellite litigation about costs”, Latham LJ lamented, “has become a growth industry, and one that is a blot on the civil justice system”. ⁷⁶¹ Paradoxically, much of this litigation has been the result of the reforms that were intended to improve access to justice, to increase the efficiency of litigation and to reduce litigation costs. For instance, one of the notable features of the CPR is that it employs costs orders as a policy instrument to promote party compliance with rules and orders, to encourage inter-party co-operation and to foster reasonable litigation practices. As a result, the award of costs has become less a rule-based and more a case-based exercise of judicial discretion. There certainly are some indications that the court’s approach to party compliance, including the use of case-based costs orders, has improved the litigation culture. ⁷⁶² But at the same time, it is fairly clear that the discretionary approach has increased uncertainty and, with it, the prospect of litigation about costs.
28. 308 Crucial to note here is the chilling effect on access to justice caused by the prospect of an unlimited costs liability, especially on litigants of modest means. In his Preliminary Report, Jackson LJ said:
- “We have arguably reached the position in this jurisdiction where the level of costs is so high that facing a full adverse costs order is likely to be a disaster for most ordinary citizens. This is so much so that litigation on behalf of individuals does not tend to happen these days unless a mechanism can be found to protect the claimant (either legal aid cost protection or after-the-event insurance). Even small corporate bodies like NGOs will not litigate on important issues if there is a risk of full costs exposure.” ⁷⁶³
28. 309 It must therefore be accepted that high and disproportionate costs are undesirable. Given the magnitude of the expense of litigation, parties and their lawyers have a powerful motivation to try to shift their costs burden to other participants. This is true not just of private parties and their lawyers in individual cases, but also, at a wider systemic level, of claims management companies, insurance companies, the government and other public bodies. This aspect also generates much satellite litigation over costs, which consumes a good deal of court time and expense.
28. 310 It is occasionally said that high litigation costs deter excessive litigation. It is, however, iniquitous to seek to moderate litigation levels by means of high costs because such a strategy disproportionately affects poor litigants. In any event, an increase in the volume of litigation is not necessarily an evil. Within reasonable limits, there is no harm in affording more people access to justice and in enabling solicitors to attract higher volumes of litigation.
28. 311 A further received idea that must be abandoned is that a litigant who has insisted on their rights but whose case has been rejected has caused the successful opponent a loss for which the latter is entitled to compensation. ⁷⁶⁴ There may of course be cases where the litigation process has been abused and used to ends other than obtaining court adjudication on a genuine dispute,

where the victim of the abuse should be entitled to a remedy. But where a litigant has presented a serious case that justified a trial on the merits they should not be regarded as having inflicted an unwarranted financial harm on their opponent for no better reason than that the court found for their opponent on the merits. Unfortunately, the combined effect the mistaken view that costs are a legitimate deterrent and of the view that they are dictated by compensatory principles has undermined the search for alternative arrangements.

28. 312 A further factor that has undermined the search for sensible solutions has been the tendency to focus on the symptoms rather than seek to address the underlying problem. The underlying problem lies in the combined effect of two features of the English costs system: the costs-shifting principle (transferring the costs burden from the successful party to the unsuccessful one) and quantification methods that produce high levels of remuneration for lawyers. The system induces litigants into thinking that the more they invest in litigation the greater their chances of winning on the merits and recovering their costs. This reduces litigant resistance to their lawyers' demands for ever-increasing their investment in the process. Litigants feel compelled to react to each other's moves and invest ever-greater resource in litigation for fear that if they fail to do so they may lose and have to pay the opponent's costs on top of losing their own investment.

Abolition of the costs-shifting principle

28. 313 A relatively straightforward solution would be to abandon costs recovery altogether.⁷⁶⁵ The benefit of a no-recovery system is that the assessment of the cost–benefit advantage of litigation is far more transparent; each litigant must assess for themselves what they are prepared to invest in litigation and make a cost–benefit analysis. Most important in the English context, wrangling over costs would be completely eliminated.
28. 314 A non-recovery system works well with contingency fees for legal representation. In the US, claimants can agree to pay their lawyers a share of any amount recovered.⁷⁶⁶ A standard objection to contingency fee litigation is that it tends to corrupt the ethics of the legal profession. This objection has lost its force since the successful introduction of CFAs and DBAs which give lawyers an interest in the outcome. A further objection is that lawyers have an incentive to settle rather than take the claim to trial because it is more profitable to do so. This incentive is at odds with the client's interest. But a conflict of interest is also present under the costs-shifting principle where a lawyer paid by the hour has an incentive to complicate and protract the process to maximise billable hours.⁷⁶⁷ In any litigation funding system there will inevitably be conflicts of interest between lawyers and their clients.
28. 315 A greater difficulty with contingency fees is that they reduce the claimant's damages. This is particularly problematic where the damages represent the cost of remedying the consequences of personal injuries, or providing for future care and loss of income.⁷⁶⁸ The rules governing CFAs and DBAs seek to address this by placing a cap on contingency fees to ensure that fees do not deplete the damages awarded for future care and loss of income. In claims other than for personal injuries, the cut taken by contingency fee lawyers may be seen as the price paid for obtaining redress through the courts. Nevertheless, it seems unrealistic to hope, at least for the time being, that the cost-shifting principle will be abrogated in the general run of litigation in England and Wales.⁷⁶⁹

Fixed recoverable costs

28. 316 A solution argued for by previous editions of this work is to fix recoverable costs in advance by reference to a predetermined scale. Since 2023 a comprehensive FRC system has applied to claims on the fast and intermediate tracks.⁷⁷⁰ As argued in the previous edition, FRC have numerous benefits, chief among them the knowability in advance of the likely costs liability in the

event of defeat. There are risks. First, the fixed recoverable costs must be set at a proportionate level, so as to force lawyers to maximise their own efficiency and thus exert a downward pressure on costs—rather than simply seeking to approximate to the fees lawyers could expect to receive if the fixed recoverable costs case was done on an hourly rate basis.⁷⁷¹ The 2023 FRC scheme achieves this for claims settled early, but the prescribed amounts rise to levels that can exceed the value of the claim (depending on the complexity band etc) for claims that reach trial. Costs at this level should be regarded as strictly disproportionate, rather than being endorsed by the FRC scheme.

28. 317 Second, the method of calculating FRC must be simple and contain no variables that cannot be known in advance of litigation. Such a system operates in Germany, where recoverable costs are more or less straightforwardly calculated as a percentage of the value of the claim.⁷⁷² The 2023 FRC scheme tries to fine tune the recoverable costs with variables such as the complexity band, the stage a claim ends, exceptional circumstances, vulnerability etc. These variables defeat the predictability benefit of the scheme. Litigants cannot know when they start proceedings what their likely maximum costs exposure will be, and so are unable to undertake an informed cost–benefit analysis before embarking on litigation.

Costs management and the need for a robust and predictable approach to proportionality

28. 318 Costs budgeting is the primary method of controlling costs in claims on the multi-track. It also seeks to achieve a degree of advance notice of the parties' exposure on costs. As we have seen, however, the system is not without flaws.⁷⁷³ First, budgets must be filed either with the directions questionnaire or 21 days before the first case management conference ([CPR 3.13\(1\)\(b\)](#)). But by this time, a claimant has had to commence proceedings and in practical terms commit to litigation, and the parties may have already run up significant incurred costs (which cannot be subject to the costs management order). The problem of incurred costs was discussed in Jackson LJ's Supplemental Report. Based on 191 claimant budgets examined in the course of that review, incurred costs represented 35 per cent of the total budget figure.⁷⁷⁴ He suggested that in order to control pre-action and pre-budget costs in cases subject to costs management, consideration should be given to devising a version of fixed or capped costs which would govern pre-action and pre-budget costs.⁷⁷⁵
28. 319 Second, and most significantly, costs management orders are not set in stone, but may be revised upwards or downwards at various stages in the proceedings. Revising costs budgets no later than 28 days before trial is built into all three of the 2025 costs budgeting Practice Directions.⁷⁷⁶ [CPR 3.18\(b\)](#), which states that the court must not depart from approved or agreed budgeted costs unless satisfied that there is good reason to do so, while providing some measure of predictability, does so on a precarious basis. Consequently, as emphasised above, it is essential that the courts adopt a robust approach to [CPR 3.18](#) so as to hold parties to their budgets in all but the most exceptional cases.⁷⁷⁷ Otherwise, one of the main objects of the costs management scheme, to give parties a reasonably (if not absolutely) clear and certain indication of each other's likely outlay, would be frustrated.
28. 320 Third, it is clear that the success of costs management depends on the court's approach to proportionality. This is not isolated to costs management but is an issue wherever costs are at large (as opposed to fixed). It is therefore to [CPR 44.3\(5\)](#) that we must now return.⁷⁷⁸ As articulated in that rule, proportionality is a multi-dimensional concept. Costs are proportionate if they bear a reasonable relationship to (a) the sums in issue in the proceedings; (b) the value of any non-monetary relief in issue in the proceedings; (c) the complexity of the litigation; (d) any additional work generated by the conduct of the paying party; (e) any wider factors involved in the proceedings, such as reputation or public importance; and (f) any additional work undertaken or expense incurred due to the vulnerability of a party or any witness. Of these factors only the first is capable of being reduced to a test that is comprehensible to the ordinary litigant. People tend to share a sense of what is a reasonable correlation between risk and reward. There may be disagreement at the margins, but most would agree that some correlations are disproportionate. As discussed previously, it is safe to assume that most people would consider it disproportionate to spend £50,000 to recover £50,000 when there is a moderate risk of being unsuccessful and ending up having to pay the opponent's costs of £50,000 on

top of the same amount spent already. Most would agree that it is foolish to risk losing £100,000 for the sake of recovering half that amount when the prospect of recovery is not clear-cut.⁷⁷⁹ We may refer to the correlation between costs and expected recovery as *strict proportionality*.

28. 321 Once we move away from strict proportionality, we part company with ordinary common-sense notions of proportionality. The multi-dimensional test of proportionality that the court must apply makes it difficult to predict the likely amount of recoverable costs, and provides incentives to those interested in driving up budgets to do so. There is considerable scope for a determined party with deep pockets, or for legal representatives intent on leaving no stone unturned, to complicate matters sufficiently to hike up budgets beyond what is strictly proportionate. This is because, as emphasised previously, factors such as complexity and public importance shade, in the end, into considerations of what costs are reasonable and necessary to incur. They therefore risk eliding questions of reasonableness, necessity and proportionality *stricto sensu*, and leading the courts to revert to the approach adopted in *Lownds v Home Office*,⁷⁸⁰ where the Court of Appeal held that if costs were reasonable and necessary they were recoverable notwithstanding the fact that they were not proportionate. True, the court can no longer order disproportionate costs. But it would in effect be doing just that if it ruled costs to be proportionate because they were necessitated by the complexity of the issues, the opponent's conduct or any other wider factors.⁷⁸¹
28. 322 Much turns, therefore, on the way that the court applies the proportionality test. *Malmsten v Bohinc*⁷⁸² made a clear break in its reasoning from *Lownds*, in endeavouring to maintain a clear separation between the assessment of reasonableness and necessity on the one hand, and of proportionality on the other. This is to be commended, but the result is still cold comfort for the average litigant. Costs of £15,000 were allowed for a simple *Companies Act 2006* application which took three weeks from start to finish, and involved a single 30-minute court hearing. Just as the court has scope for emptying the proportionality test of real content, so it has an opportunity to make it an effective instrument of costs control.
28. 323 The court could develop a convention that in most cases only strictly proportionate costs would be recoverable, limiting higher costs to cases of unusual complexity, egregious litigant conduct or exceptional public importance. If such a convention became accepted, it would soon become known what the court considers as an acceptable correlation between recoverable costs and the amount in dispute. For claims of upwards of £100,000, a correlation of 30 to 50 per cent may well be justified. The percentage correlation would probably come down as the amount claimed goes up. For instance, in claims of the order of £1 million a correlation of 50 per cent (i.e. £500,000 recoverable costs) could be considered excessive, but not one of 25 per cent. Such an approach to proportionality would go a long way to bringing proportionality in line with common sense. Unfortunately, there is limited evidence the courts will adopt this approach without legislation.⁷⁸³ In *Marks and Spencer plc v Asda Stores Ltd*⁷⁸⁴ it was suggested that there is a rebuttable presumption that costs should not exceed 50 per cent of the amount in dispute. But this approach has not been widely adopted in other cases. Complexity, for example, was regarded as an important factor justifying higher costs under CPR 44.3(5) in *May v Wavell Group Ltd*,⁷⁸⁵ which was simply a construction work nuisance case affecting residential property. Although Morgan J in *Group Seven Ltd v Notable Services LLP* concluded, more realistically, that an unsophisticated fraud case was not particularly complex,⁷⁸⁶ he went on to approve cost budgets for the claimants totalling £3.5 million in a claim valued at £7 million.⁷⁸⁷
28. 324 By giving pre-eminence to strict proportionality, the court would render costs predictable to an extent hitherto unknown in English litigation. Litigants would be in a position to assess early in the dispute the costs and benefits of litigation and to make appropriate provision for funding. It would largely remove the incentives to complicate and protract litigation, and would greatly restrict the scope for litigation over costs. Proportionality thus represents a tool by which litigation costs could be rendered as reasonable and predictable as is possible, at least in cases where fixed costs do not apply. It is therefore to be hoped that as the case law on proportionality continues to develop, the courts make best use of this tool, so as to put access to justice within the reach of many and not just a few wealthy litigants.

Footnotes

- 761 *Times Newspapers Ltd v Burstein (No.2) [2002] EWCA Civ 1739, (2002) Sol. Jo. L.B. 277* [29].
- 762 See Ch.12 Case Management Part II paras 12.225 ff.
- 763 Jackson LJ, Preliminary Report Vol.2 Ch.46 para.5.2.
- 764 As the Court of Appeal stated in *Arkin v Borchard Lines Ltd (costs order) [2005] EWCA Civ 655; [2005] 1 W.L.R. 3055*, but see *Federal Republic of Nigeria v Process & Industrial Developments Ltd [2025] UKSC 36; [2025] 3 W.L.R. 681*.
- 765 This option was rejected by Jackson LJ in his review: see for example Preliminary Report Vol.1 Ch.46.
- 766 *J. Peysner, "What's Wrong with Contingency Fees" (2001) 10(1) Nottingham L.J. 22.*
- 767 *S. Yarrow and R. Abrams, "Conditional Fees: The Challenge to Ethics" (1999) 2(2) Legal Ethics 192; C. Graffey, "Conditional Fees: Key to the Court House or the Casino" (1998) 1(1) Legal Ethics 70; and A. Cannon, "Designing Cost Policies to Provide Sufficient Access to Lower Courts" (2002) 21 C.J.Q. 198.*
- 768 To compensate for this effect the recommendation (Jackson LJ, Preliminary Report p.463) was that general damages in personal injuries, nuisance and all other civil wrongs to individuals should be increased by 10 per cent, which was implemented by *Simmons v Castle [2012] EWCA Civ 1288; [2013] 1 W.L.R. 1239*.
- 769 See Jackson LJ, Preliminary Report Vol.1 Ch.46.
- 770 CPR 45 ss.VI to IX, discussed at para.28.153 ff.
- 771 This point has been recognised by Jackson LJ in his Supplemental Report on fixed costs: see Supplemental Report Ch.7 para.1.3.
- 772 For a description of the scheme see: D. Leipold, "Limiting Costs for Better Access to Justice—the German Experience" in A.A.S. Zuckerman and R. Cranston (eds), *Reform of Civil Procedure—Essays on Access to Justice* (Oxford: Oxford University Press, 1995) p.265; A.A.S. Zuckerman, "Lord Woolf's Access to Justice: Plus Ça Change" (1996) 59 M.L.R. 773; and Jackson LJ, Preliminary Report Vol.2 Ch.55 para.2.3.
- 773 See the discussion above at paras 28.103 ff.
- 774 Jackson LJ, Supplemental Report Ch.6 paras 3.1 ff. See also Ch.3, which details the results of the data-collection exercise.
- 775 Jackson LJ, Supplemental Report Ch.6 para.4.3. Consultees to the CJC Costs Review 2025, who may have an interest in preserving the status quo on this, were not very exercised about incurred costs not being managed by the court (para 1.27).
- 776 PD 51ZG1 para.9(b); PD 51ZG2 para.8(b); PD 51ZG3 para.10(b).
- 777 See above, paras 28.110 ff.
- 778 The proportionality test was discussed above at paras 28.91 ff.
- 779 See above, para.28.98.
- 780 *Lownds v Home Office [2002] EWCA CIV 365; [2002] 4 All ER 775 (CA)*.
- 781 See above, paras 28.91–28.94 and 28.101
- 782 *Malmsten v Bohinc [2019] EWHC 1386 (Ch)*. See also *West & Anor v Stockport NHS Foundation Trust [2019] EWCA Civ 1220*, and see above, paras 28.116–28.117.
- 783 Indeed, Jackson LJ concluded that despite costs management, "the cost of litigating lower value cases in the multi-track remains disproportionate to the value of such cases": Supplemental Report Ch.7 para.1.3.
- 784 *Marks and Spencer plc v Asda Stores Ltd [2016] EWHC 2081 (Pat)*.
- 785 *May v Wavell Group Ltd (County Court at Central London, unreported, 22 December 2017)*.
- 786 *Group Seven Ltd v Notable Services LLP [2016] EWHC 620 (Ch)*. See also *Savoye v Spicers Ltd [2015] EWHC 33 (TCC)*, where a £900,000 dispute over whether a conveyor system formed part of the land was regarded as not being complex by Akenhead J. Costs claimed of £200,000 were reduced on proportionality grounds to £96,465.
- 787 This was a reduction from the £5 million claimed in the two claimants' filed costs budgets. There were five defendants. One of them alone had a costs budget of £3.7 million. Similarly, in *CIP Properties (AIP) Ltd v Galliford Try Infrastructure Ltd [2015] EWHC 481 (TCC)*, a large construction dispute valued at £18 million resulted in costs budgets being approved at £4.28 million (claimant), £4.22 million (main defendant) and £5.45 million (other defendants). The total approved budgets came to £13.95 million, or 77 per cent of the value of the claim.

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