

High Court Enforcement Officers Regulations 2004

White Book 2023

Volume 2

Section 9 - Jurisdictional and Procedural Legislation

Section 9B - Other Statutes and Regulations

High Court Enforcement Officers Regulations 2004

Arrangement of SI

(SI 2004/400)

End of Document

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Regulation 1. - Citation and commencement

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High Court Enforcement Officers Regulations 2004

Regulation 1

Part 1 Introduction

1. Citation and commencement

9B-1225+ These Regulations may be cited as the High Court Enforcement Officers Regulations 2004 and shall come into force on 15 March 2004.



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Regulation 2. - Interpretation

White Book 2023

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Section 9 - Jurisdictional and Procedural Legislation

Section 9B - Other Statutes and Regulations

High Court Enforcement Officers Regulations 2004

Part 1 Introduction

2.— Interpretation

9B-1226+

(1) In these Regulations—

- (a) “*application*” means an application by an individual for authorisation to act as an enforcement officer;
- (b) “*district*” means a district set out in Schedule 1 to these Regulations;
- (c) “*enforcement officer*” means an individual authorised by the Lord Chancellor under Schedule 7 to act as such;
- (d) “*Schedule 7*” means Schedule 7 to the Courts Act 2003.

(2) References in these Regulations to—

- (a) the Lord Chancellor shall include a person acting on his behalf under Schedule 7;
- (b) a writ of execution shall not include—
 - (i) a writ of sequestration; or
 - (ii) a writ relating to ecclesiastical property.

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Regulation 3. - Districts for enforcement of writs of execution by enforcement officers

White Book 2023 | Commentary last updated February 16, 2015

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High Court Enforcement Officers Regulations 2004

Regulation 3

Part 1 Introduction

3.— Districts for enforcement of writs of execution by enforcement officers

9B-1227+ (1) For the purposes of Schedule 7 and these Regulations, England and Wales is to be divided into 105 districts.

(2) Such districts correspond with the postal areas for England and Wales and are listed in Schedule 1 to these Regulations.

Note

9B-1228+Amended by SI 2004/673.



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Regulation 4. - Conditions to be satisfied

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Regulation 4

Part 2 Authorisation of Enforcement Officers

4.— Conditions to be satisfied

9B-1229+ (1) An individual will not be authorised to act as an enforcement officer unless the conditions in paragraph (2) are satisfied.



- (2) The individual must not—
- (a) have been convicted of any criminal offence—
 - (i) for which he received a custodial sentence; or
 - (ii) involving dishonesty or violence;
 - (b) be liable for any unpaid fines;
 - (c) be liable for any court judgment granted within the last 6 years which remains unsatisfied;
 - (d) be an undischarged bankrupt;
 - (e) have been disqualified from acting as a director of a company within the last 6 years;
 - (f) carry on or be involved in any business relating to or including the purchase or sale of debts.

Regulation 5. - Application procedure

White Book 2023 | Commentary last updated August 14, 2018

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Regulation 5

Part 2 Authorisation of Enforcement Officers

5.— Application procedure

- 9B-1230+ (1) An application for authorisation to act as an enforcement officer may only be made by an individual and must—

(a) be made in writing; and
(b) contain a statement signed and dated by the individual certifying that the contents of the application are true.
- (2) The application must contain the following information about the individual—
(a) his name, address and date of birth;
(b) whether he has been convicted of any criminal offence, whether or not punishable by imprisonment, and if so details of each offence and conviction;
(c) whether he is liable for any unpaid fines and if so appropriate details;
(d) whether he is or has been liable for any court judgment and if so appropriate details including whether any judgment remains unsatisfied;
(e) whether he is or has ever been subject to any of the following proceedings and if so with what result—
(i) bankruptcy proceedings;
(ii) an administration order under section 112 of the County Courts Act 1984;
(iii) [...] an individual voluntary arrangement under Part VIII of the Insolvency Act 1986;
(iv) proceedings under the Company Directors Disqualification Act 1986;
(v) insolvency proceedings in relation to any partnership in which he was a partner or any company of which he was a director; or
(vi) any other proceedings under the Insolvency Act 1986.
- (3) The application shall also—

- (a) specify to which district or districts the applicant is requesting assignment; and
- (b) include details and documentation giving evidence of—
- (i) any relevant insurance policies held by the applicant;
 - (ii) any permission that the applicant has under the Financial Services and Markets Act 2000 which relates to or is connected with a contract of the kind mentioned in para.23 or para.23B of Schedule 2 to that Act (credit agreements and contracts for hire of goods);
 - (iv) any current membership held by the applicant of a professional body which is listed in Schedule 2 to these Regulations as a professional body recognised by the Lord Chancellor;
 - (v) the bank account or accounts held by the applicant through which it is proposed that monies recovered on behalf of judgment debtors are to be collected and paid;
 - (vi) the applicant's relevant experience;
 - (vii) the applicant's knowledge of the laws and the practice and procedure of the High Court in relation to enforcement of debts;
 - (viii) the applicant's business plan including any person whom the applicant is proposing to engage to act on his behalf to assist with his work as an enforcement officer;
 - (ix) the applicant's policies in relation to the selection and employment of staff; and
 - (x) any existing or previous businesses of the applicant.

(4) Where the applicant has an existing business, the application shall be accompanied by audited or certified accounts of the applicant and of any company associated with the applicant for the preceding 3 years, or for the period of trading if this is shorter.

(5) In the case of any application, the Lord Chancellor may require further details of information already given or any additional information or documentation which seems to him to be necessary.

(6) For the purposes of this regulation and regulation 8, “*relevant insurance policies*” means—

- (a) professional indemnity insurance;
- (b) public liability insurance;
- (c) employers liability insurance, where the individual is an employer; and
- (d) goods in transit insurance, where the individual will be conducting his own removals.

(7) Paragraph (ii) of paragraph (3)(b) must be read with—

- (a) section 22 of the Financial Services and Markets Act 2000;
- (b) any relevant order under that section, and
- (b) Schedule 2 to that Act.

Note

9B-1230.

- 1+ Amended, subject to transitional provisions, by [SI 2013/1881, Sch.1, para.25](#), with effect from 26 July 2013 (for transitional provisions see [Part 8](#) thereof); by the [Deregulation Act 2015 \(Insolvency\) \(Consequential Amendments and Transitional and Savings Provisions\) Order 2015 \(SI 2015/1641\)](#) Sch.3 para.3(5), with effect from 1 October 2015 subject to savings as specified in [SI 2015/1641 art.10](#); and by the [Digital Economy Act 2017 s.111\(8\)](#), with effect from 25 May 2018.

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Regulation 6. - Authorisation and assignment

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Regulation 6

Part 2 Authorisation of Enforcement Officers

6.— Authorisation and assignment

9B-1231+ (1) The Lord Chancellor may take account, in deciding whether to authorise an individual to act as an enforcement officer, of—

- (a) the information contained in or provided with the individual's application; and
- (b) any other relevant information available to him.

(2) Upon being authorised to act as an enforcement officer, an individual may be assigned to—

- (a) any or all of the districts to which he has requested assignment; and
- (b) any other district or districts, if the Lord Chancellor considers it necessary or expedient in order to ensure that sufficient enforcement officers are assigned to each district.

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Regulation 7. - Duty to execute writs

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Part 3 Post Authorisation

7. Duty to execute writs

- 9B-1232+ Once assigned to a district or a number of districts, the enforcement officer must undertake enforcement action for all writs of execution received which are to be executed at addresses which fall within his assigned district.

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Regulation 8. - Conditions to be satisfied following authorisation

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Part 3 Post Authorisation

8. Conditions to be satisfied following authorisation

9B-1233+ Every enforcement officer is under a continuing duty to—

- (a) successfully complete any required training;
- (b) comply with any requirements set by the Lord Chancellor for his continuous professional development;
- (c) hold current relevant insurance policies;
- (d) hold a bank account through which monies recovered on behalf of judgment debtors are to be collected and paid;
- (e) produce to the Lord Chancellor—
 - (i) annual audited or certified accounts;
 - (ii) performance statistics when requested; and
 - (iii) such other information or documentation relevant to his work as an enforcement officer as may be required.

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Regulation 9. - Change of details

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Part 3 Post Authorisation

9. Change of details

- 9B-1234+ An enforcement officer must immediately give the Lord Chancellor written notification of any change in—

(a) his name;
(b) his address;
(c) the bank account or accounts held by him through which monies recovered on behalf of judgment debtors are collected and paid; or
(d) the information or documentation contained in his application for authorisation to act as an enforcement officer.

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Regulation 10. - Changes to assignment

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Part 3 Post Authorisation

10.— Changes to assignment

9B-1235+

- (1) An enforcement officer may at any time apply to the Lord Chancellor to change the districts to which he is assigned.
- (2) An application under paragraph (1) must be made in writing and must include a declaration of any changes in the information and documentation contained in the individual's application for authorisation to act as an enforcement officer.
- (3) An enforcement officer may at any time be assigned to an additional district or districts without having applied for such assignment, if the Lord Chancellor considers it necessary or expedient in order to ensure that sufficient enforcement officers are assigned to each district.

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Regulation 11. - Resignation

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Part 3 Post Authorisation

11. Resignation

- 9B-1236+ If an enforcement officer wishes to resign from his appointment he must provide the Lord Chancellor with at least 28 days' written notice of his intended resignation.



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Regulation 12. - Termination of authorisation or assignment

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Part 3 Post Authorisation

12.— Termination of authorisation or assignment

9B-1237+



- (1) The Lord Chancellor may at any time terminate—
(a) the authorisation of an individual to act as an enforcement officer; or
(b) the assignment of an enforcement officer to any one or more of the districts to which he is assigned,
on any of the grounds in paragraph (2).
- (2) The grounds are that—
(a) it would be in the public interest to do so;
(b) any of the—
(i) information provided in the application for authorisation; or
(ii) documentation supplied,
under regulation 5 is found to be incomplete or untrue;
- (c)** the enforcement officer or any person acting on his behalf who assists with his work as an enforcement officer has behaved in a manner which the Lord Chancellor reasonably considers to be unprofessional or unacceptable;
or
- (d)** the enforcement officer has failed to satisfy one or more of the conditions of regulation 8.
- (3) Where practicable, the Lord Chancellor when considering whether to terminate the authorisation or assignment of an enforcement officer shall firstly notify the enforcement officer of the reasons and provide the enforcement officer with a reasonable opportunity to—
(a) make representations about the Lord Chancellor's reasons for proposing to terminate his authorisation or assignment; and

(b) remedy the circumstances giving rise to the Lord Chancellor's proposal to terminate his authorisation or assignment.

Regulation 13. - Fees

White Book 2023 | Commentary last updated March 31, 2014

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High Court Enforcement Officers Regulations 2004

Regulation 13

Part 4 Miscellaneous

13.— Fees

9B-1238+ (1) Schedule 3 to these Regulations sets out the fees that may be charged by enforcement officers.



(2) [...]

(3) Where a writ is withdrawn or satisfied or its execution is stopped, the fees set out under Schedule 3 must be paid by—

- (a) the person upon whose application the writ was issued; or
- (b) the person at whose instance the execution is stopped,

as the case may be.

(3A) Where an enforcement officer uses the Schedule 12 procedure and the proceeds, if any, are insufficient to enable the enforcement officer to recover the compliance fee, that fee (or the balance of it which remains outstanding) must be paid by the person on whose application the writ was issued.

(3B) In paragraph (3A), “*Schedule 12 procedure*” and “*compliance fee*” have the same meanings as in the Taking Control of Goods (Fees) Regulations 2014.

(4) An enforcement officer or a party liable to pay any fees under Schedule 3 may apply to a costs judge or a district judge of the High Court for an assessment of the amount payable, by the detailed assessment procedure in accordance with the Civil Procedure Rules 1998.

Note

9B-1238.

1+



Amended subject to transitional and saving provisions by the [Tribunals, Courts and Enforcement Act 2007 \(Consequential, Transitional and Saving Provisions\) Order 2014 \(SI 2014/600\)](#), Sch, Pt.1, para.8, with effect from 6 April 2014 (for transitional and saving provisions see [arts 3–6](#)).

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Regulation 14. - Directories

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Regulation 14

Part 4 Miscellaneous

14. Directories

- 9B-1239+ Directories containing details of all current enforcement officers, the districts to which they have been assigned and the addresses to which writs of execution issued from the High Court to enforcement officers are to be sent shall be published and available for inspection at—

(a) the Royal Courts of Justice;

(b) district registries of the High Court; and

(c) county courts,

during the hours when the offices of such courts are open.

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Regulation 15. - Walking possession agreement

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Part 4 Miscellaneous

15. Walking possession agreement

- 9B-1240+ *[Revoked subject to transitional and saving provisions by the *Tribunals, Courts and Enforcement Act 2007 (Consequential, Transitional and Saving Provisions) Order 2014* (SI 2014/600), Sch, Pt.1, para.8, Pt.2, with effect from 6 April 2014 (for transitional and saving provisions see arts 3–6).]*

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Schedule 1 - Districts for Writs of Execution Enforced by Enforcement Officers

White Book 2023 | Commentary last updated January 1, 2005

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High Court Enforcement Officers Regulations 2004

Schedule 1

Schedule 1 Districts for Writs of Execution Enforced by Enforcement Officers

Regulation 3

9B-1241+

DISTRICT	POSTAL AREA
Bath	BA
Birmingham	B
Blackburn	BB
Bolton	BL
Bournemouth	BH
Bradford	BD
Brighton	BN
Bristol	BS
Bromley	BR
Cambridge	CB
Canterbury	CT
Cardiff	CF
Carlisle	CA
Chelmsford	CM
Chester	CH
Cleveland (Teesside)	TS
Colchester	CO
Coventry	CV
Crewe	CW

Croydon	CR
Darlington	DL
Dartford	DA
Derby	DE
Doncaster	DN
Dorchester	DT
Dudley	DY
Durham	DH
Enfield	EN
Exeter	EX
Fylde (Blackpool)	FY
Gloucester	GL
Guildford	GU
Halifax	HX
Harrogate	HG
Harrow	HA
Hemel Hempstead	HP
Hereford	HR
Huddersfield	HD
Hull	HU
Ilford	IG
Ipswich	IP
Kingston upon Thames	KT
Lancaster	LA
Leeds	LS
Leicester	LE
Lincoln	LN
Liverpool	L
Llandridnod Wells	LD
Llandudno	LL
London East	E
London East Central	EC
London North	N
London North West	NW
London South East	SE
London South West	SW
London West	W
London West Central	WC

Luton	LU
Manchester	M
Medway	ME
Milton Keynes	MK
Newcastle	NE
Newport	NP
Northampton	NN
Norwich	NR
Nottingham	NG
Oldham	OL
Oxford	OX
Peterborough	PE
Plymouth	PL
Portsmouth	PO
Preston	PR
Reading	RG
Redhill	RH
Romford	RM
Salisbury	SP
Sheffield	S
Shrewsbury	SY
Slough	SL
Southall (Uxbridge)	UB
Southampton	SO
Southend on Sea	SS
St. Albans	AL
Stevenage	SG
Stockport	SK
Stoke on Trent	ST
Sunderland	SR
Sutton	SM
Swansea	SA
Swindon	SN
Taunton	TA
Telford	TF
Tonbridge	TN
Torquay	TQ
Truro	TR

Tweeddale (Berwick upon Tweed)	TD
Twickenham	TW
Wakefield	WF
Walsall	WS
Warrington	WA
Watford	WD
Wigan	WN
Wolverhampton	WV
Worcester	WR
York	YO

Note

9B-1242-Amended by SI 2004/673.



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Schedule 2 - Professional Bodies Recognised by the Lord Chancellor

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High Court Enforcement Officers Regulations 2004

Schedule 2

Schedule 2 Professional Bodies Recognised by the Lord Chancellor

Regulation 5

9B-1243+ The Lord Chancellor recognises the following as professional bodies:

- High Court Enforcement Officers Association

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Schedule 3 - Fees Chargeable by Enforcement Officers

White Book 2023 | Commentary last updated March 31, 2014

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Schedule 3

Schedule 3 Fees Chargeable by Enforcement Officers

Regulation 13

- 9B-1244+ The fees chargeable by enforcement officers on execution of writs are as follows. Value Added Tax, if payable, may be added to the fees specified.

A. Fees chargeable on execution of writs of fieri facias	
...	
B. Fees chargeable on executing writs of possession or delivery	
<i>8. Mileage</i>	
Mileage from the enforcement officer's business address to the place of execution and return, in respect of one journey	29.2 pence per mile, up to a maximum of £25.00 in total
<i>9. Writs of possession</i>	
(1) Where an enforcement officer executes a writ of possession of domestic property within the meaning of section 66 of the Local Government Finance Act 1988, 3 per cent of the net annual value for rating shown in the valuation list in force immediately before 1 April 1990 in respect of the property seized, subject to paragraph (3).	
(2) Where an enforcement officer executes a writ of possession to which paragraph (1) does not apply, 0.4 per cent of the net annual value for rating of the property seized, subject to paragraph (4).	
(3) For the purposes of paragraph (1), where the property does not consist of one or more hereditaments which, immediately before 1 April 1990—	
(a) had a separate net annual value for rating shown on the valuation list then in force; and	
(b) was domestic property within the meaning of section 66 of the Local Government Finance Act 1988,	
the property or such part of it as does not so consist shall be taken to have had such a value for rating equal to two-fifteenths of its value by the year when seized.	
(4) For the purposes of paragraph (2), where the property does not consist of one or more hereditaments having a separate net annual value for rating, the property or such part of it as does not so consist shall be taken to have such a value equal to its value by the year when seized.	
<i>10. Writs of delivery</i>	
For executing a writ of delivery, 4 per cent of the value of the goods as stated in the writ or judgment.	

C. General fees

11. Copies of returns

For a copy of any return indorsed by the enforcement officer on a writ of execution	£5.00
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12. Miscellaneous

For any matter not otherwise provided for, such sum as a Master, district judge or costs judge may allow upon application.
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Note

9B-1244.

- 1+ Part A revoked subject to transitional and saving provisions by the [Tribunals, Courts and Enforcement Act 2007 \(Consequential, Transitional and Saving Provisions\) Order 2014 \(SI 2014/600\)](#), Sch, Pt.1, para.8, Pt.2, with effect from 6 April 2014 (for transitional and saving provisions see arts 3–6).



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Schedule 4 - Walking Possession Agreement

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Schedule 4

Schedule 4 Walking Possession Agreement

9B-1245+ [Schedule 4 revoked subject to transitional and saving provisions by the *Tribunals, Courts and Enforcement Act 2007 (Consequential, Transitional and Saving Provisions) Order 2014* (SI 2014/600), Sch, Pt. 1, para.8, Pt.2, with effect from 6 April 2014 (for transitional and saving provisions see arts 3–6).]

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Regulation 1. - Citation and commencement

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Proceeds of Crime Act 2002 (Legal Expenses in Civil Recovery Proceedings) Regulations 2005

Regulation 1
(SI 2005/3382)

Part 1 Introduction

1. Citation and commencement

9B-1246 These Regulations may be cited as the Proceeds of Crime Act 2002 (Legal Expenses in Civil Recovery Proceedings) Regulations 2005 and shall come into force on 1 January 2006.

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Regulation 2. - Interpretation

White Book 2023 | Commentary last updated November 18, 2010

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Proceeds of Crime Act 2002 (Legal Expenses in Civil Recovery Proceedings) Regulations 2005

Regulation 2

Part 1 Introduction

2.— Interpretation

9B-1247

(1) In these Regulations—

“*the 1990 Act*” means the Courts and Legal Services Act 1990;

“*the 2002 Act*” means the Proceeds of Crime Act 2002;

“*CPR*” means the Civil Procedure Rules 1998;

“*the Order in Council*” means the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005;

“*RSC (NI)*” means the Rules of the Supreme Court (Northern Ireland) 1980;

“*civil recovery proceedings*” means proceedings under Part 5 of the 2002 Act or Part 5 of the Order in Council;

“*notice*” means notice in writing;

“*relevant enforcement authority*” means the enforcement authority which is conducting the civil recovery proceedings concerned;

“*solicitor*” means a solicitor of the Supreme Court and, in relation to England and Wales, includes any other person who is an authorised litigator within the meaning of section 119(1) of the 1990 Act;

“*solicitor*” means a solicitor of the Senior Courts and, in relation to England and Wales, includes any other person who, for the purposes of the Legal Services Act 2007, is an authorised person in relation to an activity which constitutes the conduct of litigation (within the meaning of that Act).

(2) Any reference in these Regulations to the assessment of legal expenses by the court shall, in relation to Northern Ireland, be interpreted as referring to the taxation of those expenses by the Master (Taxing Office).

Note

9B-1247.

1

Amended by [SI 2008/523](#) and [SI 2009/3348](#), with effect from 1 January 2010.

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Regulation 3. - Effect of this part

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Proceeds of Crime Act 2002 (Legal Expenses in Civil Recovery Proceedings) Regulations 2005

Regulation 3

Part 2 Required Conditions: General

3. Effect of this part

- 9B-1248 This Part specifies the required conditions for the purposes of sections 245C(5) and 252(4) of the 2002 Act and articles 149(5) and 157(4) of the Order in Council.

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Regulation 4. - Condition relating to work covered by exclusion

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Proceeds of Crime Act 2002 (Legal Expenses in Civil Recovery Proceedings) Regulations 2005

Part 2 Required Conditions: General

4. Condition relating to work covered by exclusion

- 9B-1249 An exclusion from a property freezing order or interim receiving order must specify—
(a) the stage or stages in civil recovery proceedings to which it relates; and
(b) the maximum amount which may be released in respect of legal expenses for each stage to which it relates.

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Regulation 5. - Condition relating to notification

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Proceeds of Crime Act 2002 (Legal Expenses in Civil Recovery Proceedings) Regulations 2005

Regulation 5

Part 2 Required Conditions: General

5. Condition relating to notification

- 9B-1250 If the solicitor acting for the person to whose legal expenses the exclusion relates becomes aware that—
(a) that person's legal expenses in respect of any stage in civil recovery proceedings have exceeded or will exceed the maximum amount specified in the exclusion for that stage; or
(b) that person's total legal expenses in respect of all the stages to which the exclusion relates have exceeded or will exceed the total amount that may be released pursuant to the exclusion,
the solicitor must give notice to the relevant enforcement authority and the court as soon as reasonably practicable.

Note

- 9B-1250.
1 Amended by SI 2008/523.

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Regulation 6. - Condition relating to payment of expenses

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Proceeds of Crime Act 2002 (Legal Expenses in Civil Recovery Proceedings) Regulations 2005

Regulation 6

Part 2 Required Conditions: General

6. Condition relating to payment of expenses

- 9B-1251 Where a person has incurred legal expenses in relation to a stage in civil recovery proceedings specified in an exclusion—
(a) during any period when the property freezing order or interim receiving order has effect, a sum may only be released in respect of those expenses in accordance with Part 3;
(b) where the court makes a recovery order which provides for the payment of that person's reasonable legal expenses in respect of civil recovery proceedings, the sum payable in respect of his legal expenses shall be determined in accordance with Part 4, regardless of whether a sum has been released in respect of any of those expenses under Part 3.

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Regulation 7. - Effect of this Part

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Proceeds of Crime Act 2002 (Legal Expenses in Civil Recovery Proceedings) Regulations 2005

Part 3 Required Conditions: Release of Interim Payments

7. Effect of this Part

9B-1252 This Part applies where, during a period when a property freezing order or interim receiving order has effect, a person to whose property the order applies seeks the release of a sum in respect of his legal expenses pursuant to an exclusion from the order.

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Regulation 8. - Request for relevant enforcement authority's agreement to release of interim payment

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Proceeds of Crime Act 2002 (Legal Expenses in Civil Recovery Proceedings) Regulations 2005

Regulation 8

Part 3 Required Conditions: Release of Interim Payments

8.— Request for relevant enforcement authority's agreement to release of interim payment

9B-1253 (1) A request for the relevant enforcement authority's agreement to the release of a sum in respect of legal expenses pursuant to an exclusion must be made in writing to that authority by the person to whose expenses the exclusion relates.

(2) The request must—

(a) describe the stage or stages in the civil recovery proceedings in relation to which the legal expenses were incurred;

(b) summarise the work done in connection with each stage;

(c) be accompanied by any invoices, receipts or other documents which are necessary to show that the expenses have been incurred; and

(d) identify any item or description of property from which the person making the request wishes the sum to be released.

(3) A person may not make a request under this regulation—

(a) in respect of legal expenses which he has not yet incurred; or

(b) more than once in any 2 month period.

Note

9B-1253.

1 Amended by SI 2008/523.

Regulation 9. - Relevant enforcement authority's response to request

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Proceeds of Crime Act 2002 (Legal Expenses in Civil Recovery Proceedings) Regulations 2005

Regulation 9

Part 3 Required Conditions: Release of Interim Payments

9.— Relevant enforcement authority's response to request

- 9B-1254 (1) Not later than 21 days after it receives the request, the relevant enforcement authority must give notice to the person who made the request stating—
(a) whether it agrees to the release of the requested sum; and
(b) if it does not agree to the release of the requested sum—
(i) the amount (if any) which it agrees may be released; and
(ii) the reasons for its decision.
- (2) Where an interim receiving order applies to the property from which it is proposed that the requested sum should be released, the relevant enforcement authority must at the same time send copies of the request and the notice referred to in paragraph (1) to the interim receiver.
- (3) In determining the amount which may be released in respect of legal expenses with its agreement, the relevant enforcement authority must have regard to the provisions of Part 5 which would apply on the assessment of those expenses by the court.

Note

- 9B-1254.
1 Amended by SI 2008/523.

Regulation 10. - Release of interim payment

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Regulation 10

Part 3 Required Conditions: Release of Interim Payments

10.— Release of interim payment

- 9B-1255**
- (1) The sum which may be released pursuant to the exclusion is the greater of—
(a) the amount which the relevant enforcement authority agrees may be released; and
(b) 65% of the requested sum.
- (2) The sum may only be released to—
(a) the solicitor who is instructed to act in the civil recovery proceedings for the person to whose legal expenses the exclusion relates; or
(b) where appropriate, to the solicitor who was so instructed when the legal expenses to which the sum relates were incurred.

Note

9B-1255.

1 Amended by SI 2008/523.

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Regulation 11. - Effect of this Part

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Regulation 11

Part 4 Agreement or Assessment of Expenses at Conclusion of Civil Recovery Proceedings

11. Effect of this Part

9B-1256 This Part specifies the procedure for determining the amount payable in respect of a person's reasonable legal expenses in civil recovery proceedings, where the court has made a recovery order which provides for the payment of those expenses.

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Regulation 12. - Agreement of expenses by the relevant enforcement authority

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Regulation 12

Part 4 Agreement or Assessment of Expenses at Conclusion of Civil Recovery Proceedings

12.— Agreement of expenses by the relevant enforcement authority

- 9B-1257
- (1) This regulation applies where a person seeks the relevant enforcement authority's agreement to the payment of a sum in respect of its legal expenses pursuant to section 266(8B)(a) of the 2002 Act or article 177(11)(a) of the Order in Council.
- (2) In determining the amount which may be paid in respect of legal expenses with its agreement, the relevant enforcement authority must have regard to the provisions of Part 5 which would apply on the assessment of those expenses by the court.
- (3) Where the relevant enforcement authority agrees to the payment of the sum which a person seeks in respect of his legal expenses—
- (a) it shall give that person and the trustee for civil recovery notice of the agreed sum; and
 - (b) the sum payable in respect of those expenses shall be the agreed sum.

Note

9B-1257.

1 Amended by SI 2008/523.

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Regulation 13. - Expenses to be assessed if not agreed

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Regulation 13

Part 4 Agreement or Assessment of Expenses at Conclusion of Civil Recovery Proceedings

13.— Expenses to be assessed if not agreed

9B-1258 (1) Unless the relevant enforcement authority agrees to the payment of the sum which a person seeks in respect of his legal expenses pursuant to provision made in a recovery order, that person must commence proceedings for the assessment of those expenses in accordance with paragraph (2).

(2) Where paragraph (1) requires a person to commence proceedings for the assessment of his legal expenses—
(a) in relation to civil recovery proceedings in England and Wales, he must commence proceedings for the detailed assessment of those expenses in accordance with CPR Part 47, subject to the modifications that—
(i) rule 47.7 shall have effect as if it provided that he must commence those proceedings not later than 2 months after the date of the recovery order; and
(ii) rule 47.14(2) shall have effect as if it provided that he must file a request for a detailed assessment hearing not later than 2 months after the expiry of the period for commencing the detailed assessment proceedings;

(b) in relation to civil recovery proceedings in Northern Ireland, he must begin proceedings for the taxation of those expenses in accordance with RSC (NI) Order 62, subject to the modification that rule 29(1) shall have effect as if it provided that he must begin those proceedings not later than 4 months after the date of the recovery order.

(3) The court will assess the person's legal expenses in accordance with the provisions of Part 5 and the relevant rules of court, and the sum payable in respect of those expenses shall be the assessed amount.

Note

9B-1258.

1 Amended by SI 2008/523.

Regulation 14. - Payment of expenses

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Proceeds of Crime Act 2002 (Legal Expenses in Civil Recovery Proceedings) Regulations 2005

Regulation 14

Part 4 Agreement or Assessment of Expenses at Conclusion of Civil Recovery Proceedings

14.— Payment of expenses

- 9B-1259 (1) Where the sum payable in respect of a person's legal expenses—
(a) exceeds the total amount which has been released in respect of those expenses in accordance with Part 3, the trustee for civil recovery must pay the balance out of the sums referred to in section 280(1) of the 2002 Act or article 191(1) of the Order in Council;
(b) is less than the total amount which has been released in respect of those expenses in accordance with Part 3, the person to whose expenses the sum relates must repay the balance to the trustee.
- (2) The trustee for civil recovery may only make a payment in respect of a person's legal expenses to—
(a) the solicitor who is instructed to act for that person; or
(b) where appropriate, the solicitor who was so instructed when the legal expenses to which the sum relates were incurred.

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Regulation 15. - Effect of this Part

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Part 5 Basis of Assessment of Legal Expenses

15. Effect of this Part

9B-1260 This Part sets out the basis on which the court must assess the amount payable in respect of a person's reasonable legal expenses of civil recovery proceedings pursuant to provision made in a recovery order.

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Regulation 16. - General principles

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Part 5 Basis of Assessment of Legal Expenses

16.— General principles

- 9B-1261 (1) Subject to regulation 17, the court will assess a person's legal expenses on the standard basis.
- (2) The court must give effect to—
(a) any provision made in the recovery order for the purpose of enabling the person to meet his reasonable legal expenses of civil recovery proceedings; and
(b) subject to sub-paragraph (a), the terms of any exclusion made for the purpose of enabling that person to meet those legal expenses (including the required conditions).
- (3) In paragraph (1), “*the standard basis*” has the meaning given in—
(a) CPR rule 44.4 in relation to proceedings in England and Wales;
(b) RSC (NI) Order 62 rule 12 in relation to proceedings in Northern Ireland.

Regulation 17. - Rates of remuneration

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Proceeds of Crime Act 2002 (Legal Expenses in Civil Recovery Proceedings) Regulations 2005

Part 5 Basis of Assessment of Legal Expenses

17.— Rates of remuneration

9B-1262

(1) Subject to the following paragraphs of this regulation, remuneration for work done by a legal representative may only be allowed at the appropriate hourly rate shown in the Table below.

(2) The higher hourly rates specified in the third column of the Table may only be allowed where the case involves substantial novel or complex issues of law or fact.

(3) The rates specified in the Table will be increased by—

(a) 20% for legal representatives whose offices are situated in Central London; and

(b) 10% for legal representatives whose offices are situated in Outer London.

(4) In paragraph (3)—

(a) “Central London” means postcode districts EC1—4, SW1, W1 and WC1—2;

(b) “Outer London” means all other postcode districts in postcode areas BR, CR, DA, E, N, NW, SE, SW, UB and W.

and “postcode area” and “postcode district” shall be construed in accordance with the Postcode Address File within the meaning given in section 116 of the Postal Services Act 2000.

TABLE:

TABLE: RATES OF REMUNERATION FOR LEGAL REPRESENTATIVES

CATEGORY OF FEE EARNER ⁽¹⁾	STANDARD HOURLY RATE (EXCLUDING VAT)	HIGHER HOURLY RATE (EXCLUDING VAT)
Solicitors and their employees		
Senior solicitor (of at least 8 years' standing)	£187.50	£225.00

Solicitor (of at least 4 years' and less than 8 years' standing)	£150.00	£187.50
Junior solicitor (of less than 4 years' standing)	£107.50	£131.25
Trainee solicitor, paralegal or other fee earner	£75.00	£93.75
Counsel		
Queen's Counsel	—	£275.00
Senior junior counsel (of at least 10 years' standing)	£150.00	£225.00
Junior counsel (of less than 10 years' standing)	£100.00	£150.00

(¹) In relation to England and Wales, a reference to a number of years' standing as a solicitor or counsel to be interpreted as referring to that number of years' general qualification (within the meaning of section 71 of the 1990 Act).

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Arrangement of SI

(SI 1971/1861)

9B-1263 [As amended by the Transfer of Functions (Magistrates' Court and Family Law) Order 1992 (SI 1992/709), the Blood Tests (Evidence of Paternity) (Amendment) Regulations 2001 (SI 2001/773), the Blood Tests (Evidence of Paternity) (Amendment) Regulations 2004 (SI 2004/596), the Health Professions (Operating Department Practitioners and Miscellaneous Amendments) Order 2004 (SI 2004/2033), the Blood Tests (Evidence of Paternity) (Amendment) Regulations 2008 (SI 2008/972), the Crime and Courts Act 2013 (Family Court: Consequential Provision) (No.2) Order (SI 2014/879), the Blood Tests (Evidence of Paternity) (Amendment) Regulations 2015 (SI 2015/1834), and the Blood Tests (Evidence of Paternity) (Amendment) (Review) Regulations 2015 (SI 2015/2048).]

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Regulation 1. - Citation and Commencement

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Regulation 1

1. Citation and Commencement

- 9B-1264+ These Regulations may be cited as the Blood Tests (Evidence of Paternity) Regulations 1971 and shall come into operation on 1 March 1972.



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Regulation 2. - Interpretation

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Blood Tests (Evidence of Paternity) Regulations 1971

Regulation 2

2.— Interpretation

9B-1265+ (1) In these Regulations, unless the context otherwise requires—

“*the Act*” means the Family Law Reform Act 1969;

“*court*” means a court which gives a direction for the use of scientific tests in pursuance of section 20(1) of the Act;

“*direction*” means a direction given as aforesaid;

“*direction form*” means Form 1 in Schedule 1 to these Regulations;

“*photograph*” means a recent photograph, taken full face without a hat, of at least the size required for insertion in a passport;

“*protected party*” means a person who lacks capacity, within the meaning of the Mental Capacity Act 2005, to consent to tests;

“*sample*” means bodily fluid or bodily tissue taken for the purpose of scientific tests;

“*sampler*” has the meaning given in paragraph (4) and is subject to the provisions of paragraphs (5) and (6);

“*subject*” means a person from whom a court directs that bodily samples shall be taken;

“*tester*” means an individual employed to carry out tests by a body which has been accredited for the purpose of s.20 of the Act either by the Lord Chancellor or by a body appointed by him for the purposes and which has been nominated in a direction to carry out tests;

“*tests*” scientific tests carried out under Pt III of the Act and includes any test made with the object of ascertaining the inheritable characteristics of bodily fluid or bodily tissue.

(2) [...]

(3) The Interpretation Act 1889 shall apply to the interpretation of these Regulations as it applies to the interpretation of an Act of Parliament. [Note: the [Interpretation Act 1889](#) has been replaced by the [Interpretation Act 1978](#).]

(4) In these Regulations, subject to the provisions of paragraphs (5) and (6), “*sampler*” means—

(a) a registered medical practitioner;

(b) a person who is under the supervision of a registered medical practitioner and who is—

(i) a registered nurse; or

- (ii) a registered biomedical scientist;
- (c) a tester;
- (d) an officer of the Service, within the meaning given by section 11(3) of the Criminal Justice and Court Services Act 2000;
- (e) a Welsh family proceedings officer, within the meaning given by section 35(4) of the Children Act 2004; or
- (f) a person, not being someone within sub-paragraphs (a) or (b), who is appointed by a tester to be a sampler.

(5) A sampler who is within sub-paragraph (d) or (e) in the definition of “sampler” in paragraph (4) may only be involved in the obtaining of samples where—

- (a) the court has given a direction of its own initiative in proceedings for a child arrangements order under section 8 of the Children Act 1989;
- (b) the sampler has been trained by a tester, or under arrangements made by a tester, in relation to the requirements of these Regulations; and
- (c) the sample is to be obtained by way of a mouth swab.

(6) A sampler who is within sub-paragraph (f) in the definition of “sampler” in paragraph (4) may only be involved in the obtaining of samples where—

- (a) the sampler has been trained by a tester, or under arrangements made by a tester, in relation to the requirements of these Regulations; and
- (b) the sample is to be obtained by way of a mouth swab.

Note

9B-1265.

1+ Paragraph (1) was amended and paras (3)–(6) were inserted by the [Blood Tests \(Evidence of Paternity\) \(Amendment\) Regulations 2015 \(SI 2015/1834\)](#) reg.2(2), with effect from 23 November 2015.



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Regulation 3. - Direction form

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Regulation 3

3. Direction form

- 9B-1266+** A sampler shall not obtain a sample from a subject unless Parts I and II of the direction form have been completed and the direction form purports to be signed by the proper officer of the court or some person on his behalf.



Note

9B-1266.

- 1+** Amended by the [Blood Tests \(Evidence of Paternity\) \(Amendment\) Regulations 2015 \(SI 2015/1834\) reg.2\(3\)](#), with effect from 23 November 2015.



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Regulation 4. - Subject who is under 16 or a protected party to be accompanied to sampler

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Regulation 4

4. Subject who is under 16 or a protected party to be accompanied to sampler

- 9B-1267+ A subject who is under 16 or a protected party who attends a sampler for a sampler to be obtained shall be accompanied by a person of full age who shall identify him to the sampler.



Note

9B-1267.

- 1+ Amended by the Blood Tests (Evidence of Paternity) (Amendment) Regulations 2015 (SI 2015/1834) reg.2(4), with effect from 23 November 2015.



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Regulation 5. - Obtaining of samples

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Regulation 5

5.— Obtaining of samples

9B-1268+ (1) Without prejudice to the provisions of rules of court, a sampler may make arrangements for samples to be obtained from the subjects or may change any arrangements already made and make other arrangements.



(2) Subject to the provisions of these Regulations, where a subject attends a sampler in accordance with arrangements made under a direction, the sampler must on that occasion act in accordance with paragraph (2A), (2B) or (2C), as applicable to that sampler.

(2A) Where the sampler is a person within sub-paragraph (a), (b) or (c) of the definition of “*sampler*” in regulation 2(4), the sampler must take a sample from the subject.

(2B) Where the sampler is a person within sub-paragraph (d) or (e) of the definition of “*sampler*” in regulation 2(4), the sampler must supervise the taking of the sample—

(a) by the subject; or

(b) where the subject is under 16 or a protected party, by the person of full age who has accompanied the subject.

(2C) Where the sampler is a person within sub-paragraph (f) of the definition of “*sampler*” in regulation 2(4), the sampler must—

(a) take the sample; or

(b) supervise the taking of the sample—

(i) by the subject; or

(ii) where the subject is under 16 or a protected party, by the person of full age who has accompanied the subject.

(3) A sampler shall not obtain a sample from a subject if—

(i) he has reason to believe that the subject has been transfused with blood within the three months immediately preceding the day on which the sample is to be obtained in the case of a blood sample; or

(ii) in his opinion, tests on a sample obtained at that time from that subject could not effectively be carried out for the purposes of and in accordance with the direction; or

(iii) in his opinion, obtaining a sample might have an adverse effect on the health of the subject.

(4) A sampler may take a sample from a subject who has been injected with a blood product or blood plasma if, in his opinion, the value of any tests done on that sample would not be thereby affected, but shall inform the tester that the subject was so injected.

(5) Where a sampler does not obtain a sample from a subject in accordance with arrangements made for obtaining that sample and no other arrangements are made, he shall return the direction form relating to that subject to the court, having stated on the form his reason for not obtaining the sample and any reason given by the subject (or the person having the care and control of the subject) for any failure to attend in accordance with those arrangements.

(6) A subject who attends a sampler to give a sample may be accompanied by his legal representative.

Note

9B-1268.

1+ Amended by the [Blood Tests \(Evidence of Paternity\) \(Amendment\) Regulations 2015 \(SI 2015/1834\) reg.2\(5\)](#), with effect from 23 November 2015.



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Regulation 6. - Sampling procedure

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Regulation 6

6.— Sampling procedure

9B-1269+



(1) A sampler shall comply with the provisions of this Regulation, all of which shall be complied with in respect of one subject before any are complied with in respect of any other subject; so however that a report made in accordance with the provisions of section 20(2) of the Act or any other evidence relating to the samples or the tests made on the samples shall not be challenged solely on the grounds that a sampler has not acted in accordance with the provisions of this Regulation.

(2) The sampler shall ensure that a photograph of the subject is attached to the direction form relating to him before he obtains a sample from that subject.

(3) Before a sample is obtained from a subject, he, or where he is under 16 or a protected party the person of full age accompanying him, shall complete the declaration in Part V of the direction form (that that subject is the subject to whom the direction form relates and, where a photograph is attached to the direction form, that the photograph is a photograph of that subject) which shall be signed in the presence of and witnessed by the sampler.

(5) A sample shall not be obtained from any subject unless—

(a) he or, where he is under 16 or a protected party, the person having the care and control of him, has signed a statement on the direction form that he consents to the sample being obtained; or

(b) where he is under 16 or a protected party and is not accompanied by the person having the care and control of him, the sampler is in possession of a statement in writing, purporting to be signed by that person that he consents to the sample being obtained.

(c) where he is under the age of sixteen years, and the person with care and control of him does not consent, the court has nevertheless ordered that sample to be obtained.

(6) The sampler shall attach to the direction form any statement referred to in sub-paragraph (b) of the preceding paragraph.

(7) If a subject or, where he is under 16 or a protected party, the person having the care and control of him, does not consent to a sample being obtained, he may record on the direction form his reasons for withholding his consent.

(8) When the sampler has obtained a sample he shall place it in a suitable, tamper proof, container and shall affix to the container a label giving the full name, age and sex of the subject from whom it was obtained and the label shall be signed by the sampler.

(9) The sampler shall state in Part VII of the direction form that he has obtained the sample and the date on which he did so.

Note

9B-1269.

1+ Amended by the [Blood Tests \(Evidence of Paternity\) \(Amendment\) Regulations 2015 \(SI 2015/1834\) reg.2\(6\)](#), with effect from 23 November 2015.



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Regulation 7. - Despatch of samples to tester

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Regulation 7

7.— Despatch of samples to tester

9B-1270+



(1) When a sampler has obtained samples, he shall, where he is not himself the tester, pack the containers together with the relevant direction forms and shall despatch them forthwith to the tester by post by recorded signed for delivery or international signed for delivery or shall deliver them or cause them to be delivered to the tester by some person other than a subject or a person who has accompanied a subject to the sampler.

(2) If at any time a sampler despatches to a tester samples from some only of the subjects and has not previously despatched samples obtained from the other subjects, he shall inform the tester whether he is expecting to obtain any samples from those other subjects and, if so, from whom and on what date.

Note

9B-1270.

1+

Amended by the [Blood Tests \(Evidence of Paternity\) \(Amendment\) Regulations 2015 \(SI 2015/1834\) reg.2\(7\)](#), with effect from 23 November 2015.



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Regulation 8. - Procedure where sampler nominated is unable to obtain the samples

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Regulation 8

8.— Procedure where sampler nominated is unable to obtain the samples

9B-1271+

(1) Where a sampler is unable himself to obtain samples from all or any of the subjects, he may nominate another sampler medical practitioner or tester to take the samples which he is unable to obtain.



(2) The sampler shall record the nomination of the other sampler on the relevant direction forms and shall forward them to the sampler nominated by him.

Note

9B-1271.

1+ Amended by the Blood Tests (Evidence of Paternity) (Amendment) Regulations 2015 (SI 2015/1834) reg.2(8), with effect from 23 November 2015.



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Regulation 8A. - Accreditation

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Regulation 8a

8A. Accreditation

- 9B-1272+ (1) Subject to paragraph 2(2), a body shall not be eligible for the purposes of section 20 of the Act unless it is accredited to ISO/IEC/17025 by an accreditation body which complies with the requirements of ISO Guide 58.



- (2) A body which employs a person who at the date of the coming into force of the Blood Tests (Evidence of Paternity) (Amendment) Regulations 2001 was a tester appointed by the Lord Chancellor shall, until three years after the date, be eligible for accreditation for the purposes of Section 20 of the Act notwithstanding; that it does not comply with paragraph (1).

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Regulation 9. - Testing of samples

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Regulation 9

9.— Testing of samples

9B-1273+ (1) Samples obtained for the purpose of giving effect to a direction shall (so far as practicable) all be tested by the same tester.

(2) A tester shall not make tests on any samples for the purpose of a direction unless he will, in his opinion, be able to show from the results of those tests (whether alone or together with the results of tests on any samples which he has received and tested or expects to receive subsequently) that a subject is or is not excluded from being the father or mother of the person whose parentage falls to be determined or mother of the person whose parentage falls to be determined.

Note

9B-1273.

1+ Amended by the [Blood Tests \(Evidence of Paternity\) \(Amendment\) Regulations 2015 \(SI 2015/1834\) reg.2\(9\)](#), with effect from 23 November 2015.

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Regulation 10. - Report by tester

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Regulation 10

10. Report by tester

- 9B-1274+ On completion of the tests in compliance with the direction, the tester shall forward to the court a report in Form 2 in Schedule 1 to these Regulations, together with the appropriate direction forms.



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Regulation 11. - Procedure where tests not made

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11. Procedure where tests not made

- 9B-1275+ If at any time it appears to a tester that he will be unable to make tests in accordance with the direction, he shall inform the court, giving his reasons, and shall return the direction forms in his possession to the court.



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Regulation 12. - Fees

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Regulation 12

12.— Fees

9B-1276+ (1) A sampler may charge £37.90 for making the arrangements to obtain a sample.

(2) The charge in paragraph (1) is payable whether or not a sample is obtained.

(3) This regulation does not apply where regulation 2(5) applies in a given case.

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Schedule 1

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Schedule 1

9B-1276.
1+

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Note

9B-1276.

2+ Amended by the [Blood Tests \(Evidence of Paternity\) \(Amendment\) Regulations 2015 \(SI 2015/1834\)](#) reg.2(10), with effect from 23 November 2015.



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Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951

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Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951

Arrangement of Act

(1951 14 and 15 Geo. 6 c.65)

Editorial note

9B-1277 This 1951 Act is of renewed importance given the current policy of using reserve forces, such as regiments of the Territorial Army in active service. Reservists have been called up and are serving in theatres of war, in peacekeeping duties and/or to assume the duties of regulars who are themselves on active service. Clearly any court is likely to have sympathy for a reservist unable to deal with his/her personal affairs while on active service and could in any event in the exercise of its discretion stay proceedings or stay enforcement. However, it is not merely a matter of discretion. In some circumstances the Act requires leave before issuing: in other circumstances it prohibits proceedings or enforcement. These provisions need to be known by landlords, mortgagees and other lenders.



Scheme of the Act

9B-1278 The Act is in seven parts. We are concerned here only with the provisions relating to civil proceedings and enforcement and also omit provisions applicable only to Scotland. In cases governed by s.3 no one may, without leave, proceed to execution on or enforcement of a judgment. Secondly, no one may, without leave, levy distress, take possession or appoint a receiver of property, re-enter on land, realise a security, take forfeiture at a deposit or institute proceedings for foreclosure. Thirdly, no one may without leave, proceed to execution or other enforcement of a judgment or order for recovery at possession of land in default of payment of rent. There is power to stay a bankruptcy petition.



Part II (ss.14—25) protects the reservist and family from eviction during the period of service and for four months thereafter.

Part III (ss.26—40) give protection to a reservist who was the working proprietor of a business or professional practice immediately before service.

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Section 1. - Application of sections two to six

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Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951

Section 1

Part I Protection Against Certain Legal Remedies

Provisions as to England and Wales

1. Application of sections two to six

9B-1279+ The five next following sections shall apply to England and Wales only.



Note

9B-1280+ Subsections (1)(d) were substituted by the Children Act 1989 s.108(5) and (6), Sch.13 para.12 and Sch.14 para.1; subs.(6) was amended by the Statute Law (Repeals) Act 1993.



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Section 2. - General restrictions on execution and other remedies

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Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951

Section 2

Part I Protection Against Certain Legal Remedies

Provisions as to England and Wales

2.— General restrictions on execution and other remedies

9B-1281+

(1) In the cases mentioned in the next following section no person shall be entitled, subject to the provisions of this Part of this Act, to proceed, except with the leave of the appropriate court, to execution on, or otherwise to the enforcement of, a judgment or order of any court other than a county court (whether given or made before or after the commencement of this Act) for the payment or recovery of a sum of money:

Provided that nothing in this subsection shall apply to—

- (a) a judgment for the recovery of damages for tort;
- (b) a judgment or order for the recovery of a debt which has become due by virtue of a contract made after the relevant date;
- (c) a judgment or order under which no sum of money is recoverable otherwise than in respect of costs;
- (d) an order for alimony, maintenance or other payment made under sections 21 to 33 of the Matrimonial Causes Act 1973 or made, or having effect as if made, under Schedule 1 to the Children Act 1989.
- (e) an order made in criminal proceedings, or an order made in proceedings for the recovery of a penalty in respect of a contravention of, or failure to comply with, any provisions of an Act;

or to the enforcement of any other judgment or order by judgment summons.

(2) In the cases mentioned in the next following section no person shall be entitled, subject to the provisions of this Part of this Act, except with the leave of the appropriate court—

- (a) to proceed to exercise any remedy which is available to him by way of—
 - the levying of distress;
 - the taking of possession of any property;
 - the appointment of a receiver of any property;
 - re-entry upon land;

the realisation of a security; or

the forfeiture of a deposit; or

(b) to institute proceedings for foreclosure or for sale in lieu of foreclosure, or for the recovery of possession of mortgaged property, or to take any step in any such proceedings instituted before the relevant date:

Provided that this subsection shall not apply to any remedy or proceedings available in consequence of default in the payment of a debt arising by virtue of a contract made after the relevant date or the performance of an obligation so arising; and nothing in this subsection shall affect—

(i) a power of sale of a mortgagee of land or an interest in land who is in possession of the mortgaged property at the relevant date, or who before that date has appointed a receiver who at that date is in possession, or in receipt of the rents and profits, of the mortgaged property; or

(ii) a power of sale of a mortgagee in possession of property other than land or some interest in land, where the power of sale has arisen and notice of the intended sale has been given before the relevant date; or

(iii) a right or power of a pawnbroker to deal with a pledge; or

(iv) any right or power of a person to sell goods in his custody as a bailee, being a right or power arising by reason of default in the payment of a debt; or

(v) the institution or prosecution of proceedings for the appointment by the court of a receiver of any property.

(3) In the cases mentioned in the next following section no person shall be entitled, subject to the provisions of this Part of this Act, to proceed, except with the leave of the appropriate court, to execution on, or otherwise to the enforcement of, a judgment or order of any court (whether given or made before or after the commencement of this Act) for the recovery of possession of land in default of payment of rent or for the delivery of any property other than mortgaged property by reason of a default in the payment of money:

Provided that nothing in this subsection shall apply to a judgment given or order made in proceedings for the enforcement of a contract made after the relevant date.

(4) If, on any application for such leave as is required under this section for the exercise of any of the rights and remedies mentioned in subsections (1), (2) and (3) of this section, the appropriate court is of opinion that the person liable to satisfy the judgment or order, or to pay the rent or other debt, or to perform the obligation, in question is unable immediately to do so by reason of circumstances directly or indirectly attributable to his or someone else's performing or having performed a period of relevant service, the court may, subject to the provisions of this Part of this Act, refuse leave for the exercise of that right or remedy, or give leave therefor subject to such restrictions and conditions as the court thinks proper.

(5) The appropriate court, in determining for the purpose of the last foregoing subsection whether a person is unable immediately to satisfy the judgment or order, or to pay the rent or other debt, or to perform the obligation, in question by reason of any such circumstances as are mentioned in that subsection, or in determining the restrictions and conditions (if any) subject to which leave is to be given under that subsection, may take account of other liabilities, whether present or future, of his.

(6) Where—

(a) a bankruptcy petition has been presented against a debtor, and it is shown to the satisfaction of the court having jurisdiction in the bankruptcy that his inability to pay his debts is due to circumstances directly or indirectly attributable to his or someone else's performing or having performed a period of relevant service; or

(b) [...]

the court may at any time stay the proceedings under the petition for such time and subject to such conditions as the court thinks fit.

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Section 3. - Scope of protection

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Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951

Part I Protection Against Certain Legal Remedies

Provisions as to England and Wales

3.— Scope of protection

9B-1282+



(1) Subject to the following provisions of this section, the provisions of subsection (1), (2) or (3) of the last foregoing section shall apply to the exercise of a right or remedy in the following cases, and in the following cases only, that is to say:—

(a) they shall apply (by virtue of this paragraph and without more) where the person liable to satisfy the judgment or order, or to pay the rent or other debt, or to perform the obligation, in question is for the time being performing a period of relevant service;

(b) they shall apply (by virtue of this paragraph and without more, but subject to any order of the appropriate court directing that they shall not so apply or shall cease so to apply) where the person liable as aforesaid has been performing a period of relevant service and, while he was so doing, an application was made to the appropriate court for leave under the last foregoing section to exercise the right or remedy;

(c) they shall apply in a case where—

(i) the appropriate court by order so directs, on the application of the person liable as aforesaid and on being satisfied that he is unable immediately to satisfy the judgment or order, or to pay the rent or other debt, or to perform the obligation, in question by reason of circumstances directly or indirectly attributable to his or someone else's performing or having performed a period of relevant service; or

(ii) the person liable as aforesaid has made to the appropriate court an application for an order under this paragraph and the application has not been disposed of, or not having made such an application has given to the proper person written notice of his intention to do so.

(2) A notice given for the purpose of paragraph (c) of the foregoing subsection shall expire at the expiration of fourteen days (or, if given in a class of case as to which a longer period is prescribed for the purposes of this subsection, at the expiration of that period) from the date on which it was given, and where the person giving a notice for that purpose has given a previous notice to the like effect the later notice shall have no operation unless the previous notice was withdrawn with the consent of the proper person before it expired.

(3) For the purpose of the foregoing subsections, the expression "*the proper person*" means the person seeking to exercise the right or remedy in question, but a notice shall be deemed to be given to the proper person if given to any person (whether the proper person or his agent or not) proceeding to the enforcement of that right or remedy.

(4) Where the appropriate court makes an order under paragraph (c) of subsection (1) of this section with respect to the exercise of a right or remedy, the powers of the court under the last foregoing section shall thereupon be exercisable as if an application for leave to exercise the right or remedy in question had been made under that section.

(5) The appropriate court, in determining for the purpose of the said paragraph (c) whether the applicant is unable immediately to satisfy the judgment or order, or to pay the rent or other debt, or to perform the obligation, in question by reason of any such circumstances as are mentioned in that paragraph, may take account of other liabilities, whether present or future, of his.

(6) In their application to the enforcement of a judgment or order for the recovery of possession of land in default of payment of rent, the references in subsection (4) of the last foregoing section and subsection (1) of this section to the person liable to satisfy the judgment or order, or to pay the rent or other debt, or to perform the obligation, in question shall be construed as referring only to the person or persons against whom the judgment or order was made and who is or are, or would, but for any forfeiture incurred in consequence of the default be, entitled to the benefit of the lease under which the rent was reserved.

(7) Any reference in subsection (4) of the last foregoing section or subsection (1) of this section to the person liable to satisfy the judgment or order, or to pay the rent or other debt, or to perform the obligation, in question shall in a case where it is sought to exercise a right or remedy against one such person separately from any others who are also so liable, be construed as referring to him only and not including any such other person, but, in a case where it is sought to exercise it against two or more such persons jointly, shall be construed as referring to all or any of the persons against whom it is sought to exercise the right or remedy; and in this subsection references to exercising a right or remedy against a person shall include exercising it against property in which he has an interest or of which he is in possession.

(8) This section, and subsection (4) of the last foregoing section, shall apply to a person affected, or claiming to be affected, by an exercise or proposed exercise by the mortgagee of any property of any of the rights or remedies mentioned in subsection (2) of the last foregoing section, being a right or remedy arising by virtue of a default in the payment of any mortgage money or a breach of any mortgage obligation, as if that person were a person liable to pay the mortgage money or to perform the mortgage obligation:

Provided that the said subsection (2) shall not apply to require leave for the exercise of the right or remedy otherwise than against the person liable as aforesaid except by virtue of paragraph (c) of subsection (1) of this section.

(9) For the purposes of the last foregoing section and of subsection (3) of this section a person shall be deemed to be proceeding to execution on, or otherwise to the enforcement of, a judgment or order if, being entitled to the benefit of the judgment or order—

(a) he issues a bankruptcy notice or presents a bankruptcy petition or a winding-up petition founded on the non-payment of money due under the judgment or order; or

(b) he takes out some judicial process with a view to, or in the course of, the enforcement of the judgment or order;

and, where a person has (in a case for which leave was not required under the last foregoing section) taken out any judicial process with a view to, or in the course of, the enforcement of a judgment or order, or proceeded to the exercise of any such remedy as is mentioned in subsection (2) of that section, he shall be deemed to be proceeding to the enforcement of the judgment or order or to the exercise of the remedy when any step is taken by him or on his behalf towards its completion:

Provided that—

(i) the last foregoing section shall not apply to require leave for the taking of any such step as aforesaid except by virtue of paragraph (c) of subsection (1) of this section; and

(ii) for the purposes of this subsection, an application for discovery in aid of execution shall not be treated as the taking out of a judicial process or as the taking of a step towards the completion of the enforcement of a judgment or order.

(10) For the purposes of the last foregoing section, the expression "*the relevant date*" means the date on which the service man in question began to perform the period of relevant service:

Provided that—

(a) for the purposes of any reference in the last foregoing section to a contract made after the relevant date, where a service man performs two or more periods of relevant service the said expression means the date on which he began the later or latest of those periods of service; and

(b) for the purposes of paragraph (b) of subsection (2) of the last foregoing section, and of paragraphs (i) and (ii) of the proviso to the said subsection (2)—

(i) where the said date was before the commencement of this Act, then subject to sub-paragraph (ii) of this paragraph the said expression means the date of that commencement; and

(ii) in a case to which the last foregoing section applies by virtue of paragraph (c) of subsection (1) of this section, the said expression means the date on which that section began so to apply.

Section 4. - Special provisions as to leases and hire-purchase agreements

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Section 4

Part I Protection Against Certain Legal Remedies

Provisions as to England and Wales

4.— Special provisions as to leases and hire-purchase agreements

9B-1283+



(1) Where under section two of this Act the appropriate court refuses, or grants subject to restrictions and conditions, leave to enforce a judgment or order for the recovery of possession in default of payment of rent of any premises, the lease shall be deemed not to have been forfeited by reason of the default so long as the judgment or order remains unenforceable; and a judgment or order shall be deemed to have remained unenforceable, notwithstanding that it has at some time been enforceable, if before it is enforced it again becomes unenforceable.

(2) A judgment or order for the recovery of possession of a dwelling house let on or subject to a protected tenancy of statutory tenancy within the meaning of the Rent Act 1977 shall be deemed for the purposes of the foregoing provisions of this Act to be a judgment or order for the recovery of possession of the dwelling house in default of payment of rent if the court in giving or making the judgment or order was exercising the power conferred by Case 1 in Schedule 15 to the Rent Act 1977 on the sole ground that rent lawfully due from the tenant had not been paid and was not exercising any other power conferred by that Schedule.

(2A) For the purposes of the foregoing provisions of this Act, a judgment or order for the recovery of possession of a dwelling-house let on an assured tenancy within the meaning of Part I of the Housing Act 1988 shall be regarded as a judgment or order for the recovery of possession in default of payment of rent if the judgment or order was made on any of Grounds 8, 10 and 11 in Schedule 2 to that Act and not on any other ground.

(3) On an application under section two of this Act for leave to enforce a judgment or order for the recovery in default of payment of rent of possession of land held in distinct parcels under one lease by two or more lessees, the court may (notwithstanding that a single rent was reserved by the lease and the proviso for re-entry in default of payment of the rent was not severable) order that the application shall be dealt with as if those parcels had been held under distinct leases and applications were being made for leave to enforce separate judgments or orders in relation thereto, and may make such consequential provision as seems just for the apportionment of the arrears of rent, for the relief of any lessee from forfeiture of the parcel held by him and for the adjustment of the rights and obligations under the lease of the parties to the application.

I(4) Where the appropriate court refuses leave under section 4(2) of this Act to take possession of goods subject to a hire-purchase agreement or a conditional sale agreement or to execute a judgment or order for delivery of such goods, or gives leave subject to restrictions and conditions, and the person to whom the goods are bailed, or, as the case may be, the buyer, before possession is taken or execution on the judgment or order completed, pays the total price, the creditor's title to the goods shall, notwithstanding any failure to pay the total price at the time required by the agreement, vest in that person.

(5) Where the creditor under a hire-purchase agreement or a conditional sale agreement has taken possession of the goods bailed or agreed to be sold under it, the appropriate court on an application under section 3(1)(c) of this Act, may, if it thinks fit, deal with the case as if the creditor were proceeding to take possession of the goods and, if it makes an order under that paragraph, may direct accordingly that the goods be restored to the person to whom they were bailed or, as the case may be, the buyer; and if, after the creditor has taken possession of the goods, notice is given under that paragraph with respect to them, he shall not, so long as the notice is in force or any application in pursuance of the notice is undisposed of, deal with the goods in such a way as to prejudice the powers of the appropriate court under this subsection.

Note

9B-1284 Subsections (1)(d) were substituted by the [Children Act 1989 s.108\(5\)](#) and **(6)**, Sch.13 para.12 and Sch.14 para.1; subs.(6) was amended by the [Statute Law \(Repeals\) Act 1993](#).



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Section 5. - Appropriate courts and procedure

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Section 5

Part I Protection Against Certain Legal Remedies

Provisions as to England and Wales

5.— Appropriate courts and procedure

9B-1285+



(1) The appropriate court for the purposes of any of the provisions of this Part of this Act applying to England and Wales shall be such court as may be designated by rules made by the Lord Chancellor under this section, and such rules may designate different courts in relation to different classes of proceedings.

(2) Rules may be made in accordance with Part 1 of Schedule 2 to the Constitutional Reform Act 2005 prescribing the manner in which applications under the said provisions are to be made, and prescribing any matter which under any of those provisions is to be prescribed, and generally for regulating the conduct of proceedings under the said provisions.

(3) Rules under subsection (2) may in particular make provision for enabling a court, for the purpose of hearing and determining an application under the said provisions of this Part of this Act or in exercising any discretion for the purposes of the said provisions of this Part of this Act, to admit any document as evidence of any facts stated therein.

(4) Rules under subsection (2) may in particular make provision for requiring, or dispensing with, service of notice of any application under the said provisions of this Part of this Act upon persons who may be affected, whether by virtue of subsection (5) of section two or subsection (5) or (8) of section three or otherwise, and for enabling any persons to be heard at the hearing of any application under those provisions, and may also make provision for the making of applications ex parte in such cases as may be prescribed by the rules.

(5) Rules under subsection (2) may, for the purpose of enabling a person performing relevant service to obtain the protection afforded by subsections (8) and (9) of section three of this Act, provide for enabling the appropriate court to treat as an application made by him for an order under paragraph (c) of subsection (1) of the said section three, an application for that purpose made by some other person on his behalf; and the rules may further provide that an application which the appropriate court has, under the rules, power to treat as an application by the person performing relevant service shall also be treated for the purposes of sub-paragraph (ii) of the said paragraph (c) as an application made by that person.

(5A) The Lord Chancellor must consult the Lord Chief Justice of England and Wales before making rules under subsection (1) that relate to England and Wales.

(5B) The Lord Chief Justice may nominate a judicial office holder (as defined in section 109(4) of the Constitutional Reform Act 2005) to exercise his functions under subsection (5A).

(6) The power to make rules conferred by subsection (1) shall be exercisable by statutory instrument, which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

Note

9B-1286 Subsections (2) to (6) were amended and subss.(5A) and (5B) were inserted by the [Constitutional Reform Act 2005 s.12\(2\)](#) and [Sch.1 Pt II, para.8](#) and [Sch.4, Pt I, para.41](#).



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Section 6. - Interpretation of sections two to five

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Section 6

Part I Protection Against Certain Legal Remedies

Provisions as to England and Wales

6.— Interpretation of sections two to five

9B-1287+

(1) In the foregoing provisions of this Act the following expressions have the meanings hereby respectively assigned to them, that is to say:—

“*costs*” includes all charges and possession money payable to a sheriff in respect of interpleader proceedings taken by him;

“*lease*” includes an underlease and any contract of tenancy, and the expression “*lessee*” shall be construed accordingly;

“*mortgage*” includes any charge, and the expressions “*mortgagor*” and “*mortgagee*” shall be construed accordingly;

“*mortgage money*” includes any part thereof and interest thereon;

“*mortgage obligation*” means any obligation arising under or by virtue of the mortgage, other than an obligation to pay the mortgage money;

“*prescribed*” means prescribed by rules made under the last foregoing section;

“*rent*” includes any sum payable by way of mesne profits;

“*the relevant date*” has the meaning assigned to it by subsection (10) of section three of this Act.

(2) It is hereby declared that in this Part of this Act the expression “*distress*” includes distress for rates.

(3) For the purposes of the foregoing provisions of this Act an execution against goods shall be deemed to be completed by seizure and sale or, where a writ or warrant of delivery is issued, by delivery of the goods, an attachment of a debt shall be deemed to be completed by the receipt of the debt, an execution against land shall be deemed to be completed by seizure or, in the case of an equitable interest, by the appointment of a receiver, and the enforcement of a judgment or order for recovery of possession of land shall be deemed to be completed by delivery of possession.

(4) References in the foregoing provisions of this Act to judgments or orders for the recovery of possession of land include references to any judgment or order the effect of which is to enable a person to obtain possession of land, and in particular includes, in relation to a mortgagee, a judgment or order for the delivery of possession of the mortgaged land.

(5) For the purposes of the foregoing provisions of this Act a mortgagee of land or any interest in land shall be treated as not being entitled to obtain possession of the mortgaged property, whether by virtue of his estate or interest as mortgagee or of any attornment or other provision contained in the mortgage or in any agreement collateral thereto, unless default has been made in payment of some mortgage money, or there has been a breach on the part of the mortgagor, or of some person concurring in the making of the mortgage of some mortgage obligation; and for this purpose default shall not be deemed to have been made in payment of any mortgage money (except in a case where the mortgage money is repayable by instalments) unless a written demand for payment has been served on the person liable, and a period of three months has elapsed since the service of the demand

Section 13. - Effect of failure to observe restrictions under Part I

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Section 13

Part I Protection Against Certain Legal Remedies

Effect of failure to observe restrictions under Part I

13.— Effect of failure to observe restrictions under Part I

9B-1288+



(1) Omission to obtain leave required under section two of this Act, failure to observe a restriction or condition subject to which leave so required was given, or contravention of the prohibition in subsection (5) of section four of this Act against dealing with goods, shall not render invalid, or alter the effect of—

- (a) anything which would have operated as a transfer of the title to any property or of the possession of any property if leave had not been required or the restriction, condition or prohibition had not been imposed;
- (b) any payment, receipt, appointment or other transaction; or
- (c) any legal proceedings.

(2) In any action for damages for conversion or other proceedings which lie by virtue of any such omission, failure or contravention, the court may take account of the conduct of the defendant with a view, if the court thinks fit, to awarding exemplary damages in respect of the wrong sustained by the plaintiff.

(3) If in any action or proceedings which lie by virtue of any such omission, failure or contravention the court is satisfied that the defendant acted honestly and reasonably, and ought fairly to be excused for it, the court may relieve the defendant from liability in respect thereof.

(4) In so far as it appears to the appropriate court to be practicable to remedy the results of any such omission, failure or contravention as aforesaid specifically without prejudice to the interests of third parties, the court may give any such directions for restoration of property, repayment of money or other measures as may appear to the court to be requisite for that purpose.

In this subsection the expression “*third parties*” means persons other than—

- (a) in the case of such an omission or failure in connection with the enforcement of a judgment or order or the exercise of a remedy, the person proceeding thereto and any person acting in relation thereto on his behalf;

- (b) in the case of an omission to obtain leave for instituting such proceedings as are mentioned in paragraph (b) of subsection (2) of section two of this Act or for taking a step in such proceedings, the person instituting the proceedings or taking the step in question;
- (c) in the case of a contravention of the prohibition in subsection (5) of section four of this Act, the owner of the goods; and
- (d) in any of the cases aforesaid, any person taking a transfer of the title to or possession of any property under a transaction in connection with which the omission, failure or contravention took place, if he took with knowledge of the circumstances which rendered what was done such an omission, failure or contravention.

(5) In relation to an action or other proceedings tried by a judge and jury—

(a) the references to the court in subsections (2) and (3) of this section shall be construed as references to the jury, but without prejudice to the power of the judge to give to the jury directions whether there is any evidence of facts justifying an award of exemplary damages on the one hand or the granting of relief on the other hand, or to give them advice as to the making of such an award or grant;

(b) the references to the court in subsection (4) of this section shall be construed as references to the judge alone.

(6) This section shall apply to Scotland subject to the following modifications:—

(a) for references to section two or to subsection (5) of section four of this Act there shall be respectively substituted references to section eight or to subsection (2) of section ten of this Act;

(b) paragraph (b) of subsection (4) of this section shall be omitted;

(c) the expression “*plaintiff*” means pursuer and the expression “*defendant*” means defender and any reference to a judgment shall include a reference to a decree.

Section 14. - Period of residence protection, and scope of three succeeding sections (protection of tenure under lettings at a rent)

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Section 14

Part II Protection Against Insecurity of Tenure of Place of Residence

Protection during service other than short period of training

14.— Period of residence protection, and scope of three succeeding sections (protection of tenure under lettings at a rent)

9B-1289+



(1) The three next succeeding sections shall have effect, subject to subsection (2) of this section, in the case of a service man who performs a period of relevant service, other than a short period of training, either wholly after the commencement of this Act or partly theretofore and partly thereafter, for giving, during that period of service, or the residue of it if it began before the commencement of this Act, and four months from the date of the ending of it (in this Part of this Act referred to, in relation to such a service man, as his “period of residence protection”), security of tenure of premises which at any time during the period of protection are a rented family residence of his.

For the purposes of the operation of this Part of this Act at any time during a service man’s period of residence protection—

(a) the expression “*rented family residence*” means premises in which (or in part of which) the service man was living immediately before the beginning of his period of service with a dependant or dependants of his in right of a tenancy at a rent of those premises being a tenancy vested in him or in that dependant or any of those dependants, and in which (or in part of which) at the time in question during the period of protection a dependant or dependants of his is or are living, whether with or without him, in right of such a tenancy of those premises being a tenancy vested in him or in that dependant or any of those dependants; and

(b) the expression “*tenancy qualifying for protection*” means the tenancy of a rented family residence of the service man in right of which a dependant or dependants of his is or are living therein or in part thereof at the time in question.

(2) The three next succeeding sections shall not have effect if and so long as the rented family residence—

(a) is a dwelling house which consists of or comprises premises which, by virtue of a premises licence issued under the Licensing (Scotland) Act 2005, are licensed for the sale of alcohol (within the meaning of section 2 of that Act) for consumption on the premises; or

(b) is bona fide let at a rent which includes payments in respect of board; or

(c) is a dwelling-house which is subject to a protected occupancy or statutory tenancy as defined in the Rent (Agriculture) Act 1976.

Note

 9B-1290 Subsection (2)(a) was amended by the Rent Act 1968 s.117(2) and Sch.15 and by the Licensing Act 2003 s.198(1) and Sch.6, paras 21 and 22; subs.(2)(c) was amended by the Rent (Agriculture) Act 1976 s.40 and Sch.8 para.1. Subsection (2)(a) was amended by the Licensing (Scotland) Act 2005 (Consequential Provisions) Order 2009 (SSI 2009/248) with effect from 1 September 2009.

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Section 15. - Protection of tenure of furnished, and certain other, rented premises, by extension of the Furnished Houses (Rent Control) Act

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Section 15

Part II Protection Against Insecurity of Tenure of Place of Residence

Protection during service other than short period of training

15.— Protection of tenure of furnished, and certain other, rented premises, by extension of the Furnished Houses (Rent Control) Act

9B-1291+



(1) Subject to subsection (2) of the last preceding section, where at any time during a service man's period of residence protection,

(a) the rented family residence is let under the tenancy qualifying for protection either on such terms as are mentioned in section 19(2) of the Rent Act 1977 (which relates to premises let in consideration of a rent which includes payment for the use of furniture or for services) or on terms of sharing with the lessor, and

(b) a notice to quit has been served by the lessor on the lessee (whether after or before the beginning of the period of protection) and the notice has not expired, but

(c) the condition specified in subsection (1)(b) of [section 104 of the Rent Act 1977 is not fulfilled, the said section 104 shall apply in relation to the notice to quit as if that condition had been fulfilled as to the contract under which that tenancy subsists.

(1A) This section does not apply in relation to any tenancy entered into after the commencement of section 69(2) of the Housing Act 1980.

(2) The reference in paragraph (a) of the preceding subsection to a letting on terms of sharing with the lessor is a reference to a letting under which—

(a) the lessee has the exclusive occupation of some accommodation (in this subsection referred to as "the separate accommodation");

(b) he has the use of other accommodation in common with the lessor or with the lessor and other persons; and

(c) the accommodation mentioned in the last preceding paragraph is or includes accommodation of such a nature that the circumstances specified in that paragraph is sufficient to prevent the separate accommodation from being

a dwelling-house [let on or subject to a protected tenancy or statutory tenancy within the meaning of the Rent Act 1977, whether apart from that circumstance it would be such a dwelling-house or not.

(3) The subsistence of a Crown interest in premises shall not affect the operation of this section if the interest of the immediate landlord of the tenant under the tenancy in question is not a Crown interest, but nothing in this subsection shall be construed as excluding the operation of this Part of this Act in cases where there subsists a Crown interest not being the reversion immediately expectant on the tenancy in question.

(4) References in the said section 104 to that section shall be construed as including references to the preceding provisions of this section and to the said section 104 as extended by those provisions.

(5) Nothing in the preceding provisions of this section shall be construed as rendering the said section 104 applicable in a case in which the contract under which the tenancy in question subsists is excluded from being a restricted contract (within the meaning of the Rent Act 1977) by paragraph 17 of Schedule 24 to that Act.

Note

9B-1292 Subsection (1) was amended by the [Rent Act 1968 s.117\(2\)](#) and [Sch.15](#) and the [Rent Act 1977 s.155](#) and [Sch.23, para.3](#); subs. (1A) was inserted by the [Housing Act 1980 s.152](#), [Sch.25, para.1](#); subss.(2), (4), (5) were amended by the [Rent Act 1977 s.155](#) and [Sch.23 para.3](#); subs.(3) was amended by the [Rent Act 1968 s.117\(2\)](#) and [Sch.15](#).



Section 16. - Protection of tenure of certain rented premises by extension of Housing Act 1988

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Section 16

Part II Protection Against Insecurity of Tenure of Place of Residence

Protection during service other than short period of training

16.— Protection of tenure of certain rented premises by extension of Housing Act 1988

9B-1293+



(1) Subject to subsection (2) of section 14 of this Act and subsection (3) below, if at any time during a service man's period of residence protection—

(a) a tenancy qualifying for protection which is a fixed term tenancy ends without being continued or renewed by agreement (whether on the same or different terms and conditions), and

(b) by reason only of such circumstances as are mentioned in subsection (4) below, on the ending of that tenancy no statutory periodic tenancy of the rented family residence would arise, apart from the provisions of this section,

Chapter I of Part I of the Housing Act 1988 shall, during the remainder of the period of protection, apply in relation to the rented family residence as if those circumstances did not exist and had not existed immediately before the ending of that tenancy and, accordingly, as if on the ending of that tenancy there arose a statutory periodic tenancy which is an assured tenancy during the remainder of that period.

(2) Subject to subsection (2) of section 14 of this Act and subsection (3) below, if at any time during a service man's period of residence protection—

(a) a tenancy qualifying for protection which is a periodic tenancy would come to an end, apart from the provisions of this section, and

(b) by reason only of such circumstances as are mentioned in subsection (4) below that tenancy is not an assured tenancy, and

(c) if that tenancy had been an assured tenancy, it would not have come to an end at that time,

Chapter I of Part I of the Housing Act 1988 shall, during the remainder of the period of protection, apply in relation to the rented family residence as if those circumstances did not exist and, accordingly, as if the tenancy had become an assured tenancy immediately before it would otherwise have come to an end.

(3) Neither subsection (1) nor subsection (2) above applies if, on the ending of the tenancy qualifying for protection, a statutory tenancy arises.

(4) The circumstances referred to in subsections (1) and (2) above are any one or more of the following, that is to say,—

(a) that the tenancy was entered into before, or pursuant to a contract made before, Part I of the Housing Act 1988 came into force;

(b) that the rateable value (as defined for the purposes of that Act) of the premises which are the rented family residence, or of a property of which those premises form part, exceeded the relevant limit specified in paragraph 2A of Schedule 1 to that Act;

(c) that the circumstances mentioned in paragraph 2, 3, 3A, 3B or paragraph 6 of that Schedule applied with respect to the tenancy qualifying for protection; and

(d) that the reversion immediately expectant on the tenancy qualifying for protection belongs to any of the bodies specified in paragraph 12 of that Schedule.

Note

9B-1294 Substituted by the Housing Act 1988 s.140 and Sch.17 Pt I; subs.(4) was amended by SI 1990/434.



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Section 17. - Provisions supplementary to section sixteen in case of rented premises which include accommodation shared otherwise than with the landlord

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Section 17

Part II Protection Against Insecurity of Tenure of Place of Residence

Protection during service other than short period of training

17.— Provisions supplementary to section sixteen in case of rented premises which include accommodation shared otherwise than with the landlord

9B-1295+



(1) Where at any time during a service man's period of residence protection a tenancy qualifying for protection which is a fixed term tenancy ends as mentioned in paragraph (a) of subsection (1) of the last preceding section, and immediately before the ending of the tenancy—

(a) the tenant under the terms of the tenancy had the exclusive occupation of some accommodation (in this section referred to as "the separate accommodation") and had the use of other accommodation in common with another person or other persons, not being or including the landlord, but

(b) by reason only of such circumstances as are mentioned in section 16(4) above, subsection (1) of section 3 of the Housing Act 1988 (provisions where tenant shares accommodation with persons other than landlord) did not have effect with respect to the separate accommodation,

the said section 3 shall during the remainder of the period of protection apply in relation to the separate accommodation as if the circumstances referred to in paragraph (b) of this subsection did not exist, and had not existed immediately before the ending of the tenancy, and, accordingly, as if on the ending of the tenancy there arose a statutory periodic tenancy which is an assured tenancy during the remainder of that period.

(2) Where, at any time during a service man's period of residence protection—

(a) a tenancy qualifying for protection which is a periodic tenancy would come to an end, apart from the provisions of this section and section 16 above, and

(b) paragraphs (a) and (b) of subsection (1) above apply,

section 3 of the Housing Act 1988 shall, during the remainder of the period of protection, apply in relation to the separate accommodation as if the circumstances referred to in subsection (1)(b) above did not exist and, accordingly, as if the tenancy had become an assured tenancy immediately before it would otherwise have come to an end.

(3) Neither subsection (1) nor subsection (2) above applies if, on the ending of the tenancy qualifying for protection, a statutory tenancy arises.

Note

9B-1296 Subsection (1) was amended by the [Rent Act 1968 s.117\(2\)](#) and [Sch.15](#); the [Housing Act 1988 s.140](#) and [Sch.17 Pt I](#); subss.(2) and (3) substituted for original subs.(2) by the [Housing Act 1988 s.140](#) and [Sch.17 Pt I](#).



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Section 18. - Protection of tenure, in connection with employment, under a licence or a rent-free letting, by extension of the Rent Acts

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Section 18

Part II Protection Against Insecurity of Tenure of Place of Residence

Protection during service other than short period of training

18.— Protection of tenure, in connection with employment, under a licence or a rent-free letting, by extension of the Rent Acts

9B-1297+

(1) Where—

(a) a service man begins a period of relevant service, other than a short period of training, after the commencement of this Act, and immediately before beginning it he was living, together with a dependant or dependants of his, in any premises by virtue of a licence in that behalf granted to him by his employer in consequence of his employment, or by virtue of a tenancy so granted otherwise than at a rent (in this section referred to as a “rent-free tenancy”), or

(b) a service man is performing a period of relevant service, other than a short period of training, at the commencement of this Act, and immediately before beginning it he was living as aforesaid, and a dependant or dependants of his is or are living in the premises or in part thereof, otherwise than in right of a tenancy at a rent, at the commencement of this Act,

then during the service man’s period of residence protection as defined in section fourteen of this Act Chapter I of Part I of the Housing Act 1988 shall, subject to the provisions of this section, apply in relation to those premises as if instead of the licence, or of the rent-free tenancy, as the case may be, there had been granted to the service man a tenancy at a rent—

(i) for a term of years certain expiring at the beginning of the period of service, or at the commencement of this Act if the period of service began theretofore, and

(ii) in other respects on the same terms and conditions (excluding any terms or conditions relating to the employment) as those on which the licence, or the rent-free tenancy, as the case may be, was granted; and those premises shall be deemed to be during the period of protection a dwelling-house let on a statutory periodic tenancy which is an assured tenancy if apart from this section they would not have been so.

(2) [repealed]

(3) Subsection (1) of this section shall not have effect—

(a) where the licence, or the rent-free tenancy, as the case may be, was granted in connection with the management of premises in England and Wales which, by virtue of a premises licence under the Licensing Act 2003, may be used for the supply of alcohol (within the meaning of section 14 of that Act) on the premises for consumption on the premises which, by virtue of a premises licence issued under the Licensing (Scotland) Act 2005, are licensed for the sale of alcohol (within the meaning of section 2 of that Act) for consumption on the premises, or

(b) where the licence, or the rent-free tenancy, as the case may be, was granted pursuant to a contract which imposed on the grantor thereof an obligation to provide board for the service man and the dependant or dependants, or

(c) where the premises are a dwelling-house subject to a protected occupancy or statutory tenancy as defined in the Rent (Agriculture) Act 1976, or

(d) is a dwelling-house which is let on or subject to an assured agricultural occupancy within the meaning of Part I of the Housing Act 1988 which is not an assured tenancy.

(4) As regards the assumption of the granting of a tenancy which is to be made for the purposes of subsection (1) of this section in a case where the grant in question was of a licence, if the granting of such a tenancy would have been a subletting of the premises it shall not be treated for any purpose as constituting a breach of any covenant or agreement prohibiting or restricting subletting.

(5) The subsistence of a Crown interest in the premises shall not affect the application of this section if the interest of the grantor of the licence, or the rent-free tenancy, as the case may be, is not a Crown interest.

(6) In relation to a policeman service man this section shall have effect with the substitution of a reference to a grant to him, either by the relevant local policing body or relevant police authority or by another person under arrangements made by that body or authority with that person, in consequence of the service man's membership of the relevant police force, for the reference in subsection (1) to a grant to a service man by his employer in consequence of his employment.

Note

9B-1298 Subsection (1) was amended by the [Rent Act 1968 s.117\(2\)](#) and [Sch.15](#) and the [Housing Act 1988 s.140](#) and [Sch.17 Pt I](#); subs. (2) was repealed by the [Housing Act 1988 s.140](#) and [Sch.17, Pt I](#); subs.(3)(a) was amended by the [Licensing Act 2003 s.198\(1\)](#) and [Sch.6 paras 21 and 23](#); subs.(3)(c) was amended by the [Rent \(Agriculture\) Act 1976 s.40](#) and [Sch.8 para.2](#); subs.(3)(d) was inserted by the [Housing Act 1988 s.140](#) and [Sch.17 Pt I](#); subs.(6) was amended by the [Police Reform and Social Responsibility Act 2011 Sch.16 Pt.3 para.70](#), with effect from 16 January 2012. Subsection (3)(a) was amended by the [Licensing \(Scotland\) Act 2005 \(Consequential Provisions\) Order 2009 \(SSI 2009/248\)](#) with effect from 1 September 2009.

Section 19. - Limitation on application of Housing Act 1988 by virtue of sections 16 to 18

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Section 19

Part II Protection Against Insecurity of Tenure of Place of Residence

Protection during service other than short period of training

19. Limitation on application of Housing Act 1988 by virtue of sections 16 to 18

9B-1299+ Where by virtue of sections 16 to 18 above, the operation of Chapter I of Part I of the Housing Act 1988 in relation to any premises is extended or modified, the extension or modification shall not affect—



- (a) any tenancy of those premises other than the statutory periodic tenancy which is deemed to arise or, as the case may be, the tenancy which is for any period deemed to be an assured tenancy by virtue of any of those provisions; or
- (b) any rent payable in respect of a period beginning before the time when that statutory periodic tenancy was deemed to arise or, as the case may be, before that tenancy became deemed to be an assured tenancy; or
- (c) anything done or omitted to be done before the time referred to in paragraph (b) above.

Note

9B-1300+ Substituted by the Housing Act 1988 s.140, Sch.17, Pt I.



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Section 20. - Modifications of Rent Acts as respects occupation by employees

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Section 20

Part II Protection Against Insecurity of Tenure of Place of Residence

Protection during service other than short period of training

20.— Modifications of Rent Acts as respects occupation by employees

9B-1301+



(1) Where the carrying out of duties connected with an employment which a service man had before beginning a period of relevant service (or, in the case of a policeman service man, the carrying out of his police duties) constitutes an obligation of a tenancy, and his performing that service prevents his carrying out those duties, the fact that he does not carry them out shall not be treated for the purposes of Case 1 in Schedule 15 to the Rent Act 1977 or Ground 12 in Schedule 2 to the Housing Act 1988 (which relates to recovery of possession where an obligation of a tenancy has been broken or not performed) or the ground in section 157 of the Renting Homes (Wales) Act 2016 (anaw 1) (which relates to breach of contract) as a breach or non-performance of the obligation.

(2) Case 8 in the said Schedule 15 or, as the case may be, Ground 16 in the said Schedule 2 (which relates to recovery of possession, without proof of suitable alternative accommodation, in circumstances connected with occupation by employees) shall not apply for the purposes of the proceedings on an application for possession of premises made at any time during a service man's period of residence protection (as defined in section fourteen of this Act) if either—

(a) the premises are a rented family residence of his as defined in that section; or

(b) Chapter I of Part I of the Housing Act 1988 applies in relation to the premises as mentioned in section 18(1) of this Act and a defendant or defendants of the service man is or are living in the premises or in part thereof in right of the statutory periodic tenancy or assured tenancy referred to in section 19(a) of this Act.

(3) Where the last preceding subsection has effect as to an application for possession, the circumstances specified in the Cases in Part I of the said Schedule 15 or, as the case may be, Grounds 10 to 16 in Part II of the said Schedule 2 in which the court has power to make or give an order or judgment for the recovery of possession without proof of suitable alternative accommodation shall include the circumstances specified in either of the following paragraphs, that is to say—

(a) that the landlord is a body who are statutory undertakers or a local authority or development corporation having public utility functions, and that the premises are required by that body in the public interest for occupation as a residence for some person who is engaged in their whole-time employment in connection with their public

utility functions or with whom, conditional on housing accommodation being provided, a contract for such employment has been entered into;

(b) where the last preceding subsection has effect by virtue of paragraph (b) thereof and the service man in question is a policeman service man, that the premises are required by the relevant local policing body or relevant police authority for occupation as a residence by a member of the police force in question:

Provided that, where the court is satisfied that circumstances exist such as are specified in paragraph (a) of this subsection, the matters relevant for the court in determining under section 98(1) of the Rent Act 1977 or, as the case may be, section 7(4) of the Housing Act 1988 whether it is reasonable to make or give such an order or judgment shall (without prejudice to the generality of that subsection) include the question whether the body seeking the order or judgment have at their disposal any vacant accommodation which would be suitable alternative accommodation for the tenant, or will have such accommodation at their disposal at or before the time when it is proposed that the order or judgment should take effect.

(4) In the last preceding subsection the expressions "*statutory undertakers*" and "*local authority*" have the same meanings as in the Town and Country Planning Act, 1971, the expression "*development corporation*" has the same meaning as in the New Towns Act 1965, and the expression "*public utility functions*" means powers or duties conferred or imposed by or under any enactment being powers or duties to carry on a statutory undertaking (as defined in the said Act of 1971) or being powers or duties of an internal drainage board.

Note

 9B-1302-Subsection (1) was amended by the [Rent Act 1968 s.117\(2\)](#) and [Sch.15](#), the [Rent Act 1977 s.155](#) and [Sch.23 para.8](#), and the [Housing Act 1988 s.140](#) and [Sch.17 Pt I](#); subs.(2) amended by the [Rent Act 1977 s.155](#) and [Sch.23 para.8](#), and the [Housing Act 1988 s.140](#) and [Sch.17 Pt I](#); subs.(3) was amended by the [Rent Act 1968 s.117\(2\)](#) and [Sch.15](#), the [Rent Act 1977 s.155](#) and [Sch.23, para.8](#), and the [Housing Act 1988 s.140](#) and [Sch.17, Pt I](#); subs.(4) was amended by the [Water Act 1989 s.190](#) and [Sch.25, para.16](#); subs.(3)(b) was amended by the [Police Reform and Social Responsibility Act 2011 Sch.16 Pt.3 para.71](#), with effect from 16 January 2012. Subsection (1) further amended by the [Renting Homes \(Wales\) Act 2016 \(Consequential Amendments\) Regulations 2022 \(SI 2022/1166\) reg.4\(2\)](#), with effect from 1 December 2022.

Section 22. - Facilities for action on behalf of men serving abroad in proceedings as to tenancies

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Section 22

Part II Protection Against Insecurity of Tenure of Place of Residence

Protection during service other than short period of training

22.— Facilities for action on behalf of men serving abroad in proceedings as to tenancies

9B-1303+



(1) Where in the course of any proceedings brought under Part I of the Protection from Eviction Act 1977 or under Part III, IV, or VII of the Rent Act 1977 or under Part I of the Housing Act 1988 or under Part 9 of the Renting Homes (Wales) Act 2016 (anaw 1) (termination etc of occupation contracts), or of any proceedings consequential upon the making of a reference or application to a rent tribunal under Part V of the Rent Act 1977 or Part I of the Housing Act 1988 of that Act, or under the Renting Homes (Wales) Act 2016, or under this Part of this Act, it appears to the court or tribunal—

(a) that the proceedings relate to a tenancy or licence vested in a service man;

(b) that a person other than the service man desires to take a step in the proceedings on behalf of the service man at a time when he is serving abroad, or has purported to take a step in the proceedings on his behalf at a time when he was so serving; and

(c) that the said person, in seeking or purporting to take that step, is or was acting in good faith in the interests of the service man, and is or was a fit person to take that step on his behalf, but is or was not duly authorised to do so,

the court or tribunal may direct that the said person shall be deemed to be, or to have been, duly authorised to take that step on behalf of the service man.

(2) The provisions of the preceding subsection apply in relation to the institution of proceedings before a court as they apply in relation to the taking of a step in such proceedings, and apply in relation to the making of a reference or application to a rent tribunal as they apply in relation to the taking of a step in proceedings consequential upon the making of such a reference or application; and references in that subsection to proceedings brought or a reference or application made as therein mentioned include references to proceedings which purport to be so brought or to a reference or application which purports to be so made, as the case may be.

(3) Where in the course of any proceedings a court or tribunal gives a direction under subsection (1) of this section, the person to whom the direction relates shall have the like right of audience in those proceedings as the service man himself would have.

(3A) In relation to any proceedings before a rent officer or rent assessment committee, within the meaning of the Rent Act 1977, subsections (1) to (3) of this section shall have effect as if the references to the court or tribunal included references to a rent officer or rent assessment committee.

(4)–(6) [repealed]

(7) References in this section to a time when a service man is serving abroad are references to a time when he is performing a period of relevant service and is outside the United Kingdom.

Note

9B-1304 Subsection (1) was amended by the [Rent Act 1968 s.117\(2\)](#) and [Sch.15](#), the [Protection from Eviction Act 1977 s.12](#) and [Sch1, para.1](#), the [Rent Act 1977 s.155](#) and [Sch.23 para.9](#), and the [Housing Act 1988 s.140](#) and [Sch.17, Pt I](#); subss.(4)–(6) were repealed by the [Agricultural Holdings \(Notices to Quit\) Act 1977 s.13](#) and [Sch 2](#).

Subsection (1) further amended by the [Renting Homes \(Wales\) Act 2016 \(Consequential Amendments\) Regulations 2022 \(SI 2022/1166\) reg.4\(3\)](#), with effect from 1 December 2022.

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Section 23. - Interpretation of Part II

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Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951

Section 23

Part II Protection Against Insecurity of Tenure of Place of Residence

Protection during service other than short period of training

23.— Interpretation of Part II

9B-1305+

(1) In this Part of this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned to them respectively, that is to say:—

“*agricultural land*” has the same meaning as it has for the purposes of section 26 of the Rent Act 1977;

“*assured tenancy*” has the same meaning as in Part I of the Housing Act 1988

“*Crown interest*” means an interest belonging to His Majesty in right of the Crown or of the Duchy of Lancaster, or to the Duchy of Cornwall, or to a Government department, or held on behalf of His Majesty for the purposes of a Government department;

“*dependant*”, in relation to a service man, means—

(a) his spouse or civil partner, and

(b) any other member of his family who was wholly or mainly maintained by him immediately before the beginning of the period of service in question;

“*fixed term tenancy*” means any tenancy other than a periodic tenancy;

in relation to a statutory tenancy or to a provision of the Rent Act 1977 “*landlord*” and “*tenant*” have the same meaning as in that Act but, subject to that, those expressions have the same meaning as in Part I of the Housing Act 1988

“*policeman service man*” means a service man who, immediately before beginning the period of relevant service in question, was a member of a police force;

“*relevant local policing body*” or “*relevant police authority*” means, in relation to a police force, the local policing body or the police authority responsible for the maintenance of that force;

“*statutory periodic tenancy*” has the same meaning as in Part I of the Housing Act 1988

“*statutory tenancy*” means a right to retain possession of premises after the ending of a tenancy thereof, being a right arising on the ending of that tenancy from the operation of the Rent Act 1977 (or of the Rent Act 1977 as

extended by this Part of this Act) in relation to a person as being, or being the surviving spouse or surviving civil partner of or otherwise related to, the former owner of the tenancy, or a right to retain possession of premises arising by virtue of subsection (1) of section eighteen of this Act;

"tenancy" includes a statutory tenancy, and, apart from a statutory tenancy, means a tenancy created either immediately or derivatively out of the freehold, whether by a lease or underlease, by an agreement for a lease or underlease or by a tenancy agreement, but does not include any relationship between a mortgagor and a mortgagee as such.

(1A) Any reference in this Part of this Act to Chapter I of Part I of the Housing Act 1988 includes a reference to the General Provisions of Chapter VI of that Part, so far as applicable to Chapter I.

(2) In this Part of this Act—

(a) references to the ending of a tenancy are references to the coming to an end thereof however brought about, whether by effluxion of time, notice to quit or otherwise, and in particular, as respects a statutory tenancy, include references to the coming to an end thereof as between the tenant and a landlord who is himself a tenant by reason of the ending of the tenancy of the landlord;

(b) references to a tenancy vested in any person include references to a tenancy vested in trustees, or held as part of the estate of a deceased person, where the first-mentioned person has a right or permission to occupy the premises arising by reason of a beneficial interest (whether direct or derivative) under the trusts or, as the case may be, in the estate of the deceased person or under trusts of which the deceased person was trustee.

(3) In this Part of this Act, and in the Rent Act 1977 or Chapter I of Part I of the Housing Act 1988 as applied by any provision thereof, references to rent shall be construed as including references to any sum in the nature of rent payable in respect of such a licence as is mentioned in section eighteen of this Act.

Note

9B-1306 In subs.(1) the definition "agricultural land" was amended by the [Rent Act 1968 s.117\(2\)](#) and [Sch.15](#), the [Rent Act 1977 s.155](#) and [Sch.23 para.10](#); the definitions "assured tenancy", "fixed term tenancy" and "statutory periodic tenancy" were inserted by the [Housing Act 1988 s.140](#) and [Sch.17 Pt I](#); the definitions "dependant" and "statutory tenancy" were amended by the [Civil Partnership Act 2004 s.257](#) and [Sch.26 para.21](#); the definition "landlord" and "tenant" was substituted by the [Housing Act 1988 s.140](#) and [Sch.17 Pt I](#); the definition "police force" repealed and the definition "relevant police authority" was amended by the [Police Act 1964 s.64\(3\)](#) and [Sch.10 Pt I](#); and the definition "statutory tenancy" was amended by the [Rent Act 1977 s.155](#) and [Sch.23 para.10](#).

Subsection (1A) was inserted by the [Housing Act 1988 s.140](#) and [Sch.17 Pt I](#).

Subsection (3) was amended by the [Rent Act 1977 s.155](#) and [Sch.23 para.10](#) and the [Housing Act 1988 s.140](#) and [Sch.17 Pt I](#). In subs.(1) definition "relevant local policing body" or "relevant police authority" was amended by the [Police Reform and Social Responsibility Act 2011 Sch.16 Pt.3 para.72](#), with effect from 16 January 2012.

Section 25. - Protection during short period of training

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Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951

Section 25

Part II Protection Against Insecurity of Tenure of Place of Residence

Protection during short period of training

25.— Protection during short period of training

9B-1307+



- (1) Where a service man who has been living with a dependant or dependants of his in any premises in right of a tenancy, or of a licence in that behalf granted by his employer in consequence of his employment, performs a short period of training, then, for so long during that period and within fourteen days from the ending of it as the dependant or dependants and the service man or any of them is or are still living in the premises or any part thereof, no person shall be entitled, except with the leave of the appropriate court, to proceed—
- (a) to execution on, or otherwise to the enforcement of, any judgment or order given or made against any of them for the recovery of possession of any part of the premises in which any of them is or are living, or
 - (b) to exercise against any of them any right to take possession of, or to re-enter upon, any such part thereof.

(2) If, on any application for such leave as is required by the preceding subsection, the court is of opinion that, by reason of circumstances directly or indirectly attributable to the service man's performing or having performed the period of service in question, the judgment, order or right ought not to be immediately executed, enforced or exercised, the court may refuse leave or give leave subject to such restrictions and conditions as the court thinks proper.

(3) References in this section to a judgment or order for the recovery of possession of premises include references to any judgment or order the effect of which is to enable a person to obtain possession of the premises, and in particular includes, in relation to a mortgagee, a judgment or order for the delivery of possession of the premises.

(4) For the purposes of this section a person shall be deemed to be proceeding to execution on, or otherwise to the enforcement of, a judgment or order in the circumstances in which, by virtue of subsection (9) of section three of this Act, he would be deemed to be so proceeding for the purposes of section two of this Act, and, where a person has, in a case for which leave was not required under this section, taken out any judicial process with a view to, or in the course of, the enforcement of a judgment or order or proceeded to the exercise of a right to take possession of or to re-enter upon premises, he shall be deemed to be proceeding to the enforcement of the judgment or order or to the exercise of the right when any step is taken by him or on his behalf towards its completion.

(5) The references in section five and subsection (1) of section eleven of this Act to the provisions of Part I of this Act shall include references to the provisions of this section, and the provisions of section thirteen of this Act which relate to omission to obtain leave required under section two of this Act shall have effect in relation to omission to obtain leave required under this section.

(6) In this section the expression “*dependant*”, in relation to a service man, means—

(a) his spouse or civil partner, and

(b) any other member of his family wholly or mainly maintained by him.

Note

9B-1308 Subsection (6) was amended by the [Civil Partnership Act 2004 s.257](#) and [Sch.26, para.22](#).



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Section 26. - Application of sections twenty-seven to thirty-six

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26. Application of sections twenty-seven to thirty-six

9B-1309+ The ten next following sections shall apply to England and Wales only.



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Section 27. - Renewal of tenancy expiring during period of service or within two months thereafter

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Part III Protection Against Insecurity of Tenure of Business and Professional Premises

Provisions as to England and Wales

27.—Renewal of tenancy expiring during period of service or within two months thereafter

9B-1310+



(1) The provisions of this Part of this Act shall have effect for empowering the court to order the grant of new tenancies in cases where—

(a) immediately before beginning (whether after or before the commencement of this Act) a period of relevant service, other than a short period of training, a service man was the working proprietor of a business or professional practice carried on in the premises, or part of the premises, comprised in a tenancy vested in him, and

(b) the tenancy (in this Part of this Act referred to as “the expiring tenancy”) would apart from the provisions of this Part of this Act come to an end after the commencement of this Act and before the date of the ending of that period of service or before the expiration of two months from that date, and would so come to an end by effluxion of time or by the expiration of a notice to quit given by the landlord, whether after or before the commencement of this Act, and

(c) at the time when an application for the grant of a new tenancy is made under this Part of this Act the service man is still the proprietor of the business or practice and it is still being carried on in the premises, or part of the premises, comprised in the expiring tenancy:

Provided that the said provisions shall not have effect if at the time when the application might otherwise be made the premises comprised in the expiring tenancy

(a) are an agricultural holding (within the meaning of the Agricultural Holdings Act 1986) held under a tenancy in relation to which that Act applies,

(b) are a holding (other than a holding excepted from this provision) held under a farm business tenancy, or

(c) consist of or comprise premises (other than premises excepted from this provision) which, by virtue of a premises licence under the Licensing Act 2003, may be used for the supply of alcohol (within the meaning of section 14 of that Act) for consumption on the premises.

(2) For the purposes of paragraph (a) of the last preceding subsection a service man shall be deemed to have been at any time the working proprietor of a business or professional practice carried on as mentioned in that paragraph if,

and only if, he was the proprietor of the business or practice during the whole of the period of one year immediately preceding that time and, during more than one-half of that period, either—

(a) he worked whole-time in the actual management or conduct of that business or practice, or

(b) he worked whole-time in the actual management or conduct of a business or professional practice of which that business or practice was a branch and was mainly engaged in the management or conduct of that branch.

(3) In the preceding provisions of this section the expression "*proprietor*" means, in the case of a business or practice carried on by a partnership firm, a partner in the firm on terms and conditions entitling him to not less than one half of the profits of the firm, and, in the case of a business or practice carried on by a company, a person holding shares in the company amounting in nominal value to not less than one half of the issued share capital of the company; and, in relation to a business or practice carried on by a partnership firm or by a company, references in those provisions to the proprietor of the business or practice include references to a person being one of two such partners in the firm or, as the case may be, being one of two persons each holding such shares in the company, and references to the working proprietor of the business or practice shall be construed accordingly.

(4) In relation to a business or practice carried on by a partnership firm or by a company, references in the preceding provisions of this section to a tenancy vested in the service man include references to a tenancy vested in one or more partners of the firm, or vested in the company, as the case may be; and for the purposes of those provisions and of this subsection a tenancy shall be treated as having been vested at any time in a person if it was then vested in trustees, or held as part of the estate of a deceased person, and the first-mentioned person then had a right or permission to occupy the premises comprised in the tenancy, or the part of those premises in which the business or practice was being carried on, being a right or permission arising by reason of a beneficial interest (whether direct or derivative) under the trusts or, as the case may be, in the estate of the deceased person or under trusts of which the deceased person was trustee.

(5) In this section—

(a) the expression "*profits*" in relation to a firm means such profits of the firm as are from time to time distributable among the partners therein;

(b) the expression "*company*" has the meaning given by section 1(1) of the Companies Act 2006;

(bb) the expressions '*farm business tenancy*' and '*holding*', in relation to such a tenancy, have the same meaning as in the Agricultural Tenancies Act 1995;

(c) the expression "*share*" includes stock and the expression "*share capital*" shall be construed accordingly;

and for the purposes of this section shares held by a person's spouse or civil partner, or held by him jointly with his spouse or civil partner, shall be treated as shares held by that person.

(5A) In paragraph (b) of the proviso to subsection (1) of this section the reference to a holding excepted from the provision is a reference to a holding held under a farm business tenancy in which there is comprised a dwelling-house occupied by the person responsible for the control (whether as tenant or servant or agent of the tenant) of the management of the holding.

(6) In paragraph (c) of the proviso to subsection (1) of this section, the reference to premises excepted from the provision is a reference to premises in respect of which—

(a) the excise licence for the time being in force is a licence the duty in respect of which is the reduced duty payable under section forty-five of the Finance (1909—10) Act 1910, or a licence granted in pursuance of regulations under subsection (5) of the said section forty-five (which relates to the granting of licences on the provisional payment of reduced duty), or

(b) the Commissioners of Customs and Excise certify that no application under the said section forty-five has been made in respect of the period for which the excise licence for the time being in force was granted, but that

if such an application had been made such a licence could properly have been granted as is mentioned in the preceding paragraph.

Note

 9B-1311+Subsection (1) was amended by the [Agricultural Tenancies Act 1995 s.40](#) and Sch. para 9(2) and the [Licensing Act 2003 s.198\(1\)](#) and [Sch.6 paras 21 and 24](#). Subsection (5) was amended by the [Agricultural Tenancies Act 1995 s.40](#) and Sch. para 9(3) and the [Civil Partnership Act 2004 s.257](#) and [Sch.26 para.23](#). Subsection (5A) was inserted and subs.(6) was amended by the [Agricultural Tenancies Act 1995 s.40](#) and Sch para 9(4) and (5). Subsection (5)(b) was amended by the [Companies Act 2006 \(Consequential Amendments, Transitional Provisions and Savings\) Order 2009 \(SI 2009/1941\)](#).

Section 28. - Premises to be comprised in new tenancy

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28.— Premises to be comprised in new tenancy

9B-1312+



(1) Any new tenancy granted under this Part of this Act shall, subject to the next succeeding subsection, be a tenancy of the whole of the premises comprised in the expiring tenancy.

(2) If at the time of the application for a new tenancy the business or practice is being carried on in a separate part of the premises comprised in the expiring tenancy (whether that part is used exclusively for the purposes of the business or practice or not) any new tenancy granted as aforesaid shall, if the landlord so requires, be a tenancy of the whole of the premises comprised in the expiring tenancy, but otherwise shall be a tenancy of that separate part:

Provided that where in such a case the landlord does not require the new tenancy to be a tenancy of the whole of the premises comprised in the expiring tenancy and—

(a) those premises include such a separate part as aforesaid and also another separate part consisting of living accommodation occupied wholly or mainly by one or more dependants of the service man, or by a person who is employed for the purposes of the business or practice carried on as aforesaid, and

(b) an application is made in that behalf,

the new tenancy shall, unless the court in its discretion otherwise determines, be a tenancy of the separate part in which the business or practice is carried on and also of the separate part consisting of the living accommodation.

(3) Any question arising under the last preceding subsection whether a part of premises should be treated as a separate part for the purposes of the grant of a new tenancy shall be determined by the court on the hearing of the application.

(4) In this section the expression "*dependant*" has the meaning assigned to it by subsection (1) of section twenty-three of this Act.

Section 29. - Application for grant of new tenancy

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29.— Application for grant of new tenancy

9B-1313+



(1) An order for the grant of a new tenancy under this Part of this Act shall not be made except upon an application to the county court made by the tenant under the expiring tenancy; and, subject to subsection (3) of this section, any such application shall—

(a) if apart from this section the expiring tenancy would expire by effluxion of time, not be made later than one month before the date on which that tenancy would so expire;

(b) if apart from this section the expiring tenancy would come to an end by notice to quit given by the landlord, be made after the giving of the notice to quit and not later than one month before the notice is due to expire: Provided that—

(i) in a case falling within paragraph (b) of this subsection an application may be made at any time not later than one month after the giving of the notice to quit, if the latest time limited by that paragraph would fall before the end of that month; and

(ii) where the latest time limited by the preceding provisions of this subsection would fall before the end of one month beginning with the commencement of this Act, an application may be made not later than the end of that month.

(2) Where apart from this section the expiring tenancy would come to an end—

(a) by effluxion of time, or

(b) by notice to quit given by the landlord so as to expire not less than four months after the giving of the notice,

the landlord may at any time not earlier than the beginning of the service man's period of service in question nor earlier than four months before the date on which that tenancy would so come to an end serve on the tenant notice, in such form and containing such particulars as to the provisions of this Part of this Act as may be prescribed by regulations made by the Lord Chancellor by statutory instrument, requiring the tenant within the period of one month from the date of the service of the notice to elect whether or not to make an application under the preceding subsection; and, subject to the next succeeding subsection, where a notice under this subsection is served no such application shall be made in relation to the expiring tenancy after the end of the said period of one month.

(3) The court to which an application under subsection (1) of this section could be made within the time limited by the preceding subsections shall have power, on an application made in that behalf either before or after the expiration of that time, to extend the time limited by those subsections for making the application under the said subsection (1) if the court is satisfied that there are or were adequate reasons for not making that application within the time so limited and that in all the circumstances of the case it is reasonable to extend the time.

(4) Where an application is duly made under subsection (1) of this section and the expiring tenancy would apart from this section come to an end before the relevant date, then—

(a) if the expiring tenancy would so come to an end after the application is made, it shall be treated as continuing until the relevant date;

(b) if the expiring tenancy would have so come to an end at a time before the application is made, it shall be treated as having continued since that time until the application is made and as continuing thereafter until the relevant date.

(5) The relevant date for the purposes of the last preceding subsection, in relation to an application—

(a) unless the application is withdrawn, is the date falling one month after the date on which the proceedings on the application (including any proceedings on or in consequence of an appeal) are finally determined;

(b) if the application is withdrawn, is the date falling one month after the withdrawal of the application.

(6) Section one hundred and ninety-six of the Law of Property Act 1925 (which relates to service of notices) shall apply to notices for the purposes of this section.

Section 30. - Power of court to grant new tenancy

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30.— Power of court to grant new tenancy

9B-1314+



(1) Subject to the provisions of this Part of this Act, on an application under this Part of this Act duly made the court may, if in all the circumstances of the case it appears reasonable to do so, order that there shall be granted to the tenant a tenancy for such period, at such rent and on such terms and conditions as the court in all the circumstances thinks reasonable, and thereafter the parties shall be deemed to have entered into a lease of the premises or part of premises (as the case may be) creating such a tenancy:

Provided that in fixing the rent under this subsection the court shall disregard any consideration arising from the personal circumstances of any of the parties.

(2) Any period for which under the last preceding subsection a tenancy is ordered to be granted shall begin with the end of the expiring tenancy, whether it ends in accordance with the terms thereof or after being continued by subsection (4) of the last preceding section.

(3) In ordering the grant of a new tenancy under this section the court shall so limit the period of the tenancy, or shall order the grant subject to such terms and conditions, as in the opinion of the court may be most suitable for securing that the tenancy shall not extend beyond or may be terminated by the landlord at a time not later than, the expiration of four months from the end of the period of service in consequence of which the application was made:

Provided that nothing in this subsection shall be construed as restricting the discretion of the court in a case where the court thinks it reasonable that the tenancy should come to an end, or be capable of being terminated by the landlord, at any earlier time.

(4) The court shall not order the grant of a new tenancy if it is satisfied—

(a) that the tenant has broken any of the terms or conditions of the expiring tenancy, and that in view of the nature and circumstances of the breach a new tenancy ought not to be granted; or

(b) that the landlord has offered to afford to the tenant, on terms and conditions which in the opinion of the court are reasonable, alternative accommodation which, in the opinion of the court, is suitable for the purposes of the business or professional practice carried on under the expiring tenancy; or

- (c) that the landlord reasonably requires possession in order that the premises the subject of the expiring tenancy, or a substantial part of those premises, may be demolished or reconstructed; or
- (d) where there subsists in the premises an interest belonging to a public authority, that in the public interest a new tenancy ought not to be granted; or
- (e) that having regard to all the circumstances of the case greater hardship would be caused by ordering the grant of a new tenancy than by refusing to do so.

The reference in paragraph (d) of this subsection to an interest belonging to a public authority is a reference to an interest belonging to a Government department or held on behalf of His Majesty for the purposes of a Government department, or held by a local authority (as defined in the Town and Country Planning Act 1971), by statutory undertakers (as so defined) or by a development corporation (as defined in the New Towns Act 1965).

(5) Where at the commencement of this Act any authority is empowered by any enactment or order to purchase compulsorily land specifically described in that enactment or order, there shall, for the purposes of the last preceding subsection, be deemed, during a period of six months from the commencement of this Act or during such period as the authority remains so empowered as aforesaid (whichever period first expires), to be subsisting in that land an interest belonging to that authority.

(6) A tenancy ordered to be granted under this section shall, where the reversion is subject to a mortgage, be deemed to be a tenancy created by a lease authorised by section ninety-nine of the Law of Property Act 1925.

Section 31. - Provision for further renewal of tenancy

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31. Provision for further renewal of tenancy

- 9B-1315+ Where the grant of a new tenancy has been ordered under this Part of this Act, the provisions of this Part of this Act shall thereafter apply in relation to the new tenancy as if the conditions specified in paragraph (a) of subsection (1) of section twenty-seven of this Act were fulfilled in relation to the new tenancy and the new tenancy were the tenancy referred to in those provisions as the expiring tenancy.

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Section 32. - Provisions for cases where landlord is a tenant

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32.— Provisions for cases where landlord is a tenant

9B-1316+



(1) Where in the case of a tenancy the reversion is itself a tenancy, and the period for which in accordance with the preceding provisions of this Part of this Act the court proposes to order the grant of a new tenancy will extend beyond the date on which the reversion will come to an end, the power of the court under those provisions shall include power to order such a grant until the end of the reversion and also to order the grant of such a reversionary tenancy or reversionary tenancies as may be required to secure that the combined effect of those grants will be equivalent to the grant of a tenancy for the said period; and the provisions of this Part of this Act shall, subject to the necessary modifications, apply to the grant of a tenancy and of one or more reversionary tenancies.

(2) Where by virtue of any of the provisions of this Part of this Act a tenancy (in this subsection referred to as "the inferior tenancy") is continued or granted for a period such as to extend to or beyond the end of the term of a superior tenancy, the superior tenancy shall, for the purposes of this Part of this Act and of any other enactment and of any rule of law, be deemed so long as it subsists to be an interest in reversion expectant upon the termination of the inferior tenancy and, if there is no intermediate tenancy, to be the interest in reversion immediately expectant upon the termination thereof.

(3) In the case of a tenancy continuing by virtue of subsection (4) of section twenty-nine of this Act after the coming to an end of the reversion, subsection (1) of section one hundred and thirty-nine of the Law of Property Act 1925 (which relates to the effect of the extinguishment of a reversion) shall apply as if references in the said subsection (1) to the surrender or merger of the reversion included references to the determination of the reversion for any reason other than surrender or merger.

Section 33. - Provisions as to Landlord and Tenant Act 1927

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33.— Provisions as to Landlord and Tenant Act 1927

9B-1317+



(1) In relation to the granting of tenancies under this Part of this Act, the following provisions shall have effect as respects the Landlord and Tenant Act 1927.

(2) The provisions of Part I of the said Act of 1927 shall not apply in relation to tenancies granted under this Part of this Act.

(3) Nothing in this Part of this Act shall affect the time at which a tenancy is to be treated as terminating for the purposes of the said Part I; and a tenant who by virtue of this Part of this Act remains in occupation of any premises or part of premises after the expiring tenancy would apart from this Part of this Act have come to an end shall be treated for those purposes as having quitted his holding on the termination of that tenancy.

(4) In considering, for the purposes of section four of the said Act of 1927, whether the tenant or his predecessors in title has or have carried on a trade or business at any premises for the period of five years specified in subsection (1) of that section, a period of occupation of the premises by virtue of this Part of this Act shall not count towards completion of the said five years, but shall notwithstanding anything in the last preceding subsection be treated as not breaking the continuity of immediately preceding and succeeding periods of occupation of the premises.

(5) Notwithstanding anything in this Part of this Act, the following provisions shall have effect, as respects claims by the tenant for compensation under Part I of the said Act of 1927, and notices by the landlord under paragraph (d) of subsection (1) of section two of that Act or paragraph (b) of the proviso to subsection (1) of section four thereof (which paragraphs exclude compensation where within the specified period of two months the landlord serves on the tenant such a notice for the renewal of the tenancy as is therein mentioned)—

(a) no application shall be made under this Part of this Act for the grant of a new tenancy if the tenant has duly claimed such compensation as aforesaid and the landlord has within the said period of two months served such a notice as aforesaid;

(b) where an application is made under this Part of this Act at a time when the tenant has duly claimed such compensation and when the landlord has not served such a notice as aforesaid but the said period of two months

has not expired, the application shall not be heard until that period has expired, and, if within that period the landlord serves such a notice, the application shall be dismissed;

(c) where at the time such an application is made the tenant has not duly claimed such compensation but the time for claiming it has not expired the application shall not be heard before the expiration of that time, and if before the expiration thereof the tenant duly makes a claim the last foregoing paragraph shall apply as it applies where the application under this Part of this Act is made after the making of a claim for compensation.

(6) Where the tribunal under the said Act of 1927 has made an interim order under subsection (13) of section five of that Act and subsequently determines not to order the grant of a new tenancy under subsection (2) of that section, the said tribunal may if it thinks fit direct that the possession of the tenant under the interim order shall be treated as if it were a tenancy granted under this Part of this Act, and where it so directs the time within which an application for the grant of a further new tenancy may be made under this Part of this Act shall be such as the tribunal may direct.

Section 34. - Appeals

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34.— Appeals

9B-1318+

(1) No appeal shall be brought from any determination or order of the court under this Part of this Act except with the leave of the court or of the Court of Appeal.



(2) Notwithstanding anything in subsection (4) of section twenty-nine of this Act, the court granting leave to appeal may direct that during the period beginning with the granting of leave to appeal and ending with the date to which a tenancy is continued by the said subsection (4) the tenancy shall have effect subject to such modifications, terms or conditions as that court may specify.

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Section 35. - Application to Crown property

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35.— Application to Crown property

9B-1319+



(1) Except in so far as it is otherwise expressly provided, this Part of this Act shall apply where there is an interest belonging to His Majesty in right of the Crown or to a Government department, or held on behalf of His Majesty for the purposes of a Government department, in like manner as where no such interest subsists.

(2) Where an interest in any land belongs to a Government department, or is held on behalf of His Majesty for the purposes of a Government department, and the Minister or Board in charge of any Government department is satisfied that for reasons of national security it is necessary that the use or occupation of the land should be discontinued or changed, the Minister or Board may certify that this subsection applies to the land; and where such a certificate is given no order shall be made under this Part of this Act for the grant of a new tenancy comprising that land or any part thereof.

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Section 36. - Interpretation of preceding sections of Part III

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36.— Interpretation of preceding sections of Part III

9B-1320+

(1) In this Part of this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned to them, that is to say:—

“*the landlord*”, in relation to a tenancy, means the person for the time being entitled to the reversion and, where the reversion is subject to a mortgage and the mortgagee is in possession or he or a receiver appointed by him or by the court is in receipt of the rents and profits, includes that mortgagee and any such receiver as aforesaid;

“*mortgage*” includes any charge, and the expressions “*mortgagor*” and “*mortgagee*” shall be construed accordingly;

“*notice to quit*” includes a notice to determine a term of years certain, but does not include a notice requiring possession where section one hundred and twenty-one of the Lands Clauses Consolidation Act 1845, applies;

“*the reversion*”, in relation to a tenancy, means the interest which not being a mortgage term and apart from any such term, is for the time being in reversion immediately expectant upon the termination of the tenancy; and

“*tenancy*” means a tenancy created either immediately or derivatively out of the freehold, whether by a lease or underlease, by an agreement for a lease or under lease or by a tenancy agreement, but does not include any relationship between a mortgagor and a mortgagee as such, and “*tenant*” shall be construed accordingly.

(2) References in this Part of this Act to the premises comprised in a tenancy are references to the aggregate of the land comprised in the tenancy.

Section 60. - Evidence as to performance of relevant service

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Part VII Miscellaneous and General

60.— Evidence as to performance of relevant service

9B-1321+



(1) A certificate stating that a person has performed or is performing or is to perform a period of relevant service or of relevant service of any particular description, or the duration or the date of the beginning or ending of such a period, or whether such a period which has been or is being or is to be performed by any person is or is not a short period of training, being a certificate which is signed by a person authorised in that behalf—

(a) by the Defence Council

(b) [repealed]

shall in all legal proceedings be sufficient evidence of the facts stated therein for the purposes of this Act except to any extent to which it is shown to be incorrect.

(2) A certificate signed by a person authorised in that behalf by the Defence Council stating that a person is not performing, and has not within a specified previous time performed, a period of relevant service in a specified force or forces (being a force or forces in respect of which the Defence Council, keep records),, shall in all legal proceedings be sufficient evidence of the facts stated therein for the purposes of this Act except to any extent to which it is shown to be incorrect.

(3) A certificate signed by a person authorised in that behalf by the Defence Council, referring to an inquiry as to a person therein described and being to the effect that no person answering to that description is identifiable in the relevant records kept by the authority on whose behalf the certificate is signed, shall be sufficient evidence for the purposes of this Act that no such person is so identifiable.

(4) A certificate signed as aforesaid stating any matter as a matter appearing from records shall be treated for the purposes of subsection (1), and of subsection (2), of this section as stating it as a fact.

(5) A document purporting to be a certificate signed as aforesaid shall be deemed to be such unless the contrary is proved.

(6) The Defence Council shall be under obligation to secure that, on inquiry made to them for the purposes of this Act as to a person therein described, if the information appearing from records kept by them is such as to enable a certificate falling within subsection (1) or subsection (2) of this section to be given as to a person appearing to answer that description, or is such as to justify the giving of a certificate falling within subsection (3) of this section, such a certificate shall be given:

Provided that no certificate the giving of which would in the opinion of the authority to whom the inquiry is made be against the interests of national security shall be given.

Note

9B-1322 Subsections (1)–(3) and (6) were amended by [SI 1964/488](#) and the [Statute Law \(Repeals\) Act 1977](#).



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Section 64. - Interpretation

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Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951

Section 64

Part VII Miscellaneous and General

64.— Interpretation

9B-1323+ (1) In this Act, unless the context otherwise requires, the following expressions have the meaning hereby assigned to them respectively, that is to say,—

+ *{"conditional sale agreement"* means an agreement for the sale of goods under which the purchase price or part of it is payable by instalments, and the property in the goods is to remain in the seller (notwithstanding that the buyer is to be in possession of the goods) until such conditions as to the payment of instalments or otherwise as may be specified in the agreement are fulfilled;

"creditor" means the person by whom goods are bailed or (in Scotland) hired under a hire-purchase agreement or, as the case may be, the seller under a conditional sale agreement, or the person to whom his rights and duties have passed by assignment or operation of the law;

"hire-purchase agreement" means an agreement, other than a conditional sale agreement, under which—

(a) (a) goods are bailed or (in Scotland) hired in return for periodical payments by the person to whom they are bailed or hired, and

(b) the property in the goods will pass to that person if the terms of the agreement are complied with and one or more of the following occurs—

(i) the exercise of an option to purchase by that person,

(ii) the doing of any other specified act by any party to the agreement,

(iii) the happening of any other specified event;

"local authority" has the same meaning as in paragraph 6(1) of Schedule 3 to the Pensions (Increase) Act 1971 and any reference in this Act to a local authority shall apply also to the bodies mentioned in paragraph 6(2) of that Schedule;

"local Act scheme" means the superannuation scheme administered by a local authority maintaining a superannuation fund under a local Act;

"relevant service" means service after the fifteenth day of July, nineteen hundred and fifty, of a description specified in the First Schedule to this Act;

"service" means the discharge of naval, military or air force duties, and includes training for the discharge of such duties;

“*service man*” means a man who performs a period of relevant service;

“*short period of training*” means a period of relevant service of a description specified in paragraph 7 of the First Schedule to this Act performed under an obligation or voluntary arrangements under which its continuous duration is limited to less than three months.

“*total price*” means the total sum payable by the person to whom goods are bailed or hired under a hire-purchase agreement or, as the case may be, the buyer under a conditional sale agreement including any sum payable on the exercise of an option to purchase but excluding any sum payable as a penalty or as compensation or damages for a breach of the agreement.

(2), (3) [repealed]

(4) In this Act, unless the context otherwise requires, references to any enactment shall be construed as references to that enactment as amended by or under any other enactment.

Note

9B-1324 Subsection (1) was amended by the [Rent Act 1968 s.117\(2\)](#) and [\(5\)](#) and [Schs 15 and 17](#); the definitions “conditional sale agreement”, “creditor”, “hire-purchase agreement” and “total price” were inserted by the [Consumer Credit Act 1974 s.192\(3\)](#) and [Sch.4 Pt I para.14](#); the definitions “local authority” and “local Act scheme” were substituted by the [Superannuation Act 1972 s.29\(1\)](#) and [Sch.6 para.32](#); the definitions “service” and “short period of training” were amended by the [Statute Law \(Repeals\) Act 1977](#).

Subsection (2) was repealed by the [Armed Forces Act 1981 s.28\(2\)](#) and [Sch.5 Pt I](#).

Subsection (3) was repealed by the [Statute Law \(Repeals\) Act 1977](#).

Late Payment of Commercial Debts (Interest) Act 1998

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Late Payment of Commercial Debts (Interest) Act 1998

Arrangement of Act

(1998 c.20)

Introduction

9B-1325 This Act applies where both contracting parties are acting in the course of business. Its aim is to encourage prompt payment in such cases but in pursuit of this aim uses the “stick” rather than the “carrot” by providing for payment of a fixed sum plus statutory interest at a penal rate in the event of late payment. Anti-avoidance provisions prevent contracting out. The Act was brought into force gradually by a series of statutory instruments and has been fully in force from 7 August 2002 ([SI 2002/1673](#)), and this applies to all commercial contracts (unless exempt—see below).

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Section 1. - Statutory interest

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Late Payment of Commercial Debts (Interest) Act 1998

Section 1

Part I Statutory interest on qualifying debts

1.— Statutory interest

- 9B-1326 (1) It is an implied term in a contract to which this Act applies that any qualifying debt created by the contract carries simple interest subject to and in accordance with this Part.
- (2) Interest carried under that implied term (in this Act referred to as “statutory interest”) shall be treated, for the purposes of any rule of law or enactment (other than this Act) relating to interest on debts, in the same way as interest carried under an express contract term.
- (3) This Part has effect subject to Part II (which in certain circumstances permits contract terms to oust or vary the right to statutory interest that would otherwise be conferred by virtue of the term implied by subsection (1)).

“implied term”/“express term”

9B-1327 The principle of the Act is to imply a term into commercial contracts but the implied term is then treated as an express term.

“statutory interest”

9B-1328 When suing for a debt which is covered by the Act the particulars of the claim should include a claim for:

“statutory interest pursuant to the [Late Payment of Commercial Debts \(Interest\) Act](#) at [appropriate rate—see below] amounting to £x as at the date hereof and continuing at £y per day from today until judgment or sooner payment.”

Section 2. - Contracts to which Act applies

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Late Payment of Commercial Debts (Interest) Act 1998

Section 2

Part I Statutory interest on qualifying debts

2.— Contracts to which Act applies

- 9B-1329 (1) This Act applies to a contract for the supply of goods or services where the purchaser and the supplier are each acting in the course of a business, other than an excepted contract.
- (2) In this Act “*contract for the supply of goods or services*” means—
(a) a contract of sale of goods; or
(b) a contract (other than a contract of sale of goods) by which a person does any, or any combination, of the things mentioned in subsection (3) for a consideration that is (or includes) a money consideration.

(3) Those things are—

- (a)** transferring or agreeing to transfer to another the property in goods;
(b) bailing or agreeing to bail goods to another by way of hire or, in Scotland, hiring or agreeing to hire goods to another; and
(c) agreeing to carry out a service.

(4) For the avoidance of doubt a contract of service or apprenticeship is not a contract for the supply of goods or services.

(5) The following are excepted contracts—

- (a)** a consumer credit agreement;
(b) a contract intended to operate by way of mortgage, pledge, charge or other security.

(6) [...]

(7) In this section—

“*business*” includes a profession and the activities of any government department or local or public authority;

“*consumer credit agreement*” has the same meaning as in the Consumer Credit Act 1974;

“*contract of sale of goods*” and “*goods*” have the same meaning as in the Sale of Goods Act 1979;

“*government department*” includes any part of the Scottish Administration;

“*property in goods*” means the general property in them and not merely a special property.

Note

9B-1330 Amended by the [Late Payment of Commercial Debts \(Scotland\) Regulations 2002 \(SSI 2002/335\)](#), reg.2(2).

“in the course of a business”

9B-1331 Only contracts where both supplier and purchaser are acting in the course of a business are covered by this Act. All such contracts are covered unless specifically exempted.

“excepted contracts”

9B-1332 Excepted contracts include mortgage and contracts governed by the [Consumer Credit Act 1974](#).

Note

9B-1333 [Section 2A](#) applies to Scotland and is not reproduced here.

Section 3. - Qualifying debts

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Late Payment of Commercial Debts (Interest) Act 1998

Section 3

Part I Statutory interest on qualifying debts

3.— Qualifying debts

9B-1334 (1) A debt created by virtue of an obligation under a contract to which this Act applies to pay the whole or any part of the contract price is a “qualifying debt” for the purposes of this Act, unless (when created) the whole of the debt is prevented from carrying statutory interest by this section.

(2) A debt does not carry statutory interest if or to the extent that it consists of a sum to which a right to interest or to charge interest applies by virtue of any enactment (other than section 1 of this Act).

This subsection does not prevent a sum from carrying statutory interest by reason of the fact that a court, arbitrator or arbiter would, apart from this Act, have power to award interest on it.

(3) A debt does not carry (and shall be treated as never having carried) statutory interest if or to the extent that a right to demand interest on it, which exists by virtue of any rule of law, is exercised.

Note

9B-1335 Amended by the Late Payment of Commercial Debts (Scotland) Regulations, reg.2.(4)

“qualifying debt”

9B-1336 The Act applies to a “qualifying debt” as defined. By s.3(1) it applies both to contracts providing for a lump sum payment and to those providing for stage payments. The Act is intended to deal with contracts not already subject to a different statutory regime: hence s.3(2). The nature of “qualifying debt” was examined in *National Museums and Galleries on Merseyside Board of Trustees v AEW Architects and Designers Ltd [2013] EWHC 3025 (TCC); [2014] 1 Costs L.O. 39* (Akenhead J.), where issues arose as to whether interest was payable in accordance with the 1998 Act in relation to an award of common law damages arising from breach of contract, or at the discretionary rate under the Senior Courts Act 1981 s.35A.

Section 4. - Period for which statutory interest runs

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Late Payment of Commercial Debts (Interest) Act 1998

Section 4

Part I Statutory interest on qualifying debts

4.— Period for which statutory interest runs

9B-1337

(1) Statutory interest runs in relation to a qualifying debt in accordance with this section (unless section 5 applies).

(2) Statutory interest starts to run on the day after the relevant day for the debt, at the rate prevailing under section 6 at the end of the relevant day.

(2A) The relevant day for a debt is—

(a) where there is an agreed payment day, that day, unless a different day is given by subsection (2D), (2E) or (2G);

(b) where there is not an agreed payment day, the last day of the relevant 30-day period.

(2B) An “agreed payment day” is a date agreed between the supplier and the purchaser for payment of the debt (that is, the day on which the debt is to be created by the contract).

(2C) A date agreed for payment of a debt may be a fixed date or may depend on the happening of an event or the failure of an event to happen.

(2D) Where—

(a) the purchaser is a public authority, and

(b) the last day of the relevant 30-day period falls earlier than the agreed payment day, the relevant day is the last day of the relevant 30-day period, unless subsection (2G) applies.

(2E) Where—

(a) the purchaser is not a public authority, and

(b) the last day of the relevant 60-day period falls earlier than the agreed payment day, the relevant day is the last day of the relevant 60-day period, unless subsection (2G) applies.

(2G) But subsection (2E) does not apply (and so the relevant day is the agreed payment day, unless subsection (2G) applies) if the agreed payment day is not grossly unfair to the supplier (see subsection (7A)).

(2H) “*The relevant 30-day period*” is the period of 30 days beginning with the later or latest of—
(a) the day on which the obligation of the supplier to which the debt relates is performed;

(b) the day on which the purchaser has notice of the amount of the debt or (where that amount is unascertained) the sum which the supplier claims is the amount of the debt;

(c) where subsection (5A) applies, the day determined under subsection (5B).

(2I) “*The relevant 60-day period*” is the period of 60 days beginning with the later or latest of—
(a) the day on which the obligation of the supplier to which the debt relates is performed;

(b) the day on which the purchaser has notice of the amount of the debt or (where that amount is unascertained) the sum which the supplier claims is the amount of the debt;

(c) where subsection (5A) applies, the day determined under subsection (5B).

(3)–(5) [...]

(5A) This subsection applies where—

(a) there is a procedure of acceptance or verification (whether provided for by an enactment or by the contract), under which the conforming of goods or services with the contract is to be ascertained, an

(b) the purchaser has notice of the amount of the debt on or before the day on which the procedure is completed.

(5B) For the purposes of subsections (2H)(c) and (2I)(c), the day in question is the day after the day on which the procedure is completed.

(5C) Where, in a case where subsection (5A) applies, the procedure in question is completed after the end of the period of 30 days beginning with the day on which the obligation of the supplier to which the debt relates is performed, the procedure is to be treated for the purposes of subsection (5B) as being completed immediately after the end of that period.

(5D) Subsection (5C) does not apply if—

(a) the supplier and the purchaser expressly agree in the contract a period for completing the procedure in question that is longer than the period mentioned in that subsection, and

(b) that longer period is not grossly unfair to the supplier (see subsection (7A)).

(6) Where the debt is created by virtue of an obligation to pay a sum due in respect of a period of hire of goods, subsections (2H)(a) and (2I)(a) have effect as if they referred to the last day of that period.

(7) Statutory interest ceases to run when the interest would cease to run if it were carried under an express contract term.

(7A) In determining for the purposes of subsection (2F) or (5D) whether something is grossly unfair, all circumstances of the case shall be considered; and for that purpose, the circumstances of the case include in particular—

(a) anything that is a gross deviation from good commercial practice and contrary to good faith and fair dealing,

(b) the nature of the goods or services in question, and

(c) whether the purchaser has any objective reason to deviate from the result which is provided for by subsection (2E) or (5C).

(8) In this section—

“*advance payment*” has the same meaning as in section 11;

“*enactment*” includes an enactment contained in subordinate legislation (within the meaning of the Interpretation Act 1978);

“*public authority*” means a contracting authority (within the meaning of regulation 2(1) of the Public Contracts Regulations 2015).

Note

9B-1337.

1 Subsections (3A)–(3C), (5)(c), (5A)–(5D), (7A) inserted and subs.(8) substituted, subject to savings, by the [Late Payment of Commercial Debts Regulations 2013 \(SI 2013/395\)](#) with effect from 16 March 2013; for savings see art.1(3). Subsection (5B) amended, subject to savings, by the [Late Payment of Commercial Debts \(No.2\) Regulations 2013 \(SI 2013/908\)](#) with effect from 14 May 2013; for savings see art.1(3). Subsection (8) amended by the [Public Contracts Regulations 2015 \(SI 2015/102\) Sch.6\(1\) para.1](#), with effect from 26 February 2015; for savings and transitional provisions see [Pt 5 of SI 2015/102](#). Further amended by the [Late Payment of Commercial Debts \(Amendment\) Regulations 2015 \(SI 2015/1336\)](#) with effect from 21 June 2015. It should be noted that [SI 2015/1336](#), whilst adding subss.(2A) to (2I) to s.4, also omitted from the section subss.(3) to (5).

When does the statutory interest start to run?

9B-1338 With effect from 16 March 2013, subss.(3A), (3B), (3C), (5A) to (5D) and (7A) were added by, and subs.(8) was amended by, the [Late Payment of Commercial Debts Regulations 2013 \(SI 2013/395\)](#). These Regulations were made for the purpose of implementing Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions. The amendments to [s.4](#) effected by the Regulations do not affect contracts made before 16 March 2013. Paragraph (5B) of [s.4](#) was amended by the [Late Payment of Commercial Debts \(No. 2\) Regulations 2013 \(SI 2013/908\)](#) with effect from 14 May 2013.

The question posed in this sub-heading is answered by [s.4](#). Interest runs from the day after the “relevant day” as defined. Where a date has been agreed for payment that is the relevant day ([s.4\(3\)](#)). Where the contract provides for an advance payment see [s.11](#). In other cases the relevant day is 30 days after the date specified in [s.4\(5\)](#).

Interest runs on “the amount” of the debt. Where there are errors or omissions in the suppliers’ invoices, the paying party can withhold payment for sums reasonably in doubt or not yet properly settled, but is not by reason of such mistakes relieved from late payment interest liability ([Ruttle Plant Hire Limited v Secretary of State for Environment Food and Rural Affairs \[2009\] EWCA Civ 97; \[2009\] B.L.R. 301, CA](#)). The court can protect paying parties from any unfairness caused to them by suppliers’ invoice mistakes by exercising its powers under [s.5](#) to grant appropriate remission from statutory interest (*ibid.*). See also [E-Nik Ltd v Secretary of State for Communities and Local Government \[2012\] EWHC 3027 \(Comm\); \[2013\] 2 All E.R \(Comm\) 868](#) (Burton J.).

For statutory powers of court to award interest on debts, see Senior Courts Act 1981 s.35A and [County Courts Act 1984 s.69](#), and commentary thereon (paras [9A-132](#) and [9A-554](#) above).

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Section 5. - Remission of statutory interest

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Late Payment of Commercial Debts (Interest) Act 1998

Section 5

Part I Statutory interest on qualifying debts

5.— Remission of statutory interest

9B-1339 (1) This section applies where, by reason of any conduct of the supplier, the interests of justice require that statutory interest should be remitted in whole or part in respect of a period for which it would otherwise run in relation to a qualifying debt.

(2) If the interests of justice require that the supplier should receive no statutory interest for a period, statutory interest shall not run for that period.

(3) If the interests of justice require that the supplier should receive statutory interest at a reduced rate for a period, statutory interest shall run at such rate as meets the justice of the case for that period.

(4) Remission of statutory interest under this section may be required—

(a) by reason of conduct at any time (whether before or after the time at which the debt is created); and

(b) for the whole period for which statutory interest would otherwise run or for one or more parts of that period.

(5) In this section “conduct” includes any act or omission.

Discretion

9B-1340 The effect of s.5 is to give the court a discretion to withhold statutory interest where the interests of justice so require. For example, interest may be awarded for a period less than that of the relevant day to the day of the judgment where the claimant has unreasonably delayed in either issuing or prosecuting the claim.

The leading case on remission is *Ruttle Plant Hire Limited v Secretary of State for Environment Food and Rural Affairs*, op cit; see also *Fitzroy Robinson Ltd v Mentmore Towers Ltd [2009] EWHC 3365 (TCC); [2010] B.L.R. 165; 128 Con. L.R. 103* (Coulson J.).

Section 5A. - Compensation arising out of late payment

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Section 5a

Part I Statutory interest on qualifying debts

5A.— Compensation arising out of late payment

9B-1341 (1) Once statutory interest begins to run in relation to a qualifying debt, the supplier shall be entitled to a fixed sum (in addition to the statutory interest on the debt).

(2) That sum shall be—

- (a) for a debt less than £1,000, the sum of £40;
- (b) for a debt of £1,000 or more, but less than £10,000, the sum of £70;
- (c) for a debt of £10,000 or more, the sum of £100.

(2A) If the reasonable costs of the supplier in recovering the debt are not met by the fixed sum, the supplier shall also be entitled to a sum equivalent to the difference between the fixed sum and those costs.

(3) The obligation to pay a sum under this section in respect of a qualifying debt shall be treated as part of the term implied by section 1(1) in the contract creating the debt.

(4) Section 3(2)(b) of the Unfair Contract Terms Act 1977 (no reliance to be placed on certain contract terms) shall apply in cases where a contract term is not contained in written standard terms of the purchaser as well as in cases where the term is contained in such standard terms.

(5) In this section “*contract term*” means a term of the contract relating to a sum due to the supplier under this section.

Note

9B-1342 Amended by the Late Payment of Commercial Debts (Scotland) Regulations (SSI 2002/335) reg.2(5). With effect from 16 March 2013 (and for the purpose explained in para. 9B-1338 above), subss.2A, 4 and 5 were added by, and subs.(3) was amended by, the Late Payment of Commercial Debts Regulations 2013 (SI 2013/395). The amendments do not affect contracts made before that date.

Compensation payment

9B-1343 In addition to statutory interest at a penal rate (see below) the claimant is entitled to a fixed sum as provided for by s.5A(2).

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Section 6. - Rate of statutory interest

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Late Payment of Commercial Debts (Interest) Act 1998

Section 6

Part I Statutory interest on qualifying debts

6.— Rate of statutory interest

- 9B-1344 (1) The Secretary of State shall by order made with the consent of the Treasury set the rate of statutory interest by prescribing—
(a) a formula for calculating the rate of statutory interest; or
(b) the rate of statutory interest.
- (2) Before making such an order the Secretary of State shall, among other things, consider the extent to which it may be desirable to set the rate so as to—
(a) protect suppliers whose financial position makes them particularly vulnerable if their qualifying debts are paid late; and
(b) deter generally the late payment of qualifying debts.

“rate of statutory interest”

9B-1345 The rate of statutory interest prescribed pursuant to s.6 is currently set out in the [Late Payment of Commercial Debts \(Rate of Interest\) \(No.3\) Order 2002 \(SI 2002/1675\)](#). The rate is 8% above the official bank rate. For all relevant rates see Vol.1 para. 7.0.17(h). Paragraph 4 of [SI 2002/1675](#) provides that the rate is 8% above the official bank rate in force on the 30 June (in respect of interest which starts to run between 1 July and 31 December) or on the 31 December (in respect of interest which starts to run between 1 January and 30 June) immediately before the day on which statutory interest starts to run.

[SI 2002/1675](#) refers to “the official dealing rate” but this is the rate now known as the official bank rate, as set out in Vol.1 at para. [16AI.5](#). (Somewhat unhelpfully the statutory instrument’s “explanatory note” mentions the “repo” rate which is no longer in use.)

Editorial note

9B-1346 Sections 7 to 10 set out the anti-avoidance provisions of the Act, but see also ss.12 and 14.

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Section 7. - Purpose of Part II

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Section 7

Part II Contract Terms Relating to Late Payment of Qualifying Debts

7.— Purpose of Part II

- 9B-1347 (1) This Part deals with the extent to which the parties to a contract to which this Act applies may by reference to contract terms oust or vary the right to statutory interest that would otherwise apply when a qualifying debt created by the contract (in this Part referred to as “the debt”) is not paid.
- (2) This Part applies to contract terms agreed before the debt is created; after that time the parties are free to agree terms dealing with the debt.
- (3) This Part has effect without prejudice to any other ground which may affect the validity of a contract term.

Forbearance

- 9B-1348 The anti-avoidance provisions are intended to prevent a commercial contract excluding the provisions of the Act. Thus Pt II applies to contract terms agreed before the debt is created and by s.7(2), does not apply to later terms agreed by the parties dealing with the debt e.g. a term whereby the creditor later agrees to forego interest if payment is made by a new agreed date.

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Section 8. - Circumstances where statutory interest may be ousted or varied

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Late Payment of Commercial Debts (Interest) Act 1998

Section 8

Part II Contract Terms Relating to Late Payment of Qualifying Debts

8.— Circumstances where statutory interest may be ousted or varied

9B-1349

(1) Any contract terms are void to the extent that they purport to exclude the right to statutory interest in relation to the debt, unless there is a substantial contractual remedy for late payment of the debt.

(2) Where the parties agree a contractual remedy for late payment of the debt that is a substantial remedy, statutory interest is not carried by the debt (unless they agree otherwise).

(3) The parties may not agree to vary the right to statutory interest in relation to the debt unless either the right to statutory interest as varied or the overall remedy for late payment of the debt is a substantial remedy.

(4) Any contract terms are void to the extent that they purport to—

(a) confer a contractual right to interest that is not a substantial remedy for late payment of the debt, or

(b) vary the right to statutory interest so as to provide for a right to statutory interest that is not a substantial remedy for late payment of the debt,

unless the overall remedy for late payment of the debt is a substantial remedy.

(5) Subject to this section, the parties are free to agree contract terms which deal with the consequences of late payment of the debt.

Limited contracting out

9B-1350 Section 8, the key anti-avoidance provision, renders void any contract term which merely purports to exclude the right to statutory interest. Contracting parties are free to agree an alternative to statutory interest provided that it is a “substantial remedy”.

Section 9. - Meaning of “substantial remedy”

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Late Payment of Commercial Debts (Interest) Act 1998

Section 9

Part II Contract Terms Relating to Late Payment of Qualifying Debts

9.— Meaning of “substantial remedy”

- 9B-1351 (1) A remedy for the late payment of the debt shall be regarded as a substantial remedy unless—
(a) the remedy is insufficient either for the purpose of compensating the supplier for late payment or for deterring late payment; and
(b) it would not be fair or reasonable to allow the remedy to be relied on to oust or (as the case may be) to vary the right to statutory interest that would otherwise apply in relation to the debt.
- (2) In determining whether a remedy is not a substantial remedy, regard shall be had to all the relevant circumstances at the time the terms in question are agreed.
- (3) In determining whether subsection (1)(b) applies, regard shall be had (without prejudice to the generality of subsection (2)) to the following matters—
(a) the benefits of commercial certainty;
(b) the strength of the bargaining positions of the parties relative to each other;
(c) whether the term was imposed by one party to the detriment of the other (whether by the use of standard terms or otherwise); and
(d) whether the supplier received an inducement to agree to the term.

“substantial remedy”

- 9B-1352 Any term purporting to exclude the right to statutory interest is void (see s.8 above) but a “substantial remedy” can be agreed instead. To be “substantial” the remedy must fulfil the Act’s primary aim of deterring late payment or, alternatively be sufficient to compensate for late payment. Additionally, it must be fair and reasonable to allow the remedy to be relied on to deny, or vary, the right to statutory interest. In deciding this all the circumstances at the time the contract was agreed are relevant (see s.9(2)) and, without prejudice to this, the factors in s.9(3) will be considered.

Section 10. - Interpretation of Part II

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Late Payment of Commercial Debts (Interest) Act 1998

Section 10

Part II Contract Terms Relating to Late Payment of Qualifying Debts

10.— Interpretation of Part II

9B-1353

(1) In this Part—

“*contract term*” means a term of the contract creating the debt or any other contract term binding the parties (or either of them);

“*contractual remedy*” means a contractual right to interest or any contractual remedy other than interest;

“*contractual right to interest*” includes a reference to a contractual right to charge interest;

“*overall remedy*”, in relation to the late payment of the debt, means any combination of a contractual right to interest, a varied right to statutory interest or a contractual remedy other than interest;

“*substantial remedy*” shall be construed in accordance with section 9.

(2) In this Part a reference (however worded) to contract terms which vary the right to statutory interest is a reference to terms altering in any way the effect of Part I in relation to the debt (for example by postponing the time at which interest starts to run or by imposing conditions on the right to interest).

(3) In this Part a reference to late payment of the debt is a reference to late payment of the sum due when the debt is created (excluding any part of that sum which is prevented from carrying statutory interest by section 3).

Section 11. - Treatment of advance payments of the contract price

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Late Payment of Commercial Debts (Interest) Act 1998

Section 11

Part III General and Supplementary

11.— Treatment of advance payments of the contract price

9B-1354

(1) A qualifying debt created by virtue of an obligation to make an advance payment shall be treated for the purposes of this Act as if it was created on the day mentioned in subsection (3), (4) or (5) (as the case may be).

(2) In this section “*advance payment*” means a payment falling due before the obligation of the supplier to which the whole contract price relates (“the supplier’s obligation”) is performed, other than a payment of a part of the contract price that is due in respect of any part performance of that obligation and payable on or after the day on which that part performance is completed.

(3) Where the advance payment is the whole contract price, the debt shall be treated as created on the day on which the supplier’s obligation is performed.

(4) Where the advance payment is a part of the contract price, but the sum is not due in respect of any part performance of the supplier’s obligation, the debt shall be treated as created on the day on which the supplier’s obligation is performed.

(5) Where the advance payment is a part of the contract price due in respect of any part performance of the supplier’s obligation, but is payable before that part performance is completed, the debt shall be treated as created on the day on which the relevant part performance is completed.

(6) Where the debt is created by virtue of an obligation to pay a sum due in respect of a period of hire of goods, this section has effect as if—

(a) references to the day on which the supplier’s obligation is performed were references to the last day of that period; and

(b) references to part performance of that obligation were references to part of that period.

(7) For the purposes of this section an obligation to pay the whole outstanding balance of the contract price shall be regarded as an obligation to pay the whole contract price and not as an obligation to pay a part of the contract price.

“advance payment”

9B-1355 The Act applies not merely to a conventional contract, e.g. where goods are supplied and payment is then due, but also to contracts where some or all of the payment is to be made in advance. The right to statutory interest arises where the advance payment is not made and [s.11](#) defines the date when the debt is deemed to have been created for the purpose of statutory interest.

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Section 12. - Conflict of laws

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Late Payment of Commercial Debts (Interest) Act 1998

Section 12

Part III General and Supplementary

12.— Conflict of laws

9B-1356 (1) This Act does not have effect in relation to a contract governed by the law of a part of the United Kingdom by choice of the parties if—

(a) there is no significant connection between the contract and that part of the United Kingdom; and

(b) but for that choice, the applicable law would be a foreign law.

(2) This Act has effect in relation to a contract governed by a foreign law by choice of the parties if—

(a) but for that choice, the applicable law would be the law of a part of the United Kingdom; and

(b) there is no significant connection between the contract and any country other than that part of the United Kingdom.

(3) In this section—

“contract” means a contract falling within section 2(1); and

“foreign law” means the law of a country outside the United Kingdom.

“conflict of laws”

9B-1357 Although s.12 has the title “conflict of laws”, s.12(2) is in reality an anti-avoidance provision. It prevents the Act being disapplied by a term stating that the contract is governed by a foreign law when in reality the contract has no connection with the foreign country and would otherwise be governed by the law of a part of the United Kingdom. Section 12(1) operates the other way round to disapply the Act in contracts expressed to be governed by the law of a part of the United Kingdom but which otherwise have no connection with the United Kingdom and the applicable law would be a foreign law.

In effect, s.12 provides that where parties to a contract with an international dimension have chosen English law to govern the contract, the choice of English law is not of itself sufficient to attract the application of the 1998 Act. The section mandates the application of the penal interest provisions only if one or both of two further requirements are fulfilled. There must be a significant connection between the contract and England (s.12(1)(a)); or the contract must be one which would be governed by

English law apart from the choice of law (s.12(1)(b)); either is sufficient. In *Martrade Shipping & Transport GmbH v United Enterprises Corporation* [2014] EWHC 1884, [2014] 2 Lloyd's Rep. 198 (Popplewell J.) the judge explained the reasons for the rule that where parties to a contract with an international dimension have chosen English law to govern the contract, that choice is not of itself sufficient to attract the application of the 1998 Act. In that case a charterparty provided for English law and London arbitration, and an appeal against an award of interest under the 1998 Act made by the arbitral tribunal was allowed on the ground that there was no significant connection between the contract and England.

Section 13. - Assignments, etc.

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Late Payment of Commercial Debts (Interest) Act 1998

Section 13

Part III General and Supplementary

13.— Assignments, etc.

9B-1358

(1) The operation of this Act in relation to a qualifying debt is not affected by—

(a) any change in the identity of the parties to the contract creating the debt; or

(b) the passing of the right to be paid the debt, or the duty to pay it (in whole or in part) to a person other than the person who is the original creditor or the original debtor when the debt is created.

(2) Any reference in this Act to the supplier or the purchaser is a reference to the person who is for the time being the supplier or the purchaser or, in relation to a time after the debt in question has been created, the person who is for the time being the creditor or the debtor, as the case may be.

(3) Where the right to be paid part of a debt passes to a person other than the person who is the original creditor when the debt is created, any reference in this Act to a debt shall be construed as (or, if the context so requires, as including) a reference to part of a debt.

(4) A reference in this section to the identity of the parties to a contract changing, or to a right or duty passing, is a reference to it changing or passing by assignment or assignation, by operation of law or otherwise.

“change in identity of the parties”

9B-1359 The effect of the Act is not affected by a change in the identity of the parties (e.g. by assignment under a factoring agreement).

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Section 14. - Contract terms relating to the date for payment of the contract price

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Section 14

Part III General and Supplementary

14.— Contract terms relating to the date for payment of the contract price

- 9B-1360 (1) This section applies to any contract term which purports to have the effect of postponing the time at which a qualifying debt would otherwise be created by a contract to which this Act applies.
- (2) Sections 3(2)(b) and 17(1)(b) of the Unfair Contract Terms Act 1977 (no reliance to be placed on certain contract terms) shall apply in cases where such a contract term is not contained in written standard terms of the purchaser as well as in cases where the term is contained in such standard terms.
- (3) In this section "*contract term*" has the same meaning as in section 10(1).

Postponing payment

- 9B-1361 Section 14 is in reality another anti-avoidance provision. Any term purporting to have the effect of postponing the time at which a qualifying debt would otherwise have been created is subject to s.3(2)(b) and 17(1)(b) of the Unfair Contract Terms Act 1977 (see para. 3H-555).

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Section 15. - Orders and regulations

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Late Payment of Commercial Debts (Interest) Act 1998

Section 15

Part III General and Supplementary

15.— Orders and regulations

- 9B-1362
- (1) Any power to make an order or regulations under this Act is exercisable by statutory instrument.
 - (2) Any statutory instrument containing an order or regulations under this Act, other than an order under section 17(2), shall be subject to annulment in pursuance of a resolution of either House of Parliament.

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Section 16. - Interpretation

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Late Payment of Commercial Debts (Interest) Act 1998

Part III General and Supplementary

16.— Interpretation

9B-1363

(1) In this Act—

“*contract for the supply of goods or services*” has the meaning given in section 2(2);

“*contract price*” means the price in a contract of sale of goods or the money consideration referred to in section 2(2)(b) in any other contract for the supply of goods or services;

“*purchaser*” means (subject to section 13(2)) the buyer in a contract of sale or the person who contracts with the supplier in any other contract for the supply of goods or services;

“*qualifying debt*” means a debt falling within section 3(1);

“*statutory interest*” means interest carried by virtue of the term implied by section 1(1); and

“*supplier*” means (subject to section 13(2)) the seller in a contract of sale of goods or the person who does one or more of the things mentioned in section 2(3) in any other contract for the supply of goods or services.

(2) In this Act any reference (however worded) to an agreement or to contract terms includes a reference to both express and implied terms (including terms established by a course of dealing or by such usage as binds the parties).

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Section 17. - Short title, commencement and extent

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Late Payment of Commercial Debts (Interest) Act 1998

Part III General and Supplementary

17.— Short title, commencement and extent

9B-1364

(1) This Act may be cited as the Late Payment of Commercial Debts (Interest) Act 1998.

(2) This Act (apart from this section) shall come into force on such day as the Secretary of State may by order appoint; and different days may be appointed for different descriptions of contract or for other different purposes.

An order under this subsection may specify a description of contract by reference to any feature of the contract (including the parties).

(3) The Secretary of State may by regulations make such transitional, supplemental or incidental provision (including provision modifying any provision of this Act) as the Secretary of State may consider necessary or expedient in connection with the operation of this Act while it is not fully in force.

(4) This Act does not affect contracts of any description made before this Act comes into force for contracts of that description.

(5) This Act extends to Northern Ireland.

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Legal Aid, Sentencing and Punishment of Offenders Act 2012

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Legal Aid, Sentencing and Punishment of Offenders Act 2012

Arrangement of Act

(2012 c.10)

Introductory note

9B-1393 Part 1 of this Act (Legal Aid) (ss.1 to 43) implements major reforms following a fundamental review undertaken by the Government for the purpose of making legal aid “work more efficiently”. The statutory framework provided replaces that formerly found in Pt 1 of the Access to Justice Act 1999.

Part 3 (Sentencing and Punishment of Offenders) (ss.63 to 148) implements a number of the sentencing reforms affecting the sentencing framework (previously broadly governed by the [Criminal Justice Act 2003](#)).

In Pt 2 (Litigation Funding and Costs) (ss.44 to 62), ss.49 to 54 amend existing legislation to give the court power to make orders in divorce proceedings, and corresponding civil partnership proceedings, for payments to be made by one party to another for the purposes of paying for legal services. And, by s.62 (bringing into effect Sch.7), new arrangements are made for regulating the power of courts in criminal cases to order that an amount in respect of costs incurred by a successful defendant, witness or successful appellant should be paid out of central funds.

In addition, Pt 2 implements reforms affecting civil proceedings; in particular as to conditional fee agreements, pro bono representation, offers to settle, and referral fees. The reforms as to the first two of those particular matters are accomplished by amending existing statutes (ss.44 to 48 and 61); in particular by amending [ss.58, 58A and 58AA of the Courts and Legal Services Act 1990](#) (see para.9B-101 above) and [s.194 of the Legal Services Act 2007](#) (see para.9B-550 above), by inserting s.58C in the [1990 Act](#), and by revoking [ss.29 and 30 of the Access to Justice Act 1999](#) (see para.9B-774+ above). The reforms as to the latter two particular matters (offers to settle and referral fees) are in terms accomplished, respectively, by s.55 and by ss.56 to 60; see para.9B-1394 et seq below.

Section 55. - Payment of additional amount to successful claimant

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Legal Aid, Sentencing and Punishment of Offenders Act 2012

Section 55

Part II Litigation Funding and Costs

Offers to settle

55.— Payment of additional amount to successful claimant

9B-1394

(1) Rules of court may make provision for a court to order a defendant in civil proceedings to pay an additional amount to a claimant in those proceedings where—

(a) the claim is a claim for (and only for) an amount of money,

(b) judgment is given in favour of the claimant,

(c) the judgment in respect of the claim is at least as advantageous as an offer to settle the claim which the claimant made in accordance with rules of court and has not withdrawn in accordance with those rules, and

(d) any prescribed conditions are satisfied.

(2) Rules made under subsection (1) may include provision as to the assessment of whether a judgment is at least as advantageous as an offer to settle.

(3) In subsection (1) “*additional amount*” means an amount not exceeding a prescribed percentage of the amount awarded to the claimant by the court (excluding any amount awarded in respect of the claimant’s costs).

(4) The Lord Chancellor may by order provide that rules of court may make provision for a court to order a defendant in civil proceedings to pay an amount calculated in a prescribed manner to a claimant in those proceedings where—

(a) the claim is or includes a non-monetary claim,

(b) judgment is given in favour of the claimant,

(c) the judgment in respect of the claim is at least as advantageous as an offer to settle the claim which the claimant made in accordance with rules of court and has not withdrawn in accordance with those rules, and

(d) any prescribed conditions are satisfied.

(5) An order under subsection (4) must provide for the amount to be calculated by reference to one or more of the following—

- (a) any costs ordered by the court to be paid to the claimant by the defendant in the proceedings;
- (b) any amount awarded to the claimant by the court in respect of so much of the claim as is for an amount of money (excluding any amount awarded in respect of the claimant's costs);
- (c) the value of any non-monetary benefit awarded to the claimant.

(6) An order under subsection (4)—

- (a) must provide that rules made under the order may include provision as to the assessment of whether a judgment is at least as advantageous as an offer to settle, and
- (b) may provide that such rules may make provision as to the calculation of the value of a non-monetary benefit awarded to a claimant.

(7) Conditions prescribed under subsection (1)(d) or (4)(d) may, in particular, include conditions relating to—

- (a) the nature of the claim;
- (b) the amount of money awarded to the claimant;
- (c) the value of the non-monetary benefit awarded to the claimant.

(8) Orders under this section are to be made by the Lord Chancellor by statutory instrument.

(9) A statutory instrument containing an order under this section is subject to annulment in pursuance of a resolution of either House of Parliament.

(10) Rules of court and orders made under this section may make different provision in relation to different cases.

(11) In this section—

- “*civil proceedings*” means proceedings to which rules of court made under the Civil Procedure Act 1997 apply;
- “*non-monetary claim*” means a claim for a benefit other than an amount of money;
- “*prescribed*” means prescribed by order made by the Lord Chancellor.

Commencement

9B-1394.

1 Brought into force from 1 October 2012 by [SI 2012/2412 art.2\(b\)](#).

Editorial note

9B-1395 In the Review of Civil Litigation Costs: Final Report (December 2009) it was noted that, under the arrangements provided for by [CPR Pt 36](#) then prevailing, the costs sanctions against a defendant for failing to accept a claimant's offer to settle generally amounted to considerably less than the sanctions against a claimant for failing to beat a defendant's offer to settle. Consequently,

there was less incentive for a defendant to accept a reasonable offer from the claimant than for a claimant to accept a reasonable offer by the defendant. It was recommended that this imbalance should be rectified (*ibid* Ch.41 para.5.1). This section provides the legislative basis for the enactment of rules of court by the Rule Committee to achieve that objective by requiring that the defendant should pay an “additional amount”, both in cases in which the claim is for (and only for) an amount of money and in other cases. Rules are to be made in a manner as provided for by orders made by the Lord Chancellor by statutory instrument (subject to the negative resolution procedure). The [Offers to Settle in Civil Proceedings Order 2013](#) was made by the Lord Chancellor in exercise of powers conferred by this section.

Section 56. - Rules against referral fees

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Legal Aid, Sentencing and Punishment of Offenders Act 2012

Section 56

Part II Litigation Funding and Costs

Referral fees

56.— Rules against referral fees

9B-1396

(1) A regulated person is in breach of this section if—
(a) the regulated person refers prescribed legal business to another person and is paid or has been paid for the referral, or

(b) prescribed legal business is referred to the regulated person, and the regulated person pays or has paid for the referral.

(2) A regulated person is also in breach of this section if in providing legal services in the course of prescribed legal business the regulated person—

(a) arranges for another person to provide services to the client, and

(b) is paid or has been paid for making the arrangement.

(3) Section 59 defines “regulated person”.

(4) “*Prescribed legal business*” means business that involves the provision of legal services to a client, where—

(a) the legal services relate to a claim or potential claim for damages for personal injury or death,

(b) the legal services relate to any other claim or potential claim for damages arising out of circumstances involving personal injury or death, or

(c) the business is of a description specified in regulations made by the Lord Chancellor.

(5) There is a referral of prescribed legal business if—

(a) a person provides information to another,

(b) it is information that a provider of legal services would need to make an offer to the client to provide relevant services, and

(c) the person providing the information is not the client;

and “*relevant services*” means any of the legal services that the business involves.

(6) “*Legal services*” means services provided by a person which consist of or include legal activities (within the meaning of the Legal Services Act 2007) carried on by or on behalf of that person; and a provider of legal services is a person authorised to carry on a reserved legal activity within the meaning of that Act.

(7) “*Client*” —

(a) where subsection (4)(a) applies, means the person who makes or would claim;

(b) where subsection (4)(c) applies, has the meaning given by the regulations.

(8) Payment includes any form of consideration whether any benefit is received by the regulated person or by a third party (but does not include the provision of hospitality that is reasonable in the circumstances).

Commencement

9B-1396.

1 Brought into force from 1 April 2013 by [SI 2013/453 art.3\(b\)](#).

Editorial note

9B-1397 In the Review of Civil Litigation Costs: Final Report (December 2009) the fact that referral fees, although not recoverable as a discrete item of costs, had a substantial impact upon the costs of personal injuries litigation was noted, the question whether such fees should be banned, alternatively capped or otherwise regulated was considered, and recommendations were made (*ibid.*, Ch.20 para.5.1). On 9 September 2011, by ministerial statement the Government announced its intention to ban such fees. [Sections 55 to 60](#) provide the legislative foundation for achieving that objective and for establishing a regulatory machinery for ensuring that the ban is effective. The Lord Chancellor is authorised to make regulations extending the ban to other types of claim. A “regulated person” is as described in [s.59](#).

Section 57. - Effect of rules against referral fees

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Legal Aid, Sentencing and Punishment of Offenders Act 2012

Section 57

Part II Litigation Funding and Costs

Referral fees

57.—Effect of rules against referral fees

9B-1398

(1) The relevant regulator must ensure that it has appropriate arrangements for monitoring and enforcing the restrictions imposed on regulated persons by section 56.

(2) A regulator may make rules for the purposes of subsection (1).

(3) The rules may in particular provide for the relevant regulator to exercise in relation to anything done in breach of that section any powers (subject to subsections (5) and (6)) that the regulator would have in relation to anything done by the regulated person in breach of another restriction.

(4) Where the relevant regulator is the Financial Services Authority, section 58 applies instead of subsections (1) to (3) (and (7) to (9)).

(5) A breach of section 56—

(a) does not make a person guilty of an offence, and

(b) does not give rise to a right of action for breach of statutory duty.

(6) A breach of section 56 does not make anything void or unenforceable, but a contract to make or pay for a referral or arrangement in breach of that section is unenforceable.

(7) Subsection (8) applies in a case where—

(a) a referral of prescribed legal business has been made by or to a regulated person, or

(b) a regulated person has made an arrangement as mentioned in section 56(2)(a),

and it appears to the regulator that a payment made to or by the regulated person may be a payment for the referral or for making the arrangement (a “referral fee”).

(8) Rules under subsection (2) may provide for the payment to be treated as a referral fee unless the regulated person shows that the payment was made—

(a) as consideration for the provision of services, or

(b) for another reason,

and not as a referral fee.

(9) For the purposes of provision made by virtue of subsection (8) a payment that would otherwise be regarded as consideration for the provision of services of any description may be treated as a referral fee if it exceeds the amount specified in relation to services of that description in regulations made by the Lord Chancellor.

Commencement

9B-1398.

1 Brought into force from 1 April 2013 by SI 2013/453 art.3(c).

Editorial note

9B-1399 Relevant regulators are required to have arrangements in place to monitor and enforce the prohibition on the payment or receipt of referral fees and are permitted to make rules and to use existing powers to enable them to monitor and enforce the prohibition. A “regulator” is a person described in s.59. The Lord Chancellor is authorised to make regulations specifying the maximum amount that can be paid for certain services, above which a regulated person will be required to show that the payment is not, or does not include, the payment of a referral fee.

Section 58. - Regulation by FSA

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Legal Aid, Sentencing and Punishment of Offenders Act 2012

Section 58

Part II Litigation Funding and Costs

Referral fees

58.— Regulation by FSA

9B-1400

(1) The Treasury may make regulations to enable the Financial Services Authority, where it is the relevant regulator, to take action for monitoring and enforcing compliance with the restrictions imposed on regulated persons by section 56.

(2) The regulations may apply, or make provision corresponding to, any of the provisions of the Financial Services and Markets Act 2000 with or without modification.

(3) Those provisions include in particular—

(a) provisions as to investigations, including powers of entry and search and criminal offences;

(b) provisions for the grant of an injunction in relation to a contravention or anticipated contravention;

(c) provisions giving Ministers or the Financial Services Authority powers to make subordinate legislation;

(d) provisions for the Financial Services Authority to charge fees.

(4) The regulations may make provision corresponding to the provision that may be made by virtue of section 57(7) to (9) (but as if the reference to the Lord Chancellor were a reference to the Treasury).

(5) The power to make regulations under this section is subject to section 57(5) and (6).

Commencement

9B-1400.

1 Brought into force from 4 March 2013 by [SI 2013/453 art.2\(b\)](#).

Editorial note

9B-1401 By this section the Treasury is authorised to make regulations which will enable the Financial Services Authority to monitor and enforce the prohibition on payment and receipt of referral fees in respect of those it regulates.

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Section 59. - Regulators and regulated persons

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Section 59

Part II Litigation Funding and Costs

Referral fees

59.— Regulators and regulated persons

9B-1402

- (1) In relation to a referral of business within section 56(4)(a)—
(a) a regulator is any person listed in column 1 below;
(b) a regulated person is any person listed in column 2;
(c) a regulator in column 1 is the relevant regulator in relation to the corresponding person in column 2.

1. Regulator

the Financial Services Authority

the General Council of the Bar

the Law Society

a regulatory body specified for the purposes of this subsection in regulations made by the Lord Chancellor

2. Regulated person

an authorised person (within the meaning of the Financial Services and Markets Act 2000) of a description specified in regulations made by the Treasury

a person authorised by the Council to carry on a reserved legal activity within the meaning of the Legal Services Act 2007

a person authorised by the Society to carry on a reserved legal activity within the meaning of the Legal Services Act 2007

a person of a description specified in the regulations in relation to the body

- (2) In relation to a referral of prescribed legal business of any other kind—

- (a)** a regulator is any person listed in column 1 below and specified in relation to business of that kind in regulations made by the Lord Chancellor;
- (b)** a regulated person is any person specified in accordance with column 2 in relation to business of that kind;
- (c)** a person specified under paragraph (a) in relation to business of that kind is the relevant regulator in relation to a person specified in accordance with the corresponding entry in column 2 in relation to business of that kind.

1. Regulator	2. Regulated person
the Financial Services Authority	an authorised person (within the meaning of the Financial Services and Markets Act 2000) of a description specified in regulations made by the Treasury
an approved regulator for the purposes of Part 3 of the Legal Services Act 2007 (approved legal activities); a licensing authority for the purposes of Part 5 of that Act (alternative business structures)	a person who is authorised by the regulator to carry on a reserved legal activity and is of a description specified in regulations made by the Lord Chancellor
	a person who is licensed by the authority to carry on a reserved legal activity and is of a description specified in regulations made by the Lord Chancellor

Commencement

9B-1402.

1 Brought into force from 1 April 2013 by [SI 2013/453 art.3\(d\)](#).

Note

9B-1402.

2 Amended by the Financial Services and Markets Act 2000 (Claims Management Activity) Order 2018 (SI 2018/1253) art.96, with effect from 29 November 2018 for the limited purposes specified in SI 2018/1253 art.1(2); 1 April 2019 otherwise subject to transitional provisions specified in SI 2018/1253 Part 3.

Editorial note

9B-1403 This section lists both the “regulators” who are required to monitor and enforce the prohibition on the payment and receipt of referral fees and the “regulated persons” who are subject to the prohibition. For the purpose of identifying “regulator” and “regulated” the section distinguishes claims for personal injury or death and other kinds of prescribed legal business.

Section 60. - Referral fees: regulations

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Legal Aid, Sentencing and Punishment of Offenders Act 2012

Section 60

Part II Litigation Funding and Costs

Referral fees

60.— Referral fees: regulations

9B-1404

(1) This section applies to any regulations under sections 56 to 59.

(2) The regulations are to be made by statutory instrument.

(3) The power to make the regulations includes power to make consequential, supplementary, incidental, transitional, transitory or saving provision.

(4) A statutory instrument containing the regulations may not be made unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament.

Commencement

9B-1404.

1 Brought into force from 4 March 2013 by [SI 2013/453 art.2\(c\)](#).

Editorial note

9B-1405 In [ss.56 to 59](#), regulations may be made by various persons or bodies for various purposes. This section provides that such regulations are to be made by the affirmative resolution procedure.

Justice and Security Act 2013

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Justice and Security Act 2013

Arrangement of Act

(2013 c.18)

Editorial note

9B-1406 In Pt 2 of this Act ss.6 to 11 and s.14 make provision for closed material procedures in proceedings (other than those in a criminal cause or matter) before the High Court, the Court of Session, the Court of Appeal or the Supreme Court. Sections 17 and 18 provide a mechanism for the suspension in certain circumstances of the court's jurisdiction to order a person involved (however innocently) in arguable wrongdoing by another person to disclose information about the wrongdoing where the information is "sensitive". Those sections are set out hereunder. The other sections in Pt 2 (not set out hereunder) impose a duty on the Secretary of State to produce annual reports on the use of the closed material procedure under ss.6–11 (s.12) and to appoint a reviewer to review the first five years of the use of the procedure (s.13). The five-year period ended on 24 June 2018, although the review was only announced in February 2021. The reviewer (Sir Duncan Ouseley) completed his report in December 2021, but it was not published until November 2022. As at August 2023 the Government has not responded to the report's findings and recommendations. Section 15 amends the [Special Immigration Appeals Commission Act 1997](#) for the purpose of extending the existing closed material procedure provided for by that Act (s.15). Section 16, which amended the [Regulation of Investigatory Powers Act 2000](#) to permit the use of intercept evidence in closed proceedings in employment cases before tribunals throughout the UK, has now been repealed. Various provisions in Pt 2 provide for the making of rules of court, in particular s.11, but also ss.6, 7 and 8. Rules relating to proceedings under Pt 2, and conforming with those provisions, are contained in [CPR Pt 82](#) (Closed material procedure). That Part was inserted in the [CPR](#) by the [Civil Procedure \(Amendment No.5\) Rules 2013 \(SI 2013/1571\)](#). Those Rules were made by the Lord Chancellor in exercise of the power conferred by para.3 of Sch.3 to the 2013 Act to make rules under the [Civil Procedure Act 1997](#) s.1. See further introductory commentary on Pt 82 in Vol.1 para.82.0.1.

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Section 6. - Declaration permitting closed material applications in proceedings

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Volume 2

Section 9 - Jurisdictional and Procedural Legislation

Section 9B - Other Statutes and Regulations

Justice and Security Act 2013

Section 6

Part 2 Disclosure of Sensitive Material

Closed material procedure: general

6.— Declaration permitting closed material applications in proceedings

9B-1407

(1) The court seised of relevant civil proceedings may make a declaration that the proceedings are proceedings in which a closed material application may be made to the court.

(2) The court may make such a declaration—

- (a) on the application of—
 - (i) the Secretary of State (whether or not the Secretary of State is a party to the proceedings), or
 - (ii) any party to the proceedings, or
- (b) of its own motion.

(3) The court may make such a declaration if it considers that the following two conditions are met.

(4) The first condition is that—

(a) a party to the proceedings would be required to disclose sensitive material in the course of the proceedings to another person (whether or not another party to the proceedings), or

(b) a party to the proceedings would be required to make such a disclosure were it not for one or more of the following—

- (i) the possibility of a claim for public interest immunity in relation to the material,
- (ii) the fact that there would be no requirement to disclose if the party chose not to rely on the material,
- (iii) section 56(1) of the Investigatory Powers Act 2016 (exclusion for intercept material),
- (iv) any other enactment that would prevent the party from disclosing the material but would not do so if the proceedings were proceedings in relation to which there was a declaration under this section.

(5) The second condition is that it is in the interests of the fair and effective administration of justice in the proceedings to make a declaration.

(6) The two conditions are met if the court considers that they are met in relation to any material that would be required to be disclosed in the course of the proceedings (and an application under subsection (2)(a) need not be based on all of the material that might meet the conditions or on material that the applicant would be required to disclose).

(7) The court must not consider an application by the Secretary of State under subsection (2)(a) unless it is satisfied that the Secretary of State has, before making the application, considered whether to make, or advise another person to make, a claim for public interest immunity in relation to the material on which the application is based.

(8) A declaration under this section must identify the party or parties to the proceedings who would be required to disclose the sensitive material ("a relevant person").

(9) Rules of court may—

(a) provide for notification to the Secretary of State by a party to relevant civil proceedings, or by the court concerned, of proceedings to which a declaration under this section may be relevant,

(b) provide for a stay or list of relevant civil proceedings (whether on an application by a party to the proceedings or by the court concerned of its own motion) where a person is considering whether to apply for a declaration under this section,

(c) provide for the Secretary of State, if not a party to proceedings in relation to which there is a declaration under this section or proceedings for or about such a declaration, to be joined as a party to the proceedings.

(10) Rules of court must make provision—

(a) requiring a person, before making an application under subsection (2)(a), to give notice of the person's intention to make an application to every other person entitled to make such an application in relation to the relevant civil proceedings,

(b) requiring the applicant to inform every other such person of the outcome of the application.

(11) In this section—

"closed material application" means an application of the kind mentioned in section 8(1)(a),

"relevant civil proceedings" means any proceedings (other than proceedings in a criminal cause or matter) before

—
(a) the High Court,

(b) the Court of Appeal,

(c) the Court of Session, or

(d) the Supreme Court,

Note

Subsection (4)(b)(iii) substituted by the [Investigatory Powers Act 2016 Sch.10\(2\)](#) para.[52](#), with effect from 27 June 2018 subject to savings specified in [2016 c.25 s.270](#) and [Sch.9](#) paras 7 and 10.

Effect of this section

9B-1408 In [Al Rawi v Security Service \[2011\] UKSC 34; \[2012\] 1 A.C. 531, SC](#), the Supreme Court held that, in the absence of statutory authority, a court has no power to adopt a closed material procedure in an ordinary civil claim for damages. By this and the following sections of the [2013 Act](#), Parliament has provided such authority. The Act followed upon the Justice and Security Green Paper (Cm 8194) where it was stated that, in cases involving sensitive material, a court may be prevented from reaching a fully informed judgment because it cannot hear all the evidence in the case, and noted that, in the absence of statutory authority, the only method by which sensitive material could be protected from disclosure in open court was by public interest immunity.

The most important aspect of the principle of natural justice is that every party has a right to know the full case against him or her, and the right to test and challenge that case fully. An arrangement where the court can look at evidence or hear arguments on behalf of one party without the other party knowing, or being able to test, the contents of that evidence and those arguments (“the closed material”), or even being able to see all the reasons why the court reached its conclusions gives rise to inequality, unfairness as between the parties, and infringes that aspect of the principle of natural justice ([Bank Mellat v HM Treasury \[2013\] UKSC 38; \[2014\] A.C. 700, SC](#), at para.3 per Lord Neuberger). The provisions of Pt 2 of the 2013 Act and the rules in CPR Pt 82 seek to provide a CMP that minimises such inequality and unfairness.

A declaration made under this section in civil proceedings is a “gateway” decision made by the court about whether or not a closed material procedure (a “CMP”) application may be made to the court in the proceedings. In effect, such an application is an application by a person (“relevant person”) for permission to be relieved from the normal rules as to disclosure to parties in civil proceedings, and for disclosure to be restricted to the court and any person appointed as a special advocate. So there are two stages, first the application for a CMP declaration ([s.6](#)) and, secondly, the application for a CMP ([s.8](#)). The court may make a declaration of its own motion.

The first two declarations under [s.6](#) were made in [McGartland v Attorney General \[2014\] EWHC 2248 \(QB\)](#) (Mitting J) and [R. \(Sarkandi\) v Secretary of State for Foreign & Commonwealth Affairs \[2014\] EWHC 2359 \(Admin\)](#) (Bean J). [McGartland](#) was a claim for damages, and [Sarkandi](#) a judicial review. The claimants in both cases appealed against the [s.6](#) declaration. The Court of Appeal dismissed both appeals in judgments handed down at the same time: [\[2015\] EWCA Civ 686](#) and [\[2015\] EWCA Civ 687; \[2016\] 3 All E.R. 837](#) respectively. In the judgments of the Court of Appeal the framework of the legislation, including the rules in CPR Pt 82, their purposes and effects, and the exercise by a court of the power under [s.6](#), are explained. The purposes and effects of the rules and statutory provisions were again reviewed in [Belhaj v Straw \[2017\] EWHC 1861 \(QB\)](#), (Popplewell J), at paras 15 to 26. In that case the claimants (C) brought a claim arising out of alleged unlawful “rendition” against various State defendants, framed in the English law torts of false imprisonment, trespass to the person, and conspiracy to injure etc., and resisted D’s CMP application on various grounds. In particular it was argued (1) that the court must decide the application by reference to issues of “central” relevance or issues on the “core allegations” and that it must be satisfied that the sensitive material is “highly relevant”, and (2) that the application was doomed by reason of a failure by D properly to address the issues which would arise in the proceedings, as distinct from the allegations which C make. In granting the declaration sought, the judge rejected these submissions, principally on the ground that the wording of [s.6](#) imported no heightened test of relevance, and no categorisation of the issue to which it was relevant; the statutory test set out in [s.6\(4\)\(a\)](#) is fulfilled if a sensitive document or part of it was disclosable. D had done all that they could do in open to identify the issues and the court should not seek to go behind the stated position that they were unable to articulate their position further for the purposes of this application.

In [CF v Security Service \[2013\] EWHC 3402 \(QB\); \[2014\] 1 W.L.R. 1699](#) (Irwin J) the court rejected the claimant’s submission that the PII process should be concluded before a declaration could be made under [s.6](#) of the 2013 Act that the proceedings were ones in which a closed material application could be made.

In [Rahmatullah v Ministry of Defence \[2017\] EWHC 547 \(QB\)](#), (Leggatt J) the judge explained (para.7) that although a [s.6](#) declaration opens a gateway to a closed material procedure, it is only the first stage of the process and does not finally decide whether such a procedure will be used at the trial. In particular, [s.7 of the 2013 Act](#) requires the court to keep any declaration under review, to undertake a formal review once the pre-trial disclosure exercise has been completed, and to revoke

the declaration if the court considers that it is no longer in the interests of the fair and effective administration of justice in the proceedings. Further, it is sufficient to justify making a [s.6](#) declaration that the two statutory conditions are met in relation to any relevant material, and the defendants do not need to put before the court at this stage all the material which might meet the conditions ([s.6\(6\)](#)). Furthermore, in considering whether it is in the interests of the fair and effective administration of justice in the proceedings to make a [s.6](#) declaration, the court should focus on whether any sensitive material on which the application is based is necessary for resolving the issues in the case before it.

In *R. (Khaled) v Secretary of State for Foreign and Commonwealth Affairs [2017] EWHC 1422 (Admin)*, by way of a judicial review claim, the claimant challenged an asset-freezing order imposed under anti-terrorism legislation. The court granted the defendant's application under [s.6](#) and directed that an open hearing should take place "to consider the principles of disclosure" relevant to the proceedings, being proceedings to which art.6 of the ECHR did not apply. At that hearing the judge reviewed the effects of [ss.6 to 8 of the 2013 Act](#), in particular the effect of [s.7\(3\)](#), and concluded that, in judicial review proceedings to which a closed material procedure applied under [s.6](#), there was no common law right to "a core minimum" of disclosure, and [s.7\(3\)](#) did not incorporate or preserve any such right, as it would be inconsistent with the overall scheme of the [Act](#).

In *Abdul v Foreign and Commonwealth Office [2018] EWHC 3594 (QB)*, 21 December 2018, unrep. (Nicol J), the claimant (C) brought a claim against the UK Government (D) for assault, false imprisonment and misfeasance in public office based on incidents occurring in Somalia for which C said D were responsible. D applied for, and was granted, a CMP declaration. The statutory provisions and relevant authorities were carefully examined by the judge. These included the PII consideration precondition set out in [s.6\(7\)](#) and the further conditions that must apply where that condition is satisfied, in particular the condition in [s.6\(4\)\(a\)](#) that a party to proceedings would be required (for example, under [r.16.5\(2\)](#) or [r.31.6](#)) to disclose sensitive material in the course of the proceedings to another person. Nicol J noted that the requirement to "disclose" in this context extends to disclosure of information. Accordingly, the reference to "material" in [s.6\(4\)](#) is wider than documents that would otherwise be disclosable, and covers, for example, disclosure of information pursuant to [CPR r.18](#) and the requirements of [r.16.5](#).

In *Belhaj v Director of Public Prosecutions [2018] UKSC 33*, the Supreme Court decided by a 3:2 majority that a judicial review of a decision not to prosecute a person were proceedings in a criminal cause or matter within [s.6\(11\)](#) of the 2013 Act, such that the closed material procedure could not apply. In overturning the Divisional court *[2017] EWHC 3056 (Admin)*, the majority found that in its ordinary and natural meaning "proceedings in a criminal cause or matter" include proceedings by way of judicial review of a decision made in a criminal cause, and the statutory context did not call for any narrower meaning than the words themselves suggest.

For an example of a case where the conditions set out above were not even remotely made out, see *Coghan v Chief Constable of Greater Manchester [2018] EWHC 1784 (QB)*.

In *Abdul v Foreign and Commonwealth Office [2018] EWHC 692 (QB)* it was found that proceedings before a Master come within the scope of [s.6\(11\)](#) as being "proceedings before the High Court", which are the "relevant civil proceedings" under [s.6\(1\)](#). Though only a Master's decision, and thus not an authoritative precedent, this ruling tends to suggest that a Master has the power to exercise jurisdiction under [s.6](#).

For further discussion as to the making of declaration under [s.6](#), see *Belhaj v Straw [2017] EWHC 1861 (QB)* at [15]–[32], and *HTF, ZMS v Ministry of Defence [2018] EWHC 1623 (QB)*, at [12]–[19].

Rules of court making provision for the matters referred to in subss.(9) and (10) of this section are found in [CPR Pt 82](#), in particular in [Pt III](#) thereof. The effects of [Pt 2 of the 2013 Act](#) and the role of the rules in Pt 82 were outlined in *F v Security Service [2013] EWHC 3402 (QB); [2014] 1 W.L.R. 1699* (Irwin J). See also *R. (K) v Secretary of State for Defence [2016] EWCA Civ 1149; [2017] 1 W.L.R. 1671*, CA; *R. (K) v Secretary of State for Defence [2017] EWHC 830 (Admin)*. See further Vol.1 para.[82.0.1](#).

Section 7. - Review and revocation of declaration under section 6

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Section 7

Part 2 Disclosure of Sensitive Material

Closed material procedure: general

7.— Review and revocation of declaration under section 6

9B-1409 (1) This section applies where a court seised of relevant civil proceedings has made a declaration under section 6.

(2) The court must keep the declaration under review, and may at any time revoke it if it considers that the declaration is no longer in the interests of the fair and effective administration of justice in the proceedings.

(3) The court must undertake a formal review of the declaration once the pre-trial disclosure exercise in the proceedings has been completed, and must revoke it if it considers that the declaration is no longer in the interests of the fair and effective administration of justice in the proceedings.

(4) The court may revoke a declaration under subsection (2) or (3)—

(a) on the application of—

(i) the Secretary of State (whether or not the Secretary of State is a party to the proceedings), or

(ii) any party to the proceedings, or

(b) of its own motion.

(5) In deciding for the purposes of subsection (2) or (3) whether a declaration continues to be in the interests of the fair and effective administration of justice in the proceedings, the court must consider all of the material that has been put before it in the course of the proceedings (and not just the material on which the decision to make the declaration was based).

(6) Rules of court must make provision—

(a) as to how a formal review is to be conducted under subsection (3),

(b) as to when the pre-trial disclosure exercise is to be considered to have been completed for the purposes of subsection (3).

(7) In relation to proceedings before the Court of Session—

- (a) the reference in subsection (3) to the completion of the pre-trial disclosure exercise is a reference to the fixing of a hearing to determine the merits of the proceedings, and
- (b) the reference in subsection (6)(b) to when the pre-trial disclosure exercise is to be considered to have been completed is a reference to what constitutes a hearing to determine the merits of the proceedings.

Effect of this section

9B-1410 Where a court makes a declaration under [s.6](#), the court must keep the declaration under review and may revoke it. Rules of court dealing with the review and revocation of declarations are contained in Section IV of CPR Pt 82.

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Section 8. - Determination by court of applications in section 6 proceedings

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Section 8

Part 2 Disclosure of Sensitive Material

Closed material procedure: general

8.— Determination by court of applications in section 6 proceedings

9B-1411

(1) Rules of court relating to any relevant civil proceedings in relation to which there is a declaration under section 6 (“section 6 proceedings”) must secure—

- (a) that a relevant person has the opportunity to make an application to the court for permission not to disclose material otherwise than to—
 - (i) the court,
 - (ii) any person appointed as a special advocate, and
 - (iii) where the Secretary of State is not the relevant person but is a party to the proceedings, the Secretary of State,

(b) that such an application is always considered in the absence of every other party to the proceedings (and every other party’s legal representative),

(c) that the court is required to give permission for material not to be disclosed if it considers that the disclosure of the material would be damaging to the interests of national security,

(d) that, if permission is given by the court not to disclose material, it must consider requiring the relevant person to provide a summary of the material to every other party to the proceedings (and every other party’s legal representative),

(e) that the court is required to ensure that such a summary does not contain material the disclosure of which would be damaging to the interests of national security.

(2) Rules of court relating to section 6 proceedings must secure that provision to the effect mentioned in subsection (3) applies in cases where a relevant person—

- (a) does not receive the permission of the court to withhold material, but elects not to disclose it, or

(b) is required to provide another party to the proceedings with a summary of material that is withheld, but elects not to provide the summary.

(3) The court must be authorised—

(a) if it considers that the material or anything that is required to be summarised might adversely affect the relevant person's case or support the case of another party to the proceedings, to direct that the relevant person—

(i) is not to rely on such points in that person's case, or

(ii) is to make such concessions or take such other steps as the court may specify, or

(b) in any other case, to ensure that the relevant person does not rely on the material or (as the case may be) on that which is required to be summarised.

Effect of this section

9B-1412 For these purposes, proceedings in which a declaration has been made are “[section 6](#) proceedings”. This section provides a power for rules of court to make provision specific to the second stage of the process, following the granting of a declaration under [s.6](#), and sets out some of the things that must be included in the rules. See, generally, [CPR Pt 82](#). In that Part an application of the kind mentioned [s.8\(1\)\(a\)](#) is referred to as a “closed material application”.

Section 9. - Appointment of special advocate

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Part 2 Disclosure of Sensitive Material

Closed material procedure: general

9.— Appointment of special advocate

9B-1413

(1) The appropriate law officer may appoint a person to represent the interests of a party in any section 6 proceedings from which the party (and any legal representative of the party) is excluded.

(2) A person appointed under subsection (1) is referred to in this section as appointed as a “special advocate”.

(3) The “*appropriate law officer*” is—

(a) in relation to proceedings in England and Wales, the Attorney General,

(b) in relation to proceedings in Scotland, the Advocate General for Scotland, and

(c) in relation to proceedings in Northern Ireland, the Advocate General for Northern Ireland.

(4) A person appointed as a special advocate is not responsible to the party to the proceedings whose interests the person is appointed to represent.

(5) A person may be appointed as a special advocate only if—

(a) in the case of an appointment by the Attorney General, the person has a general qualification for the purposes of section 71 of the Courts and Legal Services Act 1990,

(b) in the case of an appointment by the Advocate General for Scotland, the person is an advocate or a solicitor who has rights of audience in the Court of Session or the High Court of Justiciary by virtue of section 25A of the Solicitors (Scotland) Act 1980, and

(c) in the case of an appointment by the Advocate General for Northern Ireland, the person is a member of the Bar of Northern Ireland.

Effect of this section

9B-1414 The functions of a special advocate for these purposes are stated in CPR rr.82.10 and 82.11.

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Section 10. - Saving for normal disclosure rules

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Section 10

Part 2 Disclosure of Sensitive Material

Closed material procedure: general

10. Saving for normal disclosure rules

9B-1415 Subject to sections 8, 9 and 11, rules of court relating to section 6 proceedings must secure that the rules of disclosure otherwise applicable to those proceedings continue to apply in relation to the disclosure of material by a relevant person.

Effect of this section

9B-1416 No express provision in [CPR Pt 82](#) secures that, subject to [s.8](#), [9](#) and [11](#), the normal rules of disclosure apply. That result is secured by implication.

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Section 11. - General provisions about section 6 proceedings

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Section 11

Part 2 Disclosure of Sensitive Material

Closed material procedure: general

11.— General provisions about section 6 proceedings

9B-1417

(1) A person making rules of court relating to section 6 proceedings must have regard to the need to secure that disclosures of information are not made where they would be damaging to the interests of national security.

(2) Rules of court relating to section 6 proceedings may make provision—

(a) about the mode of proof and about evidence in the proceedings,

(b) enabling or requiring the proceedings to be determined without a hearing,

(c) about legal representation in the proceedings,

(d) enabling the proceedings to take place without full particulars of the reasons for decisions in the proceedings being given to a party to the proceedings (or to any legal representative of that party),

(e) enabling the court concerned to conduct proceedings in the absence of any person, including a party to the proceedings (or any legal representative of that party),

(f) about the functions of a person appointed as a special advocate,

(g) enabling the court to give a party to the proceedings a summary of evidence taken in the party's absence.

(3) In subsection (2) references to a party to the proceedings do not include the relevant person concerned and (if the Secretary of State is not the relevant person but is a party to the proceedings) the Secretary of State.

(4) The following proceedings are to be treated as section 6 proceedings for the purposes of sections 8 to 10, this section and sections 12 to 14—

(a) proceedings on, or in relation to, an application for a declaration under section 6,

(b) proceedings on, or in relation to, a decision of the court to make a declaration under that section of its own motion,

(c) proceedings on, or in relation to, an application for a revocation under section 7, and

(d) proceedings on, or in relation to, a decision of the court to make a revocation under that section of its own motion.

(5) In proceedings treated as section 6 proceedings by virtue of subsection (4), a relevant person, for the purposes of sections 8 to 10, this section and sections 12 to 14, is a person who would be required to disclose sensitive material in the course of the proceedings.

Effect of this section

9B-1418 This section makes further provision for the exercise of the rule-making power in relation to proceedings described (in subs. (4)) as “[section 6 proceedings](#)”. The mandatory requirement of subs.(1) is secured by [CPR r.82.2\(2\)](#).

Section 14. - Sections 6 to 11: interpretation

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Section 14

Part 2 Disclosure of Sensitive Material

Closed material procedure: general

14.— Sections 6 to 11: interpretation

9B-1419

(1) In sections 6 to 11 and this section— “*enactment*” means an enactment whenever passed or made and includes—

- (a) an enactment contained in this Act,
- (b) an enactment contained in subordinate legislation within the meaning of the Interpretation Act 1978,
- (c) an enactment contained in, or in an instrument made under, an Act of the Scottish Parliament,
- (d) an enactment contained in, or in an instrument made under, Northern Ireland legislation, and
- (e) an enactment contained in, or in an instrument made under, a Measure or Act of the National Assembly for Wales,

“*the Human Rights Convention*” means the Convention within the meaning of the Human Rights Act 1998 (see section 21(1) of that Act),

“*relevant civil proceedings*” has the meaning given by section 6(11),

“*relevant person*” has the meaning given by section 6(8) and includes any person treated as a relevant person by any enactment,

“*section 6 proceedings*” has the meaning given by section 8(1) and includes any proceedings treated as section 6 proceedings by any enactment,

“*sensitive material*” has the meaning given by section 6(11),

“*special advocate*” has the meaning given by section 9(2),

and references to a party’s legal representative do not include a person appointed as a special advocate.

(2) Nothing in sections 6 to 11 and this section (or in any provision made by virtue of them)—

- (a) restricts the power to make rules of court or the matters to be taken into account when doing so,

- (b) affects the common law rules as to the withholding, on grounds of public interest immunity, of any material in any proceedings, or

(c) is to be read as requiring a court or tribunal to act in a manner inconsistent with Article 6 of the Human Rights Convention.

Effect of this section

9B-1420 Subsection (1) provides for the interpretation of certain expressions used in ss.6 to 13. For the avoidance of doubt, subs.(2) contains certain exclusions. Where a public interest immunity application is made in relation to certain material the result is that the material is excluded completely from the proceedings, no matter how central or relevant it is to the proceedings. That conventional view must now be considered subject to *R. (Haralambous) v St Albans Crown Court [2018] UKSC 1; [2018] 2 W.L.R. 357* and cases following that decision. In some circumscribed situations there may now be substantive consideration in a closed material procedure not specifically provided for by statute, of material that is subject to public interest immunity: in particular cases involving applications for warrants (e.g. *Competition and Markets Authority v Concordia International RX (UK) Ltd [2018] EWHC 3158 (Ch)*, and *R. (Jordan) v Chief Constable of Merseyside [2020] EWHC 2274 (Admin)*) and an appeal to the Crown Court against revocation of a certificate under the Firearms Act 1968 (*R. (Commissioner of Police of the Metropolis) v Kingston-upon-Thames Crown Court [2023] EWHC 1938 (Admin)*)). One of the justifications for the introduction of the closed material procedure provided for by Pt 2 of the 2013 Act was the perceived need to enable the court, in restricted circumstances, to consider material for which PII could and should properly be claimed.

Subsection (2)(c) may be significant. In various circumstances, in other statutory closed material procedures, the requirements of art.6 and/or the requirements of EU law have been held to require a “reading down” of the strict prohibition on disclosure of sensitive material. This is considered further in the notes to Pt 82, at para.82.0.1.

Section 17. - Disclosure proceedings

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Justice and Security Act 2013

Section 17

Part 2 Disclosure of Sensitive Material

“Norwich Pharmacal” and similar jurisdictions

17.— Disclosure proceedings

9B-1421

(1) This section applies where, by way of civil proceedings, a person (“A”) seeks the disclosure of information by another person (“B”) on the grounds that—

- (a) wrongdoing by another person (“C”) has, or may have, occurred,
- (b) B was involved with the carrying out of the wrongdoing (whether innocently or not), and
- (c) the disclosure is reasonably necessary to enable redress to be obtained or a defence to be relied on in connection with the wrongdoing.

(2) A court may not, in exercise of its residual disclosure jurisdiction, order the disclosure of information sought (whether that disclosure would be to A or to another person) if the information is sensitive information.

(3) “*Sensitive information*” means information—

- (a) held by an intelligence service,
- (b) obtained from, or held on behalf of, an intelligence service,
- (c) derived in whole or part from information obtained from, or held on behalf of, an intelligence service,
- (d) relating to an intelligence service, or
- (e) specified or described in a certificate issued by the Secretary of State, in relation to the proceedings, as information which B should not be ordered to disclose.

(4) The Secretary of State may issue a certificate under subsection (3)(e) only if the Secretary of State considers that it would be contrary to the public interest for B to disclose—

- (a) the information,
- (b) whether the information exists, or

(c) whether B has the information.

(5) For the purposes of subsection (4) a disclosure is contrary to the public interest if it would cause damage—
(a) to the interests of national security, or

(b) to the interests of the international relations of the United Kingdom.

(6) In this section—

“enactment” means an enactment whenever passed or made and includes an enactment contained in—
(a) an Act of the Scottish Parliament,

(b) Northern Ireland legislation, or

(c) a Measure or Act of the National Assembly for Wales,

“Her Majesty’s forces” has the same meaning as in the Armed Forces Act 2006,

“information” includes—

(a) information contained in any form of document or stored in any other way, and

(b) alleged information,

“intelligence service” means—

(a) the Security Service,

(b) the Secret Intelligence Service,

(c) the Government Communications Headquarters, or

(d) any part of Her Majesty’s forces, or of the Ministry of Defence, which engages in intelligence activities,

“obtained” means obtained directly or indirectly,

“residual disclosure jurisdiction” means any jurisdiction to order the disclosure of information which is not specifically conferred as such a jurisdiction by or under an enactment.

(7) This section—

(a) enables the Secretary of State to issue a certificate under subsection (3)(e) where the Secretary of State is B as it enables the Secretary of State to issue such a certificate where another person is B, and

(b) does not restrict any other right or privilege that the Secretary of State can claim in order to resist an application for the disclosure of information.

Effect of this section

9B-1422 In the Justice and Security Green Paper (Cm 8194) it was noted that cases had arisen in which claimants had sought to use what is known as the Norwich Pharmacal jurisdiction to apply to the courts for disclosure of sensitive Government-held information, usually to use in proceedings against third parties overseas (e.g. *R. (Omar) v Secretary of State for Foreign & Commonwealth*

Affairs [2011] EWCA Civ 1587). In some instances, the information sought was sensitive intelligence information shared by foreign partner governments on a confidential basis. Section 17 prevents the court in certain circumstances from exercising its residual disclosure jurisdiction (the classic example of which is known as the Norwich Pharmacal jurisdiction) so as to order the disclosure of specified types of sensitive Government-held information. There is no equivalent of the Norwich Pharmacal jurisdiction in Scotland; nevertheless the section extends there to prevent such a form of relief arising there in the future in relation to these types of sensitive information.

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Section 18. - Review of certification

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Justice and Security Act 2013

Section 18

Part 2 Disclosure of Sensitive Material

“Norwich Pharmacal” and similar jurisdictions

18.—Review of certification

9B-1423

(1) Where the Secretary of State has issued a certificate under section 17(3)(e) in relation to proceedings, any party to the proceedings may apply to the relevant court to set aside the decision on the ground in subsection (2).

(2) That ground is that the Secretary of State ought not to have determined, in relation to the information specified or described in the certificate, that a disclosure by B as mentioned in section 17(4) would be contrary to the public interest.

(3) In determining whether the decision to issue the certificate should be set aside on the ground in subsection (2), the relevant court must apply the principles which would be applied in judicial review proceedings.

(4) Proceedings arising by virtue of this section are to be treated as section 6 proceedings for the purposes of sections 8 to 14.

(5) Sections 8 to 14 apply in relation to proceedings treated as section 6 proceedings by subsection (4) as if—
(a) the Secretary of State were the relevant person, and

(b) the references to the interests of national security in sections 8, 11 and 13 were references to the interests of national security or the interests of the international relations of the United Kingdom.

(6) In this section “*relevant court*” means—

(a) if the court seised of the proceedings in relation to which the certificate has been issued is a county court, the High Court,

(b) if the court seised of those proceedings is the sheriff, the Court of Session, and

(c) in any other case, the court seised of those proceedings.

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Crime and Courts Act 2013

White Book 2023 | Commentary last updated February 16, 2015

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Crime and Courts Act 2013

Arrangement of Act

(2013 c.22)

Editorial note

9B-1424 The first section (Administration of Justice) in Pt 2 of this Act (ss.17 to 33) contains provisions establishing a single county court and a single family court for England and Wales. In relation to the county court, this is accomplished almost exclusively by amending provisions in existing statutes, particularly in the [Senior Courts Act 1981](#) and the [County Courts Act 1984](#). Amongst other things, Pt 2 also contains provisions dealing with judicial appointments and the deployment of the judiciary, accomplished principally by amending provisions in existing statutes.

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Section 24. - Appeals relating to regulation of the Bar

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Crime and Courts Act 2013

Section 24

Part 2 Courts and Justice

Administration of Justice

24.— Appeals relating to regulation of the Bar

9B-1425

(1) Section 44 of the Senior Courts Act 1981 (extraordinary functions of High Court judges) ceases to have the effect of conferring jurisdiction on judges of the High Court sitting as Visitors to the Inns of Court.

(2) The General Council of the Bar, an Inn of Court, or two or more Inns of Court acting collectively in any manner, may confer a right of appeal to the High Court in respect of a matter relating to—

- (a) regulation of barristers;
- (b) regulation of other persons regulated by the person conferring the right;
- (c) qualifications or training of barristers or persons wishing to become barristers, or
- (d) admission to an Inn of Court or call to the Bar.

(3) An Inn of Court may confer a right of appeal to the High Court in respect of—

- (a) a dispute between the Inn and a member of the Inn, or
- (b) a dispute between members of the Inn;

and in this subsection any reference to a member of an Inn includes a reference to a person wishing to become a member of that Inn.

(4) A decision of the High Court on an appeal under this section is final.

(5) Subsection (4) does not apply to a decision disbarring a person.

(6) The High Court may make such order as it thinks fit on an appeal under this section.

(7) A right conferred under subsection (2) or (3) may be removed by the person who conferred it; and a right conferred under subsection (2) by two or more Inns of Court acting collectively may, so far as relating to any one of the Inns concerned, be removed by that Inn.

Note

9B-1425.

- 1 This section was brought into force on 7 January 2014, by the [Crime and Courts Act 2013 \(Commencement No. 7 and Saving and Consequential Provisions\) Order 2013 \(SI 2013/3176\)](#).

Effect of section

9B-1426 In the [Senior Courts Act 1981 s.44](#) (Extraordinary functions of judges of High Court) preserves duties, authority and powers conferred on or exercisable by High Court judges “by virtue of any statute, law or custom” before that Act came into effect on 28 July 1981. By [subsection \(1\) of s.24](#) that section ceases to have the effect of conferring jurisdiction on judges of the High Court sitting as Visitors to the Inns of Court, and by the other subsections power is conferred on the Bar Council and the Inns of Court to confer rights of appeal to the High Court in relation to matters that were covered by the Visitors’ jurisdiction.

Section 32. - Enabling the making, and use, of films and other recordings of proceedings

White Book 2023 | Commentary last updated August 9, 2016

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Section 9 - Jurisdictional and Procedural Legislation

Section 9B - Other Statutes and Regulations

Crime and Courts Act 2013

Section 32

Part 2 Courts and Justice

Administration of Justice

32.— Enabling the making, and use, of films and other recordings of proceedings

9B-1427

(1) The Lord Chancellor may, by order made with the concurrence of the Lord Chief Justice, provide that a section mentioned in subsection (2) or any provision of either of those sections—

(a) does not apply in relation to the making of a recording or the making of a prescribed recording;

(b) does not apply in relation to the making of a recording, or the making of a prescribed recording, if prescribed conditions are met, including conditions as to a court or tribunal or any other person being satisfied as to anything or agreeing;

(c) does not apply in relation to prescribed use of a prescribed recording.

(2) Those sections are—

(a) section 41 of the Criminal Justice Act 1925 (no photography or drawing in court of persons involved in proceedings, and no publication of contravening images);

(b) section 9 of the Contempt of Court Act 1981 (no sound recording in court without permission, and no public playing of recordings).

(3) In the case of any particular proceedings of a court or tribunal, the court or tribunal may in the interests of justice or in order that a person is not unduly prejudiced—

(a) direct that a provision disapp lied in relation to the proceedings by an order under subsection (1) is, despite the order, to apply in relation to the proceedings, or

(b) direct that a provision disapp lied in relation to the proceedings by an order under subsection (1) is, despite the order, disapp lied in relation to the proceedings only if conditions specified in the direction are met.

(4) No appeal may be made against—

(a) a direction given under subsection (3), or

(b) a decision not to give a direction under that subsection.

(5) In this section—

“recording” means a visual or sound recording on any medium, including (in particular)—

(a) films and other video-recordings, with or without sound;

(b) other photographs, and

(c) sketches and portraits;

“prescribed” means prescribed by an order under subsection (1).

(6) The preceding provisions of this section do not apply in relation to Supreme Court proceedings.

(7) In section 41 of the Criminal Justice Act 1925 after subsection (1) insert—

“(1A) See section 32 of the Crime and Courts Act 2013 for power to provide for exceptions.”

(8) In section 9 of the Contempt of Court Act 1981 after subsection (4) insert—

“(5) See section 32 of the Crime and Courts Act 2013 for power to provide for further exceptions.

Effect of section

9B-1428 This section was brought into effect on 15 July 2013, by the [Crime and Courts Act 2013 \(Commencement No. 3\) Order 2013 \(SI 2013/1725\)](#).

[Section 9 of the Contempt of Court Act 1981](#) states that it is contempt of court to record legal proceedings or to publish recordings of legal proceedings, but provides for exceptions (see para.[3C-67](#) above). The purpose of this section is to permit filming and broadcast of proceedings in courts and tribunals in certain additional circumstances.

The [Court of Appeal \(Recording and Broadcasting\) Order 2013 \(SI 213/2786\)](#) was made by the Lord Chancellor under this section and came into effect on 30 October 2013. The Order prescribes the conditions to be satisfied for the recording and broadcast of hearings in the Court of Appeal. The [Crown Court \(Recording\) Order 2016 \(SI 2016/612\)](#) was made under this section and came into effect on 27 May 2016. The Order makes, subject conditions, provision for the recording of sentencing remarks in Crown Court cases.

[Section 31 of the Act](#) amends [s.9 of the 1981 Act](#) for the purpose of disapplying its provisions in relation to UK Supreme Court proceedings.

Section 33. - Abolition of scandalising the judiciary as form of contempt of court

White Book 2023 | Commentary last updated April 14, 2013

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Crime and Courts Act 2013

Section 33

Part 2 Courts and Justice

Administration of Justice

33.— Abolition of scandalising the judiciary as form of contempt of court

- 9B-1429 (1) Scandalising the judiciary (also referred to as scandalising the court or scandalising judges) is abolished as a form of contempt of court under the common law of England and Wales.
- (2) That abolition does not prevent proceedings for contempt of court being brought against a person for conduct that immediately before that abolition would have constituted both scandalising the judiciary and some other form of contempt of court.

Effect of section

9B-1430 For “scandalising the court” as a form of contempt of court, see para.3C-7 above. This section was brought into force on 25 June 2013, by [s.61\(6\) of the Act](#).

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Regulation 1. - Citation, commencement and extent

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Certification of Enforcement Agents Regulations 2014

(SI 2014/421)

1.— Citation, commencement and extent

- 9B-1433
- (1) These Regulations may be cited as the Certification of Enforcement Agents Regulations 2014 and come into force on 6 April 2014.
 - (2) These Regulations extend to England and Wales only.

Regulation 2. - General interpretation

White Book 2023 | Commentary last updated August 7, 2020

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Certification of Enforcement Agents Regulations 2014

Interpretation

2. General interpretation

9B-1434

In these Regulations—

“*the Act*” means the Tribunals, Courts and Enforcement Act 2007;

“*the 1888 Act*” means the Law of Distress Amendment Act 1888(b);

“*the 1895 Act*” means the Law of Distress Amendment Act 1895(c);

“*the 1988 Rules*” means the Distress for Rent Rules 1988(a);

“*applicant*” means a person applying for a certificate to be issued under section 64 of the Act;

“*certificate*” means a certificate under section 64 of the Act to act as an enforcement agent and includes a certificate under section 7 of the 1888 Act which by virtue of section 64(4) of the Act has effect as a certificate under section 64 of the Act;

“*certificated person*” means a person to whom a certificate has been issued;

“*commercial rent arrears recovery*” has the meaning given by section 72 of the Act;

“*complainant*” means a person who makes a complaint to the court under regulation 9;

“*court*” means the County Court;

“*enforcement agent*” has the meaning given in paragraph 2(1) of Schedule 12 (enforcement agents);

“*Schedule 12*” means Schedule 12 to the Act;

“*the security*” means the security required by regulation 6(1) of these Regulations.

Note

9B-1434.

- 1 The definition “emergency period” was inserted by the [Taking Control of Goods and Certification of Enforcement Agents \(Amendment\) \(Coronavirus\) Regulations 2020 \(SI 2020/451\)](#) reg.3(2), with effect from 25 April 2020 subject to saving specified in [SI 2020/451](#) reg.1(2). A new definition of “emergency period” was thereafter omitted by the [Taking Control of Goods and](#)

Certification of Enforcement Agents (Amendment) (Coronavirus) Regulations 2020 (SI 2020/614) reg.3(2) with effect from 24 June 2020 subject to saving specified in SI 2020/614 reg.1.

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Regulation 3. - Issue of certificates

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Issue of certificates

3. Issue of certificates

- 9B-1435 A certificate may be issued under section 64 of the Act only—
- (a) on application by the person to whom the certificate is to be issued; and
 - (b) if the judge is satisfied that—
 - (i) the applicant is a fit and proper person to hold a certificate;
 - (ii) the applicant possesses sufficient knowledge of the law and procedure relating to powers of enforcement by taking control of goods and of commercial rent arrears recovery to be competent to exercise those powers;
 - (iii) the forms which the applicant intends to use when exercising powers of taking control of goods or commercial rent arrears recovery conform to the design and layout prescribed in the Schedule to these Regulations;
 - (iv) the applicant has lodged the security required by regulation 6(1), or such security is already subsisting; and
 - (v) the applicant does not carry on, and is not and will not be employed in, a business which includes buying debts.

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Regulation 4. - Information about certificates and applications

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Issue of certificates

4.— Information about certificates and applications

9B-1436

(1) The court must compile and maintain a list of all certificated persons who hold a certificate which has not expired or been cancelled.

(2) The list required by paragraph (1) must contain, for each certificated person—

- (a) the certificated person's name;
- (b) the name of the certificated person's employer, if any; (c)
- (c) the date of issue of the certificate; and
- (d) the date on which the certificate ceases to have effect.

(3) The list required by paragraph (1) must be published on a website maintained by or on behalf of Her Majesty's Courts and Tribunals Service.

(4) The court must also publish, on the website referred to in paragraph (3), notice of every application made to the court for a certificate to be issued under section 64.

(5) The notice required by paragraph (4) must contain the following information—

- (a) the applicant's name;
- (b) the name of the applicant's employer, if any;
- (c) the date on which the application will be heard, which must be at least eight days after the date in sub-paragraph (f);
- (d) that any person who knows of any reason or reasons why the applicant may not be a fit and proper person to hold a certificate may give the reason or reasons to the court;
- (e) that reasons given under sub-paragraph (d) must be given in writing;
- (f) the date by which a person must give a reason or reasons to the court under sub-paragraph (d), which must be at least 30 days from the date on which the notice is published on the website.

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Regulation 5. - When application may be heard

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Issue of certificates

5. When application may be heard

9B-1437

No application for a certificate to be issued will be heard before the date in regulation 4(5)(c).

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Regulation 6. - Security

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Certification of Enforcement Agents Regulations 2014

Issue of certificates

6.— Security

9B-1438

- (1) The applicant must, before a certificate is issued—
 (a) lodge in court by way of bond security totalling £10,000; or
 (b) satisfy the judge that security totalling that amount is already subsisting by way of bond.
- (2) The security must be retained once the certificate has been issued for the purpose of securing the certificated person's duties as an enforcement agent and the payment of any reasonable costs, fees and expenses incurred in the investigation of any complaint made to the court against the certificated person in the capacity of an enforcement agent.
- (3) The certificated person must maintain the security throughout the duration of the certificate.
- (4) If at any time during the duration of the certificate the security no longer exists, or is reduced in value so it totals less than £10,000, the certificated person must, by such time as the court may direct, provide fresh security to the satisfaction of the court.

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Regulation 7. - Duration of certificates

White Book 2023 | Commentary last updated August 7, 2020

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Certification of Enforcement Agents Regulations 2014

Issue of certificates

7.— Duration of certificates

9B-1439 (1) Subject to paragraph (3), a certificate has effect, unless cancelled, for two years from the date on which it was issued, subject in the case of a replacement certificate to regulation 8(3).

(2) Subject to paragraph (3), every certificate must state the date on which it ceases to have effect.

(3) If the relevant day during the period beginning with 26th December 2019 and ending on 23rd August 2020, the certificate will continue to have effect for a period of 9 months beginning with the relevant day.

(4) For the purposes of paragraph (3), the relevant day is the day 3 months before the expiry of the period referred to in paragraph (1).

Note

9B-1439.

1 Paragraphs (1), (2) were amended and paras (3), (4) were inserted by the [Taking Control of Goods and Certification of Enforcement Agents \(Amendment\) \(Coronavirus\) Regulations 2020 \(SI 2020/451\)](#) reg.3(3), with effect from 25 April 2020 subject to saving specified in [SI 2020/451](#) reg.1(2). Paragraph 7(3) was amended by the substitution of new definition from “falls” to “day” by [the Taking Control of Goods and Certification of Enforcement Agents \(Amendment\) \(Coronavirus\) Regulations 2020 \(SI 2020/614\)](#) reg.3(3), with effect from 24 June 2020, subject to saving specified in [SI 2020/614](#) reg.1.

Regulation 8. - Issue of replacement certificate following change of relevant details

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9B-1440

Issue of certificates

8.— Issue of replacement certificate following change of relevant details

- (1) If there is for any certificated person a change in any of the matters referred to in regulation 4(2)(a) and (b) (name, business address and employer of a certificated person), the certificated person must as soon as possible notify the court in writing of the change or changes, and produce the certificate to the court.
- (2) Where a certificated person notifies the court and produces the certificate in accordance with paragraph (1), the certificate must be cancelled, and a replacement certificate issued to the certificated person, as soon as possible.
- (3) The replacement certificate must reflect the change notified, but in all other respects, including the date on which it ceases to have effect, must be the same as the cancelled certificate.
- (4) No fee is payable for cancellation of a certificate and issue of a replacement certificate under this regulation.

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Regulation 9. - Complaints as to fitness to hold a certificate

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Regulation 9

Complaints and cancellation of certificates

9.— Complaints as to fitness to hold a certificate

9B-1441

(1) Any person who considers that a certificated person is by reason of the certificated person's conduct in acting as an enforcement agent, or for any other reason, not a fit person to hold a certificate, may submit a complaint in writing to the court.

(2) No fee is payable for submitting a complaint under paragraph (1).

(3) A complaint submitted under paragraph (1) must provide details of the matters complained of and explain the reason or reasons why the certificated person is not a fit person to hold a certificate.

(4) No complaint submitted under paragraph (1) may be considered by the judge until the certificated person has been provided with a copy of the complaint and given an opportunity to respond to it in writing.

(5) If on considering the complaint and the certificated person's response the judge is satisfied that the certificated person remains a fit and proper person to hold a certificate, the complaint must be dismissed.

(6) If—

(a) the certificated person fails to respond; or

(b) on considering the complaint and the certificated person's response the judge is not satisfied that the certificated person remains a fit and proper person to hold a certificate,

the complaint must be considered at a hearing.

(7) If a complaint is to be considered at a hearing under paragraph (6)—

(a) the certificated person must attend for examination and may make representations; and

(b) the complainant may attend and make representations, or may make representations in writing.

(8) If after a hearing the judge is satisfied that the certificated person remains a fit and proper person to hold a certificate, the complaint must be dismissed.

(9) No appeal lies against the dismissal of a complaint under paragraph (5) or paragraph (8).

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Regulation 10. - Cancellation or suspension of certificates

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Complaints and cancellation of certificates

10.— Cancellation or suspension of certificates

9B-1442

(1) If, following consideration of a complaint at a hearing, the judge is satisfied that the certificated person is not a fit and proper person to hold a certificate, the judge may—

(a) cancel the certificate; or

(b) suspend the certificate.

(2) If the certificate is cancelled, the judge may order that the certificated person must, before making any further application to be issued with a certificate, have fulfilled such conditions as to training or any other conditions the judge considers necessary for the certificated person to be a fit and proper person to hold a certificate.

(3) If the certificate is suspended the judge may order that the suspension is not to be lifted until the certificated person has fulfilled such conditions as to training or any other conditions the judge considers necessary for the certificated person to be a fit and proper person to hold a certificate.

(4) The court must, whether the certificate is suspended or cancelled, consider whether to make an order under regulation 13(2).

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Regulation 11. - Application of security after consideration of complaint at a hearing

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Complaints and cancellation of certificates

11.— Application of security after consideration of complaint at a hearing

9B-1443

(1) When a complaint has been considered at a hearing, the judge may, if satisfied that the complaint was well founded, order that the security be forfeited either wholly or in part, and that the forfeited amount be paid, in such proportions as the judge considers appropriate—
(a) to the complainant by way of compensation for failure in due performance of the certificated person's duties as an enforcement agent or for the complainant's costs or expenses in attending and making representations; and
(b) where costs or expenses have been incurred by the court in considering the complaint at a hearing, to Her Majesty's Paymaster General by way of reimbursement of those costs or expenses.

(2) The judge may make an order under paragraph (1) whether or not the certificate is cancelled or suspended.

(3) If an order is made under paragraph (1) but the certificate is not cancelled, regulation 6(4) applies.

(4) If the certificate is cancelled, the security must, subject to the making of an order under paragraph (1), be cancelled and the balance of any deposit, following payment of any amounts ordered to be forfeited, returned to the certificated person.

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Regulation 12. - Surrender of certificate

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Complaints and cancellation of certificates

12.— Surrender of certificate

- 9B-1444
- (1) When a certificate is cancelled or expires, it must be surrendered to the court, unless the judge directs otherwise.
 - (2) If a certificated person ceases to carry on business as an enforcement agent, the certificated person must unless the judge orders otherwise surrender the certificate to the court, and the certificate will be treated as if it had expired on the date on which it was surrendered.
 - (3) The security must be cancelled and the balance of any deposit returned to the certificated person following surrender of a certificate.

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Regulation 13. - Continuing effect of certificate in certain circumstances

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Complaints and cancellation of certificates

13.— Continuing effect of certificate in certain circumstances

9B-1445

(1) This regulation applies in any case where—

(a) a certificate is cancelled or has expired, or is suspended; and

(b) before the cancellation, expiry or suspension, the certificated person took control of goods (within the meaning given by paragraph 13(1) of Schedule 12 (ways of taking control)).

(2) In such a case, unless the court orders otherwise, the goods continue to be controlled goods and the certificate continues to have effect, for the purpose of any action which may be taken in relation to the goods as controlled goods under Schedule 12, as if it had not been cancelled, or expired, or suspended as the case may be.

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Regulation 14. - Applications for grant of certificate made under the 1988 Rules

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Certification of Enforcement Agents Regulations 2014

Transitional, saving and consequential provisions

14.— Applications for grant of certificate made under the 1988 Rules

9B-1446

(1) The 1988 Rules continue to apply in relation to—

- (a) an application for the grant of a certificate which was made before 6 April 2014 by a person who does not hold a certificate but was not determined before that date;
- (b) an application for the grant of a certificate to replace an existing certificate which ceases to have effect on or before 6 August 2014.

(2) A certificate granted on or after 6 April 2014 pursuant to an application referred to in paragraph (1)(a) or (b) has effect as a certificate under section 64 of the Act in the same way as a certificate under section 7 of the 1888 Act which is in force on that date.

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Regulation 15. - Duration of certificates granted under section 7 of the 1888 Act

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Section 9 - Jurisdictional and Procedural Legislation

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Certification of Enforcement Agents Regulations 2014

Transitional, saving and consequential provisions

15. Duration of certificates granted under section 7 of the 1888 Act

9B-1447 A certificate under section 7 of the 1888 Act which is in force on 6 April 2014 shall have effect for the period provided for when it was granted.

Editorial note

9B-1448 The Schedule to the [Certification of Enforcement Agents Regulations \(SI 2014/421\)](#) contains new enforcement regulation forms, which we publish in the online Civil Procedure Forms Volume under the heading “Enforcement Regulation Forms”.

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Civil Liability Act 2018

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Civil Liability Act 2018

Arrangement of Act

(2018 c.29)

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Section 1. - "Whiplash injury" etc

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Civil Liability Act 2018

1

PART 1 Whiplash

Whiplash injuries

1. "Whiplash injury" etc

9B-1449+



(1) In this Part "*whiplash injury*" means an injury of soft tissue in the neck, back or shoulder that is of a description falling within subsection (2), but not including an injury excepted by subsection (3).

(2) An injury falls within this subsection if it is—

- (a) a sprain, strain, tear, rupture or lesser damage of a muscle, tendon or ligament in the neck, back or shoulder, or
- (b) an injury of soft tissue associated with a muscle, tendon or ligament in the neck, back or shoulder.

(3) An injury is excepted by this subsection if—

- (a) it is an injury of soft tissue which is a part of or connected to another injury, and
- (b) the other injury is not an injury of soft tissue in the neck, back or shoulder of a description falling within subsection (2).

(4) For the purposes of this Part a person suffers a whiplash injury because of driver negligence if—

- (a) when the person suffers the injury, the person
 - (i) is using a motor vehicle other than a motor cycle on a road or other public place in England or Wales, or
 - (ii) is being carried in or on a motor vehicle other than a motor cycle while another uses the vehicle on a road or other public place in England or Wales,
- (b) the injury is caused
 - (i) by the negligence of one or more other persons, or
 - (ii) partly by the negligence of one or more other persons and partly by the negligence of the person who suffers the injury, and

(c) the negligence of the other person or persons consists in an act or acts done by the person or persons while using a motor vehicle on a road or other public place in England or Wales.

(5) The fact that the act or acts constituting the negligence of the other person or persons is or are also sufficient to establish another cause of action does not prevent subsection (4)(b) being satisfied.

(6) For the purposes of this section references to a person being carried in or on a vehicle include references to a person entering or getting on to, or alighting from, the vehicle.

(7) In this section—

"act" includes omission;

"motor cycle" has the meaning given by section 185(1) of the Road Traffic Act 1988 ;

"motor vehicle" means a mechanically propelled vehicle intended or adapted for use on roads;

"road" means a highway or other road to which the public has access, and includes bridges over which a road passes.

Section 2. - Power to amend section 1

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Civil Liability Act 2018

PART 1 Whiplash

Whiplash injuries

2. Power to amend section 1

9B-1450+

(1) The Lord Chancellor may by regulations amend the definition of

"whiplash injury"

in section 1 , but not so as to include an injury of soft tissue other than soft tissue in the neck, back or shoulder.

(2) Before making regulations under subsection (1), the Lord Chancellor must—

(a) review the definition of "whiplash injury" in section 1 ,

(b) as part of the review, consider whether to amend section 1 ,

(c) prepare and publish a report of the review, including a decision whether or not to amend section 1 and the reasons for the decision, and

(d) lay a copy of the report before Parliament.

(3) After laying the copy of the report before Parliament and before making regulations under subsection (1), the Lord Chancellor must consult—

(a) the Lord Chief Justice;

(b) the General Council of the Bar;

(c) the Law Society;

(d) the Chief Medical Officer of the Department of Health and Social Care;

(e) the member of staff of the Welsh Government designated by the Welsh Ministers as the Chief Medical Officer for Wales;

(f) such other persons or bodies as the Lord Chancellor considers appropriate.

(4) The Lord Chancellor may not carry out the first review under subsection (2) before the end of the period of three years beginning with the day on which section 1 comes into force.

(5) After the first review, the Lord Chancellor may not carry out a review under subsection (2) before the end of the period of three years beginning with—

(a) if regulations under subsection (1) were made following the previous review, the day on which those regulations came into force, or

(b) if no regulations under subsection (1) were made following the previous review, the day on which a copy of the report of the previous review was laid before Parliament.

(6) A statutory instrument containing regulations under this section is subject to affirmative resolution procedure.

Section 3. - Damages for whiplash injuries

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PART 1 Whiplash

Damages

3. Damages for whiplash injuries

9B-1451+



(1) This section applies in relation to the determination by a court of damages for pain, suffering and loss of amenity in a case where—

(a) a person ("the claimant") suffers a whiplash injury because of driver negligence, and

(b) the duration of the whiplash injury or any of the whiplash injuries suffered on that occasion—

(i) does not exceed, or is not likely to exceed, two years, or

(ii) would not have exceeded, or would not be likely to exceed, two years but for the claimant's failure to take reasonable steps to mitigate its effect.

(2) The amount of damages for pain, suffering and loss of amenity payable in respect of the whiplash injury or injuries, taken together, is to be an amount specified in regulations made by the Lord Chancellor.

(3) If the claimant suffers one or more minor psychological injuries on the same occasion as the whiplash injury or injuries, the amount of damages for pain, suffering and loss of amenity payable in respect of the minor psychological injury or the minor psychological injuries, taken together, is to be an amount specified in regulations made by the Lord Chancellor.

(4) If regulations made by the Lord Chancellor so provide, the amount of damages for pain, suffering and loss of amenity payable in respect of—

(a) the whiplash injury or injuries, and

(b) a minor psychological injury or injuries suffered by the claimant on the same occasion as the whiplash injury or injuries,

taken together, is to be an amount specified in regulations made by the Lord Chancellor (notwithstanding subsections (2) and (3)).

(5) Regulations under this section may in particular—

(a) specify different amounts in respect of different durations of injury;

(b) specify amounts in respect of minor psychological injuries by reference to the duration of the related whiplash injury or injuries.

(6) Regulations under this section may provide for a person to be treated as if the person had taken reasonable steps to mitigate the effect of the person's whiplash injury or minor psychological injury.

(7) Regulations under this section amending or replacing earlier regulations may increase or reduce amounts payable in respect of injuries.

(8) Nothing in this section prevents a court, in a case where a person suffers an injury or injuries in addition to an injury or injuries to which regulations under this section apply, awarding an amount of damages for pain, suffering and loss of amenity that reflects the combined effect of the person's injuries (subject to the limits imposed by regulations under this section).

(9) Nothing in this section prevents the amount of damages payable being reduced by virtue of section 1 of the Law Reform (Contributory Negligence) Act 1945 .

(10) This section does not apply in relation to damages payable by a person because of the person's breach of the duty under section 143(1)(b) of the Road Traffic Act 1988 (duty not to cause or permit any other person to drive without insurance or security in respect of third party risks).

(11) The Lord Chancellor must consult the Lord Chief Justice before making regulations under this section.

(12) A statutory instrument containing regulations under this section is subject to affirmative resolution procedure.

Section 4. - Review of regulations under section 3

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PART 1 Whiplash

Damages

4. Review of regulations under section 3

9B-1452+

- (1) The Lord Chancellor must carry out reviews of regulations made under section 3 .
- (2) The first review must be completed before the end of the period of three years beginning with the day on which the first regulations under section 3 come into force.
- (3) Subsequent reviews must be completed before the end of the period of three years beginning with the day on which the previous review was completed.
- (4) The Lord Chancellor must prepare and publish a report of each review.
- (5) The Lord Chancellor must lay a copy of each report before Parliament.

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Section 5. - Uplift in exceptional circumstances

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PART 1 Whiplash

Damages

5. Uplift in exceptional circumstances

9B-1453+



- (1) Regulations made by the Lord Chancellor may provide for a court—
- (a) to determine that the amount of damages payable for pain, suffering and loss of amenity in respect of one or more whiplash injuries is an amount greater than the tariff amount relating to that injury or those injuries;
 - (b) to determine that the amount of damages payable for pain, suffering and loss of amenity in respect of one or more whiplash injuries and one or more minor psychological injuries, taken together, is an amount greater than the tariff amount relating to those injuries;
 - (c) in a case where the court considers the combined effect of—
 - (i) an injury or injuries in respect of which a tariff amount is specified by regulations under section 3(2) or (4), and
 - (ii) one or more other injuries,to determine that an amount greater than the tariff amount is to be taken into account when deciding the amount of damages payable for pain, suffering and loss of amenity in respect of the injuries mentioned in sub-paragraphs (i) and (ii).
- (2) The regulations may require a court to be satisfied, before making the determination mentioned in subsection (1)(a), (b) or (c), that—
- (a) the degree of pain, suffering or loss of amenity caused by the whiplash injury or injuries in question makes it appropriate to use the greater amount, and
 - (b) it is the case that—
 - (i) the whiplash injury is, or one or more of the whiplash injuries are, exceptionally severe, or
 - (ii) where the person's circumstances increase the pain, suffering or loss of amenity caused by the injury or injuries, those circumstances are exceptional.
- (3) The regulations must specify the maximum percentage by which the greater amount mentioned in subsection (1)(a), (b) or (c) may exceed the relevant tariff amount.

(4) Regulations under this section amending or replacing earlier regulations may increase or reduce the maximum percentage.

(5) The Lord Chancellor must consult the Lord Chief Justice before making regulations under this section.

(6) A statutory instrument containing regulations under this section is subject to affirmative resolution procedure.

(7) In this section "*tariff amount*" means—

(a) in relation to one or more whiplash injuries, the amount specified in respect of the injury or injuries by regulations under section 3(2) ;

(b) in relation to one or more whiplash injuries and one or more minor psychological injuries, the amount specified in respect of the injuries by regulations under section 3(4) .

Section 6. - Rules against settlement before medical report

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PART 1 Whiplash

Settlement of whiplash claims

6. Rules against settlement before medical report

9B-1454+



- (1) A regulated person is in breach of this section if—
- (a) the regulated person knows or has reason to suspect that a whiplash claim is being made,
 - (b) the regulated person does, or arranges or advises the doing of, an act mentioned in subsection (2), without first seeing appropriate evidence of the whiplash injury or injuries, and
 - (c) the regulated person is acting as such when the regulated person does, or arranges or advises the doing of, that act.
- (2) The acts referred to in subsection (1) are—
- (a) inviting a person to offer a payment in settlement of the claim;
 - (b) offering a payment in settlement of the claim;
 - (c) making a payment in settlement of the claim;
 - (d) accepting a payment in settlement of the claim.
- (3) The Lord Chancellor may by regulations make provision about what constitutes appropriate evidence of an injury for the purposes of this section.
- (4) The regulations may in particular—
- (a) specify the form of any evidence of an injury;
 - (b) specify the descriptions of persons who may provide evidence of an injury;
 - (c) require persons to be accredited for the purpose of providing evidence of an injury;
 - (d) make provision about accrediting persons, including provision for a person to be accredited by a body specified in the regulations.

(5) A statutory instrument containing regulations under this section is subject to affirmative resolution procedure.

(6) In this section "*whiplash claim*" means a claim that consists only of, or so much of a claim as consists of, a claim for damages for pain, suffering and loss of amenity caused by—

(a) one or more whiplash injuries suffered by a person on a particular occasion because of driver negligence and in relation to which section 3 applies, or

(b) a whiplash injury or injuries within paragraph (a) suffered by a person on a particular occasion and one or more minor psychological injuries suffered by the person on the same occasion as the whiplash injury or injuries.

Section 7. - Effect of rules against settlement before medical report

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PART 1 Whiplash

Settlement of whiplash claims

7. Effect of rules against settlement before medical report

(1) The relevant regulator must ensure that it has appropriate arrangements for monitoring and enforcing compliance with the restrictions imposed on regulated persons by section 6 .

(2) The relevant regulator may make rules for the purposes of subsection (1).

(3) The rules may in particular provide that, in relation to anything done in breach of section 6 , the relevant regulator may exercise any powers that the regulator would have in relation to anything done by the regulated person in breach of another restriction (subject to subsections (5) and (6)).

(4) Where the relevant regulator is the Financial Conduct Authority, section 8 applies instead of subsections (1) to (3).

(5) A breach of section 6 —

(a) does not make a person guilty of an offence, and

(b) does not give rise to a right of action for breach of statutory duty.

(6) A breach of section 6 does not make an agreement to settle the whiplash claim in question void or unenforceable.

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Section 8. - Regulation by the Financial Conduct Authority

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PART 1 Whiplash

Settlement of whiplash claims

8. Regulation by the Financial Conduct Authority

9B-1456+



(1) The Treasury may make regulations to enable the Financial Conduct Authority, where it is the relevant regulator, to take action for monitoring and enforcing compliance with the restrictions imposed on regulated persons by section 6 .

(2) The regulations may apply, or make provision corresponding to, any of the provisions of the Financial Services and Markets Act 2000 with or without modification.

(3) Those provisions include in particular—

- (a) provisions as to investigations, including powers of entry and search and criminal offences;
- (b) provisions for the grant of an injunction in relation to a contravention or anticipated contravention;
- (c) provisions giving Ministers or the Financial Conduct Authority powers to make subordinate legislation;
- (d) provisions for the Financial Conduct Authority to charge fees.

(4) The power to make regulations under this section may not be used to make provision inconsistent with section 7(5) and (6) .

(5) A statutory instrument containing regulations under this section is subject to affirmative resolution procedure.

Section 9. - Interpretation

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PART 1 Whiplash

Interpretation

9. Interpretation

9B-1457+



- (1) For the purposes of this Part, in relation to an act mentioned in section 6(2), a regulator listed in the first column is the relevant regulator in relation to the regulated person listed in the corresponding entry in the second column.

REGULATOR	REGULATED PERSON
The Financial Conduct Authority	An authorised person (within the meaning of the Financial Services and Markets Act 2000) of a description specified in regulations made by the Treasury
The Claims Management Regulator	A person authorised by the Regulator under section 5(1)(a) of the Compensation Act 2006 to provide regulated claims management services
The General Council of the Bar	A person authorised by the Council to carry on a reserved legal activity within the meaning of the Legal Services Act 2007
The Law Society	A person authorised by the Society to carry on a reserved legal activity within the meaning of the Legal Services Act 2007
The Chartered Institute of Legal Executives	A person authorised by the Institute to carry on a reserved legal activity within the meaning of the Legal Services Act 2007
A licensing authority for the purposes of Part 5 of the Legal Services Act 2007 (alternative business structures)	A person who is— (a) licensed by the authority to carry on a reserved legal activity within the meaning of the Legal Services Act 2007, and

	(b) of a description specified in regulations made by the Lord Chancellor
A regulatory body specified for the purposes of this subsection in regulations made by the Lord Chancellor	A person of a description specified in the regulations in relation to the body
<p>(2) A statutory instrument containing regulations under subsection (1) is subject to negative resolution procedure.</p>	
<p>(3) In this Part—</p>	
<p> (a) a reference to making a claim against a person includes a reference to notifying a person of the basis of a claim;</p>	
<p> (b) a reference to making a payment to a person includes a reference to conferring a benefit on a person or a third party.</p>	
<p>(4) In this Part—</p>	
<p> <i>"benefit"</i> means—</p>	
<p> (a) any benefit, whether or not in money or other property and whether temporary or permanent, and</p>	
<p> (b) any opportunity to obtain a benefit;</p>	
<p> <i>"claim"</i> includes counter-claim;</p>	
<p> <i>"whiplash claim"</i> has the meaning given by section 6(6) .</p>	

"SCHEDULE 1 - ASSUMED RATE OF RETURN ON INVESTMENT OF DAMAGES: ENGLAND AND WALES

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PART 2 Personal Injury discount rate

10. Assumed rate of return on investment of damages

9B-1458+

(1) Before section 1 of the Damages Act 1996 (assumed rate of return on investment of damages) insert—

+ "A1 Assumed rate of return on investment of damages: England and Wales

(1) In determining the return to be expected from the investment of a sum awarded as damages for future pecuniary loss in an action for personal injury the court must, subject to and in accordance with rules of court made for the purposes of this section, take into account such rate of return (if any) as may from time to time be prescribed by an order made by the Lord Chancellor.

(2) Subsection (1) does not however prevent the court taking a different rate of return into account if any party to the proceedings shows that it is more appropriate in the case in question.

(3) An order under subsection (1) may prescribe different rates of return for different classes of case.

(4) An order under subsection (1) may in particular distinguish between classes of case by reference to—

(a) the description of future pecuniary loss involved;

(b) the length of the period during which future pecuniary loss is expected to occur;

(c) the time when future pecuniary loss is expected to occur.

(5) Schedule A1 (which makes provision about determining the rate of return to be prescribed by an order under subsection (1)) has effect.

(6) An order under this section is to be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament."

(2) Before the Schedule to the Damages Act 1996 insert—

**"SCHEDULE 1 ASSUMED RATE OF RETURN ON INVESTMENT OF DAMAGES:
ENGLAND AND WALES**

1 Periodic reviews of the rate of return

(1) The Lord Chancellor must review the rate of return periodically in accordance with this paragraph.

(2) The first review of the rate of return must be started within the 90 day period following commencement.

(3) Each subsequent review of the rate of return must be started within the 5 year period following the last review.

(4) It is for the Lord Chancellor to decide—

(a) when, within the 90 day period following commencement, a review under subparagraph (2) is to be started;

(b) when, within the 5 year period following the last review, a review under subparagraph (3) is to be started.

(5) In this paragraph—

"*90 day period following commencement*" means the period of 90 days beginning with the day on which this paragraph comes into force;

"*5 year period following the last review*" means the period of five years beginning with the day on which the last review under this paragraph (whether under subparagraph (2) or (3)) is concluded.

(6) For the purposes of this paragraph a review is concluded on the day when the Lord Chancellor makes a determination under paragraph 2 or 3 (as the case may be) as a result of the review.

2 Conducting the first review

(1) This paragraph applies when the Lord Chancellor is required by paragraph 1(2) to conduct a review of the rate of return.

(2) The Lord Chancellor must review the rate of return and determine whether it should be—

(a) changed to a different rate, or

(b) kept unchanged.

(3) The Lord Chancellor must conduct that review and make that determination within the 140 day review period.

(4) In conducting the review, the Lord Chancellor must consult—

(a) the Government Actuary, and

(b) the Treasury.

(5) The consultation of the Government Actuary must start within the period of 20 days beginning with the day on which the 140 day review period starts.

(6) The Government Actuary must respond to the consultation within the period of 80 days beginning with the day on which the Government Actuary's response to the consultation is requested.

(7) The exercise of the power of the Lord Chancellor under this paragraph to determine whether the rate of return should be changed or kept unchanged is subject to paragraph 4 .

(8) When deciding what response to give to the Lord Chancellor under this paragraph, the Government Actuary and the Treasury must take into account the duties imposed on the Lord Chancellor by paragraph 4 .

(9) During any period when the office of Government Actuary is vacant, a reference in this paragraph to the Government Actuary is to be read as a reference to the Deputy Government Actuary.

(10) In this paragraph "*140 day review period*" means the period of 140 days beginning with the day which the Lord Chancellor decides (under paragraph 1) should be the day on which the review is to start.

3 Conducting later reviews

(1) This paragraph applies whenever the Lord Chancellor is required by paragraph 1(3) to conduct a review of the rate of return.

(2) The Lord Chancellor must review the rate of return and determine whether it should be—

(a) changed to a different rate, or

(b) kept unchanged.

(3) The Lord Chancellor must conduct that review and make that determination within the 180 day review period.

(4) In conducting the review, the Lord Chancellor must consult—

(a) the expert panel established for the review, and

(b) the Treasury.

(5) The expert panel must respond to the consultation within the period of 90 days beginning with the day on which its response to the consultation is requested.

(6) The exercise of the power of the Lord Chancellor under this paragraph to determine whether the rate of return should be changed or kept unchanged is subject to paragraph 4 .

(7) When deciding what response to give to the Lord Chancellor under this paragraph, the expert panel and the Treasury must take into account the duties imposed on the Lord Chancellor by paragraph 4 .

(8) In this paragraph "*180 day review period*" means the period of 180 days beginning with the day which the Lord Chancellor decides (under paragraph 1) should be the day on which the review is to start.

4 Determining the rate of return

(1) The Lord Chancellor must comply with this paragraph when determining under paragraph 2 or 3 whether the rate of return should be changed or kept unchanged ("the rate determination").

(2) The Lord Chancellor must make the rate determination on the basis that the rate of return should be the rate that, in the opinion of the Lord Chancellor, a recipient of relevant damages could reasonably be expected to achieve if the recipient invested the relevant damages for the purpose of securing that—

(a) the relevant damages would meet the losses and costs for which they are awarded;

(b) the relevant damages would meet those losses and costs at the time or times when they fall to be met by the relevant damages; and

(c) the relevant damages would be exhausted at the end of the period for which they are awarded.

(3) In making the rate determination as required by sub-paragraph (2), the Lord Chancellor must make the following assumptions—

(a) the assumption that the relevant damages are payable in a lump sum (rather than under an order for periodical payments);

(b) the assumption that the recipient of the relevant damages is properly advised on the investment of the relevant damages;

(c) the assumption that the recipient of the relevant damages invests the relevant damages in a diversified portfolio of investments;

(d) the assumption that the relevant damages are invested using an approach that involves—

(i) more risk than a very low level of risk, but

(ii) less risk than would ordinarily be accepted by a prudent and properly advised individual investor who has different financial aims.

(4) That does not limit the assumptions which the Lord Chancellor may make.

(5) In making the rate determination as required by sub-paragraph (2), the Lord Chancellor must—

(a) have regard to the actual returns that are available to investors;

(b) have regard to the actual investments made by investors of relevant damages; and

(c) make such allowances for taxation, inflation and investment management costs as the Lord Chancellor thinks appropriate.

(6) That does not limit the factors which may inform the Lord Chancellor when making the rate determination.

(7) In this paragraph "*relevant damages*" means a sum awarded as damages for future pecuniary loss in an action for personal injury.

5 Determination

When the Lord Chancellor makes a rate determination, the Lord Chancellor must—

(a) give reasons for the rate determination made, and

(b) publish such information as the Lord Chancellor thinks appropriate about—

(i) the response of the expert panel established for the review, or

(ii) in the case of a review required by paragraph 1(2), the response of the Government Actuary or the Deputy Government Actuary (as the case may be).

6 Expert panel

(1) For each review of a rate of return required by paragraph 1(3), the Lord Chancellor is to establish a panel (referred to in this Schedule as an "*expert panel*") consisting of—

(a) the Government Actuary, who is to chair the panel; and

(b) four other members appointed by the Lord Chancellor.

(2) The Lord Chancellor must exercise the power to appoint the appointed members to secure that—

(a) one appointed member has experience as an actuary;

(b) one appointed member has experience of managing investments;

(c) one appointed member has experience as an economist;

(d) one appointed member has experience in consumer matters as relating to investments.

(3) An expert panel established for a review of a rate of return ceases to exist once it has responded to the consultation relating to the review.

(4) A person may be a member of more than one expert panel at any one time.

(5) A person may not become an appointed member if the person is ineligible for membership.

(6) A person who is an appointed member ceases to be a member if the person becomes ineligible for membership.

(7) The Lord Chancellor may end an appointed member's membership of the panel if the Lord Chancellor is satisfied that—

(a) the person is unable or unwilling to take part in the panel's activities on a review conducted under paragraph 1 ;

(b) it is no longer appropriate for the person to be a member of the panel because of gross misconduct or impropriety;

(c) the person has become bankrupt, a debt relief order (under Part 7A of the Insolvency Act 1986) has been made in respect of the person, the person's estate has been sequestered or the person has made an arrangement with or granted a trust deed for creditors.

(8) During any period when the office of Government Actuary is vacant the Deputy Government Actuary is to be a member of the panel and is to chair it.

(9) A person is "ineligible for membership" of an expert panel if the person is—

(a) a Minister of the Crown, or

(b) a person serving in a government department in employment in respect of which remuneration is payable out of money provided by Parliament.

(10) In this paragraph "*appointed member*" means a person appointed by the Lord Chancellor to be a member of an expert panel.

7 Proceedings, powers and funding of an expert panel

(1) The quorum of an expert panel is four members, one of whom must be the Government Actuary (or the Deputy Government Actuary when the office of Government Actuary is vacant).

(2) In the event of a tied vote on any decision, the person chairing the panel is to have a second casting vote.

(3) The panel may—

(a) invite other persons to attend, or to attend and speak at, any meeting of the panel;

(b) when exercising any function, take into account information submitted by, or obtained from, any other person (whether or not the production of the information has been commissioned by the panel).

(4) The Lord Chancellor must make arrangements for an expert panel to be provided with the resources which the Lord Chancellor considers to be appropriate for the panel to exercise its functions.

(5) The Government Actuary's Department, or any other government department, may enter into arrangements made by the Lord Chancellor under sub-paragraph (4).

(6) The Lord Chancellor must make arrangements for the appointed members of an expert panel to be paid any remuneration and expenses which the Lord Chancellor considers to be appropriate.

8 Application of this Schedule where there are several rates of return

(1) This paragraph applies if two or more rates of return are prescribed under section A1 .

(2) The requirements—

(a) under paragraph 1 for a review to be conducted, and

(b) under paragraph 2 or 3 relating to how a review is conducted,

apply separately in relation to each rate of return.

(3) As respects a review relating to a particular rate of return, a reference in this Schedule to the last review conducted under a particular provision is to be read as a reference to the last review relating to that rate of return.

9 Interpretation

(1) In this Schedule—

"*expert panel*" means a panel established in accordance with paragraph 6 ;

"*rate determination*" has the meaning given by paragraph 4 ;

"*rate of return*" means a rate of return for the purposes of section A1 .

(2) A provision of this Schedule that refers to the rate of return being changed is to be read as also referring to—

(a) the existing rate of return being replaced with no rate;

(b) a rate of return being introduced where there is no existing rate;

(c) the existing rate of return for a particular class of case being replaced with no rate;

(d) a rate of return being introduced for a particular class of case for which there is no existing rate.

(3) A provision of this Schedule that refers to the rate of return being kept unchanged is to be read as also referring to—

(a) the position that there is no rate of return being kept unchanged;

(b) the position that there is no rate of return for a particular class of case being kept unchanged.

(4) A provision of this Schedule that refers to a review of the rate of return is to be read as also referring to—

(a) a review of the position that no rate of return is prescribed;

(b) a review of the position that no rate of return is prescribed for a particular class of case."

(3) Any order made by the Lord Chancellor under section 1(1) of the Damages Act 1996 which relates to England and Wales and is in force immediately before the time when subsection (1) comes into force is to be treated after that time as if made by the Lord Chancellor under section A1(1) of that Act.

(4) In consequence of the amendments made by subsections (1) and (2), the Damages Act 1996 is amended as follows—

(a) section 1 is omitted;

(b) in section 2(4)(a) , for

"the Schedule "

substitute

" Schedule 1 "

;

(c) in section 2(7)(b) , for

"the Schedule "

substitute

" Schedule 1 "

;

(d) in section 6(9) , for

"The Schedule "

substitute

" Schedule 1 "

;

(e) the existing Schedule becomes Schedule 1 (and, accordingly, for the heading

"Schedule"

substitute the heading

" Schedule 1 "

).

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Section 11. - Report on effect of Parts 1 and 2

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PART 3 Miscellaneous and general

11. Report on effect of Parts 1 and 2

9B-1459+



(1) Regulations made by the Treasury may require an insurer to provide information to the FCA about the effect of Parts 1 and 2 of this Act on individuals who hold policies of insurance with the insurer.

(2) The regulations may provide that an insurer is required to provide information only if it has issued third party personal injury policies of insurance on or after 1 April 2020 to individuals domiciled in England and Wales.

(3) The regulations may—

(a) specify the information or descriptions of information to be provided;

(b) specify how information is to be provided;

(c) specify when information is to be provided;

(d) require that information or specified descriptions of information be audited by a qualified auditor before being provided;

(e) make provision about the audit;

(f) require that details of the auditor be provided to the FCA.

(4) Regulations under subsection (3)(a) may in particular require an insurer to provide information, by reference to each of the report years, about—

(a) the amount paid by the insurer during the report period under its relevant third party personal injury policies of insurance in respect of personal injuries sustained by third parties, where the amount of damages for the injury is governed by the law of England and Wales;

(b) the amount that the insurer might reasonably have been expected to pay in respect of those injuries if this Act had not been passed;

(c) the mean of the amounts paid during the report period under those policies in respect of those injuries;

(d) what might reasonably have been expected to be the mean of the amounts paid in respect of those injuries if this Act had not been passed;

(e) the amounts described in paragraphs (a) to (d), determined by reference only to cases where—

- (i) the amount paid by an insurer under a policy, or
 - (ii) the amount that an insurer might reasonably have been expected to pay under a policy,
- falls within one of the bands specified in the regulations;
- (f) the amount charged by the insurer by way of premiums for relevant third party personal injury policies of insurance where the cover starts in the report period;
 - (g) the amount that the insurer might reasonably have been expected to charge by way of premiums for those policies if this Act had not been passed;
 - (h) the mean of the premiums charged for those policies;
 - (i) what might reasonably have been expected to be the mean of the premiums charged for those policies if this Act had not been passed;
 - (j) the amounts described in paragraphs (f) to (i), determined as if the references to a premium charged for a relevant third party personal injury policy of insurance were references to so much of the premium as is charged in order to cover the risk of causing a third party to sustain personal injury;
 - (k) if any reduction in the amounts referred to in paragraph (a) has been used to confer benefits other than reduced premiums on individuals, those benefits.
- (5) The regulations may make provision about the methods to be used in determining the amounts described in subsection (4)(b), (d), (g) and (i), including provision about factors to be taken into account.
- (6) The regulations may provide for exceptions, including but not limited to—
- (a) exceptions relating to policies of insurance obtained wholly or partly for purposes relating to a business, trade or profession,
 - (b) exceptions relating to policies of insurance of a specified description,
 - (c) exceptions for cases where the value or number of policies of insurance issued by an insurer is below a level specified by or determined in accordance with the regulations, and
 - (d) exceptions relating to insurers who, during the report period, issue policies of insurance only within a period that does not exceed a specified duration.
- (7) Before the end of a period of one year beginning with 1 April 2024, the Treasury must prepare and lay before Parliament a report that—
- (a) summarises the information provided about the effect of Parts 1 and 2 of this Act, and
 - (b) gives a view on whether and how individuals who are policy holders have benefited from any reductions in costs for insurers.
- (8) If insurers provide additional information to the FCA about the effect of Parts 1 and 2 of this Act, the report may relate also to that information.
- (9) The FCA must assist the Treasury in the preparation of the report.
- (10) In the Financial Services and Markets Act 2000 —
- (a) in section 1A (functions of the Financial Conduct Authority), in subsection (6), after paragraph (cza) insert—

"(czb) the Civil Liability Act 2018 ,";

- (b) in section 204A (meaning of "*relevant requirement*" and "*appropriate regulator*")—
(i) in subsection (2), after paragraph (a) insert—

"(aa) by regulations under section 11 of the Civil Liability Act 2018 ,";

- (ii) in subsection (6), after paragraph (a) insert—

"(aa) by regulations under section 11 of the Civil Liability Act 2018 ,".

(11) A statutory instrument containing regulations under this section is subject to affirmative resolution procedure.

(12) In this section—

"the FCA" means the Financial Conduct Authority;

"insurer" means an institution which is authorised under the Financial Services and Markets Act 2000 to carry on the regulated activity of—

- (a) effecting or carrying out contracts of insurance as principal, or

- (b) managing the underwriting capacity of a Lloyd's syndicate as a managing agent at Lloyd's;

"qualified auditor" means a person who is eligible for appointment as a statutory auditor under Part 42 of the Companies Act 2006 ;

"relevant third party personal injury policy of insurance" means a third party personal injury policy of insurance issued by an insurer to an individual domiciled in England and Wales;

"report period" means the period of three years beginning with 1 April 2020;

"report year" means a year beginning with 1 April 2020, 2021 or 2022;

"third party personal injury policy of insurance" means a policy of insurance issued by an insurer which provides cover against the risk, or risks that include the risk, of causing a third party to sustain personal injury.

Section 12. - Regulations

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Civil Liability Act 2018

PART 3 Miscellaneous and general

12. Regulations

9B-1460+

(1) Regulations under this Act are to be made by statutory instrument.



(2) Where regulations under this Act are subject to "negative resolution procedure" the statutory instrument containing the regulations is subject to annulment in pursuance of a resolution of either House of Parliament.

(3) Where regulations under this Act are subject to "affirmative resolution procedure" the regulations must not be made unless a draft of the statutory instrument containing them has been laid before Parliament and approved by a resolution of each House of Parliament.

(4) Regulations under this Act may—

(a) make different provision for different purposes;

(b) make consequential, supplementary or incidental provision;

(c) make transitional, transitory or saving provision.

(5) Subsection (4) does not apply to regulations under section 14 .

Section 13. - Extent

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Civil Liability Act 2018

PART 3 Miscellaneous and general

13. Extent

9B-1461+

- (1) This Act extends to England and Wales only, subject to the following subsections.
- (2) Section 10(4)(b) and (c) extend to England and Wales and Northern Ireland.
- (3) Section 10(4)(d) and (e) extend to England and Wales, Scotland and Northern Ireland.
- (4) Sections 11(10) and 12 to 15 extend to England and Wales, Scotland and Northern Ireland.

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Section 14. - Commencement

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14. Commencement

9B-1462+



- (1) This Act comes into force on such day as the Secretary of State may by regulations appoint, subject to subsection (2).
- (2) Part 2 and this Part come into force on the day on which this Act is passed.
- (3) Regulations under this section may—
 (a) appoint different days for different purposes;
 (b) make transitional, transitory or saving provision.

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Section 15. - Short title

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Civil Liability Act 2018

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15. Short title

9B-1463+ This Act may be cited as the Civil Liability Act 2018.



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Damages Act 1996

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(1996 c.48)

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Section A1. - Assumed rate of return on investment of damages: England and Wales

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Section 9 - Jurisdictional and Procedural Legislation

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Damages Act 1996

Section a1

[A1. Assumed rate of return on investment of damages: England and Wales

9B-1464+



(1) In determining the return to be expected from the investment of a sum awarded as damages for future pecuniary loss in an action for personal injury the court must, subject to and in accordance with rules of court made for the purposes of this section, take into account such rate of return (if any) as may from time to time be prescribed by an order made by the Lord Chancellor.

(2) Subsection (1) does not however prevent the court taking a different rate of return into account if any party to the proceedings shows that it is more appropriate in the case in question.

(3) An order under subsection (1) may prescribe different rates of return for different classes of case.

(4) An order under subsection (1) may in particular distinguish between classes of case by reference to—
(a) the description of future pecuniary loss involved;

(b) the length of the period during which future pecuniary loss is expected to occur;

(c) the time when future pecuniary loss is expected to occur.

(5) Schedule A1 (which makes provision about determining the rate of return to be prescribed by an order under subsection (1)) has effect.

(6) An order under this section is to be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.]

Interest Rate

9B-1464.

1+



As from 1 June 2020 the interest rates on funds held by the Court Funds Office are: Special Account – 0.1%; Basic Account – 0.05% (see <https://www.gov.uk/guidance/coronavirus-covid-19-impact-on-the-court-funds-office> [Accessed 17 November 2020]).

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Section 1. - Assumed rate of return on investment of damages.

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Damages Act 1996

Section 1

1.— Assumed rate of return on investment of damages.

9B-1465+



(1) In determining the return to be expected from the investment of a sum awarded as damages for future pecuniary loss in an action for personal injury the court shall, subject to and in accordance with rules of court made for the purposes of this section, take into account such rate of return (if any) as may from time to time be prescribed by an order made by the Lord Chancellor.

(2) Subsection (1) above shall not however prevent the court taking a different rate of return into account if any party to the proceedings shows that it is more appropriate in the case in question.

(3) An order under subsection (1) above may prescribe different rates of return for different classes of case.

(4) Before making an order under subsection (1) above the Lord Chancellor shall consult the Government Actuary and the Treasury; and any order under that subsection shall be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

[(5) In the application of this section to Scotland—

(a) for the reference to the Lord Chancellor in subsections (1) and (4) there is substituted a reference to the Scottish Ministers; and

(b) in subsection (4)—

(i)

“and the Treasury”

is omitted; and

(ii) for

“either House of Parliament”

there is substituted

“the Scottish Parliament”

.]

[(6) In the application of this section to Northern Ireland—

(a) for the reference to the Lord Chancellor in subsections (1) and (4) there is substituted a reference to the Department of Justice in Northern Ireland; and

(b) in subsection (4)—

(i) for the reference to the Treasury there is substituted a reference to the Department of Finance and Personnel in Northern Ireland; and

(ii) for

“by statutory instrument”

to

“Parliament”

there is substituted

“by statutory rule for the purposes of the Statutory Rules (Northern Ireland) Order 1979 , and is subject to negative resolution within the meaning of section 41(6) of the Interpretation Act (Northern Ireland) 1954 ”

.]

Whiplash Injury Regulations 2021

White Book 2023 | Commentary last updated April 8, 2021

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Whiplash Injury Regulations 2021

(SI 2021/642)

Editorial introduction

9B-1466 The regulations below were made under powers conferred on the Lord Chancellor by ss.[3\(2\)](#), (4), (5) and (6), [5\(1\)](#) and (2), [6\(3\)](#) and (4) and [12\(4\)\(a\)](#) of the [Civil Liability Act 2018](#) which broadly allows the making of regulations regulating the awarding of damages for pain, suffering and loss of amenity in claims which include an element of whiplash. Note that the Regulations set out here apply to causes of action accruing on or after 31 May 2021, hence their application does not depend on date of issue of a claim (whether or not limitation is extended under the [Limitation Act 1980](#)). Accordingly a practitioner should have regard to the facts of the case when considering their application and not merely to the issuance of the claim. Also see Vol.1 paras 26.5A, [35.4](#), [25BPD.1](#), and the Pre-Action Protocol for Personal Injury Claims Below the Small Claims Limit in Road Traffic Accidents at para.[C18-001](#).

The fixed tariff for whiplash injuries

9B-1467 Regulation 2 puts into place a fixed tariff for “whiplash injuries” (subject to an exceptional circumstances rule considered below) whereby “pure” whiplash without psychological injury leads to a pain, suffering and loss of amenity (i.e. general damages) damages valuation depending on the duration of symptoms as set out in the second column of the table in the Regulations, and a somewhat higher figure where it is established that a minor psychological injury has also been caused. Where more than one whiplash injury is caused on any given occasion the duration of the longest (including the expected duration where recovery is not yet complete) is used as the basis for assessment, and the duration in question is that expected provided there is reasonable effort to mitigate the impact of the injuries.

Departures from tariff

9B-1468 Regulation 3 provides the court with the power to depart from the tariff of damages by an amount increased by up to 20% in certain circumstances namely where the degree of pain, suffering or loss of amenity makes an increase appropriate and either the whiplash is exceptionally severe or where the claimant’s personal circumstances make the effect of the injury worse and those circumstances are exceptional. The discretion to increase the damages by up to 20% applies to both the “whiplash only” and “whiplash plus psychological injury” tariffs but also apply to situations where a court is considering the combined effect of those injuries and some other injury or injuries, in which event if the test of exceptionality is met the court can increase the whiplash (or whiplash plus psychological injury) element of the total award by up to 20%.

Regulation of settlement or offers to settle before authorised medical evidence

9B-1469 [Section 6 of the Civil Liability Act 2018](#) provides that, broadly, the Lord Chancellor may make regulations stipulating certain restrictions on the making of or acceptance of offers to settle in respect of whiplash claims. Regulation 4 is such a regulation and has the effect that it is a breach of [s.6](#) of the Act if a regulated person knows or has reason to suspect that a whiplash claim is being made, and they do, or arrange or advise the invitation of a person to make an offer to settle, makes an offer to settle, makes a payment in settlement or accepts a payment in settlement, without first seeing appropriate evidence of the whiplash injury or injuries as set out in reg.4.

Importantly by virtue of [s.7 of the Civil Liability Act](#) a breach of [s.6](#) of the Act by failing to comply with reg.4 does *not* render settlement void or unenforceable. Rather the breach is a matter for the relevant regulator and its powers. A list of types of “regulated person” and the relevant regulators for them is given in [s.9](#) of the 2018 Act. See [Civil Liability Act 2018](#) at para.[9B-1449+](#).

See also in relation to whiplash, PD 16 para.4.3B and PD 35 para.2.6.

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Regulation 1. - Citation, commencement and interpretation

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Whiplash Injury Regulations 2021

1.— Citation, commencement and interpretation

- 9B-1470
- (1) These Regulations may be cited as the Whiplash Injury Regulations 2021 and come into force on 31st May 2021.
 - (2) These Regulations apply only to causes of action which accrue on or after 31st May 2021.
 - (3) In these Regulations, “the Act” means the Civil Liability Act 2018.

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Regulation 2. - Damages for whiplash injuries

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Whiplash Injury Regulations 2021

2.— Damages for whiplash injuries

- 9B-1471**
- (1) Subject to regulation 3—
- (a) the total amount of damages for pain, suffering and loss of amenity payable in relation to one or more whiplash injuries, taken together (“the tariff amount” for the purposes of section 5(7)(a) of the Act), is the figure specified in the second column of the following table; and
- (b) the total amount of damages for pain, suffering and loss of amenity payable in relation to both one or more whiplash injuries and one or more minor psychological injuries suffered on the same occasion as the whiplash injury or injuries, taken together (“the tariff amount” for the purposes of section 5(7)(b) of the Act), is the figure specified in the third column of the following table—

<i>DURATION OF INJURY</i>	<i>AMOUNT – REGULATION 2(I)(A)</i>	<i>AMOUNT – REGULATION 2(I)(B)</i>
Not more than 3 months	£240	£260
More than 3 months, but not more than 6 months	£495	£520
More than 6 months, but not more than 9 months	£840	£895
More than 9 months, but not more than 12 months	£1,320	£1,390
More than 12 months, but not more than 15 months	£2,040	£2,125
More than 15 months, but not more than 18 months	£3,005	£3,100
More than 18 months, but not more than 24 months	£4,215	£4,345.

- (2) In this regulation, “duration of injury” means—

- (a) the duration, or likely duration, of the whiplash injury a person has suffered; or
- (b) where a person suffers more than one whiplash injury on the same occasion, the whiplash injury of the longest duration, or likely longest duration, suffered on that occasion,

if the person were to take, or had taken, reasonable steps to mitigate the effect of that injury or those injuries.

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Regulation 3. - Uplift in exceptional circumstances

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Whiplash Injury Regulations 2021

3.— Uplift in exceptional circumstances

9B-1472

(1) Subject to paragraphs (2) and (3), a court—

(a) may determine that the amount of damages payable for pain, suffering and loss of amenity in respect of one or more whiplash injuries is an amount greater than the tariff amount relating to that injury or those injuries;

(b) may determine that the amount of damages payable for pain, suffering and loss of amenity in respect of one or more whiplash injuries, or one or more whiplash injuries and one or more minor psychological injuries, taken together, is an amount greater than the tariff amount relating to those injuries; and

(c) in a case where the court considers the combined effect of—

(i) an injury or injuries in respect of which a tariff amount is specified in regulation 2(1); and

(ii) one or more other injuries,

may determine that an amount greater than the tariff amount is to be taken into account when deciding the amount of damages payable for pain, suffering and loss of amenity in respect of the injuries mentioned in paragraphs (i) and (ii).

(2) Before making a determination under paragraph (1)(a), (b) or (c), the court must be satisfied that—

(a) the degree of pain, suffering or loss of amenity caused by the whiplash injury or injuries in question makes it appropriate to use the greater amount; and

(b) it is the case that—

(i) the whiplash injury is, or one or more of the whiplash injuries are, exceptionally severe, or

(ii) where the person's circumstances increase the pain, suffering or loss of amenity caused by the injury or injuries, those circumstances are exceptional.

(3) The greater amount in paragraph (1)(a), (b) or (c) may not exceed the relevant tariff amount by more than 20%.

Regulation 4. - Settlement of a whiplash claim

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Whiplash Injury Regulations 2021

4.— Settlement of a whiplash claim

- 9B-1473 (1) For the purposes of section 6 of the Act, “appropriate evidence of an injury” means—
(a) where the claimant lives, or chooses to be examined, in England or Wales—
 (i) evidence of a whiplash injury or injuries provided in a fixed cost medical report from an accredited medical expert who has been instructed via a search of the online database of medical reporting organisations and experts held by MedCo Registration Solutions (“MedCo”); or
 (ii) evidence of a whiplash injury or injuries provided in a medical report from a doctor who is listed on the General Medical Council’s Specialist Register where that medical report has been obtained in respect of another injury which was suffered on the same occasion as the whiplash injury or injuries and which is identified in the report as being more serious than the whiplash injury or injuries; or
(b) in any other case where the claimant lives outside England and Wales, evidence of a whiplash injury or injuries provided in a medical report from a medical expert of a description specified in paragraph (3).

(2) In paragraph (1)(a)(i)—
 (a) “accredited medical expert” means a medical expert who, on the date that they are instructed, is accredited by MedCo to provide fixed cost medical reports in respect of whiplash claims;
 (b) “associate” means, in respect of a medical expert, a colleague, partner, director or employee in the same practice and “associated with” has the equivalent meaning;
 (c) “fixed cost medical report” means an initial report in a whiplash claim from an accredited medical expert who, unless there are exceptional circumstances—
 (i) has not provided treatment to the claimant;
 (ii) is not associated with any person who has provided treatment; and
 (iii) does not propose or recommend treatment that they or an associate then provide;
 (d) “medical expert” means a person who is—
 (i) registered with the General Medical Council;
 (ii) registered with the General Dental Council; or
 (iii) a psychologist or physiotherapist registered with the Health Care Professions Council; and
 (e) “whiplash claim” has the meaning ascribed to it by section 6(6) of the Act.

(3) In paragraph (1)(b), “medical expert” means a person who is recognised by the country in which they practise as—

- (a)** being a medical expert; and
- (b)** having the required qualifications for the purposes of diagnosis and prognosis of a whiplash injury.

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Article 1 - Subject matter and scope

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Directive (EU) 2014/104 of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union

Article 1

9B-1474+ THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,



Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 103 and 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee¹,

Acting in accordance with the ordinary legislative procedure²,

Whereas:

(1) Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) are a matter of public policy and should be applied effectively throughout the Union in order to ensure that competition in the internal market is not distorted.

(2) The public enforcement of Articles 101 and 102 TFEU is carried out by the Commission using the powers provided by Council Regulation (EC) No 1/2003³. Upon the entry into force of the Treaty of Lisbon on 1 December 2009, Articles 81 and 82 of the Treaty establishing the European Community became Articles 101 and 102 TFEU, and they remain identical in substance. Public enforcement is also carried out by national competition authorities, which may take the decisions listed in Article 5 of Regulation (EC) No 1/2003. In accordance with that Regulation, Member

States should be able to designate administrative as well as judicial authorities to apply Articles 101 and 102 TFEU as public enforcers and to carry out the various functions conferred upon competition authorities by that Regulation.

(3) Articles 101 and 102 TFEU produce direct effects in relations between individuals and create, for the individuals concerned, rights and obligations which national courts must enforce. National courts thus have an equally essential part to play in applying the competition rules (private enforcement). When ruling on disputes between private individuals, they protect subjective rights under Union law, for example by awarding damages to the victims of infringements. The full effectiveness of Articles 101 and 102 TFEU, and in particular the practical effect of the prohibitions laid down therein, requires that anyone — be they an individual, including consumers and undertakings, or a public authority — can claim compensation before national courts for the harm caused to them by an infringement of those provisions. The right to compensation in Union law applies equally to infringements of Articles 101 and 102 TFEU by public undertakings and by undertakings entrusted with special or exclusive rights by Member States within the meaning of Article 106 TFEU.

(4) The right in Union law to compensation for harm resulting from infringements of Union and national competition law requires each Member State to have procedural rules ensuring the effective exercise of that right. The need for effective procedural remedies also follows from the right to effective judicial protection as laid down in the second subparagraph of Article 19(1) of the Treaty on European Union (TEU) and in the first paragraph of Article 47 of the Charter of Fundamental Rights of the European Union. Member States should ensure effective legal protection in the fields covered by Union law.

(5) Actions for damages are only one element of an effective system of private enforcement of infringements of competition law and are complemented by alternative avenues of redress, such as consensual dispute resolution and public enforcement decisions that give parties an incentive to provide compensation.

(6) To ensure effective private enforcement actions under civil law and effective public enforcement by competition authorities, both tools are required to interact to ensure maximum effectiveness of the competition rules. It is necessary to regulate the coordination of those two forms of enforcement in a coherent manner, for instance in relation to the arrangements for access to documents held by competition authorities. Such coordination at Union level will also avoid the divergence of applicable rules, which could jeopardise the proper functioning of the internal market.

(7) In accordance with Article 26(2) TFEU, the internal market comprises an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured. There are marked differences between the rules in the Member States governing actions for damages for infringements of Union or national competition law. Those differences lead to uncertainty concerning the conditions under which injured parties can exercise the right to compensation they derive from the TFEU and affect the substantive effectiveness of such right. As injured parties often choose their Member State of establishment as the forum in which to claim damages, the discrepancies between the national rules lead to an uneven playing field as regards actions for damages and may thus affect competition on the markets on which those injured parties, as well as the infringing undertakings, operate.

(8) Undertakings established and operating in various Member States are subject to differing procedural rules that significantly affect the extent to which they can be held liable for infringements of competition law. This uneven enforcement of the right to compensation in Union law may result not only in a competitive advantage for some undertakings which have infringed Article 101 or 102 TFEU but also in a disincentive to the exercise of the rights of establishment and provision of goods or services in those Member States where the right to compensation is enforced more effectively. As the differences in the liability regimes applicable in the Member States may negatively affect

both competition and the proper functioning of the internal market, it is appropriate to base this Directive on the dual legal bases of Articles 103 and 114 TFEU.

(9) It is necessary, bearing in mind that large-scale infringements of competition law often have a cross-border element, to ensure a more level playing field for undertakings operating in the internal market and to improve the conditions for consumers to exercise the rights that they derive from the internal market. It is appropriate to increase legal certainty and to reduce the differences between the Member States as to the national rules governing actions for damages for infringements of both Union competition law and national competition law where that is applied in parallel with Union competition law. An approximation of those rules will help to prevent the increase of differences between the Member States' rules governing actions for damages in competition cases.

(10) Article 3(1) of Regulation (EC) No 1/2003 provides that '[w]here the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article [101(1) TFEU] which may affect trade between Member States within the meaning of that provision, they shall also apply Article [101 TFEU] to such agreements, decisions or concerted practices. Where the competition authorities of the Member States or national courts apply national competition law to any abuse prohibited by Article [102 TFEU], they shall also apply Article [102 TFEU].' In the interests of the proper functioning of the internal market and with a view to greater legal certainty and a more level playing field for undertakings and consumers, it is appropriate that the scope of this Directive extend to actions for damages based on the infringement of national competition law where it is applied pursuant to Article 3(1) of Regulation (EC) No 1/2003. Applying differing rules on civil liability in respect of infringements of Article 101 or 102 TFEU and in respect of infringements of rules of national competition law which must be applied in the same cases in parallel to Union competition law would otherwise adversely affect the position of claimants in the same case and the scope of their claims, and would constitute an obstacle to the proper functioning of the internal market. This Directive should not affect actions for damages in respect of infringements of national competition law which do not affect trade between Member States within the meaning of Article 101 or 102 TFEU.

(11) In the absence of Union law, actions for damages are governed by the national rules and procedures of the Member States. According to the case-law of the Court of Justice of the European Union (Court of Justice), any person can claim compensation for harm suffered where there is a causal relationship between that harm and an infringement of competition law. All national rules governing the exercise of the right to compensation for harm resulting from an infringement of Article 101 or 102 TFEU, including those concerning aspects not dealt with in this Directive such as the notion of causal relationship between the infringement and the harm, must observe the principles of effectiveness and equivalence. This means that they should not be formulated or applied in a way that makes it excessively difficult or practically impossible to exercise the right to compensation guaranteed by the TFEU or less favourably than those applicable to similar domestic actions. Where Member States provide other conditions for compensation under national law, such as imputability, adequacy or culpability, they should be able to maintain such conditions in so far as they comply with the case-law of the Court of Justice, the principles of effectiveness and equivalence, and this Directive.

(12) This Directive reaffirms the *acquis communautaire* on the right to compensation for harm caused by infringements of Union competition law, particularly regarding standing and the definition of damage, as stated in the case-law of the Court of Justice, and does not pre-empt any further development thereof. Anyone who has suffered harm caused by such an infringement can claim compensation for actual loss (*damnum emergens*), for gain of which that person has been deprived (loss of profit or *lucrum cessans*), plus interest, irrespective of whether those categories are established separately or in combination in national law. The payment of interest is an essential component of compensation to make good the damage sustained by taking into account the effluxion of time and should be due from the time when the harm occurred until the time when compensation is paid, without prejudice to the qualification of such interest as compensatory or default interest under national law and to whether effluxion of time is taken into

account as a separate category (interest) or as a constituent part of actual loss or loss of profit. It is incumbent on the Member States to lay down the rules to be applied for that purpose.

(13) The right to compensation is recognised for any natural or legal person — consumers, undertakings and public authorities alike — irrespective of the existence of a direct contractual relationship with the infringing undertaking, and regardless of whether or not there has been a prior finding of an infringement by a competition authority. This Directive should not require Member States to introduce collective redress mechanisms for the enforcement of Articles 101 and 102 TFEU. Without prejudice to compensation for loss of opportunity, full compensation under this Directive should not lead to overcompensation, whether by means of punitive, multiple or other damages.

(14) Actions for damages for infringements of Union or national competition law typically require a complex factual and economic analysis. The evidence necessary to prove a claim for damages is often held exclusively by the opposing party or by third parties, and is not sufficiently known by, or accessible to, the claimant. In such circumstances, strict legal requirements for claimants to assert in detail all the facts of their case at the beginning of an action and to proffer precisely specified items of supporting evidence can unduly impede the effective exercise of the right to compensation guaranteed by the TFEU.

(15) Evidence is an important element for bringing actions for damages for infringement of Union or national competition law. However, as competition law litigation is characterised by an information asymmetry, it is appropriate to ensure that claimants are afforded the right to obtain the disclosure of evidence relevant to their claim, without it being necessary for them to specify individual items of evidence. In order to ensure equality of arms, those means should also be available to defendants in actions for damages, so that they can request the disclosure of evidence by those claimants. National courts should also be able to order that evidence be disclosed by third parties, including public authorities. Where a national court wishes to order disclosure of evidence by the Commission, the principle in Article 4(3) TEU of sincere cooperation between the Union and the Member States and Article 15(1) of Regulation (EC) No 1/2003 as regards requests for information apply. Where national courts order public authorities to disclose evidence, the principles of legal and administrative cooperation under Union or national law apply.

(16) National courts should be able, under their strict control, especially as regards the necessity and proportionality of disclosure measures, to order the disclosure of specified items of evidence or categories of evidence upon request of a party. It follows from the requirement of proportionality that disclosure can be ordered only where a claimant has made a plausible assertion, on the basis of facts which are reasonably available to that claimant, that the claimant has suffered harm that was caused by the defendant. Where a request for disclosure aims to obtain a category of evidence, that category should be identified by reference to common features of its constitutive elements such as the nature, object or content of the documents the disclosure of which is requested, the time during which they were drawn up, or other criteria, provided that the evidence falling within the category is relevant within the meaning of this Directive. Such categories should be defined as precisely and narrowly as possible on the basis of reasonably available facts.

(17) Where a court in one Member State requests a competent court in another Member State to take evidence or requests that evidence be taken directly in another Member State, the provisions of Council Regulation (EC) No 1206/2001⁴ apply.

(18) While relevant evidence containing business secrets or otherwise confidential information should, in principle, be available in actions for damages, such confidential information needs to be protected appropriately. National courts should therefore have at their disposal a range of measures to protect such confidential information from being disclosed during the proceedings. Those measures could include the possibility of redacting sensitive passages in documents, conducting hearings in camera, restricting the persons allowed to see the evidence, and instructing

experts to produce summaries of the information in an aggregated or otherwise non-confidential form. Measures protecting business secrets and other confidential information should, nevertheless, not impede the exercise of the right to compensation.

(19) This Directive affects neither the possibility under the laws of the Member States to appeal disclosure orders, nor the conditions for bringing such appeals.

(20) Regulation (EC) No 1049/2001 of the European Parliament and of the Council⁵ governs public access to European Parliament, Council and Commission documents, and is designed to confer on the public as wide a right of access as possible to documents of those institutions. That right is nonetheless subject to certain limits based on reasons of public or private interest. It follows that the system of exceptions laid down in Article 4 of that Regulation is based on a balancing of the opposing interests in a given situation, namely, the interests which would be favoured by the disclosure of the documents in question and those which would be jeopardised by such disclosure. This Directive should be without prejudice to such rules and practices under Regulation (EC) No 1049/2001.

(21) The effectiveness and consistency of the application of Articles 101 and 102 TFEU by the Commission and the national competition authorities require a common approach across the Union on the disclosure of evidence that is included in the file of a competition authority. Disclosure of evidence should not unduly detract from the effectiveness of the enforcement of competition law by a competition authority. This Directive does not cover the disclosure of internal documents of, or correspondence between, competition authorities.

(22) In order to ensure the effective protection of the right to compensation, it is not necessary that every document relating to proceedings under Article 101 or 102 TFEU be disclosed to a claimant merely on the grounds of the claimant's intended action for damages since it is highly unlikely that the action for damages will need to be based on all the evidence in the file relating to those proceedings.

(23) The requirement of proportionality should be carefully assessed when disclosure risks unravelling the investigation strategy of a competition authority by revealing which documents are part of the file or risks having a negative effect on the way in which undertakings cooperate with the competition authorities. Particular attention should be paid to preventing 'fishing expeditions', i.e. non-specific or overly broad searches for information that is unlikely to be of relevance for the parties to the proceedings. Disclosure requests should therefore not be deemed to be proportionate where they refer to the generic disclosure of documents in the file of a competition authority relating to a certain case, or the generic disclosure of documents submitted by a party in the context of a particular case. Such wide disclosure requests would not be compatible with the requesting party's duty to specify the items of evidence or the categories of evidence as precisely and narrowly as possible.

(24) This Directive does not affect the right of courts to consider, under Union or national law, the interests of the effective public enforcement of competition law when ordering the disclosure of any type of evidence with the exception of leniency statements and settlement submissions.

(25) An exemption should apply in respect of any disclosure that, if granted, would unduly interfere with an ongoing investigation by a competition authority concerning an infringement of Union or national competition law. Information that was prepared by a competition authority in the course of its proceedings for the enforcement of Union or national competition law and sent to the parties to those proceedings (such as a 'Statement of Objections') or prepared by a party thereto (such as replies to requests for information of the competition authority or witness statements) should therefore be disclosable in actions for damages only after the competition authority has closed its

proceedings, for instance by adopting a decision under Article 5 or under Chapter III of Regulation (EC) No 1/2003, with the exception of decisions on interim measures.

(26) Leniency programmes and settlement procedures are important tools for the public enforcement of Union competition law as they contribute to the detection and efficient prosecution of, and the imposition of penalties for, the most serious infringements of competition law. Furthermore, as many decisions of competition authorities in cartel cases are based on a leniency application, and damages actions in cartel cases generally follow on from those decisions, leniency programmes are also important for the effectiveness of actions for damages in cartel cases. Undertakings might be deterred from cooperating with competition authorities under leniency programmes and settlement procedures if self-incriminating statements such as leniency statements and settlement submissions, which are produced for the sole purpose of cooperating with the competition authorities, were to be disclosed. Such disclosure would pose a risk of exposing cooperating undertakings or their managing staff to civil or criminal liability under conditions worse than those of co-infringers not cooperating with the competition authorities. To ensure undertakings' continued willingness to approach competition authorities voluntarily with leniency statements or settlement submissions, such documents should be exempted from the disclosure of evidence. That exemption should also apply to verbatim quotations from leniency statements or settlement submissions included in other documents. Those limitations on the disclosure of evidence should not prevent competition authorities from publishing their decisions in accordance with the applicable Union or national law. In order to ensure that that exemption does not unduly interfere with injured parties' rights to compensation, it should be limited to those voluntary and self-incriminating leniency statements and settlement submissions.

(27) The rules in this Directive on the disclosure of documents other than leniency statements and settlement submissions ensure that injured parties retain sufficient alternative means by which to obtain access to the relevant evidence that they need in order to prepare their actions for damages. National courts should themselves be able, upon request by a claimant, to access documents in respect of which the exemption is invoked in order to verify whether the contents thereof fall outside the definitions of leniency statements and settlement submissions laid down in this Directive. Any content falling outside those definitions should be disclosable under the relevant conditions.

(28) National courts should be able, at any time, to order, in the context of an action for damages, the disclosure of evidence that exists independently of the proceedings of a competition authority ('pre-existing information').

(29) The disclosure of evidence should be ordered from a competition authority only when that evidence cannot reasonably be obtained from another party or from a third party.

(30) Pursuant to Article 15(3) of Regulation (EC) No 1/2003, competition authorities, acting upon their own initiative, can submit written observations to national courts on issues relating to the application of Article 101 or 102 TFEU. In order to preserve the contribution made by public enforcement to the application of those Articles, competition authorities should likewise be able, acting upon their own initiative, to submit their observations to a national court for the purpose of assessing the proportionality of a disclosure of evidence included in the authorities' files, in light of the impact that such disclosure would have on the effectiveness of the public enforcement of competition law. Member States should be able to set up a system whereby a competition authority is informed of requests for disclosure of information when the person requesting disclosure or the person from whom disclosure is sought is involved in that competition authority's investigation into the alleged infringement, without prejudice to national law providing for *ex parte* proceedings.

(31) Any natural or legal person that obtains evidence through access to the file of a competition authority should be able to use that evidence for the purposes of an action for damages to which it is a party. Such use should also

be allowed on the part of any natural or legal person that succeeded in its rights and obligations, including through the acquisition of its claim. Where the evidence was obtained by a legal person forming part of a corporate group constituting one undertaking for the application of Articles 101 and 102 TFEU, other legal persons belonging to the same undertaking should also be able to use that evidence.

(32) However, the use of evidence obtained through access to the file of a competition authority should not unduly detract from the effective enforcement of competition law by a competition authority. In order to ensure that the limitations on disclosure laid down in this Directive are not undermined, the use of evidence of the types referred to in recitals 24 and 25 which is obtained solely through access to the file of a competition authority should be limited under the same circumstances. The limitation should take the form of inadmissibility in actions for damages or the form of any other protection under applicable national rules capable of ensuring the full effect of the limits on the disclosure of those types of evidence. Moreover, evidence obtained from a competition authority should not become an object of trade. The possibility of using evidence that was obtained solely through access to the file of a competition authority should therefore be limited to the natural or legal person that was originally granted access and to its legal successors. That limitation to avoid trading of evidence does not, however, prevent a national court from ordering the disclosure of that evidence under the conditions provided for in this Directive.

(33) The fact that a claim for damages is initiated, or that an investigation by a competition authority is started, entails a risk that persons concerned may destroy or hide evidence that would be useful in substantiating an injured party's claim for damages. To prevent the destruction of relevant evidence and to ensure that court orders as to disclosure are complied with, national courts should be able to impose sufficiently deterrent penalties. In so far as parties to the proceedings are concerned, the risk of adverse inferences being drawn in the proceedings for damages can be a particularly effective penalty, and can help avoid delays. Penalties should also be available for non-compliance with obligations to protect confidential information and for the abusive use of information obtained through disclosure. Similarly, penalties should be available if information obtained through access to the file of a competition authority is used abusively in actions for damages.

(34) Ensuring the effective and consistent application of Articles 101 and 102 TFEU by the Commission and the national competition authorities necessitates a common approach across the Union on the effect of national competition authorities' final infringement decisions on subsequent actions for damages. Such decisions are adopted only after the Commission has been informed of the decision envisaged or, in the absence thereof, of any other document indicating the proposed course of action pursuant to Article 11(4) of Regulation (EC) No 1/2003, and if the Commission has not relieved the national competition authority of its competence by initiating proceedings pursuant to Article 11(6) of that Regulation. The Commission should ensure the consistent application of Union competition law by providing, bilaterally and within the framework of the European Competition Network, guidance to the national competition authorities. To enhance legal certainty, to avoid inconsistency in the application of Articles 101 and 102 TFEU, to increase the effectiveness and procedural efficiency of actions for damages and to foster the functioning of the internal market for undertakings and consumers, the finding of an infringement of Article 101 or 102 TFEU in a final decision by a national competition authority or a review court should not be relitigated in subsequent actions for damages. Therefore, such a finding should be deemed to be irrefutably established in actions for damages brought in the Member State of the national competition authority or review court relating to that infringement. The effect of the finding should, however, cover only the nature of the infringement and its material, personal, temporal and territorial scope as determined by the competition authority or review court in the exercise of its jurisdiction. Where a decision has found that provisions of national competition law are infringed in cases where Union and national competition law are applied in the same case and in parallel, that infringement should also be deemed to be irrefutably established.

(35) Where an action for damages is brought in a Member State other than the Member State of a national competition authority or a review court that found the infringement of Article 101 or 102 TFEU to which the action relates, it should be possible to present that finding in a final decision by the national competition authority or the review court to a national court as at least *prima facie* evidence of the fact that an infringement of competition law has occurred. The finding can be assessed as appropriate, along with any other evidence adduced by the parties. The effects of

decisions by national competition authorities and review courts finding an infringement of the competition rules are without prejudice to the rights and obligations of national courts under Article 267 TFEU.

(36) National rules on the beginning, duration, suspension or interruption of limitation periods should not unduly hamper the bringing of actions for damages. This is particularly important in respect of actions that build upon a finding by a competition authority or a review court of an infringement. To that end, it should be possible to bring an action for damages after proceedings by a competition authority, with a view to enforcing national and Union competition law. The limitation period should not begin to run before the infringement ceases and before a claimant knows, or can reasonably be expected to know, the behaviour constituting the infringement, the fact that the infringement caused the claimant harm and the identity of the infringer. Member States should be able to maintain or introduce absolute limitation periods that are of general application, provided that the duration of such absolute limitation periods does not render practically impossible or excessively difficult the exercise of the right to full compensation.

(37) Where several undertakings infringe the competition rules jointly, as in the case of a cartel, it is appropriate to make provision for those co-infringers to be held jointly and severally liable for the entire harm caused by the infringement. A co-infringer should have the right to obtain a contribution from other co-infringers if it has paid more compensation than its share. The determination of that share as the relative responsibility of a given infringer, and the relevant criteria such as turnover, market share, or role in the cartel, is a matter for the applicable national law, while respecting the principles of effectiveness and equivalence.

(38) Undertakings which cooperate with competition authorities under a leniency programme play a key role in exposing secret cartel infringements and in bringing them to an end, thereby often mitigating the harm which could have been caused had the infringement continued. It is therefore appropriate to make provision for undertakings which have received immunity from fines from a competition authority under a leniency programme to be protected from undue exposure to damages claims, bearing in mind that the decision of the competition authority finding the infringement may become final for the immunity recipient before it becomes final for other undertakings which have not received immunity, thus potentially making the immunity recipient the preferential target of litigation. It is therefore appropriate that the immunity recipient be relieved in principle from joint and several liability for the entire harm and that any contribution it must make vis-à-vis co-infringers not exceed the amount of harm caused to its own direct or indirect purchasers or, in the case of a buying cartel, its direct or indirect providers. To the extent that a cartel has caused harm to those other than the customers or providers of the infringers, the contribution of the immunity recipient should not exceed its relative responsibility for the harm caused by the cartel. That share should be determined in accordance with the same rules used to determine the contributions between infringers. The immunity recipient should remain fully liable to the injured parties other than its direct or indirect purchasers or providers only where they are unable to obtain full compensation from the other infringers.

(39) Harm in the form of actual loss can result from the price difference between what was actually paid and what would otherwise have been paid in the absence of the infringement. When an injured party has reduced its actual loss by passing it on, entirely or in part, to its own purchasers, the loss which has been passed on no longer constitutes harm for which the party that passed it on needs to be compensated. It is therefore in principle appropriate to allow an infringer to invoke the passing-on of actual loss as a defence against a claim for damages. It is appropriate to provide that the infringer, in so far as it invokes the passing-on defence, must prove the existence and extent of pass-on of the overcharge. This burden of proof should not affect the possibility for the infringer to use evidence other than that in its possession, such as evidence already acquired in the proceedings or evidence held by other parties or third parties.

(40) In situations where the passing-on resulted in reduced sales and thus harm in the form of a loss of profit, the right to claim compensation for such loss of profit should remain unaffected.

(41) Depending on the conditions under which undertakings are operating, it may be commercial practice to pass on price increases down the supply chain. Consumers or undertakings to whom actual loss has thus been passed on have suffered harm caused by an infringement of Union or national competition law. While such harm should be compensated for by the infringer, it may be particularly difficult for consumers or undertakings that did not themselves make any purchase from the infringer to prove the extent of that harm. It is therefore appropriate to provide that, where the existence of a claim for damages or the amount of damages to be awarded depends on whether or to what degree an overcharge paid by a direct purchaser from the infringer has been passed on to an indirect purchaser, the latter is regarded as having proven that an overcharge paid by that direct purchaser has been passed on to its level where it is able to show *prima facie* that such passing-on has occurred. This rebuttable presumption applies unless the infringer can credibly demonstrate to the satisfaction of the court that the actual loss has not or not entirely been passed on to the indirect purchaser. It is furthermore appropriate to define under what conditions the indirect purchaser is to be regarded as having established such *prima facie* proof. As regards the quantification of passing-on, national courts should have the power to estimate which share of the overcharge has been passed on to the level of indirect purchasers in disputes pending before them.

(42) The Commission should issue clear, simple and comprehensive guidelines for national courts on how to estimate the share of the overcharge passed on to indirect purchasers.

(43) Infringements of competition law often concern the conditions and the price under which goods or services are sold, and lead to an overcharge and other harm for the customers of the infringers. The infringement may also concern supplies to the infringer (for example in the case of a buyers' cartel). In such cases, the actual loss could result from a lower price paid by infringers to their suppliers. This Directive and in particular the rules on passing-on should apply accordingly to those cases.

(44) Actions for damages can be brought both by those who purchased goods or services from the infringer and by purchasers further down the supply chain. In the interest of consistency between judgments resulting from related proceedings and hence to avoid the harm caused by the infringement of Union or national competition law not being fully compensated or the infringer being required to pay damages to compensate for harm that has not been suffered, national courts should have the power to estimate the proportion of any overcharge which was suffered by the direct or indirect purchasers in disputes pending before them. In this context, national courts should be able to take due account, by procedural or substantive means available under Union and national law, of any related action and of the resulting judgment, particularly where it finds that passing-on has been proven. National courts should have at their disposal appropriate procedural means, such as joinder of claims, to ensure that compensation for actual loss paid at any level of the supply chain does not exceed the overcharge harm caused at that level. Such means should also be available in cross-border cases. This possibility to take due account of judgments should be without prejudice to the fundamental rights of the defence and the rights to an effective remedy and a fair trial of those who were not parties to the judicial proceedings, and without prejudice to the rules on the evidentiary value of judgments rendered in that context. It is possible for actions pending before the courts of different Member States to be considered as related within the meaning of Article 30 of Regulation (EU) No 1215/2012 of the European Parliament and of the Council⁶. Under that Article, national courts other than that first seized may stay proceedings or, under certain circumstances, may decline jurisdiction. This Directive is without prejudice to the rights and obligations of national courts under that Regulation.

(45) An injured party who has proven having suffered harm as a result of a competition law infringement still needs to prove the extent of the harm in order to obtain damages. Quantifying harm in competition law cases is a very

fact-intensive process and may require the application of complex economic models. This is often very costly, and claimants have difficulties in obtaining the data necessary to substantiate their claims. The quantification of harm in competition law cases can thus constitute a substantial barrier preventing effective claims for compensation.

(46) In the absence of Union rules on the quantification of harm caused by a competition law infringement, it is for the domestic legal system of each Member State to determine its own rules on quantifying harm, and for the Member States and for the national courts to determine what requirements the claimant has to meet when proving the amount of the harm suffered, the methods that can be used in quantifying the amount, and the consequences of not being able to fully meet those requirements. However, the requirements of national law regarding the quantification of harm in competition law cases should not be less favourable than those governing similar domestic actions (principle of equivalence), nor should they render the exercise of the Union right to damages practically impossible or excessively difficult (principle of effectiveness). Regard should be had to any information asymmetries between the parties and to the fact that quantifying the harm means assessing how the market in question would have evolved had there been no infringement. This assessment implies a comparison with a situation which is by definition hypothetical and can thus never be made with complete accuracy. It is therefore appropriate to ensure that national courts have the power to estimate the amount of the harm caused by the competition law infringement. Member States should ensure that, where requested, national competition authorities may provide guidance on quantum. In order to ensure coherence and predictability, the Commission should provide general guidance at Union level.

(47) To remedy the information asymmetry and some of the difficulties associated with quantifying harm in competition law cases, and to ensure the effectiveness of claims for damages, it is appropriate to presume that cartel infringements result in harm, in particular via an effect on prices. Depending on the facts of the case, cartels result in a rise in prices, or prevent a lowering of prices which would otherwise have occurred but for the cartel. This presumption should not cover the concrete amount of harm. Infringers should be allowed to rebut the presumption. It is appropriate to limit this rebuttable presumption to cartels, given their secret nature, which increases the information asymmetry and makes it more difficult for claimants to obtain the evidence necessary to prove the harm.

(48) Achieving a ‘once-and-for-all’ settlement for defendants is desirable in order to reduce uncertainty for infringers and injured parties. Therefore, infringers and injured parties should be encouraged to agree on compensating for the harm caused by a competition law infringement through consensual dispute resolution mechanisms, such as out-of-court settlements (including those where a judge can declare a settlement binding), arbitration, mediation or conciliation. Such consensual dispute resolution should cover as many injured parties and infringers as legally possible. The provisions in this Directive on consensual dispute resolution are therefore meant to facilitate the use of such mechanisms and increase their effectiveness.

(49) Limitation periods for bringing an action for damages could be such that they prevent injured parties and infringers from having sufficient time to come to an agreement on the compensation to be paid. In order to provide both sides with a genuine opportunity to engage in consensual dispute resolution before bringing proceedings before national courts, limitation periods need to be suspended for the duration of the consensual dispute resolution process.

(50) Furthermore, when parties decide to engage in consensual dispute resolution after an action for damages for the same claim has been brought before a national court, that court should be able to suspend the proceedings before it for the duration of the consensual dispute resolution process. When considering whether to suspend the proceedings, the national court should take into account the advantages of an expeditious procedure.

(51) To encourage consensual settlements, an infringer that pays damages through consensual dispute resolution should not be placed in a worse position vis-à-vis its co-infringers than it would otherwise be without the consensual settlement. That might happen if a settling infringer, even after a consensual settlement, continued to be fully jointly

and severally liable for the harm caused by the infringement. A settling infringer should in principle therefore not contribute to its non-settling co-infringers when the latter have paid damages to an injured party with whom the first infringer had previously settled. The corollary to this non-contribution rule is that the claim of the injured party should be reduced by the settling infringer's share of the harm caused to it, regardless of whether the amount of the settlement equals or is different from the relative share of the harm that the settling co-infringer inflicted upon the settling injured party. That relative share should be determined in accordance with the rules otherwise used to determine the contributions among infringers. Without such a reduction, non-settling infringers would be unduly affected by settlements to which they were not a party. However, in order to ensure the right to full compensation, settling co-infringers should still have to pay damages where that is the only possibility for the settling injured party to obtain compensation for the remaining claim. The remaining claim refers to the claim of the settling injured party reduced by the settling co-infringer's share of the harm that the infringement inflicted upon the settling injured party. The latter possibility to claim damages from the settling co-infringer exists unless it is expressly excluded under the terms of the consensual settlement.

(52) Situations should be avoided in which settling co-infringers, by paying contribution to non-settling co-infringers for damages they paid to non-settling injured parties, pay a total amount of compensation exceeding their relative responsibility for the harm caused by the infringement. Therefore, when settling co-infringers are asked to contribute to damages subsequently paid by non-settling co-infringers to non-settling injured parties, national courts should take account of the damages already paid under the consensual settlement, bearing in mind that not all co-infringers are necessarily equally involved in the full substantive, temporal and geographical scope of the infringement.

(53) This Directive respects the fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union.

(54) Since the objectives of this Directive, namely to establish rules concerning actions for damages for infringements of Union competition law in order to ensure the full effect of Articles 101 and 102 TFEU, and the proper functioning of the internal market for undertakings and consumers, cannot be sufficiently achieved by the Member States, but can rather, by reason of the requisite effectiveness and consistency in the application of Articles 101 and 102 TFEU, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 TEU. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

(55) In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents⁷, Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified.

(56) It is appropriate to provide rules for the temporal application of this Directive,

HAVE ADOPTED THIS DIRECTIVE:

Chapter I Subject Matter, Scope and Definitions

Article 1 Subject matter and scope

9B-1475+



1. This Directive sets out certain rules necessary to ensure that anyone who has suffered harm caused by an infringement of competition law by an undertaking or by an association of undertakings can effectively exercise the right to claim full compensation for that harm from that undertaking or association. It sets out rules fostering undistorted competition in the internal market and removing obstacles to its proper functioning, by ensuring equivalent protection throughout the Union for anyone who has suffered such harm.
2. This Directive sets out rules coordinating the enforcement of the competition rules by competition authorities and the enforcement of those rules in damages actions before national courts.

Footnotes

- 1 OJ C 67, 6.3.2014, p. 83.
- 2 Position of the European Parliament of 17 April 2014 (not yet published in the Official Journal) and decision of the Council of 10 November 2014.
- 3 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules of competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p. 1).
- 4 Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (OJ L 174, 27.6.2001, p. 1).
- 5 Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43).
- 6 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 351, 20.12.2012, p. 1).
- 7 OJ C 369, 17.12.2011, p. 14.

Article 2 - Definitions

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Volume 2

Section 9 - Jurisdictional and Procedural Legislation

Section 9B - Other Statutes and Regulations

Directive (EU) 2014/104 of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union

Chapter I Subject Matter, Scope and Definitions

Article 2 Definitions

For the purposes of this Directive, the following definitions apply:

9B-1476+



- (1) ‘infringement of competition law’ means an infringement of Article 101 or 102 TFEU, or of national competition law;
- (2) ‘infringer’ means an undertaking or association of undertakings which has committed an infringement of competition law;
- (3) ‘national competition law’ means provisions of national law that predominantly pursue the same objective as Articles 101 and 102 TFEU and that are applied to the same case and in parallel to Union competition law pursuant to Article 3(1) of Regulation (EC) No 1/2003, excluding provisions of national law which impose criminal penalties on natural persons, except to the extent that such criminal penalties are the means whereby competition rules applying to undertakings are enforced;
- (4) ‘action for damages’ means an action under national law by which a claim for damages is brought before a national court by an alleged injured party, or by someone acting on behalf of one or more alleged injured parties where Union or national law provides for that possibility, or by a natural or legal person that succeeded in the right of the alleged injured party, including the person that acquired the claim;
- (5) ‘claim for damages’ means a claim for compensation for harm caused by an infringement of competition law;
- (6) ‘injured party’ means a person that has suffered harm caused by an infringement of competition law;
- (7) ‘national competition authority’ means an authority designated by a Member State pursuant to Article 35 of Regulation (EC) No 1/2003, as being responsible for the application of Articles 101 and 102 TFEU;
- (8) ‘competition authority’ means the Commission or a national competition authority or both, as the context may require;
- (9) ‘national court’ means a court or tribunal of a Member State within the meaning of Article 267 TFEU;

- (10) ‘review court’ means a national court that is empowered by ordinary means of appeal to review decisions of a national competition authority or to review judgments pronouncing on those decisions, irrespective of whether that court itself has the power to find an infringement of competition law;
- (11) ‘infringement decision’ means a decision of a competition authority or review court that finds an infringement of competition law;
- (12) ‘final infringement decision’ means an infringement decision that cannot be, or that can no longer be, appealed by ordinary means;
- (13) ‘evidence’ means all types of means of proof admissible before the national court seized, in particular documents and all other objects containing information, irrespective of the medium on which the information is stored;
- (14) ‘cartel’ means an agreement or concerted practice between two or more competitors aimed at coordinating their competitive behaviour on the market or influencing the relevant parameters of competition through practices such as, but not limited to, the fixing or coordination of purchase or selling prices or other trading conditions, including in relation to intellectual property rights, the allocation of production or sales quotas, the sharing of markets and customers, including bid-rigging, restrictions of imports or exports or anti-competitive actions against other competitors;
- (15) ‘leniency programme’ means a programme concerning the application of Article 101 TFEU or a corresponding provision under national law on the basis of which a participant in a secret cartel, independently of the other undertakings involved in the cartel, cooperates with an investigation of the competition authority, by voluntarily providing presentations regarding that participant’s knowledge of, and role in, the cartel in return for which that participant receives, by decision or by a discontinuation of proceedings, immunity from, or a reduction in, fines for its involvement in the cartel;
- (16) ‘leniency statement’ means an oral or written presentation voluntarily provided by, or on behalf of, an undertaking or a natural person to a competition authority or a record thereof, describing the knowledge of that undertaking or natural person of a cartel and describing its role therein, which presentation was drawn up specifically for submission to the competition authority with a view to obtaining immunity or a reduction of fines under a leniency programme, not including pre-existing information;
- (17) ‘pre-existing information’ means evidence that exists irrespective of the proceedings of a competition authority, whether or not such information is in the file of a competition authority;
- (18) ‘settlement submission’ means a voluntary presentation by, or on behalf of, an undertaking to a competition authority describing the undertaking’s acknowledgement of, or its renunciation to dispute, its participation in an infringement of competition law and its responsibility for that infringement of competition law, which was drawn up specifically to enable the competition authority to apply a simplified or expedited procedure;
- (19) ‘immunity recipient’ means an undertaking which, or a natural person who, has been granted immunity from fines by a competition authority under a leniency programme;
- (20) ‘overcharge’ means the difference between the price actually paid and the price that would otherwise have prevailed in the absence of an infringement of competition law;
- (21) ‘consensual dispute resolution’ means any mechanism enabling parties to reach the out-of-court resolution of a dispute concerning a claim for damages;
- (22) ‘consensual settlement’ means an agreement reached through consensual dispute resolution.
- (23) ‘direct purchaser’ means a natural or legal person who acquired, directly from an infringer, products or services that were the object of an infringement of competition law;

(24) ‘indirect purchaser’ means a natural or legal person who acquired, not directly from an infringer, but from a direct purchaser or a subsequent purchaser, products or services that were the object of an infringement of competition law, or products or services containing them or derived therefrom.

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Article 3 - Right to full compensation

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Chapter I Subject Matter, Scope and Definitions

Article 3 Right to full compensation

9B-1477+



1. Member States shall ensure that any natural or legal person who has suffered harm caused by an infringement of competition law is able to claim and to obtain full compensation for that harm.
2. Full compensation shall place a person who has suffered harm in the position in which that person would have been had the infringement of competition law not been committed. It shall therefore cover the right to compensation for actual loss and for loss of profit, plus the payment of interest.
3. Full compensation under this Directive shall not lead to overcompensation, whether by means of punitive, multiple or other types of damages.

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Article 4 - Principles of effectiveness and equivalence

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Chapter I Subject Matter, Scope and Definitions

Article 4 Principles of effectiveness and equivalence

9B-1478+



In accordance with the principle of effectiveness, Member States shall ensure that all national rules and procedures relating to the exercise of claims for damages are designed and applied in such a way that they do not render practically impossible or excessively difficult the exercise of the Union right to full compensation for harm caused by an infringement of competition law. In accordance with the principle of equivalence, national rules and procedures relating to actions for damages resulting from infringements of Article 101 or 102 TFEU shall not be less favourable to the alleged injured parties than those governing similar actions for damages resulting from infringements of national law.

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Article 5 - Disclosure of evidence

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Chapter II Disclosure of Evidence

Article 5 Disclosure of evidence

9B-1479+



1. Member States shall ensure that in proceedings relating to an action for damages in the Union, upon request of a claimant who has presented a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages, national courts are able to order the defendant or a third party to disclose relevant evidence which lies in their control, subject to the conditions set out in this Chapter. Member States shall ensure that national courts are able, upon request of the defendant, to order the claimant or a third party to disclose relevant evidence.

This paragraph is without prejudice to the rights and obligations of national courts under Regulation (EC) No 1206/2001.

2. Member States shall ensure that national courts are able to order the disclosure of specified items of evidence or relevant categories of evidence circumscribed as precisely and as narrowly as possible on the basis of reasonably available facts in the reasoned justification.

3. Member States shall ensure that national courts limit the disclosure of evidence to that which is proportionate. In determining whether any disclosure requested by a party is proportionate, national courts shall consider the legitimate interests of all parties and third parties concerned. They shall, in particular, consider:

- (a) the extent to which the claim or defence is supported by available facts and evidence justifying the request to disclose evidence;
- (b) the scope and cost of disclosure, especially for any third parties concerned, including preventing non-specific searches for information which is unlikely to be of relevance for the parties in the procedure;
- (c) whether the evidence the disclosure of which is sought contains confidential information, especially concerning any third parties, and what arrangements are in place for protecting such confidential information.

4. Member States shall ensure that national courts have the power to order the disclosure of evidence containing confidential information where they consider it relevant to the action for damages. Member States shall ensure

that, when ordering the disclosure of such information, national courts have at their disposal effective measures to protect such information.

5. The interest of undertakings to avoid actions for damages following an infringement of competition law shall not constitute an interest that warrants protection.

6. Member States shall ensure that national courts give full effect to applicable legal professional privilege under Union or national law when ordering the disclosure of evidence.

7. Member States shall ensure that those from whom disclosure is sought are provided with an opportunity to be heard before a national court orders disclosure under this Article.

8. Without prejudice to paragraphs 4 and 7 and to Article 6, this Article shall not prevent Member States from maintaining or introducing rules which would lead to wider disclosure of evidence.

Article 6 - Disclosure of evidence included in the file of a competition authority

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Chapter II Disclosure of Evidence

Article 6 Disclosure of evidence included in the file of a competition authority

9B-1480+



1. Member States shall ensure that, for the purpose of actions for damages, where national courts order the disclosure of evidence included in the file of a competition authority, this Article applies in addition to Article 5.

2. This Article is without prejudice to the rules and practices on public access to documents under Regulation (EC) No 1049/2001.

3. This Article is without prejudice to the rules and practices under Union or national law on the protection of internal documents of competition authorities and of correspondence between competition authorities.

4. When assessing, in accordance with Article 5(3), the proportionality of an order to disclose information, national courts shall, in addition, consider the following:

(a) whether the request has been formulated specifically with regard to the nature, subject matter or contents of documents submitted to a competition authority or held in the file thereof, rather than by a non-specific application concerning documents submitted to a competition authority;

(b) whether the party requesting disclosure is doing so in relation to an action for damages before a national court; and

(c) in relation to paragraphs 5 and 10, or upon request of a competition authority pursuant to paragraph 11, the need to safeguard the effectiveness of the public enforcement of competition law.

5. National courts may order the disclosure of the following categories of evidence only after a competition authority, by adopting a decision or otherwise, has closed its proceedings:

(a) information that was prepared by a natural or legal person specifically for the proceedings of a competition authority;

(b) information that the competition authority has drawn up and sent to the parties in the course of its proceedings; and

(c) settlement submissions that have been withdrawn.

6. Member States shall ensure that, for the purpose of actions for damages, national courts cannot at any time order a party or a third party to disclose any of the following categories of evidence:

- (a) leniency statements; and
- (b) settlement submissions.

7. A claimant may present a reasoned request that a national court access the evidence referred to in point (a) or (b) of paragraph 6 for the sole purpose of ensuring that their contents correspond to the definitions in points (16) and (18) of Article 2. In that assessment, national courts may request assistance only from the competent competition authority. The authors of the evidence in question may also have the possibility to be heard. In no case shall the national court permit other parties or third parties access to that evidence.

8. If only parts of the evidence requested are covered by paragraph 6, the remaining parts thereof shall, depending on the category under which they fall, be released in accordance with the relevant paragraphs of this Article.

9. The disclosure of evidence in the file of a competition authority that does not fall into any of the categories listed in this Article may be ordered in actions for damages at any time, without prejudice to this Article.

10. Member States shall ensure that national courts request the disclosure from a competition authority of evidence included in its file only where no party or third party is reasonably able to provide that evidence.

11. To the extent that a competition authority is willing to state its views on the proportionality of disclosure requests, it may, acting on its own initiative, submit observations to the national court before which a disclosure order is sought.

Article 7 - Limits on the use of evidence obtained solely through access to the file of a competition authority

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Chapter II Disclosure of Evidence

Article 7 Limits on the use of evidence obtained solely through access to the file of a competition authority

9B-1481+



1. Member States shall ensure that evidence in the categories listed in Article 6(6) which is obtained by a natural or legal person solely through access to the file of a competition authority is either deemed to be inadmissible in actions for damages or is otherwise protected under the applicable national rules to ensure the full effect of the limits on the disclosure of evidence set out in Article 6.
2. Member States shall ensure that, until a competition authority has closed its proceedings by adopting a decision or otherwise, evidence in the categories listed in Article 6(5) which is obtained by a natural or legal person solely through access to the file of that competition authority is either deemed to be inadmissible in actions for damages or is otherwise protected under the applicable national rules to ensure the full effect of the limits on the disclosure of evidence set out in Article 6.
3. Member States shall ensure that evidence which is obtained by a natural or legal person solely through access to the file of a competition authority and which does not fall under paragraph 1 or 2, can be used in an action for damages only by that person or by a natural or legal person that succeeded to that person's rights, including a person that acquired that person's claim.

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Article 8 - Penalties

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Chapter II Disclosure of Evidence

Article 8 Penalties

9B-1482+

1. Member States shall ensure that national courts are able effectively to impose penalties on parties, third parties and their legal representatives in the event of any of the following:

- (a) their failure or refusal to comply with the disclosure order of any national court;
- (b) their destruction of relevant evidence;
- (c) their failure or refusal to comply with the obligations imposed by a national court order protecting confidential information;
- (d) their breach of the limits on the use of evidence provided for in this Chapter.

2. Member States shall ensure that the penalties that can be imposed by national courts are effective, proportionate and dissuasive. The penalties available to national courts shall include, with regard to the behaviour of a party to proceedings for an action for damages, the possibility to draw adverse inferences, such as presuming the relevant issue to be proven or dismissing claims and defences in whole or in part, and the possibility to order the payment of costs.

Article 9 - Effect of national decisions

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Chapter III Effect of National Decisions, Limitation Periods, Joint and Several Liability

Article 9 Effect of national decisions

9B-1483+



1. Member States shall ensure that an infringement of competition law found by a final decision of a national competition authority or by a review court is deemed to be irrefutably established for the purposes of an action for damages brought before their national courts under Article 101 or 102 TFEU or under national competition law.
2. Member States shall ensure that where a final decision referred to in paragraph 1 is taken in another Member State, that final decision may, in accordance with national law, be presented before their national courts as at least *prima facie* evidence that an infringement of competition law has occurred and, as appropriate, may be assessed along with any other evidence adduced by the parties.
3. This Article is without prejudice to the rights and obligations of national courts under Article 267 TFEU.

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Article 10 - Limitation periods

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Chapter III Effect of National Decisions, Limitation Periods, Joint and Several Liability

Article 10 Limitation periods

9B-1484+



1. Member States shall, in accordance with this Article, lay down rules applicable to limitation periods for bringing actions for damages. Those rules shall determine when the limitation period begins to run, the duration thereof and the circumstances under which it is interrupted or suspended.

2. Limitation periods shall not begin to run before the infringement of competition law has ceased and the claimant knows, or can reasonably be expected to know:

- (a) of the behaviour and the fact that it constitutes an infringement of competition law;
- (b) of the fact that the infringement of competition law caused harm to it; and
- (c) the identity of the infringer.

3. Member States shall ensure that the limitation periods for bringing actions for damages are at least five years.

4. Member States shall ensure that a limitation period is suspended or, depending on national law, interrupted, if a competition authority takes action for the purpose of the investigation or its proceedings in respect of an infringement of competition law to which the action for damages relates. The suspension shall end at the earliest one year after the infringement decision has become final or after the proceedings are otherwise terminated.

Article 11 - Joint and several liability

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Chapter III Effect of National Decisions, Limitation Periods, Joint and Several Liability

Article 11 Joint and several liability

9B-1485+



1. Member States shall ensure that undertakings which have infringed competition law through joint behaviour are jointly and severally liable for the harm caused by the infringement of competition law; with the effect that each of those undertakings is bound to compensate for the harm in full, and the injured party has the right to require full compensation from any of them until he has been fully compensated.

2. By way of derogation from paragraph 1, Member States shall ensure that, without prejudice to the right of full compensation as laid down in Article 3, where the infringer is a small or medium-sized enterprise (SME) as defined in Commission Recommendation 2003/361/EC¹, the infringer is liable only to its own direct and indirect purchasers where:

- (a) its market share in the relevant market was below 5 % at any time during the infringement of competition law; and
- (b) the application of the normal rules of joint and several liability would irretrievably jeopardise its economic viability and cause its assets to lose all their value.

3. The derogation laid down in paragraph 2 shall not apply where:

- (a) the SME has led the infringement of competition law or has coerced other undertakings to participate therein; or
- (b) the SME has previously been found to have infringed competition law.

4. By way of derogation from paragraph 1, Member States shall ensure that an immunity recipient is jointly and severally liable as follows:

- (a) to its direct or indirect purchasers or providers; and
- (b) to other injured parties only where full compensation cannot be obtained from the other undertakings that were involved in the same infringement of competition law.

Member States shall ensure that any limitation period applicable to cases under this paragraph is reasonable and sufficient to allow injured parties to bring such actions.

5. Member States shall ensure that an infringer may recover a contribution from any other infringer, the amount of which shall be determined in the light of their relative responsibility for the harm caused by the infringement of competition law. The amount of contribution of an infringer which has been granted immunity from fines under a leniency programme shall not exceed the amount of the harm it caused to its own direct or indirect purchasers or providers.

6. Member States shall ensure that, to the extent the infringement of competition law caused harm to injured parties other than the direct or indirect purchasers or providers of the infringers, the amount of any contribution from an immunity recipient to other infringers shall be determined in the light of its relative responsibility for that harm.

Footnotes

- ¹ Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36).

Article 12 - Passing-on of overcharges and the right to full compensation

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Chapter IV The Passing-on of Overcharges

Article 12 Passing-on of overcharges and the right to full compensation

9B-1486+



1. To ensure the full effectiveness of the right to full compensation as laid down in Article 3, Member States shall ensure that, in accordance with the rules laid down in this Chapter, compensation of harm can be claimed by anyone who suffered it, irrespective of whether they are direct or indirect purchasers from an infringer, and that compensation of harm exceeding that caused by the infringement of competition law to the claimant, as well as the absence of liability of the infringer, are avoided.
2. In order to avoid overcompensation, Member States shall lay down procedural rules appropriate to ensure that compensation for actual loss at any level of the supply chain does not exceed the overcharge harm suffered at that level.
3. This Chapter shall be without prejudice to the right of an injured party to claim and obtain compensation for loss of profits due to a full or partial passing-on of the overcharge.
4. Member States shall ensure that the rules laid down in this Chapter apply accordingly where the infringement of competition law relates to a supply to the infringer.
5. Member States shall ensure that the national courts have the power to estimate, in accordance with national procedures, the share of any overcharge that was passed on.

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Article 13 - Passing-on defence

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Chapter IV The Passing-on of Overcharges

Article 13 Passing-on defence

9B-1487+

Member States shall ensure that the defendant in an action for damages can invoke as a defence against a claim for damages the fact that the claimant passed on the whole or part of the overcharge resulting from the infringement of competition law. The burden of proving that the overcharge was passed on shall be on the defendant, who may reasonably require disclosure from the claimant or from third parties.

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Article 14 - Indirect purchasers

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Chapter IV The Passing-on of Overcharges

Article 14 Indirect purchasers

9B-1488+



1. Member States shall ensure that, where in an action for damages the existence of a claim for damages or the amount of compensation to be awarded depends on whether, or to what degree, an overcharge was passed on to the claimant, taking into account the commercial practice that price increases are passed on down the supply chain, the burden of proving the existence and scope of such a passing-on shall rest with the claimant, who may reasonably require disclosure from the defendant or from third parties.
2. In the situation referred to in paragraph 1, the indirect purchaser shall be deemed to have proven that a passing-on to that indirect purchaser occurred where that indirect purchaser has shown that:
 - (a) the defendant has committed an infringement of competition law;
 - (b) the infringement of competition law has resulted in an overcharge for the direct purchaser of the defendant; and
 - (c) the indirect purchaser has purchased the goods or services that were the object of the infringement of competition law, or has purchased goods or services derived from or containing them.

This paragraph shall not apply where the defendant can demonstrate credibly to the satisfaction of the court that the overcharge was not, or was not entirely, passed on to the indirect purchaser.

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Article 15 - Actions for damages by claimants from different levels in the supply chain

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Chapter IV The Passing-on of Overcharges

Article 15 Actions for damages by claimants from different levels in the supply chain

9B-1489+



1. To avoid that actions for damages by claimants from different levels in the supply chain lead to a multiple liability or to an absence of liability of the infringer, Member States shall ensure that in assessing whether the burden of proof resulting from the application of Articles 13 and 14 is satisfied, national courts seized of an action for damages are able, by means available under Union or national law, to take due account of any of the following:

- (a) actions for damages that are related to the same infringement of competition law, but that are brought by claimants from other levels in the supply chain;
- (b) judgments resulting from actions for damages as referred to in point (a);
- (c) relevant information in the public domain resulting from the public enforcement of competition law.

2. This Article shall be without prejudice to the rights and obligations of national courts under Article 30 of Regulation (EU) No 1215/2012.

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Article 16 - Guidelines for national courts

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Chapter IV The Passing-on of Overcharges

Article 16 Guidelines for national courts

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The Commission shall issue guidelines for national courts on how to estimate the share of the overcharge which was passed on to the indirect purchaser.



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Article 17 - Quantification of harm

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Chapter V Quantification of Harm

Article 17 Quantification of harm

9B-1491+



1. Member States shall ensure that neither the burden nor the standard of proof required for the quantification of harm renders the exercise of the right to damages practically impossible or excessively difficult. Member States shall ensure that the national courts are empowered, in accordance with national procedures, to estimate the amount of harm if it is established that a claimant suffered harm but it is practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the evidence available.
2. It shall be presumed that cartel infringements cause harm. The infringer shall have the right to rebut that presumption.
3. Member States shall ensure that, in proceedings relating to an action for damages, a national competition authority may, upon request of a national court, assist that national court with respect to the determination of the quantum of damages where that national competition authority considers such assistance to be appropriate.

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Article 18 - Suspensive and other effects of consensual dispute resolution

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Chapter VI Consensual Dispute Resolution

Article 18 Suspensive and other effects of consensual dispute resolution

9B-1492+



1. Member States shall ensure that the limitation period for bringing an action for damages is suspended for the duration of any consensual dispute resolution process. The suspension of the limitation period shall apply only with regard to those parties that are or that were involved or represented in the consensual dispute resolution.
2. Without prejudice to provisions of national law in matters of arbitration, Member States shall ensure that national courts seized of an action for damages may suspend their proceedings for up to two years where the parties thereto are involved in consensual dispute resolution concerning the claim covered by that action for damages.
3. A competition authority may consider compensation paid as a result of a consensual settlement and prior to its decision imposing a fine to be a mitigating factor.

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Article 19 - Effect of consensual settlements on subsequent actions for damages

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Chapter VI Consensual Dispute Resolution

Article 19 Effect of consensual settlements on subsequent actions for damages

9B-1493+



1. Member States shall ensure that, following a consensual settlement, the claim of the settling injured party is reduced by the settling co-infringer's share of the harm that the infringement of competition law inflicted upon the injured party.

2. Any remaining claim of the settling injured party shall be exercised only against non-settling co-infringers. Non-settling co-infringers shall not be permitted to recover contribution for the remaining claim from the settling co-infringer.

3. By way of derogation from paragraph 2, Member States shall ensure that where the non-settling co-infringers cannot pay the damages that correspond to the remaining claim of the settling injured party, the settling injured party may exercise the remaining claim against the settling co-infringer.

The derogation referred to in the first subparagraph may be expressly excluded under the terms of the consensual settlement.

4. When determining the amount of contribution that a co-infringer may recover from any other co-infringer in accordance with their relative responsibility for the harm caused by the infringement of competition law, national courts shall take due account of any damages paid pursuant to a prior consensual settlement involving the relevant co-infringer.

Article 20 - Review

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Chapter VII Final provisions

Article 20 Review

9B-1494+



1. The Commission shall review this Directive and shall submit a report thereon to the European Parliament and the Council by 27 December 2020.

2. The report referred to in paragraph 1 shall, inter alia, include information on all of the following:

(a) the possible impact of financial constraints flowing from the payment of fines imposed by a competition authority for an infringement of competition law on the possibility for injured parties to obtain full compensation for the harm caused by that infringement of competition law;

(b) the extent to which claimants for damages caused by an infringement of competition law established in an infringement decision adopted by a competition authority of a Member State are able to prove before the national court of another Member State that such an infringement of competition law has occurred;

(c) the extent to which compensation for actual loss exceeds the overcharge harm caused by the infringement of competition law or suffered at any level of the supply chain.

3. If appropriate, the report referred to in paragraph 1 shall be accompanied by a legislative proposal.

End of Document

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Article 21 - Transposition

White Book 2023

Volume 2

Section 9 - Jurisdictional and Procedural Legislation

Section 9B - Other Statutes and Regulations

Directive (EU) 2014/104 of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union

Chapter VII Final provisions

Article 21 Transposition

9B-1495+

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 27 December 2016. They shall forthwith communicate to the Commission the text thereof.



When Member States adopt those measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

End of Document

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Article 22 - Temporal application

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Section 9 - Jurisdictional and Procedural Legislation

Section 9B - Other Statutes and Regulations

Directive (EU) 2014/104 of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union

Chapter VII Final provisions

Article 22 Temporal application

9B-1496+

- 1. Member States shall ensure that the national measures adopted pursuant to Article 21 in order to comply with substantive provisions of this Directive do not apply retroactively.
- 2. Member States shall ensure that any national measures adopted pursuant to Article 21, other than those referred to in paragraph 1, do not apply to actions for damages of which a national court was seized prior to 26 December 2014.

End of Document

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Article 23 - Entry into force

White Book 2023

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Section 9 - Jurisdictional and Procedural Legislation

Section 9B - Other Statutes and Regulations

Directive (EU) 2014/104 of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union

Chapter VII Final provisions

Article 23 Entry into force

9B-1497+

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.



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Article 24 - Addressees

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Section 9 - Jurisdictional and Procedural Legislation

Section 9B - Other Statutes and Regulations

Directive (EU) 2014/104 of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union

Chapter VII Final provisions

Article 24 Addressees

9B-1498+ This Directive is addressed to the Member States.



Done at Strasbourg, 26 November 2014.

For the European Parliament

The President

M. SCHULZ

For the Council

The President

S. GOZI

Regulation 1. - Citation, commencement, interpretation and extent

White Book 2023

Volume 2

Section 9 - Jurisdictional and Procedural Legislation

Section 9B - Other Statutes and Regulations

Remote Observation and Recording (Courts and Tribunals) Regulations 2022

Arrangement of SI

(SI 2022/705)

1.— Citation, commencement, interpretation and extent

- 9B-1499
- (1) These Regulations may be cited as the Remote Observation and Recording (Courts and Tribunals) Regulations 2022 and come into force on 28th June 2022.
 - (2) In these Regulations, "*section 85A*" means section 85A of the Courts Act 2003.
 - (3) These Regulations extend to England and Wales, Scotland and Northern Ireland.

End of Document

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Regulation 2. - Specified proceedings

White Book 2023

Volume 2

Section 9 - Jurisdictional and Procedural Legislation

Section 9B - Other Statutes and Regulations

Remote Observation and Recording (Courts and Tribunals) Regulations 2022

2. Specified proceedings

9B-1500 Directions under section 85A(2) may be given in relation to proceedings, of any type and in any court to which section 85A applies, which are—

(a) in public; or

(b) proceedings at which the general public is not entitled to be present but specific categories of person, or specific individuals, who are not taking part in the proceedings are entitled to be present by virtue of provision made by or under any enactment or of being authorised by the court.

End of Document

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Regulation 3. - Matters of which the court must be satisfied

White Book 2023

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Section 9 - Jurisdictional and Procedural Legislation

Section 9B - Other Statutes and Regulations

Remote Observation and Recording (Courts and Tribunals) Regulations 2022

3. Matters of which the court must be satisfied

9B-1501 Before making a direction under section 85A(2), the court must be satisfied that—

(a) it would be in the interests of justice to make the direction; and

(b) there is capacity and technological capability to enable transmission, and giving effect to the direction would not create an unreasonable administrative burden.

End of Document

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Regulation 4. - Matters that the court must take into account

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Section 9 - Jurisdictional and Procedural Legislation

Section 9B - Other Statutes and Regulations

Remote Observation and Recording (Courts and Tribunals) Regulations 2022

4. Matters that the court must take into account

- 9B-1502 Before deciding whether, and on what terms, to make a direction under section 85A(2), the court must take into account—
- (a) the need for the administration of justice to be, as far as possible, open and transparent;
 - (b) the timing of any request or application to the court or tribunal to make a direction, and its impact on the business of the court or tribunal;
 - (c) the extent to which the technical, human and other resources necessary to facilitate effective remote observation are or can be made available;
 - (d) any limitation imposed by or under any enactment on the persons who are entitled to be present at the proceedings;
 - (e) any issues which might arise if persons who are outside the United Kingdom are among those watching or listening to the transmission;
 - (f) any impact which the making or withholding of such a direction, or the terms of the direction, might have upon—
 - (i) the content or quality of the evidence to be put before the court or tribunal;
 - (ii) public understanding of the law and the administration of justice;
 - (iii) the ability of the public, including the media, to observe and scrutinise the proceedings;
 - (iv) the safety and right to privacy of any person involved with the proceedings.

Regulation 5. - Provision which must be included in a direction

White Book 2023

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Section 9 - Jurisdictional and Procedural Legislation

Section 9B - Other Statutes and Regulations

Remote Observation and Recording (Courts and Tribunals) Regulations 2022

5.— Provision which must be included in a direction

- 9B-1503 (1) A direction under section 85A(2) made in relation to proceedings specified in regulation 2(b) must include provision which has the effect of—
(a) prohibiting any person other than a person entitled to be present at those proceedings from watching or listening to the transmission; and
(b) requiring any person so entitled to demonstrate, in such manner as specified in the direction, the capacity in which that person is so entitled.
- (2) A direction under section 85A(2) made in relation to any proceedings must, except where the direction is for transmission to designated live-streaming premises, include provision which has the effect—
(a) that no person will be able to watch or listen to the transmission without first, when identifying themselves to the court, providing their full name and their email address, unless the court dispenses with this requirement;
(b) of requiring as a condition of continued access that any person given access will during the transmission conduct themselves appropriately and in particular in accordance with any requirements of the direction or instructions of the judge for persons observing the proceedings.

End of Document

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Article 1.

White Book 2023 | Commentary last updated June 7, 2021

Volume 2

Section 10 - Court Fees

Civil Proceedings Fees Order 2008

Article 1

(SI 2008/1053)

Citation and commencement

1.—

10-1

(1) This Order may be cited as the Civil Proceedings Fees Order 2008 and shall come into force on 1 May 2008.

(2) In this Order—

(a) ...

(b) “*the CPR*” means the Civil Procedure Rules 1998;

(c) “*LSC*” means the Legal Services Commission established under section 1 of the Access to Justice Act 1999;¹

(d) expressions also used in the CPR have the same meaning as in those Rules.

Editorial note

10-1.1 Fees are regularly reviewed. The 2008 Order was amended by the [Civil Proceedings Fees \(Amendment\) Order 2008 \(SI 2008/2853\)](#), [Civil Proceedings Fees \(Amendment\) Order 2014 \(SI 2014/874\)](#), [Civil Proceedings, Family Proceedings and Upper Tribunal Fees \(Amendment\) Order 2016 \(SI 2016/402\)](#) and, most recently, by the [Court of Protection, Civil Proceedings and Magistrates Court Fees \(Amendment\) Order 2018 \(SI 2018/812\)](#) which came into force on 25 July 2018 and actually reduced some civil fees. Article 1(2)(a) omitted by the [Civil Proceedings Fees \(Amendment\) Order 2021](#) with effect from 18 May 2021.

Footnotes

¹ Sections 1 and 9 were amended by [S.I. 2005/3429](#).

Article 2.

White Book 2023 | Commentary last updated December 19, 2016

Volume 2

Section 10 - Court Fees

Civil Proceedings Fees Order 2008

Article 2

Fees payable

10-2

2. The fees set out in column 2 of Schedule 1 are payable in the Senior Courts of England and Wales and in County Court in respect of the items described in column 1 in accordance with and subject to the directions specified in that column.

Note

- 10-2. 1 Amended by the [Civil Proceedings Fees \(Amendment\) Order 2014 \(SI 2014/874\)](#), with effect from 22 April 2014; and by the [Civil Proceedings Fees \(Amendment\) Order 2016 \(SI 2016/1191\) art.2\(2\)](#), with effect from 6 March 2017 subject to saving provision specified in [SI 2016/1191 art.3](#).

End of Document

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Article 3.

White Book 2023 | Commentary last updated April 10, 2014

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Section 10 - Court Fees

Civil Proceedings Fees Order 2008

Article 3

Fees payable

10-3

3. No fee is payable in respect of—
(a) non-contentious probate business;
(b) the enrolment of documents;
(c) criminal proceedings (except proceedings on the Crown side of the Queen's Bench Division to which the fees in Schedule 1 are applicable);
(d) proceedings by sheriffs, under-sheriffs, deputy-sheriffs or other officers of the sheriff; or
(e) family proceedings in the High Court or in a County Court.

Note

10-3. 1 Amended by the [Civil Proceedings Fees \(Amendment\) Order 2014 \(SI 2014/874\)](#), with effect from 22 April 2014.

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Article 3A.

White Book 2023 | Commentary last updated August 6, 2019

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Section 10 - Court Fees

Civil Proceedings Fees Order 2008

Article 3a

Fees payable

- 10-3. 2 (1) In proceedings under the Guardianship (Missing Persons) Act 2017—
 (a) fee 2.4(a) (application on notice where no other fee is specified); and
 (b) fee 2.5(a) (application by consent or without notice where no other fee is specified);

are not payable by the Public Guardian.

- (2) For the purpose of this regulation, “Public Guardian” has the meaning given in section 57 of the Mental Capacity Act 2005.

Note

10-3. 2. 1 Inserted by the [Court Fees \(Miscellaneous Amendments\) Order 2019 \(SI 2019/1063\) art.4\(2\)](#), with effect from 22 July 2019.

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Article (3B)

White Book 2023 | Commentary last updated August 3, 2022

Volume 2

Section 10 - Court Fees

Civil Proceedings Fees Order 2008

Article 3b

Fees payable

- 10-3. 2. 2 (3B) Fees 2.4(a) (on an application on notice where no other fee is specified) and 2.5(a) (on an application by consent or without notice where no other fee is specified) in Schedule 1 (fees to be taken) are not payable in respect of any application made by reference to sections 85F-K of the Courts Act 2003 ¹ for an order or direction of the court relating to cross-examination in person of a party to or witness in the proceedings.

Note

- 10-3. 2. 3 Article 3B inserted by the Civil and Family Proceedings Fees (Amendment) Order 2022 (SI 2022/540) art.2, with effect from 21 July 2022.

Footnotes

1 2003 c. 39. There are no relevant amendments. Sections 85F-K were inserted by s.66 of the Domestic Abuse Act 2021 .

Article 4.

White Book 2023

Volume 2

Section 10 - Court Fees

Civil Proceedings Fees Order 2008

Article 4

Fees payable

10-4

4. Where by any convention entered into by Her Majesty with any foreign power it is provided that no fee is required to be paid in respect of any proceedings, the fees specified in this Order are not payable in respect of those proceedings.

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Article 5.

White Book 2023 | Commentary last updated June 7, 2021

Volume 2

Section 10 - Court Fees

Civil Proceedings Fees Order 2008

Article 5

Remissions and part remissions

5.—

10-5

- (1) Subject to paragraph (2), Schedule 2 applies for the purpose of ascertaining whether a party is entitled to a remission or part remission of a fee prescribed by this Order.
- (2) Schedule 2 does not apply to—
(a) fee 1.1 if the fee relates to proceedings to recover a sum of money in cases brought by Money Claim OnLine users; or
(b) fee 8.8 (fee payable on a consolidated attached of earnings order or an administration order).

Note

10-5. 1 Substituted by the Courts and Tribunals Fee Remissions Order 2013 (SI 2013/2302) art.6(2) with effect from 7 October 2013 (for transitional provisions see art.13(1) thereof). Sub-section (2)(a) substituted by Civil Proceedings and Family Proceedings Fees (Amendment) Order 2015 (SI 2015/576) art.2(2) with effect from 1 March 2015. Amended by the Civil Proceedings Fees (Amendment) Order 2021 with effect from 18 May 2021.

End of Document

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Article 6.

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Section 10 - Court Fees

Civil Proceedings Fees Order 2008

Article 6

Revocations

10-6

- 6.** The instruments listed in column 1 of the table in Schedule 3 (which have the references listed in column 2) are revoked.

End of Document

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Schedule 1 - Fees to be taken

White Book 2023 | Commentary last updated November 24, 2021

Volume 2

Section 10 - Court Fees

Civil Proceedings Fees Order 2008

Schedule 1

Schedule 1 Fees to be taken

Article 3

10-7

COLUMN 1	COLUMN 2
NUMBER AND DESCRIPTION OF FEE	AMOUNT OF FEE
1 Starting proceedings (High Court and County Court)	
1.1 On starting proceedings (including proceedings issued after permission to issue is granted) to recover a sum of money where the sum claimed:	
(a) does not exceed £300;	£35
(b) exceeds £300 but does not exceed £500;	£50
(c) exceeds £500 but does not exceed £1,000;	£70
(d) exceeds £1,000 but does not exceed £1,500;	£80
(e) exceeds £1,500 but does not exceed £3,000;	£115
(f) exceeds £3,000 but does not exceed £5,000;	£205
(g) exceeds £5,000 but does not exceed £10,000;	£455
(h) exceeds £10,000 but does not exceed £200,000;	5% of the value of the claim
(i) exceeds £200,000 or is not limited.	£10,000
1.2 [...]	
Fee 1.1	
Where the claimant does not identify the value of the claim when starting proceedings to recover a sum of money, the fee payable is the one applicable to a claim where the sum is not limited.	

Where the claimant is making a claim for interest on a specified sum of money, the amount on which the fee is calculated is the total amount of the claim and the interest.	
1.4 On starting proceedings for the recovery of land:	
(a) in the High Court;	£480
(b) in the County Court;	£355
1.5 On starting proceedings for any other remedy (including proceedings issued after permission to issue is granted):	
in the High Court	£569
in the County Court	£332
Fees 1.1, 1.4 and 1.5. Recovery of land or goods.	
Where a claim for money is additional or alternative to a claim for recovery of land or goods, only fee 1.4 or 1.5 is payable.	
Fees 1.1 and 1.5. Claims other than recovery of land or goods.	
Where a claim for money is additional to a non money claim (other than a claim for recovery of land or goods), then fee 1.1 is payable in addition to fee 1.5.	
Where a claim for money is alternative to a non money claim (other than a claim for recovery of land or goods), only fee 1.1 is payable in the High Court, and, in the County Court, whichever is greater of fee 1.1 or fee 1.5 is payable.	
Fees 1.1 and 1.5.	
Where more than one non money claim is made in the same proceedings, fee 1.5 is payable once only, in addition to any fee which may be payable under fee 1.1.	
Fees 1.1 and 1.5 are not payable where fee 1.8(b), fee 1.9(a), fee 3 or fee 10.1 applies.	
Fees 1.1 and fee 1.5. Amendment of claim or counterclaim.	
Where the claim or counterclaim is amended, and the fee paid before amendment is less than that which would have been payable if the document, as amended, had been so drawn in the first instance, the party amending the document must pay the difference.	
1.6 On the filing of proceedings against a party or parties not named in the proceedings.	£59
Fee 1.6 is payable by a defendant who adds or substitutes a party or parties to the proceedings or by a claimant who adds or substitutes a defendant or defendants.	
1.7 On the filing of a counterclaim.	The same fee as if the remedy sought were the subject of separate proceedings
No fee is payable on a counterclaim which a defendant is required to make under rule 57.8 of the CPR (a) (requirement to serve a counterclaim if a defendant makes a claim or seeks a remedy in relation to a grant of probate of a will, or letters of administration of an estate, of a deceased person).	
1.8(a) On an application for permission to issue proceedings.	£59
(b) On an application for an order under Part 3 of the Solicitors Act 1974 (b) for the assessment of costs payable to a solicitor by a client or on starting costs only proceedings.	£59
1.9(a) For permission to apply for judicial review.	£154

1.9(b) On applying for a request to reconsider at a hearing a decision on permission.	£385
Where fee 1.9(b) has been paid and permission is granted at a hearing, the amount payable under fee 1.9(c) is £385.	
Where the court has made an order giving permission to proceed with a claim for judicial review, there is payable by the claimant within 7 days of service on the claimant of that order:	
1.9(c) if the proceedings have been started by an application for permission to apply for judicial review.	£770
1.9(d) if the claim for judicial review was started otherwise than by an application for permission to apply for judicial review.	£154
1.10 On an appeal under regulation 38(9) of the Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020 (applications to the county court).	£5
2 General Fees (High Court and County Court)	
2.1 On the court fixing a trial date or trial period for a case allocated to:	
(a) the multi-track;	£1,175
(b) the fast track;	£545
(c) the small claims track where the sum claimed:	
(i) does not exceed £300;	£27
(ii) exceeds £300 but does not exceed £500;	£59
(iii) exceeds £500 but does not exceed £1,000;	£85
(iv) exceeds £1,000 but does not exceed £1,500;	£123
(v) exceeds £1,500 but does not exceed £3,000;	£181
(vi) exceeds £3,000.	£346
Where notice of trial date or trial period is given by the court 36 days or more before the trial date or the Monday of the first week of the notified trial period, fee 2.1 is payable at least 28 days prior to the trial date or the Monday of the first week of the notified trial period.	
Where notice of trial date or trial period is given by the court less than 36 days before the trial date or the Monday of the first week of the notified trial period, fee 2.1 is payable within 7 days after the date on which such notice is given.	
Where the court gives notice of both a trial date and a trial period, the fee is payable by reference to the Monday of the first week of the notified trial period.	
Written notice is given on the date on which the notice is sent out from the court. Oral notice is given on the date on which the notice is communicated by the court. Where notice is both in written form and given orally, the notice is given on the date that the written notice is sent out from the court.	
Where an application for fee remission is refused in whole or in part, fee 2.1 (or the amount of the fee which remains unremitted) is payable either: (a) within 7 days after the court giving notice of refusal of fee remission (or refusal in part); or (b) at least 28 days prior to the trial date or the Monday of the first week of the notified trial period, whichever is latest.	
Fee 2.1 is payable by the claimant except where the action is proceeding on the counterclaim alone, when it is payable by the defendant.	
Fee 2.1 is not payable in respect of a case where the court fixed the trial date on the issue of the claim.	

2.2 In the High Court on filing: an appellant's notice; or a respondent's notice where the respondent is appealing or wishes to ask the appeal court to uphold the order of the lower court for reasons different from or additional to those given by the lower court:	£259
2.3 In the County Court on filing: an appellant's notice, or a respondent's notice where the respondent is appealing or wishes to ask the appeal court to uphold the order of the lower court for reasons different from or additional to those given by the lower court:	
(a) in a claim allocated to the small claims track;	£129
(b) in all other claims.	£151
Fees 2.2 and 2.3 do not apply on appeals against a decision made in detailed assessment proceedings.	
2.4(a) On an application on notice where no other fee is specified, except for applications referred to in fee 2.4(b).	£275
2.4(b) On an application on notice where no other fee is specified made— (i) under section 3 of the Protection from Harassment Act 1997; or (ii) for a payment out of funds deposited in court.	£167
2.5(a) On an application by consent or without notice where no other fee is specified, except for applications referred to in fee 2.5(b).	£108
2.5(b) On an application made by consent or without notice where no other fee is specified made— (i) under section 3 of the Protection from Harassment Act 1997; or (ii) for a payment out of funds deposited in court.	£54
For the purpose of fee 2.5 a request for a judgment or order on admission or in default does not constitute an application and no fee is payable.	
Fee 2.5 is not payable in relation to an application by consent for an adjournment of a hearing where the application is received by the court at least 14 days before the date set for that hearing.	
Fees 2.4(a) and 2.5(b) are not payable in proceedings to which fees 3.11 and 3.12 apply.	
2.6 On an application for a summons or order for a witness to attend court to be examined on oath or an order for evidence to be taken by deposition, other than an application for which fee 7.2 or 8.3 is payable.	£21
2.7 On an application to vary a judgment or suspend enforcement, including an application to suspend a warrant of possession.	£14
Where more than one remedy is sought in the same application only one fee is payable.	
2.8 Register of judgments, orders and fines kept under section 98 of the Courts Act 2003:	
On a request for the issue of a certificate of satisfaction.	£14
3 Companies Act 1985, Companies Act 2006 and Insolvency Act 1986 (High Court and County Court)	
3.1 On entering a bankruptcy petition:	

(a) if presented by a debtor or the personal representative of a deceased debtor;	£180
(b) if presented by a creditor or other person.	£302
3.2 On entering a petition for an administration order.	£302
3.3 On entering any other petition.	£302
One fee only is payable where more than one petition is presented in relation to a partnership.	
3.4 (a) On a request for a certificate of discharge from bankruptcy.	£75
(b) after the first certificate, for each copy.	£11
3.5 On an application under the Companies Act 1985 (c), the Companies Act 2006 (d) or the Insolvency Act 1986 (e) other than one brought by petition and where no other fee is specified.	£280
Fee 3.5 is not payable where the application is made in existing proceedings.	
[...]	
3.7 On an application, for the purposes of Regulation (EU) 2015/848 of the European Parliament and of the Council, for an order confirming creditors' voluntary winding up (where the company has passed a resolution for voluntary winding up, and no declaration under section 89 of the Insolvency Act 1986 has been made).	£50
3.8 On filing:	£50
a notice of intention to appoint an administrator under paragraph 14 of Schedule B1 to the Insolvency Act 1986 (f) or in accordance with paragraph 27 of that Schedule; or	
a notice of appointment of an administrator in accordance with paragraphs 18 or 29 of that Schedule.	
Where a person pays fee 3.8 on filing a notice of intention to appoint an administrator, no fee is payable on that same person filing a notice of appointment of that administrator.	
3.9 On submitting a nominee's report under section 2(2) of the Insolvency Act 1986.	£35
3.10 On filing documents in accordance with paragraph 7(1) of Schedule A1(g) to the Insolvency Act 1986.	£35
3.11 On an application by consent or without notice within existing proceedings where no other fee is specified.	£26
3.12 On an application with notice within existing proceedings where no other fee is specified.	£99
3.13 On a search in person of the bankruptcy and companies records, in a County Court.	£45
Requests and applications with no fee:	
No fee is payable on a request or on an application to the Court by the Official Receiver when applying only in the capacity of Official Receiver to the case (and not as trustee or liquidator), or on an application to set aside a statutory demand.	
4 Copy Documents (Court of Appeal, High Court and County Court)	
4.1 On a request for a copy of a document (other than where fee 4.2 applies):	
(a) for ten pages or less;	£11

(b) for each subsequent page.	50p
Note: The fee payable under fee 4.1 includes:	
	where the court allows a party to fax to the court for the use of that party a document that has not been requested by the court and is not intended to be placed on the court file;
	where a party requests that the court fax a copy of a document from the court file; or
	where the court provides a subsequent copy of a document which it has previously provided.
4.2 On a request for a copy of a document on a computer disk or in other electronic form, for each such copy.	£11
5 Determination of costs (Senior Court and County Court)	
Fee 5 does not apply to the determination in the Senior Courts of costs incurred in the Court of Protection.	
5.1 On the filing of a request for detailed assessment where the party filing the request is legally aided, is funded by the Legal Aid Agency or is a person for whom civil legal services have been made available under arrangements made by the Lord Chancellor under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and no other party is ordered to pay the costs of the proceedings.	£237
5.2 On the filing of a request for detailed assessment in any case where fee 5.1 does not apply, or on the filing of a request for a hearing date for the assessment of costs payable to a solicitor by a client pursuant to an order under Part 3 of the Solicitors Act 1974 where (in either case) the amount of the costs claimed:	
(a) does not exceed £15,000;	£398
(b) exceeds £15,000 but does not exceed £50,000;	£801
(c) exceeds £50,000 but does not exceed £100,000;	£1,192
(d) exceeds £100,000 but does not exceed £150,000;	£1,595
(e) exceeds £150,000 but does not exceed £200,000;	£1,992
(f) exceeds £200,000 but does not exceed £300,000;	£2,988
(g) exceeds £300,000 but does not exceed £500,000;	£4,980
(h) exceeds £500,000.	£6,640
Where there is a combined assessment of costs: party and party costs and legal aid costs; party and party costs and Legal Aid Agency costs; party and party costs and Lord Chancellor costs; or party and party costs and one or more of legal aid costs, Legal Aid Agency costs or Lord Chancellor determination of costs, fee 5.2 must be attributed proportionately to the party and party, legal aid, Legal Aid Agency or Lord Chancellor (as the case may be) portions of the bill on the basis of the amount allowed.	
5.3 On a request for the issue of a default costs certificate.	£71
5.4 On commencing an appeal against a decision made in detailed assessment proceedings.	£249
5.5 On a request or application to set aside a default costs certificate.	£130
6 Determination in the Senior Court of costs incurred in the Court of Protection	
6.1 On the filing of a request for detailed assessment.	£87
6.2 On an appeal against a decision made in detailed assessment proceedings.	£70

6.3 On a request or application to set aside a default costs certificate.	£65
7 Enforcement in the High Court	
7.1 On sealing a writ of control/possession/delivery.	£71
Where the recovery of a sum of money is sought in addition to a writ of possession and delivery, no further fee is payable.	
7.2 On an application for an order requiring a judgment debtor or other person to attend court to provide information in connection with enforcement of a judgment or order.	£59
7.3(a) On an application for a third party debt order or the appointment of a receiver by way of equitable execution.	£119
(b) On an application for a charging order.	£119
Fee 7.3(a) is payable in respect of each third party against whom the order is sought.	
Fee 7.3(b) is payable in respect of each charging order applied for.	
7.4 On an application for a judgment summons.	£119
7.5 On a request or application to register a judgment or order, or for permission to enforce an arbitration award, or for a certificate or a certified copy of a judgment or order for use abroad.	£71
8 Enforcement in the county court	
8.1 On an application for or in relation to enforcement of a judgment or order of the County Court or through the County Court, by the issue of a warrant of control against goods except a warrant to enforce payment of a fine:	£83
(a) in CCBC cases, or cases in which a warrant of control is requested in accordance with paragraph 11.2 of Practice Direction 7E to the Civil Procedure Rules (Money Claim Online cases);	
(b) in any other case.	
8.2 On a request for a further attempt at execution of a warrant at a new address following a notice of the reason for non-execution (except a further attempt following suspension).	£33
8.3 On an application for an order requiring a judgment debtor or other person to attend court to provide information in connection with enforcement of a judgment or order.	£59
8.4(a) On an application for a third party debt order or the appointment of a receiver by way of equitable execution.	£119
(b) On an application for a charging order.	£119
Fee 8.4(a) is payable in respect of each third party against whom the order is sought.	
Fee 8.4(b) is payable in respect of each charging order applied for.	
8.5 On an application for a judgment summons.	£119
8.6 On the issue of a warrant of possession or a warrant of delivery.	£130
Where the recovery of a sum of money is sought in addition, no further fee is payable.	
8.7 On an application for an attachment of earnings order (other than a consolidated attachment of earnings order) to secure payment of a judgment debt.	£119

	Fee 8.7 is payable for each defendant against whom an order is sought.	
	Fee 8.7 is not payable where the attachment of earnings order is made on the hearing of a judgment summons.	
	8.8 On a consolidated attachment of earnings order or on an administration order.	For every £1 or part of a £1 of the money paid into court in respect of debts due to creditors - 10p
	Fee 8.8 is calculated on any money paid into court under any order at the rate in force at the time when the order was made (or, where the order has been amended, at the time of the last amendment before the date of payment).	
	8.9 On an application for the enforcement of an award for a sum of money or other decision made by any court, tribunal, body or person other than the High Court or the County Court.	£47
	8.10 On a request for an order to recover a sum that is:	
	a specified debt within the meaning of the Enforcement of Road Traffic Debts Order 1993; or	£9
	pursuant to an enactment, treated as a specified debt for the purposes of that Order.	
	No fee is payable on:	
	an application for an extension of time to serve a statutory declaration or a witness statement in connection with any such order; or	
	a request to issue a warrant of control to enforce any such order.	
8A Service in the county court		
	8A.1 On a request for service by a bailiff of an order to attend court for questioning.	£119
9 Sale (County Court only)		
	9.1 For removing or taking steps to remove goods to a place of deposit.	The reasonable expenses incurred
	Fee 9.1 is to include the reasonable expenses of feeding and caring for any animals.	
	9.2 For the appraisement of goods.	5p in the £1 or part of a £1 of the appraised value
	9.3 For the sale of goods (including advertisements, catalogues, sale and commission and delivery of goods).	15p in the £1 or part of a £1 on the amount realised by the sale or such other sum as the district judge may consider to be justified in the circumstances
	9.4 Where no sale takes place by reason of an execution being withdrawn, satisfied or stopped.	(a) 10p in the £1 or part of a £1 on the value of the goods seized, the value to be the appraised value where the goods have been appraised or such other sum as the district judge may consider to be justified in the circumstances; and in addition (b) any sum payable under fee 9.1 and 9.2.
FEES PAYABLE IN HIGH COURT ONLY		
	10 Miscellaneous proceedings or matters	

Bills of Sale	
10.1 On filing any document under the Bills of Sale Acts 1878 and the Bills of Sale Act (1878) Amendment Act 1882 or on an application under section 15 of the Bills of Sale Act 1878 for an order that a memorandum of satisfaction be written on a registered copy of the bill.	£30
Searches	
10.2 For an official certificate of the result of a search for each name, in any register or index held by the court; or in the Court Funds Office, for an official certificate of the result of a search of unclaimed balances for a specified period of up to 50 years.	£54
10.3 On a search in person of the court's records, including inspection, for each 15 minutes or part of 15 minutes.	£12
Judge sitting as arbitrator	
10.4 On the appointment of an eligible High Court judge as an arbitrator or umpire under section 93 of the Arbitration Act 1996	£610
10.5 For every day or part of a day (after the first day) of the hearing before an eligible High Court judge, so appointed as arbitrator or umpire.	£610
Where fee 10.4 has been paid on the appointment of an eligible High Court judge as an arbitrator or umpire but the arbitration does not proceed to a hearing or an award, the fee will be refunded.	
11 Fees payable in Admiralty matters	
In the Admiralty Registrar and Marshal's Office:	
11.1 On the issue of a warrant for the arrest of a ship or goods.	£18
11.2 On the sale of a ship or goods	
Subject to a minimum fee of £205:	
(a) for every £100 or fraction of £100 of the price up to £100,000;	£1
(b) for every £100 or fraction of £100 of the price exceeding £100,000.	50p
Where there is sufficient proceeds of sale in court, fee 11.2 will be payable by transfer from the proceeds of sale in court.	
11.3 On entering a reference for hearing by the Registrar.	£70
FEES PAYABLE IN HIGH COURT AND COURT OF APPEAL ONLY	
12 Affidavits	
12.1 On taking an affidavit or an affirmation or attestation upon honour in lieu of an affidavit or a declaration except for the purpose of receipt of dividends from the Accountant General and for a declaration by a shorthand writer appointed in insolvency proceedings: for each person making any of the above.	£13
12.2 For each exhibit referred to in an affidavit, affirmation, attestation or declaration for which fee 12.1 is payable.	£2
FEES PAYABLE IN COURT OF APPEAL ONLY	
13 Fees payable in appeals to the Court of Appeal	
13.1(a) Where in an appeal notice, permission to appeal or an extension of time for appealing is applied for (or both are applied for):	£569
on filing an appellant's notice, or	
where the respondent is appealing, on filing a respondent's notice.	

13.1(b) Where permission to appeal is not required or has been granted by the lower court:	£1,292
on filing an appellant's notice, or	
on filing a respondent's notice where the respondent is appealing.	
13.1(c) On the appellant filing an appeal questionnaire (unless the appellant has paid fee 13.1(b), or the respondent filing an appeal questionnaire (unless the respondent has paid fee 13.1(b)).	£1,292
13.2 On filing a respondent's notice where the respondent wishes to ask the appeal court to uphold the order of the lower court for reasons different from or additional to those given by the lower court.	£569
13.3 On filing an application notice.	£569
Fee 13.3 is not payable for an application made in an appeal notice.	

Note

10-7. 1 Schedule 1 substituted by the Civil Proceedings Fees (Amendment) Order 2014 (SI 2014/874), with effect from 22 April 2014.

Entry 3.5 amended by the Civil Proceedings Fees (Amendment No.2) Order 2014 (SI 2014/1834) with effect from 4 August 2014.

Entry 8.1 amended by the Civil Proceedings Fees (Amendment No.3) Order 2014 (SI 2014/2059) with effect from 4 August 2014.

The column headings and the entries from “1 Starting proceedings (High Court and county court)” to the end of the entry headed “Fees 1.1, 1.2 and 1.3” substituted by the Civil Proceedings and Family Proceedings Fees (Amendment) Order 2015 (SI 2015/576) with effect from 1 March 2015.

Entries 1.4(b), 1.4(c), 2.4, 2.5 and the entry beginning “Fees 2.4 and 2.5 are not payable” amended by the Civil Proceedings, Family Proceedings and Upper Tribunal Fees (Amendment) Order 2016 (SI 2016/402) art.2, with effect from 21 March 2016.

Entries 13.1(a), 13.1(b), 13.1(c), 13.2 and 13.3 amended by the Court of Appeal and Upper Tribunal (Lands Chamber) Fees (Amendment) Order 2016 (SI 2016/434) art.2, with effect from 18 April 2016.

Entries 1.5, 1.6, 1.8(a)–(b), 1.9(a)–(d), 5.1, 5.2, 5.3, 5.4, 5.5, 7.1, 7.2, 7.3, 7.4, 7.5, 8.1, 8.1(a)–(b), 8.2, 8.3, 8.4, 8.4(a)–(b), 8.5, 8.6, 8.7, 8.9, 8.10, 10.2, 10.2, 10.3 and 12.1 amended by the Civil Proceedings, First-tier Tribunal, Upper Tribunal and Employment Tribunals Fees (Amendment) Order 2016 (SI 2016/807), with effect from 25 July 2016.

Entry 2.1 amended by the Civil Proceedings Fees (Amendment) Order 2016 (SI 2016/1191) art.2(3), with effect from 6 March 2017, subject to saving provision specified in SI 2016/1191 art.3.

Entry 3.6 substituted and entry 3.7 amended by the Insolvency Amendment (EU 2015/848) Regulations 2017 (SI 2017/702 Sch.1(3) para.54, with effect from 26 June 2017, subject to temporal application specified in SI 2017/702 reg.3.

The Civil Proceedings Fees (Amendment) Order 2016 (SI 2016/1191) did not change Fee 2.1 but, as from 6 March 2017, did change the time when it became payable. A “hearing fee” is payable in all cases on all tracks.

Fees numbered 3.11, 3.12, 10.4(a) and (b) and 10.5(a) and (b) were reduced by the Court of Protection, Civil Proceedings and Magistrates Court Fees (Amendment) Order 2018 (SI 2018/812).

Fees numbered 2.6, 2.7, 2.8, 3.9, 3.10, 11.1 were substituted by the [Court Fees \(Miscellaneous Amendments\) Order 2020 \(SI 2020/720\) art.3](#), with effect from 3 August 2020.

Entry 3.6 omitted by the [Insolvency \(Amendment\) \(EU Exit\) Regulations 2019 \(SI 2019/146\) Sch. para.110\(2\)](#), with effect from 31 December 2020.

Fee numbered 1.10 was inserted by the [Civil Proceedings and Gender Recognition Application Fees \(Amendment\) Order 2021 \(SI 2021/462\) art.2](#), with effect from 4 May 2021. Entries 1.1, 1.2, 1.4, 8.1 and 8.2 amended by the [Civil Proceedings Fees \(Amendment\) Order 2021](#) with effect from 18 May 2021.

Entries 1.5, 1.6, 1.8, 2.1, 2.2, 2.3, 2.4, 2.5, 3.1, 3.2, 3.3, 3.4, 3.11, 3.12, 4.1, 4.2, 5.1, 5.2, 5.3, 5.4, 5.5, 6.1, 6.2, 7.1, 7.2, 7.3, 7.4, 7.5, 8.3, 8.4, 8.5, 8.6, 8.7, 8.9, 8.10, 8A.1, 10.1, 10.2, 10.3, 12.1, 13.1, 13.2 and 13.3 amended by the [Court Fees \(Miscellaneous Amendments\) Order 2021 \(SI 2021/985\) art.6](#), with effect from 30 September 2021.

Schedule 2 - Remissions and part remissions

White Book 2023 | Commentary last updated December 19, 2016

Volume 2

Section 10 - Court Fees

Civil Proceedings Fees Order 2008

Schedule 2

Schedule 2 Remissions and part remissions

Article 4

1.— Interpretation

10-8

(1) In this Schedule—

“*child*” means a person—

(a) whose main residence is with a party and who is aged—

(i) under 16 years; or

(ii) 16 to 19 years; and is—

(aa) not married or in a civil partnership; and

(bb) enrolled or accepted in full-time education that is not advanced education, or approved training; or

(b) in respect of whom a party or their partner pays child support maintenance or periodic payments in accordance with a maintenance agreement, and “*full-time education*”, “*advanced education*” and “*approved training*” have the meaning given by the Child Benefit (General) Regulations 2006;

“*child support maintenance*” has the meaning given in section 3(6) of the Child Support Act 1991;

“*couple*” has the meaning given in section 3(5A) of the Tax Credits Act 2002;

“*disposable capital*” has the meaning given in paragraph 5;

“*excluded benefits*” means any of the following—

(a) any of the following benefits payable under the Social Security Contributions and Benefits Act 1992 or the corresponding provisions of the Social Security Contributions and Benefits (Northern Ireland) Act 1992—

(i) attendance allowance paid under section 64;

(ii) severe disablement allowance;

(iii) carer’s allowance;

(iv) disability living allowance;

(v) constant attendance allowance under section 104 as an increase to a disablement pension;

(vi) any payment made out of the social fund;

(vii) housing benefit;

- (viii) widowed parents allowance;
- (b) any of the following benefit payable under the Tax Credits Act 2002—
- (i) any disabled child element or severely disabled child element of the child tax credit;
 - (ii) any childcare element of the child tax credit;
- (c) any direct payment made under the Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2009, the Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2011, the Carers and Direct Payments Act (Northern Ireland) 2002, section 12B(1) of the Social Work (Scotland) Act 1968 or the Social Care (Self-directed Support) (Scotland) Act 2013;
- (d) a back to work bonus payable under section 26 of the Jobseekers Act 1995, or article 28 of the Jobseekers (Northern Ireland) Order 1995;
- (e) any exceptionally severe disablement allowance paid under the Personal Injuries (Civilians) Scheme 1983;
- (f) any payments from the Industrial Injuries Disablement Benefit;
- (g) any pension paid under the Naval, Military and Air Forces etc (Disablement and Death) Service Pension Order 2006;
- (h) any payment made from the Independent Living Funds;
- (i) any payment of bereavement support payment under section 30 of the Pensions Act 2014;
- (j) any financial support paid under an agreement for the care of a foster child;
- (k) any housing credit element of pension credit;
- (l) any armed forces independence payment;
- (m) any personal independence payment payable under the Welfare Reform Act 2012;
- (n) any payment on account of benefit as defined in the Social Security (Payments on Account of Benefit) Regulations 2013;
- (o) any of the following amounts, as defined by the Universal Credit Regulations 2013, that make up an award of universal credit—
- (i) an additional amount to the child element in respect of a disabled child;
 - (ii) a housing costs element;
 - (iii) a childcare costs element;
 - (iv) a carer element;
- (v) a limited capability for work or limited capacity for work and work-related activity element.

“*family help (higher)*” has the meaning given in paragraph 15(3) of the Civil Legal Aid (Merits Criteria) Regulations 2013;

“*family help (lower)*” has the meaning given in paragraph 15(2) of the Civil Legal Aid (Merits Criteria) Regulations 2013;

“*gross monthly income*” has the meaning given in paragraph 13;

"Independent Living Funds" means the funds listed at regulation 20(2)(b) of the Criminal Legal Aid (Financial Resources) Regulations 2013;

"legal representation" has the meaning given in paragraph 18(2) of the Civil Legal Aid (Merits Criteria) Regulations 2013;

"maintenance agreement" has the meaning given in subsection 9(1) of the Child Support Act 1991;

"partner" means a person with whom the party lives as a couple and includes a person with whom the party is not currently living but from whom the party is not living separate and apart;

"party" means the individual who would, but for this Schedule, be liable to pay the fee under this Order;

"restraint order" means—

(a) an order under section 42(1A) of the Senior Courts Act 1981;

(b) an order under section 33 of the Employment Tribunals Act 1996;

(c) a civil restraint order under rule 3.11 of the Civil Procedure Rules 1998, or a practice direction made under that rule; or

(d) a civil restraint order under rule 4.8 of the Family Procedure Rules 2010, or the practice direction referred to in that rule.

(2) References to remission of a fee are to be read as including references to a part remission of a fee as appropriate and remit and remitted shall be construed accordingly.

2. Fee remission

If a party satisfies the disposable capital test, the amount of any fee remission is calculated by applying the gross monthly income test.

Disposable capital test

3.— Disposable capital test

(1) Subject to paragraph 4, a party satisfies the disposable capital test if—

(a) the fee payable by the party and for which an application for remission is made, falls within a fee band set out in column 1 of Table 1; and

(b) the party's disposable capital is less than the amount in the corresponding row of column 2.

Table 1

Column 1 (fee band)	Column 2 (disposable capital)
Up to and including £1,000	£3,000
£1,001 to £1,335	£4,000
£1,336 to £1,665	£5,000
£1,666 to £2,000	£6,000
£2,001 to £2,330	£7,000
£2,331 to £4,000	£8,000
£4,001 to £5,000	£10,000
£5,001 to £6,000	£12,000
£6,001 to £7,000	£14,000
£7,001 or more	£16,000

	4. Full and part remission of fees—disposable monthly income Subject to paragraph 14, if a party or their partner is aged 61 or over, that party satisfies the disposable capital test if that party's disposable capital is less than £16,000.
10-11	
10-12	5. Disposable capital Subject to paragraph 14, disposable capital is the value of every resource of a capital nature belonging to the party on the date on which the application for remission is made, unless it is treated as income by this Order, or it is disregarded as excluded disposable capital.
10-13	6. Disposable capital—non-money resources The value of a resource of a capital nature that does not consist of money is calculated as the amount which that resource would realise if sold, less— <ul style="list-style-type: none">(a) 10% of the sale value; and(b) the amount of any borrowing secured against that resource that would be repayable on sale.
10-14	7.—Disposable capital—resources held outside the United Kingdom <ul style="list-style-type: none">(1) Capital resources in a country outside the United Kingdom count towards disposable capital.(2) If there is no prohibition in that country against the transfer of a resource into the United Kingdom, the value of that resource is the amount which that resource would realise if sold in that country, in accordance with paragraph 6.(3) If there is a prohibition in that country against the transfer of a resource into the United Kingdom, the value of that resource is the amount that resource would realise if sold to a buyer in the United Kingdom.
10-15	8. Disposable capital—foreign currency resources Where disposable capital is held in currency other than sterling, the cost of any banking charge or commission that would be payable if that amount were converted into sterling, is deducted from its value.
10-15. 1	9. Disposable capital—jointly owned resources Where any resource of a capital nature is owned jointly or in common, there is a presumption that the resource is owned in equal shares, unless evidence to the contrary is produced.
10-15. 2	10. Excluded disposable capital The following things are excluded disposable capital— <ul style="list-style-type: none">(a) a property which is the main or only dwelling occupied by the party;(b) the household furniture and effects of the main or only dwelling occupied by the party;(c) articles of personal clothing;(d) any vehicle, the sale of which would leave the party, or their partner, without motor transport;(e) tools and implements of trade, including vehicles used for business purposes;

- (f) the capital value of the party's or their partner's business, where the party or their partner is self-employed;
- (g) the capital value of any funds or other assets held in trust, where the party or their partner is a beneficiary without entitlement to advances of any trust capital;
- (h) a jobseeker's back to work bonus;
- (i) a payment made as a result of a determination of unfair dismissal by a court or tribunal, or by way of settlement of a claim for unfair dismissal;
- (j) any compensation paid as a result of a determination of medical negligence or in respect of any personal injury by a court, or by way of settlement of a claim for medical negligence or personal injury;
- (k) the capital held in any personal or occupational pension scheme;
- (l) any cash value payable on surrender of a contract of insurance;
- (m) any capital payment made out of the Independent Living Funds;
- (n) any bereavement support payment in respect of the rate set out in regulation 3(2) or (5) of the Bereavement Support Payment Regulations 2017 (rate of bereavement support payment);
- (o) any capital insurance or endowment lump sum payments that have been paid as a result of illness, disability or death;
- (p) any student loan or student grant;
- (q) any payments under the criminal injuries compensation scheme.

Gross monthly income test

11.— Remission of fees—gross monthly income

10-15.3

- (1) If a party satisfies the disposable capital test, no fee is payable under this Order if, at the time when the fee would otherwise be payable, the party or their partner has the number of children specified in column 1 of Table 2 and—
- (a) if the party is single, their gross monthly income does not exceed the amount set out in the appropriate row of column 2; or
 - (2) if the party is one of a couple, the gross monthly income of that couple does not exceed the amount set out in the appropriate row of column 3.

Table 2

Column 1	Column 2	Column 3
Number of children of party	Single	Couple
no children	£1,085	£1,245
1 child	£1,330	£1,490
2 children	£1,575	£1,735

- (2) If a party or their partner has more than 2 children, the relevant amount of gross monthly income is the appropriate amount specified in Table 2 for 2 children, plus the sum of £245 for each additional child.

(3) For every £10 of gross monthly income received above the appropriate amount in Table 2, including any additional amount added under sub-paragraph (2), the party must pay £5 towards the fee payable, up to the maximum amount of the fee payable.

(4) This paragraph is subject to paragraph 12.

12.— Gross monthly income cap

- 10-15. 3.
1 (1) No remission is available if a party or their partner has the number of children specified in column 1 of Table 3 and—
 (a) if the party is single, their gross monthly income exceeds the amount set out in the appropriate row of column 2 of Table 3; or
 (b) if the party is one of a couple, the gross monthly income of that couple exceeds the amount set out in the appropriate row of column 3 of Table 3.

Table 3

Column 1 Number of children of party	Column 2 Single	Column 3 Couple
no children	£5,085	£5,245
1 child	£5,330	£5,490
2 children	£5,575	£5,735

(2) If a party or their partner has more than 2 children, the relevant amount of gross monthly income is the appropriate amount specified in Table 3 for 2 children, plus the sum of £245 for each additional child.

13.— Gross monthly income

- 10-15. 3.
2 (1) Subject to paragraph 14, gross monthly income means the total monthly income, for the month preceding that in which the application for remission is made, from all sources, other than receipt of any of the excluded benefits.
 (2) Income from a trade, business or gainful occupation other than an occupation at a wage or salary is calculated as—
 (a) the profits which have accrued or will accrue to the party; and
 (b) the drawings of the party;
 in the month preceding that in which the application for remission is made.

(3) In calculating profits under sub-paragraph (2)(a), all sums necessarily expended to earn those profits are deducted.

General

14.— Resources and income treated as the party's resources and income

- 10-15. 3.
3 (1) Subject to sub-paragraph (2), the disposable capital and gross monthly income of a partner of a party is to be treated as disposable capital and gross monthly income of the party.

(2) Where the partner of a party has a contrary interest to the party in the matter to which the fee relates, the disposable capital and gross monthly income of that partner, if any, is not treated as the disposable capital and gross monthly income of the party.

15.— Application for remission of a fee

10-15. 3.

4

(1) An application for remission of a fee must be made at the time when the fee would otherwise be payable.

(2) Where an application for remission of a fee is made, the party must—

(a) indicate the fee to which the application relates;

(b) declare the amount of their disposable capital; and

(c) provide documentary evidence of their gross monthly income and the number of children relevant for the purposes of paragraphs 11 and 12.

(3) Where an application for remission of a fee is made on or before the date on which a fee is payable, the date for payment of the fee is disapplied.

(4) Subject to sub-paragraph (5), where an application for remission is refused, or if part remission of a fee is granted, the amount of the fee which remains unremitted must be paid within the period notified in writing to the party.

(5) Where an application for remission of fee 2.1 is refused, or if part remission of that fee is granted, the amount of the fee which remains unremitted must be paid in accordance with the directions in column 1 of the table in Schedule 1 (fees to be taken), in respect of fee 2.1.

16. Remission in exceptional circumstances

10-15. 3.

5

A fee specified in this Order may be remitted where the Lord Chancellor is satisfied that there are exceptional circumstances which justify doing so.

17.— Refunds

10-15. 3.

6

(1) Subject to sub-paragraph (3), where a party pays a fee at a time when that party would have been entitled to a remission if they had provided the documentary evidence required by paragraph 15, the fee, or the amount by which the fee would have been reduced as the case may be, must be refunded if documentary evidence relating to the time when the fee became payable is provided at a later date.

(2) Subject to sub-paragraph (3), where a fee has been paid at a time when the Lord Chancellor, if all the circumstances had been known, would have remitted the fee under paragraph 15, the fee or the amount by which the fee would have been reduced, as the case may be, must be refunded to the party.

(3) No refund shall be made under this paragraph unless the party who paid the fee applies within 3 months of the date on which the fee was paid.

(4) The Lord Chancellor may extend the period of 3 months mentioned in sub-paragraph (3) if the Lord Chancellor considers that there is a good reason for a refund being made after the end of the period of 3 months.

18. Legal Aid

10-15. 3.

7

A party is not entitled to a fee remission if, under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, they are in receipt of the following civil legal services —

- (a) Legal representation; or
- (b) Family help (higher); or
- (c) Family help (lower) in respect of applying for a consent order.

19.— Vexatious litigants

10-15. 3.

8

(1) This paragraph applies where—

- (a) a restraint order is in force against a party; and
- (b) that party makes an application for permission to—
 - (i) issue proceedings or take a step in proceedings as required by the restraint order;
 - (ii) apply for amendment or discharge of the order; or
 - (iii) appeal the order.

(2) The fee prescribed by this Order for the application is payable in full.

(3) If the party is granted permission, they are to be refunded the difference between—

- (a) the fee paid; and
- (b) the fee that would have been payable if this Schedule had been applied without reference to this paragraph.

20. Exceptions

10-15. 3.

9

No remissions or refunds are available in respect of the fee payable for—

- (1) copy or duplicate documents;
- (2) searches.

Note

10-15. 3.

10

Substituted, subject to transitional provisions, by the [Courts and Tribunals Fee Remissions Order 2013 \(SI 2013/2302\)](#) art.6(4), Schedule, with effect from 7 October 2013 (for savings see art.13 thereof). Sch.2 amended by the [Courts and Tribunals Fees \(Miscellaneous Amendments\) Order 2014 \(SI 2014/590\)](#) art.3, with effect from 6 April 2014.

In para.1 definition “excluded benefits” amended by the [Civil Proceedings Fees \(Amendment No.2\) Order 2014 \(SI 2014/1834\)](#), with effect from 4 August 2014; and the [Pensions Act 2014 \(Consequential, Supplementary and Incidental Amendments\) Order 2017 \(SI 2017/422\)](#) art.33(a), with effect from 6 April 2017.

Paragraph 10 amended by the [Pensions Act 2014 \(Consequential, Supplementary and Incidental Amendments\) Order 2017 \(SI 2017/422\) art.33\(b\)](#), with effect from 6 April 2017.

Paragraph 15 amended by the [Civil Proceedings Fees \(Amendment\) Order 2016 \(SI 2016/1191\) art.2\(4\)](#), with effect from 6 March 2017 subject to saving provision specified in [SI 2016/1191 art.3](#).

Schedule 3 - Revocations

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Volume 2

Section 10 - Court Fees

Civil Proceedings Fees Order 2008

Schedule 3		Schedule 3 Revocations	
		Article 8	
10-15. 4		Article 8	
	Column 1		Column 2
	Title		Reference
	The Civil Proceedings Fees Order 2004		S.I. 2004/3121
	The Civil Proceedings Fees (Amendment) Order 2005		S.I. 2005/473
	The Civil Proceedings Fees (Amendment No. 2) Order 2005		S.I. 2005/3445
	The Civil Proceedings Fees (Amendment) Order 2006		S.I. 2006/719
	The Civil Proceedings Fees (Amendment) Order 2007		S.I. 2007/680
	The Civil Proceedings Fees (Amendment) (No. 2) Order 2007		S.I. 2007/2176
	The Civil Proceedings Fees (Amendment) (No. 2) (Amendment) Order 2007		S.I. 2007/2801
	The Civil Proceedings Fees (Amendment) Order 2008		S.I. 2008/116

Note

10-15. 5 The Civil Proceedings Fees Order 2008 came into effect on 1 May 2008.

End of Document

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Non-Contentious Probate Fees Order 2004

White Book 2023 | Commentary last updated January 4, 2005

Volume 2

Section 10 - Court Fees

Non-Contentious Probate Fees Order 2004

Arrangement of SI

(SI 2004/3120)

Note

- 10-17+ This Order replaces the [Non-Contentious Probate Fees \(Amendment\) Order 2000 \(SI 2000/642\)](#) insofar as it was made under [s.128 of the Finance Act 1990](#).



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Article 1. - Citation, commencement and interpretation

White Book 2023 | Commentary last updated October 7, 2009

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Section 10 - Court Fees

Non-Contentious Probate Fees Order 2004

Article 1

1.— Citation, commencement and interpretation

10-18+



(1) This Order may be cited as the Non-Contentious Probate Fees Order 2004 and shall come into force on the 4 January 2005.

(2) In this Order—

- (a) a fee referred to by number means the fee so numbered in Schedule 1 to this Order;
- (b) “assessed value” means the value of the net real and personal estate (excluding settled land if any) passing under the grant as shown—
 - (i) in the Inland Revenue affidavit (for a death occurring before 13 March 1975), or
 - (ii) in the Inland Revenue account (for a death occurring on or after 13 March 1975), or
 - (iii) in the case in which, in accordance with arrangements made between the President of the Family Division and the Commissioners of the Inland Revenue, or regulations made under section 256(1)(a) of the Inheritance Tax Act 1984 and from time to time in force, no such affidavit or account is required to be delivered, in the oath which is sworn to lead to the grant,

and in the case of an application to reseal means the value, as shown, passing under the grant upon its being resealed;

(c) “authorised place of deposit” means any place in which, by virtue of a direction given under section 124 of the Senior Courts Act 1981 original wills and other documents under the control of the High Court (either in the principal registry or in any district registry) are deposited and preserved;

(d) “grant” means a grant of probate or letters of administration;

(e) “district registry” includes the probate registry of Wales, any district probate registry and any sub-registry attached to it;

(f) “the principal registry” means the Principal Registry of the Family Division and any sub-registry attached to it.

Note

10-18.

1+ Amended by the Constitutional Reform Act 2005 s.59 and Sch.11, para.1 with effect from 1 October 2009 (SI 2009/1604).



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Article 2. - Fees to be taken

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Non-Contentious Probate Fees Order 2004

Article 2

2. Fees to be taken

10-19+



The fees set out in column 2 of Schedule 1 to this Order shall be taken in the principal registry and in each district registry in respect of the items described in column 1 in accordance with and subject to any directions specified in column 1.

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Article 3. - Exclusion of certain death gratuities

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Non-Contentious Probate Fees Order 2004

10-20+



3. Exclusion of certain death gratuities

In determining the value of any personal estate for the purposes of this Order there shall be excluded the value of a death gratuity payable under section 17(2) of the Judicial Pensions Act 1981 or section 4(3) of the Judicial Pensions and Retirement Act 1993, or payable to the personal representatives of a deceased civil servant by virtue of a scheme made under section 1 of the Superannuation Act 1972.

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Article 4. - Remission of fees

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Section 10 - Court Fees

Non-Contentious Probate Fees Order 2004

10-21+



4. Remission of fees

Schedule 1A applies for the purpose of ascertaining whether a party is entitled to a remission or part remission of a fee prescribed by this Order.¹

Footnotes

¹ Amended by SI 2007/2174.

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Article 5.

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Non-Contentious Probate Fees Order 2004

5.

10-22+

The Lord Chancellor may, on the ground of financial hardship or for other reasonable cause, remit in whole or in part any fee prescribed by this Order.¹



Footnotes

- ¹ Revoked, subject to transitional provisions, by the [Courts and Tribunals Fee Remissions Order 2013 \(SI 2013/2302\)](#), [art.3](#), with effect from 7 October 2013 (for transitional provisions see [art.13](#) thereof).

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Article 6.

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Non-Contentious Probate Fees Order 2004

10-23+



6.—

- (1) Where by any convention entered into by Her Majesty with any foreign power it is provided that no fee shall be required to be paid in respect of any proceedings, the fees specified in this Order shall not be taken in respect of those proceedings.
- (2) Where any application for a grant is withdrawn before the issue of a grant, a registrar may reduce or remit a fee.
- (3) Fee 7 shall not be taken where a search is made for research or similar purposes by permission of the President of the Family Division for a document over 100 years old filed in the principal registry or a district registry or another authorised place of deposit.

End of Document

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Article 7. - Special exemption—Armed Forces

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Non-Contentious Probate Fees Order 2004

7. Special exemption—Armed Forces

10-24+



Where a fee has been paid or fees have been paid for the application of a grant (other than fee 3.2) and at the time of payment of that fee or those fees—

- (a) the application for the grant was in respect of an estate exempt from Inheritance Tax by virtue of section 154 of the Inheritance Tax Act 1984 (exemption for members of the armed forces etc); and
- (b) was in respect of a death occurring before 20 March 2003;

the Lord Chancellor shall upon receiving a written application refund the difference between any fee or fees paid and fee 3.2.

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Article 8. - Revocation

White Book 2023

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Non-Contentious Probate Fees Order 2004

10-25+

8. Revocation

The Order specified in Schedule 2 in so far as it was made under section 128 of the Finance Act 1990 shall be revoked.



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Schedule 1 - Fees to be Taken

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Non-Contentious Probate Fees Order 2004

Schedule 1

Schedule 1 Fees to be Taken

Article 2

10-26+

COLUMN 1 NUMBER AND DESCRIPTION OF FEE	COLUMN 2 AMOUNT OF FEE
1. Application for a grant	£273
On an application for a grant (or for resealing a grant) other than on an application to which fee 3 applies, where the assessed value of the estate exceeds £5,000.	
2.	
3. Special applications	£20
3.1 For a duplicate or second or subsequent grant (including one following a revoked grant) in respect of the same deceased person, other than a grant preceded only by a grant limited to settled land, to trust property, or to part of the estate.	
3.2 On an application for a grant relating to a death occurring on or after 20 March 2003 in respect of an estate exempt from inheritance tax by virtue of section 154 of the Inheritance Tax Act 1984 (exemption for members of the armed forces etc).	£10
4. Caveats	£3
For the entry or the extension of a caveat.	
5. Search	£3
On an application for a standing search to be carried out in an estate, for each period of six months including the issue of a copy grant and will, if any (irrespective of the number of pages).	
6. Deposit of wills	£20
On depositing a will for safe custody in the principal registry or a district registry.	
7. Inspection	£20

On inspection of any will or other document retained by the registry (in the presence of an officer of the registry).	
8. Copy documents	
On a request for a copy of any document whether or not provided as a certified copy:	
(a) for each such copy;	£1.50
(b) where copies of any document are made available on a computer disk or in other electronic form, for each such copy.	
9. Oaths	
Except on a personal application for a grant, for administering an oath:	
9.1 for each deponent to each affidavit;	£11
9.2 for marking each exhibit.	£2
10. Determination of costs	The same fees as are payable from time to time for determining costs under the Civil Proceedings Fees Order 2008, (the relevant fees are set out in fee 5 in Schedule 1 to that Order)
11. Settling documents	£4
For perusing and settling citations, advertisements, oaths, affidavits, or other documents, for each document settled.	

Note

10-26.

1+

Substituted by the [Non-Contentious Probate Fees \(Amendment\) Order 2011 \(SI 2011/588\)](#), with effect from 4 April 2011. Fees 1, 5, 8, 9 amended by the [Non-Contentious Probate Fees \(Amendment\) Order 2014 \(SI 2014/876\)](#), with effect from 22 April 2014. Paragraph 8 substituted by the [Court Fees \(Miscellaneous Amendments\) Order 2019 \(SI 2019/1063\) art.2\(2\)](#), with effect from 22 July 2019. Fees 4, 5, 8, 11 amended by the [Court Fees \(Miscellaneous Amendments\) Order 2020 \(SI 2020/720\) art.2](#), with effect from 3 August 2020. Fee 1 further amended and Fee 2 revoked by the [Non-Contentious Probate Fees \(Amendment\) Order 2021 \(SI 2021/1451\) art.2](#), with effect from 26 January 2022.



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Schedule 1A - Remission and Part remissions

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Non-Contentious Probate Fees Order 2004

Schedule 1a

Schedule 1A Remission and Part remissions

1.— Interpretation

10-27+



(1) In this Schedule—

“*child*” means a child or young person—

(a) whose main residence is with a party and who is aged—

(i) under 16 years; or

(ii) 16 to 19 years; and is—

(aa) not married or in a civil partnership; and

(bb) enrolled or accepted in full-time education that is not advanced education, or approved training; or

(b) in respect of whom a party or their partner pays child support maintenance or periodic payments in accordance with a maintenance agreement, and “*full-time education*”, “*advanced education*” and “*approved training*” have the meaning given by the Child Benefit (General) Regulations 2006;

“*child support maintenance*” has the meaning given in s.3(6) of the Child Support Act 1991;

“*couple*” has the meaning given in s.3(5A) of the Tax Credits Act 2002;

“*disposable capital*” has the meaning given in paragraph 5;

“*excluded benefits*” means any of the following—

(a) any of the following benefits payable under the Social Security Contributions and Benefits Act 1992 or the corresponding provisions of the Social Security Contributions and Benefits (Northern Ireland) Act 1992—

(i) attendance allowance under section 64;

(ii) severe disablement allowance;

(iii) carer’s allowance;

(iv) disability living allowance;

(v) constant attendance allowance under section 104 as an increase to a disablement pension;

(vi) any payment made out of the social fund;

(vii) housing benefit;

(viii) widowed parents allowance;

(b) any of the following benefit payable under the Tax Credits Act 2002—

(i) any disabled child element or severely disabled child element of the child tax credit;

(ii) any childcare element of the working tax credit;

(c) any direct payment made under the Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2009, the Carers and Direct Payments Act (Northern Ireland) 2002, section 12B(1) of the Social Work (Scotland) Act 1968 or under regulations made under sections 50 to 53 of the Social Services and Well-being (Wales) Act 2014;

(d) a back to work bonus payable under section 26 of the Jobseekers Act 1995, or article 28 of the Jobseekers (Northern Ireland) Order 1995;

(e) any exceptionally severe disablement allowance paid under the Personal Injuries (Civilians) Scheme 1983;

(f) any payments from the Industrial Injuries Disablement Benefit;

(g) any pension paid under the Naval, Military and Air Forces etc. (Disablement and Death) Service Pension Order 2006;

(h) any payment made from the Independent Living Funds;

(i) any payment of bereavement support payment under section 30 of the Pensions Act 2014;

(j) any financial support paid under an agreement for the care of a foster child;

(k) any housing credit element of pension credit;

(l) any armed forces independence payment;

(m) any personal independence payment payable under the Welfare Reform Act 2012;

(n) any payment on account of benefit as defined in the Social Security (Payments on Account of Benefit) Regulations 2013;

(o) any of the following amounts, as defined by the Universal Credit Regulations 2013, that make up an award of universal credit—

(i) an additional amount to the child element in respect of a disabled child;

(ii) a housing costs element;

(iii) a childcare costs element;

(iv) a carer element;

(v) a limited capability for work or limited capacity for work and work-related activity element.

“*family help (higher)*” has the meaning given in para.15(3) of the Civil Legal Aid (Merits Criteria) Regulations 2013;

“*family help (lower)*” has the meaning given in para.15(2) of the Civil Legal Aid (Merits Criteria) Regulations 2013;

“*gross monthly income*” has the meaning given in paragraph 13;

"Independent Living Funds" means the funds listed at reg.20(2)(b) of the Criminal Legal Aid (Financial Resources) Regulations 2013;

"legal representation" has the meaning given in para.18(2) of the Civil Legal Aid (Merits Criteria) Regulations 2013;

"maintenance agreement" has the meaning given in subsection 9(1) of the Child Support Act 1991;

"partner" means a person with whom the party lives as a couple and includes a person with whom the party is not currently living but from whom the party is not living separate and apart;

"party" means the individual who would, but for this Schedule, be liable to pay a fee under this Order;

"restraint order" means—

(a) an order under s.42(1A) of the Senior Courts Act 1981;

(b) an order under s.33 of the Employment Tribunals Act 1996;

(c) a civil restraint order made under r.3.11 of the Civil Procedure Rules 1998, or a practice direction made under that rule; or

(d) a civil restraint order under r.4.8 of the Family Procedure Rules 2010, or the practice direction referred to in that rule.

(2) References to remission of a fee are to be read as including references to a part remission of a fee as appropriate and remit and remitted shall be construed accordingly.

2. Fee remission

If a party satisfies the disposable capital test, the amount of any fee remission is calculated by applying the gross monthly income test.

3.— Disposable capital test

(1) Subject to paragraph 4, a party satisfies the disposable capital test if—

(a) the fee payable by the party and for which an application for remission is made, falls within a fee band set out in column 1 of Table 1; and

(b) the party's disposable capital is less than the amount in the corresponding row of column 2.

Table 1

Column 1 (fee band)	Column 2 (disposable capital)
Up to and including	£1,000 £3,000
£1,001 to £1,335	£4,000
£1,336 to £1,665	£5,000
£1,666 to £2,000	£6,000
£2,001 to £2,330	£7,000
£2,331 to £4,000	£8,000
£4,001 to £5,000	£10,000
£5,001 to £6,000	£12,000
£6,001 to £7,000	£14,000

£7,001 or more	£16,000
<p>4. Subject to paragraph 14, if a party or their partner is aged 61 or over, that party satisfies the disposable capital test if that party's disposable capital is less than £16,000.</p>	
<p>5. Disposable Capital Subject to paragraph 14, disposable capital is the value of every resource of a capital nature belonging to the party on the date on which the application for remission is made, unless it is treated as income by this Order, or it is disregarded as excluded disposable capital.</p>	
<p>6. Disposable capital—non-money resources The value of a resource of a capital nature that does not consist of money is calculated as the amount which that resource would realise if sold, less—</p>	
<p>(a) 10% of the sale value; and</p>	
<p>(b) the amount of any borrowing secured against that resource that would be repayable on sale.</p>	
<p>7.—Disposable capital—resources held outside the United Kingdom</p>	
<p>(1) Capital resources in a country outside the United Kingdom count towards disposable capital.</p>	
<p>(2) If there is no prohibition in that country against the transfer of a resource into the United Kingdom, the value of that resource is the amount which that resource would realise if sold in that country, in accordance with paragraph 6.</p>	
<p>(3) If there is a prohibition in that country against the transfer of a resource into the United Kingdom, the value of that resource is the amount that resource would realise if sold to a buyer in the United Kingdom.</p>	
<p>8. Disposable capital—foreign currency resources Where disposable capital is held in currency other than sterling, the cost of any banking charge or commission that would be payable if that amount were converted into sterling, is deducted from its value.</p>	
<p>9. Disposable capital—jointly-owned resources Where any resource of a capital nature is owned jointly or in common, there is a presumption that the resource is owned in equal shares, unless evidence to the contrary is produced.</p>	
<p>10. Excluded disposable capital The following things are excluded disposable capital—</p>	
<p>(a) a property which is the main or only dwelling occupied by the party;</p>	
<p>(b) the household furniture and effects of the main or only dwelling occupied by the party;</p>	
<p>(c) articles of personal clothing;</p>	
<p>(d) any vehicle, the sale of which would leave the party, or their partner, without motor transport;</p>	
<p>(e) tools and implements of trade, including vehicles used for business purposes;</p>	
<p>(f) the capital value of the party's or their partner's business, where the party or their partner is self-employed;</p>	
<p>(g) the capital value of any funds or other assets held in trust, where the party or their partner is a beneficiary without entitlement to advances of any trust capital;</p>	

- (h) a jobseeker's back to work bonus;
- (i) a payment made as a result of a determination of unfair dismissal by a court or tribunal, or by way of settlement of a claim for unfair dismissal;
- (j) any compensation paid as a result of a determination of medical negligence or in respect of any personal injury by a court, or by way of settlement of a claim for medical negligence or personal injury;
- (k) the capital held in any personal or occupational pension scheme;
- (l) any cash value payable on surrender of a contract of insurance;
- (m) any capital payment made out of the Independent Living Funds;
- (n) any bereavement support payment in respect of the rate set out in regulation 3(2) or (5) of the Bereavement Support Payment Regulations 2017 (rate of bereavement support payment);
- (o) any capital insurance or endowment lump sum payments that have been paid as a result of illness, disability or death;
- (p) any student loan or student grant;
- (q) any payments under the criminal injuries compensation scheme.

Gross monthly income test

11.— Remission of fees—gross monthly income

- (1) If a party satisfies the disposable capital test, no fee is payable under this Order if, at the time when the fee would otherwise be payable, the party or their partner has the number of children specified in column 1 of Table 2 and—
 - (a) if the party is single, their gross monthly income does not exceed the amount set out in the appropriate row of column 2; or
 - (b) if the party is one of a couple, the gross monthly income of that couple does not exceed the amount set out in the appropriate row of column 3.

Table 2

Column 1 Number of children of party	Column 2 Single	Column 3 Couple
No children	£1,170	£1,345
1 child	£1,435	£1,610
2 children	£1,700	£1,875

(2) If a party or their partner has more than 2 children, the relevant amount of gross monthly income is the appropriate amount specified in Table 2 for 2 children, plus the sum of £265 for each additional child.

(3) For every £10 of gross monthly income received above the appropriate amount in Table 2, including any additional amount added under sub-paragraph (2), the party must pay £5 towards the fee payable, up to the maximum amount of the fee payable.

(4) This paragraph is subject to paragraph 12.

12.— Gross monthly income cap

- (1) No remission is available if a party or their partner has the number of children specified in column 1 of Table 3 and—
 - (a) if the party is single, their gross monthly income exceeds the amount set out in the appropriate row of column 2 of Table 3; or
 - (b) if the party is one of a couple, the gross monthly income of that couple exceeds the amount set out in the appropriate row of column 3 of Table 3.

Table 3

Column 1 Number of children of party	Column 2 Single	Column 3 Couple
No children	£5,170	£5,345
1 child	£5,435	£5,610
2 children	£5,700	£5,875

(2) If a party or their partner has more than 2 children, the relevant amount of gross monthly income is the appropriate amount specified in Table 3 for 2 children, plus the sum of £265 for each additional child.

13.— Gross monthly income

- (1) Subject to paragraph 14, gross monthly income means the total monthly income, for the month preceding that in which the application for remission is made, from all sources, other than receipt of any of the excluded benefits.
- (2) Income from a trade, business or gainful occupation other than an occupation at a wage or salary is calculated as—
 - (a) the profits which have accrued or will accrue to the party; and
 - (b) the drawings of the party;
 in the month preceding that in which the application for remission is made.
- (3) In calculating profits under sub-paragraph (2)(a), all sums necessarily expended to earn those profits are deducted.

General

14.— Resources and income treated as the party's resources and income

- (1) Subject to sub-paragraph (2), the disposable capital and gross monthly income of a partner of a party is to be treated as disposable capital and gross monthly income of the party.
- (2) Where the partner of a party has a contrary interest to the party in the matter to which the fee relates, the disposable capital and gross monthly income of that partner, if any, is not treated as the disposable capital and gross monthly income of the party.

15.— Application for remission of a fee

- (1) An application for remission of a fee must be made at the time when the fee would otherwise be payable.
- (2) Where an application for remission of a fee is made, the party must—
 - (a) indicate the fee to which the application relates;

- (b) declare the amount of their disposable capital; and
- (c) provide documentary evidence of their gross monthly income and the number of children relevant for the purposes of paragraphs 11 and 12.

(3) Where an application for remission of a fee is made on or before the date on which a fee is payable, the date for payment of the fee is disapplied.

(4) Where an application for remission is refused, or if part remission of a fee is granted, the amount of the fee which remains unremitted must be paid within the period notified in writing to the party.

16. Remission in exceptional circumstances

A fee specified in this Order may be remitted where the Lord Chancellor is satisfied that there are exceptional circumstances which justify doing so.

17.— Application for remission of a fee

(1) Subject to sub-paragraph (3), where a party pays a fee at a time when that party would have been entitled to a remission if they had provided the documentary evidence required by paragraph 15, the fee, or the amount by which the fee would have been reduced as the case may be, must be refunded if documentary evidence relating to the time when the fee became payable is provided at a later date.

(2) Subject to sub-paragraph (3), where a fee has been paid at a time when the Lord Chancellor, if all the circumstances had been known, would have remitted the fee under paragraph 15, the fee or the amount by which the fee would have been reduced, as the case may be, must be refunded to the party.

(3) No refund shall be made under this paragraph unless the party who paid the fee applies within 3 months of the date on which the fee was paid.

(4) The Lord Chancellor may extend the period of 3 months mentioned in sub-paragraph (3) if the Lord Chancellor considers that there is a good reason for a refund being made after the end of the period of 3 months.

18. Legal Aid

A party is not entitled to a fee remission if, under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, they are in receipt of the following civil legal services —

- (a) Legal representation; or
- (b) Family help (higher); or
- (c) Family help (lower) in respect of applying for a consent order.

19.— Vexatious litigants

(1) This paragraph applies where—

- (a) a restraint order is in force against a party; and
- (b) that party makes an application for permission to—
 - (i) issue proceedings or take a step in proceedings as required by the restraint order;
 - (ii) apply for amendment or discharge of the order; or
 - (iii) appeal the order.

(2) The fee prescribed by this Order for the application is payable in full.

- (3) If the party is granted permission, they are to be refunded the difference between—
(a) the fee paid; and
(b) the fee that would have been payable if this Schedule had been applied without reference to this paragraph.

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Schedule 1A - Remission and Part remissions

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Non-Contentious Probate Fees Order 2004

Schedule 1a

Schedule 1A Remission and Part remissions

20. Legal Aid

No remissions or refunds are available in respect of the fee payable for—

- (a) copy or duplicate documents;
- (b) searches.

Note

10-27.

1+ Schedule 1A substituted, subject to transitional provisions, by the [Courts and Tribunals Fee Remissions Order 2013 \(SI 2013/2302\)](#), Sch.1, with effect from 7 October 2013 (for transitional provisions see [SI 2013/2302 art.13\(1\)](#)). Amended by the [Courts and Tribunals Fees \(Miscellaneous Amendments\) Order 2014 \(SI 2014/590\)](#) art.6(2), with effect from 6 April 2014; the [Social Services and Well-being \(Wales\) Act 2014 \(Consequential Amendments\) \(Secondary Legislation\) Regulations 2016 \(SI 2016/211\)](#) Sch.3(2) para.189, with effect from 6 April 2016; the [Pensions Act 2014 \(Consequential, Supplementary and Incidental Amendments\) Order 2017 \(SI 2017/422\)](#) art.23, with effect from 6 April 2017; and the [Court Fees \(Miscellaneous Amendments\) Order 2021 \(SI 2021/985\)](#) art.8(2) and (3), with effect from 30 September 2021.

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Schedule 2 - Orders Revoked

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Section 10 - Court Fees

Non-Contentious Probate Fees Order 2004

Schedule 2

Schedule 2 Orders Revoked

Article 8

10-28+

TITLE	REFERENCE
The Non-Contentious Probate Fees (Amendment) Order 2000	S.I. 2000/642

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Enrolment of Deeds (Fees) Regulations 1994

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Section 10 - Court Fees

Enrolment of Deeds (Fees) Regulations 1994

Arrangement of SI

(SI 1994/601)

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Regulation 1.

White Book 2023

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Section 10 - Court Fees

Enrolment of Deeds (Fees) Regulations 1994

Regulation 1

1.

10-31+

These Regulations may be cited as the Enrolment of Deeds (Fees) Regulations 1994 and shall come into force on 1 April 1994.



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Regulation 2.

White Book 2023

Volume 2

Section 10 - Court Fees

Enrolment of Deeds (Fees) Regulations 1994

2.

10-31.

1+ These Regulations provide for the fees to be taken on or in connection with the enrolment of any deed in the Central Office (Enrolment Department) of the Supreme Court.



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Regulation 3.

White Book 2023

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Enrolment of Deeds (Fees) Regulations 1994

3.

10-31.

2+

The fees set out in column 2 of the Schedule to these Regulations shall be taken in the circumstances described in column 1 of that Schedule.



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Regulation 4.

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Enrolment of Deeds (Fees) Regulations 1994

4.

10-31.

3+

These Regulations do not apply to deeds filed in the Queen's Remembrancer's Department.



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Regulation 5.

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Enrolment of Deeds (Fees) Regulations 1994

5.

10-31.

4+

In these Regulations the expression “*deed*” includes an assurance or other instrument or document.



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Regulation 6.

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Section 10 - Court Fees

Enrolment of Deeds (Fees) Regulations 1994

6.

10-31.

5+



Where the enrolment of a deed poll (within the meaning of the Enrolment of Deeds (Change of Name) Regulations 1994) is to be advertised in the London Gazette in accordance with those Regulations, the cost of the advertisement shall be borne by the person seeking to enrol the deed poll and shall be paid by him at the time when the deed poll is enrolled to the clerk in charge of the Filing and Record Department of the Central Office of the Supreme Court.

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Regulation 7.

White Book 2023

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Section 10 - Court Fees

Enrolment of Deeds (Fees) Regulations 1994

7.

10-31.

6+



The Enrolment of Deeds (Fees) Regulations 1992 and the Enrolment of Deeds (Fees) (Amendment) Regulations 1951 are hereby revoked except in respect of any fee due before the Regulations come into force.

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Schedule

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Enrolment of Deeds (Fees) Regulations 1994

Schedule 1

Schedule

Regulation 3

10-32+

COLUMN 1	COLUMN 2
	£ p
1. For enrolling any deed.	10.00
2. For making and examining a photographic or other copy of any enrolled deed whether or not issued as an office copy.	0.25
3. Searches by applicant in person.	1.00
Searches by staff on behalf of applicant.	5.00

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Insolvency Proceedings (Fees) Order 2016

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(SI 2016/692)

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Article 1. - Citation and commencement

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Section 10 - Court Fees

Insolvency Proceedings (Fees) Order 2016

Article 1

1. Citation and commencement

10-35+



This Order may be cited as the Insolvency Proceedings (Fees) Order 2016 and comes into force twenty-one days after the day on which it is laid.

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Article 2. - Interpretation

White Book 2023 | Commentary last updated January 6, 2023

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Section 10 - Court Fees

Insolvency Proceedings (Fees) Order 2016

2. Interpretation

10-36+

In this Order—

 “*the Act*” means the Insolvency Act 1986;

“*chargeable receipts*” means the sums which are paid into the Insolvency Services Account after deducting any amounts which are paid out to secured creditors or paid out in carrying on the business of the bankrupt or the company;

“*the commencement date*” means the date this Order comes into force;

“*deposit*” means—

(a) on the making of a bankruptcy application, the sum of £550,

(b) on the presentation of a bankruptcy petition, the sum of £1,500,

(c) on the presentation of a winding up petition, other than a petition presented under section 124A of the Act, the sum of £2,600,

(d) on the presentation of a winding-up petition under section 124A of the Act, the sum of £5,000;

“*official receiver’s administration fee*” means the fee payable to the official receiver on the making of a bankruptcy or winding up order out of the chargeable receipts of the estate of the bankrupt or, as the case may be, the assets of the insolvent company for the performance of the official receiver’s functions under the Act.

Note

10-36.

 1+ The sums in paras (b) and (c) substituted by the [Insolvency Proceedings \(Fees\) \(Amendment\) Order 2022 \(SI 2022/929\)](#) art.2(a) and (b), with effect from 1 November 2022.

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Article 3. - Fees payable in connection with individual voluntary arrangements, debt relief orders and bankruptcy and winding up

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Insolvency Proceedings (Fees) Order 2016

Article 3

3. Fees payable in connection with individual voluntary arrangements, debt relief orders and bankruptcy and winding up

10-37+

The fees payable to the Secretary of State in respect of the matters specified in column 1 of the Table of Fees in Schedule 1 (Fees payable in insolvency proceedings) are the fees specified in column 2 to that Table.



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Article 4. - Deposit

White Book 2023 | Commentary last updated January 6, 2023

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Insolvency Proceedings (Fees) Order 2016

4. Deposit

10-38+



(1) On the making of a bankruptcy application, the debtor must pay a deposit to the adjudicator as security for the payment of the official receiver's administration fee.

(2) On the presentation of a bankruptcy petition or a winding-up petition, the petitioner must pay a deposit to the court as security for the payment of the official receiver's administration fee.

(3) Where a deposit is paid to the court, the court must transmit the deposit paid to the official receiver attached to the court.

(4) The deposit must be used to discharge the official receiver's administration fee to the extent that the assets comprised in the estate of the bankrupt or, as the case may be, the assets of the company are insufficient to discharge the official receiver's administration fee.

(5) Where a bankruptcy order or a winding up order is made (including any case where a bankruptcy order or a winding up is subsequently annulled, rescinded or recalled), the deposit must be returned to the person who paid it save to the extent that the assets comprised in the estate of the bankrupt or, as the case may be, the assets of the company are insufficient to discharge the official receiver's administration fee.

(6) The deposit must be repaid to the debtor where—

(a) the adjudicator has refused to make a bankruptcy order,

(b) 14 days have elapsed from the date of delivery of the notice of refusal, and

(c) the debtor has not made a request to the adjudicator to review the decision.

(7) Where the debtor has made a request to the adjudicator to review the decision to refuse to make a bankruptcy order the deposit must be repaid to the debtor where—

(a) the adjudicator has confirmed the refusal to make a bankruptcy order,

(b) 28 days have elapsed from the date of delivery of the confirmation of the notice of refusal, and

(c) the debtor has not appealed to the court against the refusal to make a bankruptcy order.

(8) Where the debtor has appealed to the court against the refusal to make a bankruptcy order the deposit must be repaid to the debtor where the appeal is dismissed or withdrawn.

(9) Where—

(a) a deposit was paid by the petitioner to the court, and

(b) the petition is withdrawn or dismissed by the court

that deposit, less an administration fee of £50, must be repaid to the petitioner.

Note

10-38.

1+

Amended by the [Insolvency Proceedings \(Fees\) \(Amendment\) Order 2022 \(SI 2022/929\)](#) art.2(c), with effect from 1 November 2022.



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Article 5. - Value Added Tax

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Section 10 - Court Fees

Insolvency Proceedings (Fees) Order 2016

Article 5

5. Value Added Tax

10-39+



Where Value Added Tax is chargeable in respect of the provision of a service for which a fee is payable by virtue of any provision of this Order, Value Added Tax must be paid on that fee.

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Article 6. - Revocation

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Insolvency Proceedings (Fees) Order 2016

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6. Revocation

The enactments listed in Schedule 2 are revoked.



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Article 7. - Transitional and saving provisions

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Insolvency Proceedings (Fees) Order 2016

7. Transitional and saving provisions

10-41+



- (1) This Order has no effect in respect of any fees payable in respect of—
(a) the preparation and submission of a report under section 274 (action on report of insolvency practitioner) of the Act; and
(b) bankruptcy orders and winding-up orders made following the making of a bankruptcy application or presentation of a petition before the commencement date.
- (2) This Order has no effect in respect of any deposit paid on the making of a bankruptcy application or the presentation of a petition for bankruptcy or winding up before the commencement date.

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Schedule 1 - Fees payable in insolvency proceedings

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Insolvency Proceedings (Fees) Order 2016

Schedule 1

Schedule 1 Fees payable in insolvency proceedings

Article 3

Table of Fees

DESCRIPTION OF FEE AND CIRCUMSTANCES IN WHICH IT IS CHARGED	AMOUNT OF FEE OR APPLICABLE %
Individual voluntary arrangement registration fee On the registration by the Secretary of State of an individual voluntary arrangement made under Part 8 of the Act, the fee of—	£15
Application for a debt relief order - official receiver's administration fee and costs of persons acting as approved intermediaries On the application for a debt relief order, for the performance of the official receiver's functions and for the payment of an amount not exceeding £10 in respect of the costs of persons acting as approved intermediaries under Part 7A of the Act, the fee of—	£90
Application for a bankruptcy order - adjudicator's administration fee On the application to the adjudicator for a bankruptcy order, for the performance of the adjudicator functions, the fee of—	£130
Bankruptcy - official receiver's administration fee following debtor's application On the making of a bankruptcy order on a debtor's application, for the performance of the official receiver's duties as official receiver the fee of—	£1,990
Bankruptcy - official receiver's administration fee following creditor's petition On the making of a bankruptcy order on a creditor's petition, for the performance of the official receiver's duties as official receiver the fee of—	£2,775
Bankruptcy - trustee in bankruptcy fee	15%

For the performance of the official receiver's duties while acting as trustee in bankruptcy of the bankrupt's estate a fee calculated as a percentage of chargeable receipts realised by the official receiver in the capacity of trustee in bankruptcy at the rate of—	
Bankruptcy - income payments agreement fee	£150
On entering into an income payments agreement with the official receiver under section 310A of the Act, the fee of—	
Bankruptcy -income payments order fee	£150
On the making of an income payments order by the court under section 310 of the Act, the fee of—	
Winding up by the court other than a winding up on a petition presented under section 124A - official receiver's administration fee	£5,000
On the making of a winding-up order, other than on a petition presented under section 124A, for the performance of the official receiver's duties as official receiver, including the duty to investigate and report on the affairs of bodies in liquidation, the fee of—	
Winding up by the court on a petition presented under section 124A - official receiver's administration fee	£7,500
On the making of a winding-up order on a petition presented under section 124A, for the performance of the official receiver's duties as official receiver, including the duty to investigate and report on the affairs of bodies in liquidation, the fee of—	
Winding up - liquidator fee	15%
For the performance of the official receiver's duties while acting as liquidator of the insolvent estate a fee calculated as a percentage of chargeable receipts realised by the official receiver in the capacity of liquidator at the rate of—	
Official receiver's general fee	£6,000
On the making of a bankruptcy order or the making of a winding up order by the court for the costs not recovered out of the official receiver's administration fee of administering—	
(a) bankruptcy orders,	
(b) winding up orders made by the court	
the fee of—	

Schedule 2 - Revocations

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Section 10 - Court Fees

Insolvency Proceedings (Fees) Order 2016

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Schedule 2 Revocations

Article 6

ORDERS REVOKED	REFERENCES	EXTENT OF REVOCATION
Insolvency Proceedings (Fees) Order 2004	S.I. 2004/593	The whole Order
Insolvency Proceedings (Fees) (Amendment) Order 2005	S.I. 2005/544	The whole Order
Insolvency Proceedings (Fees) (Amendment) Order 2006	S.I. 2006/561	The whole Order
Insolvency Proceedings (Fees) (Amendment) Order 2007	S.I. 2007/521	The whole Order
Insolvency Proceedings (Fees) (Amendment) Order 2008	S.I. 2008/714	The whole Order
Insolvency Proceedings (Fees) (Amendment) Order 2009	S.I. 2009/645	The whole Order
Insolvency Proceedings (Fees) (Amendment) Order 2010	S.I. 2010/732	The whole Order
Insolvency Proceedings (Fees) (Amendment) Order 2011	S.I. 2011/1167	The whole Order
Insolvency Proceedings (Fees) (Amendment) Order 2014	S.I. 2014/583	The whole Order
Insolvency Proceedings (Fees) (Amendment) Order 2015	S.I. 2015/1819	The whole Order
Insolvency Proceedings (Fees) (Amendment) Order 2016	S.I. 2016/184	The whole Order

A. - Introduction

White Book 2023 | Commentary last updated February 16, 2015

Volume 2

Section 11 - Overriding Objective of CPR

Overriding Objective of CPR

A. - Introduction

11-2

In March 1994, Lord Mackay L.C. appointed Lord Woolf to review the rules and procedures of the civil courts in England and Wales. The review's aims were: to improve access to justice and reduce the costs of litigation; reduce the complexity of the rules and modernise terminology; remove unnecessary distinctions of practice and procedure. Lord Woolf's conclusions from his inquiry were set out in two "Access to Justice" reports, namely the Interim Report (June 1995) and the Final Report (July 1996). The [Civil Procedure Rules 1998 \(SI 1998/3132\)](#), which replaced both the [RSC](#) and [CCR](#), was their ultimate product. The [CPR](#) entered into force in April 1999.

A novel feature of the CPR was the introduction of a purposive provision at the outset of the rules, which set out their "overriding objective". It was, as the Final Report (at 274) put it, "to guide the court and ... litigants towards the just resolution of the case". It did so through articulating "the fundamental purpose of the rules and of the underlying system of procedure". In April 2013, following the Costs Review carried out by Sir Rupert Jackson, the overriding objective was revised in order to emphasise two of its aspects—the need to ensure that litigation was conducted at proportionate cost and that greater emphasis was to be given to rule-compliance—that had not been given proper weight post-1999.

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B. - CPR Pt 1

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Volume 2

Section 11 - Overriding Objective of CPR

Overriding Objective of CPR

B. - CPR Pt 1

11-3

Part 1 of the CPR (Overriding Objective) contains four provisions. [Rule 1.1](#) states that the Rules are a procedural code “with the overriding objective of dealing with cases justly and at a proportionate cost”. Until 2022, it stated that it was a “new procedural code” ([Civil Procedure \(Amendment\) Rules 2022 \(SI 2022/101\)](#)). [Rules 1.2](#) and [1.4](#) stipulate that the court should give effect to the overriding objective in applying and interpreting the rules, and by actively managing cases. [Rule 1.3](#) states that parties are required to help the court to further the overriding objective.

Part 76 of the CPR (Prevention of Terrorism Act 2005) contains rules about control order proceedings in the High Court and appeals to the Court of Appeal against an order of the High Court in such proceedings and [Pt 80 of the CPR](#) (Proceedings under the [Terrorism Prevention and Investigations Act 2011](#)) contains rules about TPIM proceedings in those courts. (The TPIM regime in [Pt 80](#) replaces the control order regime in [Pt 76](#). In due course the rules in [Pt 76](#) will no longer be required.) [CPR Pt 79](#) (Financial Restrictions Proceedings Under the [Counter-Terrorism Act 2008](#)) contains rules about financial restriction proceedings in the High Court and appeals to the Court of Appeal against an order of the High Court in such proceedings. [CPR Pt 82](#) (Closed Material Proceedings) contains rules regarding the procedure to apply when a closed material proceeding is to be held. In [Pts 76, 79, 80](#) and [82](#), respectively, [r.76.2](#), [r.79.2](#), [r.80.2](#) and [r.82.2](#) impose on the court a duty to ensure that information is not disclosed contrary to the public interest or, in the latter case, national security. And those rules further provide that in proceedings to which the Parts apply, the overriding objective in [Pt 1](#), and so far as relevant any other rule, must be read and given effect in a way which is compatible with that duty.

The texts of these rules with annotations are found in Vol.1 para.[1.1](#) et seq. Extended commentaries on the various aspects of these rules, in particular on the provisions in [para.\(2\) of r.1.1](#), are found in what follows in this section of the White Book.

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C. - Giving Effect to the “Overriding Objective”—Generally (rr.1.1 and 1.2)

White Book 2023 | Commentary last updated February 16, 2015

Volume 2

Section 11 - Overriding Objective of CPR

Overriding Objective of CPR

C. - Giving Effect to the “Overriding Objective”—Generally (rr.1.1 and 1.2)

11-4

For commentary on the significance of the reference to the CPR being a “new procedural code”, see Vol.2 Section 12 (CPR: Application, Amendments and Interpretation, para.[12-51](#)).

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1. - Express references to “overriding objective” in CPR

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Section 11 - Overriding Objective of CPR

Overriding Objective of CPR

C. - Giving Effect to the “Overriding Objective”—Generally (rr.1.1 and 1.2)

1. - Express references to “overriding objective” in CPR

11-5

The overriding objective was a novel feature of the [CPR](#). Express references to it are found in some specific provisions in the CPR and related practice directions (e.g. [r.19.7\(2\)](#) and Practice Direction (Disclosure and Inspection) para.5.4, see Vol.1, para.[31APD.5](#)).

The overriding objective is a purposive provision and the court must give effect to it when it exercises any power given to it by the [CPR](#) ([r.1.2\(a\)](#)). It will not always be obvious whether a particular “power” which the court is being invited to exercise, or which the court proposes to exercise, is a power “given to it by the Rules”. (The point is that many of the court’s powers, including some of the “generals of management” listed in [r.3.1](#), are not given to the court by the CPR but are derived from elsewhere.) Among the more obvious and frequently recurring circumstances where the court will have at the forefront of its mind the requirement that it should seek to give effect to the overriding objective when exercising a power to give it by the CPR are where extensions of time for taking procedural steps are sought (e.g. [r.3.1\(2\)\(a\)](#)), and where relief is sought from procedural sanctions ([r.3.9](#)) (e.g. *Sayers v Clarke Walker (Practice Note)* [2002] EWCA Civ 645; [2002] 1 W.L.R. 3095, CA; *Tarling v Wabara* [2003] EWHC 450 (QB); *IBS Technologies Ltd v APM Technologies SA*, 7 April 2003, unrep. (Mr Michael Briggs Q.C.)). The courts are likely to call in aid the overriding objective (either in specific or general terms) when justifying the broad exercise of a particular discretion, especially where it arises in a context in which the relevant CPR rules were intended to mark a significant departure from previous rules; e.g. *Capital Bank plc v Stickland* [2004] EWCA Civ 1677; [2005] 1 W.L.R. 3914; [2005] 2 All E.R. 544, CA (court’s discretion under [r.36.5\(6\)\(b\)\(ii\)](#) to permit acceptance of Pt 36 offer should be as wide as possible so as to advance the overriding objective); *National Amusements (UK) Ltd v White City (Shepherds Bush) LLP* [2009] EWHC 2524 (TCC); [2010] 1 W.L.R. 1181 (Akenhead J) (court’s discretion under [r.30.5](#) (Transfer) not constrained by pre-CPR “appropriateness” test but to be exercised flexibly in accordance with the overriding objective). On several occasions, the Court of Appeal has stressed that it is important for judges making case management decisions to have in mind the overriding objective to deal with cases justly; e.g. *Roberts v Williams* [2005] EWCA Civ 1086; [2005] C.P. Rep. 44, CA (on second appeal, defendants’ late application to amend statement of case, to adduce new witness statement, and to vacate trial date granted). In *NML Capital Limited v Republic of Argentina* [2011] UKSC 31; [2011] 2 A.C. 495, the Supreme Court relied in part on the overriding objective in overruling long-standing Court of Appeal authority on the practice to be followed where a party re-applies for permission to serve a claim form out of the jurisdiction under [r.6.37](#).

Further, the court must give effect to the overriding objective when it interprets any rule (presumably, any rule in the [CPR](#)) ([r.1.2\(b\)](#)); see Vol.2 Section 12 (CPR: Application, Amendments and Interpretation, para.[12-40](#)).

Increasingly the courts refer to the objective that they should “deal with cases justly” in circumstances where the overriding objective stated in [r.1.1](#) is not applied by [r.1.2](#), that is to say, in circumstances where the court is not exercising any power given to it by the [CPR](#) or interpreting any rule (e.g. *Clarkson v Gilbert (Rights of Audience)* [2000] C.P. Rep. 58, CA (application by claimant’s spouse for right of audience under the Courts and Legal Services Act 1990 s.27(2)(c)); *Igwemema v Chief Constable of Greater Manchester Police* [2001] EWCA Civ 953; [2001] 4 All E.R. 751, CA (permitting jury to alter verdict after discharge); *Bentley v Jones Harris & Co* [2001] EWCA Civ 1724 (acceding to submission of no case to answer without putting defendant to election); *Compagnie Noga d’Importation et d’Exploration SA v Australia and New Zealand Banking Group Ltd* [2002] EWCA Civ 1142 (judge structuring judgment order in manner having effect of imposing on party need to obtain permission to appeal in circumstances where they would not otherwise require it); *London Borough of Southwark v Kofi-Adu* [2006] EWCA Civ 281; [2006] H.L.R. 33; [2006] N.P.C. 36, CA (conduct of judge raising apparent judicial bias concerns leading to retrial); *I.D. v Home Office* [2005] EWCA Civ 38; [2006] 1 W.L.R. 1003, CA (whether bringing claim for damages in a county court instead of making application for judicial review an abuse of process); *Bowman v Fels* [2005] EWCA Civ 226; [2005] 1 W.L.R. 3083, CA (jurisdiction of appeal court to hear “hypothetical” appeal). This stretching of the overriding objective beyond its

intended boundaries has been aided by the approximation of some of the language in [CPR r.1.1](#) with that used in relation to art.6 of the Convention (right to fair trial) and in the abuse of process jurisprudence, aided by dicta asserting that the principles in the rule “are now central to determining what is due process” (*Clark v University of Lincolnshire and Humberside [2000] 1 W.L.R. 1988, CA*, at para.39 per Lord Woolf MR). There are some remarkable illustrations of the overriding objective being pressed into service in the determination of issues to which it clearly does not in terms apply and, indeed, which are better categorised as jurisdictional rather than procedural. A good illustration is the issue whether the Court of Appeal should refuse permission to appeal on the ground that the point raised is “academic (or “hypothetical”) (e.g. *Gawler v Raettig [2007] EWCA Civ 1560*); see further para.[9A-77](#) above).

[Rule 1.4\(1\)](#) states that the court must further the overriding objective by “actively managing cases” and active case management includes exercising the various judicial powers listed in [r.1.4\(2\)](#) on a case by case basis as appropriate. [Paragraph \(h\) of r.1.4\(2\)](#) refers to the court’s power to consider whether the likely benefits of taking a particular step justify the cost of taking it. It seems clear that the court has jurisdiction to dismiss a pre-trial application summarily on the ground that it is not an appropriate application to make because it is likely to add to the costs without any significant benefit to the conduct of the case, and is therefore contrary to the overriding objective (*Norwich Union Linked Life Assurance Ltd v Mercantile Credit Co Ltd [2003] EWHC 3064 (Ch); [2004] 4 E.G. 109 (C.S.)* (David Richards J)).

In a number of practice directions, it is expressly stated that the court should take the overriding objective into account before making particular decisions (e.g. Practice Direction (Applications), para.3 (applications without notice) (see Vol.1, para.[23APD.3](#)), Practice Direction (Case Management—Preliminary Stage: Allocation and Re-Allocation), para.4.1 (court’s general approach to allocation of proceedings to case management track) (see Vol.1, para.[26PD.4](#)), Practice Direction (The Multi-Track), para.5.1 (directions at case management conference) (see Vol.1, para.[29PD.5](#)), and Practice Direction (Disclosure and Inspection), para.5.4 (order for specific disclosure) (see Vol.1, para.[31APD.5](#)). (Note also, Practice Direction (General Rules About Applications), para.3 (applications without notice possible where overriding objective best furthered), see Vol.1, para.[23APD.3](#).)

In [r.3.1](#), which lists various “general powers” of case management, it is provided that the court may “take any other step or make any other order for the purpose of managing the case and furthering the overriding objective” ([r.3.1\(2\)\(m\)](#)).

2. - General application of “overriding objective” as demonstrated in decided cases

White Book 2023 | Commentary last updated August 29, 2019

Volume 2

Section 11 - Overriding Objective of CPR

Overriding Objective of CPR

C. - Giving Effect to the “Overriding Objective”—Generally (rr.1.1 and 1.2)

2. - General application of “overriding objective” as demonstrated in decided cases

11-6

The particular objectives of the overriding objective as listed in r.1.1(2), to be implemented “so far as is practicable”, are not mutually exclusive and, in a given situation, a course taken by the court to meet one objective may yield a different result to a course taken to meet another. In some cases, in reaching a particular conclusion, courts have drawn attention generally to the matters listed in r.1.1(2) when clearly having only some of those matters in mind as considerations relevant to the exercise of a particular power in circumstances where other considerations might suggest a different conclusion to that preferred (e.g. *O'Brien v Chief Constable of South Wales* [2005] UKHL 26; [2005] 2 A.C. 534, *HL* (court’s power under r.32.1(2) to exclude admissible evidence)). In other cases the courts have been able to draw attention to the r.1.1(2) criteria without there being any such obvious conflict (e.g. *Independiente Ltd v Music Trading On-Line (HK) Ltd* [2003] EWHC 470 (*Ch*) (whether representative parties have same interest under r.19.6)). Instances have arisen where the court, in rejecting a submission in which substantial reliance was placed on one aspect of the overriding objective (e.g. r.1.1(2)(d)), has underpinned its decision by reference to another aspect (e.g. r.1.1(2)(e)) (see e.g. *(R. (Johnson) v Secretary of State for the Home Department* [2006] EWHC 288 (*Admin*))).

It is not uncommon for a court, in disposing of a procedural issue, to derive support for its conclusion from a broad range of the particular objectives in r.1.1(2). A good example is provided by *Palfrey v Wilson* [2007] EWCA Civ 94, a case in which, in order to upset the order under appeal, the appellant had to succeed on two grounds. The Court of Appeal, having heard argument on one and reserved judgment on it, declined to hear argument on the other. The court said it may take such a course in the interest of saving expense, dealing with cases proportionately and expeditiously, and allocating judicial resources appropriately. Another example is *Joyce v West Coach Bus Services Ltd* [2012] EWHC 404 (*QB*), where the judge carefully considered whether an interpretation of rules in Pt 36 which precluded acceptance of an offer after a claim was in substance at an end, although it had not been dismissed after a hearing and judgment had not formally been entered, would promote, or militate against, the overriding objective. Where a CPR rule falling for interpretation is one which is not concerned with a matter of procedure merely, but is concerned with the allocation of jurisdiction between one court and another, a court may be justified in preferring one interpretation to another on the ground that it is more consistent with the overriding objective (*Ali v Kayne* [2011] EWCA Civ 1582; [2012] 1 W.L.R. 1868, *CA* (allocation of jurisdiction to commit for contempt)).

Before the CPR came into force, in arriving at decisions on the scope and application of procedural law, frequently the courts were influenced by matters listed in r.1.1(2), particularly the need to be fair, and to avoid delays and unnecessary costs. The courts can now draw out and focus attention upon these matters by reference to the overriding objective. Inevitably, in some cases attention has been drawn to the fact that, in certain circumstances, considerations which governed the exercise of particular powers in accordance with rules of court replaced by the CPR are consistent with considerations encapsulated by the overriding objective as stated in r.1.1; e.g. the discretion to order inspection of document where party resisting on ground of risk of prosecution abroad (r.31.19) (*Morris v Banque Arabe et Internationale d'Investissement SA (No.1)* [2000] C.P. Rep. 65 (Neuberger J)); the power to strike out for want of prosecution petitions presented under the Companies Act 1985 s.459 (*Gerrard v Whitworth*, 28 January 2000, unrep., *CA*); the power to recall judgments (*Stewart v Engel* [2000] 1 W.L.R. 2268; [2000] 3 All E.R. 518, *CA*).

In *Colley v Council for Licensed Conveyancers* [2001] EWCA Civ 1137; [2002] 1 W.L.R. 160, *CA*, the Court of Appeal said (para.45) there is a tension between the principle stated by Lord Bingham in *R. (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 A.C. 532, *HL*, that the right of access to a court may only be curtailed by clear and precise terms, and the provisions of CPR r.1.2.

Paragraph (d) of r.1.1(2) states that, dealing with a case justly includes, so far as is practicable, ensuring that it is dealt with expeditiously and fairly. There is an obvious tension between, on the one hand justice in the individual case, fairness (see para.11-8 below), the avoidance of delay, and the need to take account of the need to ensure that the court can do justice in other cases than that immediately to hand on the other (see para.11-9 below) and occasionally this is remarked upon by judges endeavouring to ensure that the overriding objective is taken into account (e.g. *Nesheim v Kosa* [2006] EWHC 2710 (Ch); [2007] W.T.L.R. 149 (Briggs J) (retrospective permission to serve out of jurisdiction)). In *Holmes v S.G.B. Services Plc* [2001] EWCA Civ 354, the judge granted C's application (1) vacating trial date, (2) giving C leave to amend their particulars of claim, and (3) permitting parties to re-instruct the expert on particular issues. The judge said that there is a tension between (a) rules emphasising the maintaining of trial dates and (b) the interests of justice in achieving a fair trial and under r.52.3(6) gave D permission to appeal on the basis that the possibility that the Court of Appeal would resolve the tension in favour of (a) rather than (b) gave D real prospects of success or provided a compelling reason for hearing the appeal. In dismissing D's appeal, the Court of Appeal noted the elements of the overriding objective and doubted whether the tension existed. Buxton LJ said, in making a case management decision, the court has to balance all of the criteria identified in r.1.1 without giving any one of them undue weight. Striking the balance was a matter for the judge and it would be wrong for the Court of Appeal to give, or for judges to seek, any direction suggesting that one or other of those criteria was more or less important. These tensions are exemplified by the Court of Appeal's approach to relief from sanctions under r.3.9 in *Mitchell v News Group Newspapers* [2013] EWCA Civ 1537; [2014] 1 W.L.R. 795 and *Denton v White* [2014] EWCA Civ 906: see Vol.1 para.3.9.2 et seq.

The overriding objective is not applicable where legal rights are involved (*Dicker v Scammell* [2003] EWHC 1601 (QB); [2003] N.P.C. 90, *Bhusate v Patel* [2019] EWHC 470 (Ch) and *Cowan v Foreman* [2019] EWCA Civ 1336. Nor can it confer jurisdiction if manifestly there is none (*Russell-Cooke Trust Co v Prentis* [2003] EWHC 1435 (Ch)). Further, the CPR being rules of court, cannot (neither by means of the overriding objective provisions in them nor by any other provision) extend the jurisdiction of the court from that which the law provides (*Jaffray v The Society of Lloyds* [2007] EWCA Civ 586; [2008] 1 W.L.R. 75).

The requirement that the court should give effect to the overriding objective when exercising any power does not affect the established principles as stated in the authorities as to the inadvertent disclosure of documents subject to legal professional privilege (e.g. *Guinness Peat Properties Ltd v Fitzroy Robinson Partnership* [1987] 1 W.L.R. 1027, CA; *Breeze (Disclosure) v John Stacey & Sons Ltd* (2000) C.P. Rep. 77, CA). The court's approach to striking out in defamation claims is based on a long line of authority predating the CPR and reflecting matters of substance inherent in such claims (*Best v Charter Medical of England Ltd* [2001] EWCA Civ 1588). The overriding objective provides no basis upon which the court can prevent a party from instructing the legal representative of their choice (*Maltez v Lewis, The Times*, 4 May 1999). There is nothing in r.1.1 to suggest that, if a defendant failed to give an explanation for delay, that failure could be relied upon by the other party to show that the court should exercise its discretion to set aside a default judgment in a certain way (*MacDonald v Thorn Plc, The Times*, 15 October 1999, CA). The limits imposed by *Re Barrell Enterprises* [1973] 1 W.L.R. 19, CA, on the jurisdiction of a judge to recall a judgment before it is sealed or otherwise perfected are based on considerations consistent with those stated in r.1.1(2) (*Stewart v Engel* [2000] 1 W.L.R. 2268, CA; *Mamidoil-Jetoil Greek Petroleum SA v Okta Crude Oil Refinery AD (No.2)* [2001] 1 Lloyd's Rep. 591 (Thomas J); *Compagnie Noga d'Importation et d'Exploration SA v Abacha* [2001] 3 All E.R. 513, Rix LJ; *Royal Brompton Hospital NHS Trust v Hammond* [2001] EWCA Civ 778). Where an application is made for the recall for reconsideration of a judgment granting an interim injunction it has to be decided on its merits, as to which the only guidance which is required is that contained in the overriding objective (*A v B (A Company)* [2002] EWCA Civ 337; [2002] 2 All E.R. 545, CA). It has been said that the guidance as to the production of fresh evidence in the Court of Appeal given in *Ladd v Marshall* [1954] 1 W.L.R. 1489, CA, fits exactly into the statement of the overriding objective in r.1.1, including the need to make efficient use of the court's resources (*R. (Amraff Training Plc) v Department of Education and Employment* [2001] EWCA Civ 914, para.30 per Buxton LJ; see also *Hertfordshire Investments Ltd v Bubb* [2000] 1 W.L.R. 2318, CA; and *Absolute Lofts South West London Ltd v Artisan Home Improvements Ltd* [2015] EWHC 2632 (IPEC) (Judge Hacon) unrep. The requirement that a statement of case must be verified by a statement of truth does not prevent a claimant from being given permission to amend their statement of case to plead their claim on an alternative and inconsistent basis, where that alternative was suggested by the defence, for to do so would be contrary to the overriding objective (*Binks v Securicor Omega Express Ltd* [2003] EWCA Civ 993; [2003] 1 W.L.R. 2557; [2004] C.P. Rep. 4, CA). In a case where a defendant is in danger of losing their home, the overriding objective does not require that their pleaded admission to the effect that the claimant had served the required statutory notice (though the fact was otherwise) should be disregarded (*Loveridge v Healey* [2004] EWCA Civ 173, CA).

It has been said that, in the exercise of discretion the court may suspend the rule that a defendant should be called upon to elect before submitting that there is no case to answer where the overriding objective would be better served by such a course (*Mullan v Birmingham City Council, The Times*, 29 July 1999; *Worsley v Tambrands Ltd* [2000] P.I.Q.R. P95, (Ebsworth J); cf. *Landare Investments Ltd v Welsh Development Agency* [2004] EWHC 946 (QB); [2006] 1 B.C.L.C. 451 (McKinnon J)).

But the jurisdiction to suspend the rule that a defendant should be called upon to elect before submitting that there is no case to answer should be exercised with considerable caution (*Boyce v Wyatt Engineering [2001] EWCA Civ 692, CA*); see further on this point, Vol.1, para.32.1.6. For further illustrations of circumstances in which the courts, in exercising powers given to them by the CPR and in interpreting rules, have called in aid specific aspects of the overriding objective as listed in r.1.1(2); see paras 11-8 to 11-12 below.

The court will also have to have regard to its obligation to ensure a fair trial arising from art.6 of the European Convention on Human Rights.

3. - Risk of over-reliance on CPR (r.1.1)

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Overriding Objective of CPR

C. - Giving Effect to the “Overriding Objective”—Generally (rr.1.1 and 1.2)

3. - Risk of over-reliance on CPR (r.1.1)

11-7

In some instances, references in reported judgments to r.1.1 simply draw attention to the overriding objective in general terms e.g. *Powell v Pallisers of Hereford Ltd [2002] EWCA Civ 959*, (para.32). More commonly, attention is drawn to specific aspects of r.1.1(2). There is a risk that the particular objectives listed in r.1.1(2) will be subjected to over-elaborate analysis. There is also a risk that the particular objectives will be used selectively and merely for the purpose of giving added weight to particular exercises of powers given to the court by the CPR and to preferred interpretations of rules. If taken too literally, the terms of the overriding objective can tempt judges and lawyers into concluding that, in giving effect to a particular rule, the court has a discretion where, in fact, none exists, or into focusing prematurely on a residual discretion without having given proper weight to terms and conditions that have to be first satisfied (e.g. *Tinkler v Elliott [2012] EWCA Civ 1289; [2013] C.P. Rep. 4*, allowing appeal against judge’s decision made under r.39.3(3)).

In a number of cases decided shortly after the implementation of the CPR the courts drew attention to the significance of Pt 1 under the new procedural regime. In some cases they did so, it is submitted, in circumstances where it was neither necessary nor helpful to do so. Further, in some cases advocates have urged that the dominant if not exclusive considerations for resolving certain procedural issues were to be found in r.1.1. These tendencies gave rise to a risk of over-reliance on the overriding objective and the risk that decisions would be made without sufficient legal analysis, which in turn could have led to erratic “palm tree justice” — (e.g. *Law v St Margarets Insurances Ltd [2001] EWCA Civ 30, CA* (overriding objective used to support wholly unsustainable result that default judgment entered against wrong defendant should not be set aside)). This risk did not however materialise to any real degree, although, it is submitted, it remains something that the courts need to remain aware of.

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1. - Justice and fairness (rr.1.1(1) and 1.1(2)(d))

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Overriding Objective of CPR

D. - Giving Effect to the “Overriding Objective”—Particular Objectives

1. - Justice and fairness (rr.1.1(1) and 1.1(2)(d))

11-8

It is perhaps obvious that the fundamental purpose of civil procedure should be to enable the court “to deal with cases justly” (r.1.1(1)) and, so far as is practicable, “fairly” (r.1.1(2)(d)). The classic explanation of the role of civil procedure is that it should be the “handmaiden of justice” (*Coles and Ravensheath Arbitration, Re [1907] 1 K.B. 1*, per Collins MR). And it has been stressed that “procedural rules should be the servant not the master of the rule of law” (*NML Capital Limited v Republic of Argentina [2011] UKSC 31; [2011] 3 W.L.R. 273, SC*, at [74] per Lord Phillips PSC), although note that the rule of law cannot but be achieved through the proper application of procedural rules. However, these sentiments cannot be allowed to hide the fact that procedural rules are not “value free”. They are based on policy choices, they have their own objectives and, in the adversary context, for good reason individual rules may reflect a bias towards one party or another. Further, in a given situation, what is just and what is fair may be a matter on which reasonable persons may reasonably differ. These various issues all point to procedure’s fundamental role in ensuring that the court can carry out its constitutional role. They do so by ensuring that justice in the individual case can be achieved, but as was made clear in *Mitchell v News Group Newspapers Ltd [2013] EWCA Civ 1537* (para.38), this can only be achieved through the application of the various parts of r.1.1(2), which explicate what it means to “deal with a case justly and at proportionate cost”. Contrary to the view taken in previous editions of the White Book, *Mitchell v News Group Newspapers* makes clear doing justice in the individual case is not something separate from or superior to the overriding objective.

Instances in which it has been said expressly that powers should be exercised in accordance with the overriding objective of dealing with cases justly include the following: the power to exclude admissible evidence (r.32.1) (*Grobbelaar v Sun Newspapers Ltd, The Times, 12 August 1999, CA*) — the power to set aside a witness summons (r.34.3(4)) (*Harrison v Bloom Camillin 12 May 1999, unrep.*); the exercise of the discretion to join parties (r.19.4) (*Messier-Dowty Ltd v Sabena SA [2000] 1 Lloyd's Rep. 428, CA*); setting aside order for summary judgment made in absence of defendant (*Stock v Stock, 17 October 2000, unrep.*, CA; granting permission to amend a claim form or statement of case (r.17.1(2)) (*Thurrock BC v Secretary of State for the Environment, Transport and the Regions (No.1) [2001] C.P. Rep. 55, CA*); requiring party to give additional information in relation to matter in dispute (r.18.1) (*Toussaint v Mattis [2001] C.P. Rep. 61, CA*); the power to grant permission to amend a notice on appeal (r.52.8) (*Crane v Sky In-Home Ltd [2008] EWCA Civ 978*)), the power to set aside a grant of permission of appeal or to impose conditions on an appeal (r.52.9), not made promptly (*Mamidoil-Jetoil Greek Petroleum Company S.A. v Okta Crude Oil Refinery A.D. [2003] EWCA Civ 617; [2003] 2 Lloyd's Rep. 645, CA*); the power to require defamation defendant to permit inspection of documents under r.31.12 (*Rigg v Associated Newspapers [2003] EWHC 710 (QB); [2004] E.M.L.R. 4*); joinder of additional defendant to oppose claimant’s application for summary judgment (r.19.2) (*Chubb Insurance Company of Europe S.A. v Davies [2004] EWHC 2138, (Comm)*); upholding possession claim on merits although defendant not given adequate notice of hearing (*Sun Street Properties Ltd v Persons Unknown [2011] EWHC 3432 (Ch.)*); exercise of discretion to transfer wrongly issued claim to Crown Office where initially filed elsewhere or strike out to be carried out so as to enable claim to be dealt with justly (— *Cala Homes (South) Ltd v Chichester DC (Time Limits) [2000] C.P. Rep. 28*; see also *R. v Secretary of State for the Environment Ex p. National Farmers’ Union [2002] 1 C.M.L.R. 8*).

Before the CPR came into effect, the courts tended to allow interlocutory applications that would inevitably result in delay in case progress. Frequently, ensuring that a respondent party adversely affected by the granting of the application was compensated in costs was the only real concern of the court. Such compensation may be classified as a fairness concern. However, the overriding objective requires that cases should be dealt with expeditiously as well as fairly (see para.11-9 below). Whether expedition should weigh more heavily in the balance than fairness is a dilemma lying at the heart of the CPR case management system (but not one readily acknowledged, see e.g. *Holmes v S.G.B. Services Plc [2001] EWCA Civ 354*). Inevitably, its resolution may be affected by the particular procedural or case management issue confronting the court. It has been said that, generally,

amendments to statements of case required to permit the real dispute between the parties to be adjudicated should be allowed, provided the respondent party can be compensated in costs and “the public interest in the efficient administration of justice is not significantly harmed” (*Cobbold v Greenwich LBC*, 9 August 1999, unrep., per Peter Gibson LJ). This decision must however be read subject to the decisions in *Savings & Investment Bank Ltd (in liquidation) v Fincken* [2003] EWCA Civ 1630; [2004] 1 W.L.R. 667, *Swain-Mason v Mills & Reeve LLP* [2011] EWCA Civ 14; [2011] 1 W.L.R. 2735 (CA) (and see, *Worldwide Corporation Ltd v GPT Ltd*, 2 December 1998, unrep., CA) and the need to take account of all the aspects of the overriding objective, particularly those concerning the needs of other court users and any prejudice caused to them by the conduct of specific litigation (see for instance, *Su-Ling v Goldman Sachs International* [2015] EWHC 759 (Comm)), in considering such matters rather than focus, as in *Cobbold*, on the test derived from *Cropper v Smith* (1884) 26 Ch. D. 700; it having been confirmed by the UK Supreme Court that that latter test, and particularly Bowen LJ’s dictum setting it out, is no longer valid: see *Prince Abdulaziz v Apex Global Management Ltd (Rev 2)* [2014] W.L.R. 4495 per Lord Neuberger PSC at para.27. In those, and other decisions, the Court of Appeal has however also repeatedly stressed that judges must be astute to correct sloppy practice and to avoid at all costs “slipping back to the bad old days when courts took a relaxed attitude to the need for compliance with rules and court orders”. In respect of which now see: in *Mitchell v News Group Newspapers* [2013] EWCA Civ 1537; [2014] 1 W.L.R. 795 and *Denton v White* [2014] EWCA Civ 906: see Vol.1 para.3.9.2 and following.

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2. - Cost and delay (rr.1.1(2)(b) and (d))

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Overriding Objective of CPR

D. - Giving Effect to the “Overriding Objective”—Particular Objectives

2. - Cost and delay (rr.1.1(2)(b) and (d))

11-9

The “Access to Justice” Reports were concerned to recommend cures for the time-honoured twin scourges of civil justice; they are cost and delay. Since the date of the original enactment of the [CPR](#), paras (b) and (d) of r.1.1(2) have stated that the furthering of the overriding objective of dealing with a case justly includes “so far as is practicable”, amongst other things, saving expense and ensuring that it is dealt with expeditiously and fairly, and the matter of expense has also been referred to in para.(c)(iv), which requires the court to deal with the case in ways which take account of the financial position of each party. With the coming into effect on 1 April 2013, of the major reforms as to costs in civil proceedings, the basic definition of the overriding objective as contained in r.1.1(1) was expanded to include, not only the objective of enabling the court to deal with cases justly, but also of enabling the court to deal with cases “at proportionate cost”. This was done for the purpose of reflecting the greater emphasis placed on the concept of proportionality specifically in the assessment of costs and in the new arrangements for costs management by the court in the reformed costs rules. (See further “Proportionality”, paras 11-10 and 11-12 below.) The cost and delay elements of the overriding objective are reflected in r.1.4 (Court’s duty to manage cases) where it is stated that active case management includes, amongst other things, considering whether the likely benefits of taking a particular step justify the cost of taking it, and giving directions to ensure that the trial of a case proceeds quickly and efficiently. These objectives are expressly re-stated in particular contexts in the [CPR](#); e.g. Practice Direction (Possession Claims) para.3.3 (see Vol.1, para.[55APD.6](#)); and Practice Direction (Small Claims) para.2.5 (see Vol.1, para.[27PD.2](#)).

The courts have shown a willingness to avoid the costs inherent in, and the delays that are a consequence of, oral hearings, by requesting parties to make submissions in writing. This is apparent, not only where the rules expressly allow the court to deal with particular applications without a hearing, but also where they do not; e.g. where at the conclusion of the time allocated for a hearing, or upon circulating a written judgment before handing down, the court requests the parties to make further submissions, or submissions on post-trial matters, in writing. A striking illustration is *Simms v The Law Society [2005] EWCA Civ 849; [2006] 2 Costs L.R. 245; [2005] A.C.D. 98, CA*, where, after the conclusion of oral argument, the Court of Appeal invited the parties to make written submissions on an important issue as to indemnity costs. See also *Baris Ltd v Kajima Construction Europe (UK) Ltd [2006] EWHC 31 (TCC)*, (claim by claimant for interest where defendant’s pre-action offer of lump sum had been accepted by claimant), and *Redhead v Rawcliffe [2006] EWHC 2695 (QB)*, (post-judgment submissions as to calculation of figure for final lump sum award). The procedural device of dealing with matters on paper and without a hearing has obvious cost and delay reducing advantages and is available to the court in a number of circumstances (e.g. *Baris Ltd v Kasima Construction Europe (UK) Ltd [2006] EWHC 31 (TCC)*, (with consent of parties, trial judge dealing with contested application on paper)). The Court of Appeal has had this very much in mind in giving guidance as to the form of conditional orders (*Bristol City Council v Hassan [2006] EWCA Civ 656; [2006] 1 W.L.R. 2582; [2006] 4 All E.R. 420, CA*).

One of the principal ways in which the [CPR](#) seek to reduce costs and delays is by providing incentives for parties to make, and to take seriously, offers to settle (see [CPR Pt 36](#)), for example, by rules exposing parties rejecting offers to penalties in certain circumstances. It has been suggested that, for the purpose of enhancing the efficacy of these rules, they should be interpreted in the light of the “saving expense” objective stated in r.1.1(2)(b) (*Little v George Little Sebrie & Co, The Times, 17 November 1999*).

Another principal way in which the [CPR](#) seek to reduce costs and delays is by providing for the summary disposal of claims and issues within claims (see [CPR Pt 24](#)). In r.1.4(2) this is identified as one of the elements of “active case management”. It has been said that in exercising these powers the court saves expense and achieves expedition (*Swain v Hillman [2001] 1 All E.R. 91, CA; Puma AG Rudolf Dassler Sport v Sports Soccer Ltd [2003] EWHC 2705* (Etherton J)).

Under the [CPR](#), for the purpose of ensuring that cases are dealt with expeditiously, greater emphasis than previously is placed on the keeping of procedural time limits. The clearest reflection of this is the unqualified power the court has to strike out a statement of case where there has been a failure to comply with a rule, practice direction or court order ([r.3.4\(2\)\(c\)](#)) (*Biguzzi v Rank Leisure Plc [1999] 1 W.L.R. 1926, CA*).

Frequently, in exercising powers given to them by the [CPR](#) the courts make specific reference to the objectives of dealing with cases expeditiously and saving expense (e.g. *Spice Girls Ltd v Aprilia World Service BV (Permission to Appeal), The Times, 12 September 2000* (correcting errors of fact in judgment on quantum before order drawn); *Sohal v Sohal [2002] EWCA Civ 1297* (whether party losing at trial alleging judgment obtained by fraud should be required to challenge judgment by separate action rather than by appeal)).

In *A v B (A Company) [2002] EWCA Civ 337; [2002] 2 All E.R. 545, CA*, the Court of Appeal laid down guidelines to assist first instance judges when dealing with applications for interim injunctions restraining publication in breach of confidence claims. The guidelines state the effect of the voluminous case law and, generally, make it unnecessary for parties to refer judges to the copious authorities; a practice that can add hugely to the costs of litigation and also can create great problems for judges hearing such applications, particularly in view of the urgency with which they have to be dealt. The Court said that the guidelines were made in discharge of the Court's obligations under the overriding objective and are intended to ensure that the majority of applications for this form of interim relief are dealt with "in a more appropriate manner". The Court added that the 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 ordinary person". In considering the well-known recent Strasbourg jurisprudence on freedom of expression and its impact on the English law of defamation there were a growing number of cases making the same point in similar language and there was a danger of over citation.

A claimant is not obliged to include in their pleaded case all the claims which they could arguably advance against a defendant (though there are risks in failing to do so), and may legitimately limit their claim for the purpose of reducing costs and ensuring that it is dealt with proportionately (*Khiaban v Beard [2003] EWCA Civ 358* (court has no power under [r.16.3](#) or [r.26.8\(1\)\(a\)](#) to require a claimant to increase value of a claim or to include items of claim which they have chosen not to include, and it is no part of the judicial function to force a claimant to claim more than they wish to claim in order to maximise court fees)).

The court's general powers of case management include the power to direct that particular issues arising in any proceeding should be dealt with before others (see Vol.1, para.[1.4.8](#)). Necessarily, when this is done, the disposal of the other issues is delayed. In personal injury and wrongful death cases it is quite common for issues of liability to be tried before issues of damages. In the interests of bringing finality in litigation, it is the court's function to make a single award for damages, making the best assessment possible of future loss. The inherent difficulty in doing this, which is only partly overcome by the court's power to order interim payment of damages ([CPR r.25.6](#)), provisional damages, or payment of damages by periodical payments ([CPR Pt 41](#)), and the risk of doing injustice if the assessment is seriously wrong, encourages delays in concluding the assessment of damages hearing. It is not uncommon for the assessment of damages in such cases to be postponed for quite a long time after the conclusion of the liability trial, particularly where the claimant has suffered catastrophic injuries; see e.g. *Parkin v Bromley Hospital NHS Trust [2002] EWCA Civ 478* (Buckley J) (assessment hearing adjourned for eight months, principally for purpose of enabling accurate estimate to be made of costs of home (rather than institutional) care for the claimant); *Cook v Cook [2011] EWHC 1638 (QB); [2011] P.I.Q.R. P18* (Eady J) (final disposal of issue of quantum in catastrophic personal injuries case postponed to indefinite future date when claimant's adult needs could be properly assessed). It may well be in the interests of justice that a final award of damages should not be made until sufficient time has elapsed for a reliable prognosis to be made of the claimant's medical condition, and it is possible to envisage a case where the nature of the damage and the likelihood that it will be incurred is clear, but yet quantification cannot yet be meaningfully assessed. In such a case, it may well serve the interests of all concerned to postpone the quantification until all the necessary evidence becomes available (*Adan v Securicor Custodial Services Ltd [2004] EWHC 394, (QB)*, (Eady J) (after accident claimant developing psychotic symptoms and detained under mental health legislation)). It is important that courts should continue to manage cases that are, for these reasons, subject to necessary delays before final disposition.

Those aspects of the [CPR](#) that are aimed at reducing delays in the handling of civil proceedings assist in preventing violations of Convention rights, in particular violations of art.6. The [Human Rights Act 1998 Sch.1, Pt 1](#), art.6(1) states that, in the determination of their civil rights and obligations, everyone is entitled to a fair and public hearing "within a reasonable time" (see Vol.2, para.[3D-76](#)). In *Davies v United Kingdom (Application No.42007/98) (2002) 35 E.H.R.R. 29*, proceedings under the [Company Directors Disqualification Act 1986 s.6](#) were commenced against D in July 1992, but were not completed until January 1998. The European Court of Human Rights found that the State was responsible for the greater part of the delay and held that,

in the circumstances, the proceedings were not pursued with the diligence required by art.6(1). The reasonableness of the length of proceedings has to be assessed in the light of the circumstances in each case, having regard in particular to its complexity, the conduct of the parties, and of the relevant authorities (*Robins v United Kingdom* (1998) 26 E.H.R.R. 527; *Reid v United Kingdom* (Application No.50272/99) (2003) 37 E.H.R.R. 9; 14 B.H.R.C. 41. In *Eastaway v United Kingdom* (74976/01) (2005) 40 E.H.R.R. 17, following the collapse in 1990 of a group of companies, proceedings brought by Secretary of State against a former company director under the 1986 Act were commenced on 1 July 1992, and completed on 4 June 2001. The ECtHR held that, in all the circumstances, the proceedings were not pursued with the diligence required by art.6, and there had been a violation of art.6 in that director's civil rights and obligations were not determined within a reasonable time. In *Mitchell v United Kingdom* (Application No.44808/98) (2003) 36 E.H.R.R. 52; 14 B.H.R.C. 431 there was a delay of in excess of ten years between the commencement of a substantial and complex action in 1988 and the conclusion of enforcement proceedings, including a delay of 30 months, for which the parties were not responsible, between the date when the case was set down for trial and the trial. Because of the delays before and after trial, the enforcement proceedings were concluded on terms less favourable to the judgment creditors than would otherwise have been the case. The Court found that in the circumstances judgment creditors art.6 rights had been violated by failures by the State to arrange its civil procedure legal system so as to prevent undue delay. In *Ceskoslovenska Obchodni Banka AS v Nomura International Plc* [2003] I.L.Pr. 20 (Mr Jonathan Sumption Q.C.), in rejecting a submission that foreign proceedings in a non-EU jurisdiction should be stayed on the ground that substantial justice would not be done, the judge noted that delays were not unusual in the courts of many modern European states despite potentially being capable of constituting a breach of art.6. It may be commented that, even though the English courts are now relieved of the problem of applying the complex law that formerly applied to applications to strike out for want of prosecution, there is now a risk that they will become burdened with an equally complex task of considering whether claims should be struck out, or judgments set aside, for breaches of art.6, on the ground that proceedings will not be, or were not, determined within a reasonable time. Note also in *McHugh Southern Ltd (In Liquidation), Re* [2002] EWHC 3069 (art.6(1) requires civil proceedings to be struck out only where it is no longer possible for the defendant to receive a fair trial). See further Vol.2 Section 12 (CPR: Application, Amendments and Interpretation, para.12-53).

3. - Proportionality (r.1.1(2)(c))

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3. - Proportionality (r.1.1(2)(c))

11-10 See also “Ensuring parties on equal footing” at para.[11-11](#) below.

Rule 1.1(2)(c) introduces one aspect of one of the most important principles underlying the new approach to civil procedure heralded by the bringing into force of the [CPR](#), that is, the principle of proportionality. Dealing justly with a case (i.e. furthering the overriding objective) includes, so far as is practicable, 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. The other aspect of the principle of proportionality is contained in r.1.1(2)(e), which introduces the equally important principle that the new approach requires the court to consider the effect case management decisions taken in individual cases have on other litigants when making those decisions. Taken together the two rules focus on what the Court of Appeal in [L \(A Child\), Re \[2013\] EWCA Civ 1778](#) described as the individual and collective aspects of proportionality (see para.[11-12](#)).

There is nothing new in the concept of proportionality. Civil procedures have always been designed in a manner which took account of the fact that cases vary enormously in these respects. However, as a practical matter, in important respects the mechanisms that existed for matching claims with appropriate procedures and for ensuring that procedures designed for the heavier cases were not routinely used in ordinary cases were ineffective. In the “Report of the Civil Justice Review Body” (Cm. 394, 1988) it was said (p.14) that the cost of litigation was often quite disproportionate to the amount of the claim, that too many cases were dealt with according to High Court procedures when county court procedures would suffice, and that procedures for handling smaller cases (including debts, other small claims and many housing cases) were disproportionately complex. These findings were confirmed in the “Access to Justice” Reports. What was however new insofar as proportionality was concerned was its introduction, through the overriding objective, as a guiding principle of procedural fairness. As explained above (see para. [11-9](#)), with effect from 1 April 2013, the basic definition of the overriding objective in r.1.1(1) was expanded to include the objective of enabling the court to deal with cases “at proportionate cost”. This was done principally for the purpose of both embedding in the overriding objective the greater emphasis placed on the concept of proportionality in the reformed costs rules coming into effect on that date, particularly in relation to costs management by the court, the allocation of costs burdens and the assessment of costs, and drawing attention to what had not been as clear as it might have been previously, i.e. that the court is required to take account of the needs of litigants other than those in the immediate case before it (see Lord Dyson, 18th Implementation lecture, 22 March 2013, paras 15-18) (see para.[11-13](#)). In terms, r.1.1(2)(c) is concerned, not with such costs-related matters, but with “ways” in which (that is to say, the procedures and practices by which) the court may deal with cases (as is explained further in what follows).

To a significant extent, the principle of proportionality is implemented by the procedure for allocation of cases to one or other of the three case management tracks, the small claims track, the fast track, and the multi-track (see [CPR Pts 26 to 29](#)) i.e. through structural proportionality. Allocation is controlled by the court. The procedures applied in the several tracks are significantly different. The procedures applicable to cases on the small claims track are similar to those which formerly applied in cases referred to arbitration under former CCR Ord.19 Pt I. (In Practice Direction (Case Management—Preliminary Stage: Allocation and Re-Allocation), para.8.1 (see Vol.1, para.[26PD.8](#)) it is said that the small claims track is intended to provide “proportionate procedure” for such claims.) The fast track is designed to accommodate cases in the middle range. The procedures applicable to cases proceeding on this track are limited and in this way proportionality is assured. Nothing comparable to the fast track existed in the rules formerly applicable to actions proceeding in the High Court or the county courts. The multi-track is designed to accommodate the heavier cases and the full range of procedures is available. At this level proportionality is assured by the court’s power to control the development of the case by directions given in exercise of the powers given to the court by rules of court and practice directions (all of which should be exercised with the overriding objective, and therefore the need for proportionality, in mind). Rule 26.8 states the matters which the court should take into account when deciding whether to allocate a case to one

track or another. As would be expected, paras (i) to (v) of r.1.1(2)(c) are reflected in that provision. Since the CPR came into effect, some significant procedural modifications to the case management track system have been introduced, largely for the purpose of making procedures more proportionate for certain types of proceedings falling within the multi-track or the fast track. Illustrations are the streamlined procedure for the handling of claims started in, or transferred to, a patents county court (now IPEC) (under which provisions relating to statements of case, defence and reply, disclosure and inspection, and applications, that would normally apply are modified in significant respects) (see Pt 63 Section IV), and the expanded pre-action process for minor road accident injury claims (in effect replacing normal post-issue fast track procedures with pre-action processes) (see Pre-Action Protocol for Low Value Personal Injury Claims Arising out of Road Traffic Accidents), both introduced in 2010.

Paragraphs (i) to (v) or r.1.1(2)(c), or some of them, are referred to, either expressly or impliedly, in a number of other provisions in the CPR; e.g. r.30.3 (Criteria for transfer order), r.31.3 (Right of inspection of a disclosed document), r.31.7 (Duty of search), r.44.4 (Basis of assessment of costs), and r.44.5 (Matters to be taken into account in deciding the amount of costs); note also Practice Direction (Costs) Section 11.1 (see Vol.1, para.44PD.5). Further, express references to proportionality are found in some of the supplementing practice directions (e.g. Practice Direction (Disclosure and Inspection) para.2 (see Vol.1, para.31APD.2), Practice Direction (Costs), para.13.13 (court will not endorse agreed costs if disproportionate and unreasonable) (see Vol.1, para.44PD.4) and Practice Direction (Protocols) para.4 (Pre-action behaviour in cases not covered by approved protocol) (see Vol.1, para.C1-003). The financial position of each party is a relevant factor where the court is considering whether to exercise its discretion under r.44.3(8) to order an amount to be paid on account before costs are assessed (*Mars UK Ltd v Teknowledge Ltd (Costs) [1999] 2 Costs L.R. 44*). Applicants for wasted costs orders must bear in mind the principle of proportionality (*Re Merc Property Ltd, The Times, 19 May 1999*). In *Contractreal Ltd v Davies [2001] EWCA Civ 928*, Arden LJ said (para.64) that, in the context of costs awards:

“...proportionality is a more complex exercise than simply comparing the amount of the costs with the amount that was recovered and scaling down the costs accordingly.”

See also *SCT Finance Ltd v Bolton [2002] EWCA Civ 56; [2003] 3 All E.R. 434, CA*.

The Court of Appeal has held that it is essential that courts should attach the appropriate significance to the requirement of proportionality when making orders for costs and when assessing costs (in respect of the pre-Jackson approach: *Lownds v Secretary of State for the Home Department [2002] EWCA Civ 365; [2002] 1 W.L.R. 2450, CA; Voice and Script International Ltd v Alghafar [2003] EWCA Civ 736; [2003] C.P. Rep. 53, CA*). For the post-Jackson approach see *Hobbs v Guy's & St Thomas' NHS Foundation Trust [2015] EWHC B20 (Costs)*). The Court has stressed that, in modern litigation, with the emphasis on proportionality, “costs budgeting” is required in cases where it is recognised at the outset that the proceedings could easily result in disproportionate costs being incurred. The legal representatives for the parties should make an assessment of the likely value of the claim and its importance and complexity, and then plan the necessary legal work needed. This involves determining in advance the appropriate amount of time to be spent on the various stages of the proceedings and to be spent overall, and estimating the likely costs overall (ibid., see also *Jefferson v National Freight Carriers Ltd [2001] EWCA Civ 2082; [2001] Costs L.R. 313, CA*).

In para.1.1(2)(c) the word “proportionate” is used in a technical sense. In some CPR rule and practice direction provisions the words “proportionate” and “disproportionate” are used in a general sense and not for the specific purpose of drawing attention to this aspect of the overriding objective. Examples are Practice Direction (Further Information), para.1.2 (requests to be confined to matters “which are reasonably necessary and proportionate” and para.4.2 (objection to request on ground of “disproportionate expense”) (see Vol.1, paras 18PD.1 and 18PD.4). Some provisions state that remuneration awarded by the court should be proportionate (e.g. CPR r.69.7 (Receiver's remuneration)). Increasingly the words are used by judges in their judgments (e.g. *Malgar Ltd v RE Leach (Engineering) Ltd [2000] C.P. Rep. 39* (Sir Richard Scott V.-C.) (application to commit for contempt disproportionate in all the circumstances); *Secretary of State for Trade and Industry v Staton [2001] C.P. Rep. 1; [2001] B.C.C. 467, CA* (application to dismiss claim under r.3.4(2) where delay caused by the court's mistake), *Keith v CPM Field Marketing Ltd [2001] C.P. Rep. 35, CA* (order barring defendant from defending claim disproportionate); *Price v Price [2003] EWCA Civ 888; [2003] 3 All E.R. 911, CA* (time for extending service of particulars of claim extended on conditions where alternative of striking out claim disproportionate)) but it is not always clear whether they are being used in their technical or general senses.

The concept of proportionality is also relevant to the taking of appeals, both from interlocutory and final orders; see *Piglowska v Piglowski [1991] 1 W.L.R. 1360, HL* (wisdom of granting successive permissions to appeal important point of principle at expense of parties with very limited resources doubted by Lord Hoffmann) and *Walker v Home Office [1999] C.L.Y. 4104, CA* (permission to appeal striking out order refused where point of principle trivial in circumstances).

The requirement that, so far as is practicable, the court should exercise powers given to it by the CPR “in ways which are proportionate” has been referred to in various procedural contexts. For example, whether permission should be given to re amend a statement of case (*McPhilemy v Times Newspapers Ltd* [1999] 3 All E.R. 775, CA); whether expert evidence should be admitted (*Gumpo v Church of Scientology Religious Education College Inc* [2000] C.P. Rep. 38; *Mann v Chetty & Patel* [2001] C.P. Rep. 24); whether a party should be committed for technical breach of complex order in circumstances where breach trivial and non-blame worthy (*Adam Phones Ltd v Goldschmidt* [1999] 4 All E.R. 486); whether a pre-emptive costs order should be made in favour of an economically weak party bringing proceedings in the public interest (*R. v Hammersmith and Fulham LBC Ex p. C.P.R.E. London Branch* [2000] Env. L.R. 544 (Richards J)); whether a second respondent should be joined in judicial review proceedings on the basis that the applicant, if unsuccessful, would not be liable for that respondent’s costs (*R. v Secretary of State for the Environment, Transport and the Regions Ex p. O’Byrne (Application for Joinder)* [2000] C.P. Rep. 9); whether wasted costs order should be granted (*Merc Property Ltd, Re, The Times*, 19 May 1999); whether further evidence should be received under CPR Sch.1 RSC Ord.55, r.7(2) (see now r.52.11(2)) in trade mark appeal (*CLUB EUROPE Trade Mark* [2000] R.P.C. 329); whether a party dissatisfied with the report of a single joint expert should be permitted to instruct another expert (*Daniels v Walker* [2000] 1 W.L.R. 1382, CA); whether personal injuries claim should be stayed until claimant submitted to expert examination designed to investigate medical issue relevant to one of several heads of damage (*James v Baily Gibson & Co* [2002] EWCA Civ 1690); whether application for summary assessment of costs should be refused because of applicant’s failure to serve schedule of costs 24 hours before hearing (*Mac-Donald v Taree Holdings Ltd* [2001] C.P.L.R. 439 (Neuberger J)), whether permission to appeal should be subject to the condition (see r.52.3(7)) that the appellant should pay all the costs of the appeal irrespective of the outcome of the proceedings (*Morris v Wrexham CBC* [2001] EWHC Admin 697; [2002] 2 C. & P.R. 7 (Jackson J)); whether issues of liability and quantum should be tried separately (*DHL Air Ltd v Wells* [2003] EWCA Civ 1743); whether summary judgment application should be stayed pending determination of appeal in another case likely to clarify relevant law (*Green v Skandia Life Assurance Co Ltd* [2006] EWHC 1626 (Ch)). In *Flynn v Robin Thompson & Partners* (2000) 80 P. & C.R. 419, CA, the Court had recourse to the principle of proportionality when holding that it was not reasonable to allow to go to trial an allegation that a partnership was liable under the Partnership Act 1890 s.10 for an assault perpetrated by one of its members as a result of which no loss was sustained.

Beyond the CPR, concepts of proportionality are found in European Law and in the law relating to Convention rights, and they have effects on English substantive and procedural law in a number of respects. More detailed explanation of the impact of these concepts is beyond the scope of this commentary. It suffices to say that there is plenty of room for confusion. The case of *Campbell v M.G.N. Ltd (No.2)* [2005] UKHL 61; [2005] 1 W.L.R. 3394, HL, provides an illustration. Here the unsuccessful defendants in a libel claim argued on appeal that the costs they were obliged to pay the winning claimant, who had the benefit of a conditional fee agreement with her legal advisers incorporating a success fee, was necessarily disproportionate because the award of costs was more than (and up to twice as much as) the amount which, under the ordinary assessment rules, a costs judge would consider reasonable and proportionate. Lord Hoffmann said this argument was flawed because it confused two different concepts of proportionality. On the one hand there is the concept of proportionality within the CPR costs rules, which is concerned with whether expenditure on litigation was proportionate to the amount at stake, the interests of the parties, the complexity of the issues, and so forth. On the other hand there is the concept of proportionality used for testing whether a party’s rights under art.10 of the Convention (freedom of expression) were infringed. In relation to the latter his lordship pointed out that it was settled that the statutory CFA scheme, under which unsuccessful defendants may be required to pay, not only the reasonable and proportionate costs of their adversary, but also to contribute to funding of other litigation, was a proportionate measure to provide those other litigants with access to justice (also see *Coventry v Lawrence* [2015] UKSC 50; [2015] 1 W.L.R. 3485).

4. - Ensuring parties on equal footing (r.1.1(2)(a))

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4. - Ensuring parties on equal footing (r.1.1(2)(a))

11-11 Dealing with a case justly includes, so far as is practicable, “ensuring that the parties are on an equal footing” (r.1.1(2)(a)). Obviously, this aspect of the overriding objective is closely related to that of dealing with a case in ways which are proportionate “to the financial position of each party” (r.1.1(2)(c)(iv)). However, equality is not limited to the respective capacities of the parties to finance the litigation in which they are involved.

In the “Access to Justice” Reports it was said that one of the defects in the civil justice system was the “lack of equality” between the powerful, wealthy litigant and the under-resourced litigant and amongst the specific objectives of the reforms proposed in those Reports was the need to establish “equality of arms” between the parties involved in civil cases so as to ensure, so far as possible, that there should be “a level playing field between litigants of unequal financial or other resources” (see Final Report, pp.2 and 146 and Interim Report, p.26). It was said that financially stronger and more experienced parties could exploit rules of court so as to intimidate weaker parties by spinning out proceedings and escalating costs. In the Interim Report it was said that the overriding objective should include “making allowances for any inequality between the parties” (p.216) but in the Final Report this formula was abandoned in favour of that now found in r.1.1(2)(a) (p.274).

The procedures introduced by the **CPR** are simpler than those which previously prevailed and their application in individual cases is subject to supervision by the court through the case management system. Consequently, the scope for a wealthy or experienced party using intimidatory tactics against a party weaker in either or both of those respects is now reduced. Thus, the overall system goes a long way towards ensuring that in individual cases the parties are “on an equal footing”.

Practice Direction (Protocols), para.4 states that, in cases not covered by any approved pre-action protocol, the court will expect the parties to act reasonably in exchanging information and documents relevant to the claim and generally in trying to avoid the necessity for the start of proceedings. This paragraph refers generally to the overriding objective and expressly to the equal footing objective stated in r.1.1(2)(a) (see Vol.1, para.C1-003).

A party has a legitimate interest in attending the trial of proceedings to which they are a party and at which they will be a witness; that is an aspect of the right to a fair trial and accords with the objective of ensuring that parties are on an equal footing (*The Three Mile Inn Ltd v Daley [2012] EWCA Civ 970*, where direction that claimant’s evidence should be taken by video link set aside). The exercise of the court’s discretion to allow a witness to give evidence through a video link (r.32.3), which relates to the furthering of the overriding objective (r.1.1) by making use of technology (r.1.4(2)(k)) in the active management of cases, has been seen as a means by which the court may seek to ensure that the parties are on an equal footing (*Rowland v Bock [2002] EWHC 692 (QB); [2002] 4 All E.R. 370* (Newman J)).

The provisions introduced by the **CPR** as to costs should have the effect of reducing the burden on a party who is financially weaker than their opponent. In fast track cases the costs recoverable by a successful party are limited. As this limitation accrues to the benefit of both financially strong and financially weak losing parties it has been suggested that it may have the effect of favouring the stronger party and introducing inequality. However, fast track cases are subject to limited procedures and to strict timetables and this reduces both the scope for a strong party to push up the amount of work required by their weaker opponent and the extent to which the strong party will be able to spend money extravagantly on their own case (see Final Report, pp.28 and 45).

The “equal footing” aspect of the overriding objective (together with the need to deal with cases in ways which are proportionate to the financial position of each party) may be relevant where the costs payable to a successful litigant in person fall to be assessed (*R. (Wulfsohn) v Legal Services Commission [2002] EWCA Civ 250; [2002] C.P. Rep. 34; [2002] 3 Costs L.R. 341*,

CA), where an application is made for an order for costs against nonparty (*Hamilton v Al-Fayed [2002] EWCA Civ 665*, at para.65 per Chadwick LJ) and when the court is considering whether it should exercise its powers to make a pre-emptive costs order in favour of the economically weaker party (*R. v Hammersmith and Fulham LBC Ex p. C.P.R.E. London Branch [2000] Env. L.R. 532* (Richards J); *R. v Secretary of State for the Environment, Transport and the Regions Ex p. O'Byrne (Application for Joinder) [2000] C.P. Rep. 9* (Hooper J); *R. (Campaign for Nuclear Disarmament) v Prime Minister (Costs) [2002] EWHC 2712 (Admin); Henry v BBC (Qualified Privilege) [2005] EWHC 2503* (Gray J)).

Where one party can afford to instruct a large firm of experienced and expensive solicitors, whereas the other can afford only small and relatively inexperienced advisers, the court may make orders designed to rectify this imbalance; for example, orders allowing the smaller firm more time to carry out necessary work, or requiring the larger firm to prepare bundles of documents needed for court hearings (*Maltez v Lewis, The Times, 4 May 1999*). However, the court has no power, either under r.1.1(2) or under any other provision, to prevent a party from instructing the legal representatives of their choice, simply on the ground that they are able to afford more powerful representation than their opponent.

A potential source of inequality between parties may lie in their respective access to expert evidence. Some of the provisions as to experts now found in Pt 35 (particularly r.35.8) are designed to remedy this imbalance; e.g. *ES v Chesterfield & North Derbyshire Royal Hospital NHS Trust [2003] EWCA Civ 1284; [2004] Lloyd's Med. Rep. 90, CA* (on “equality of arms” grounds, infant claimant granted permission to call second expert witness in serious medical negligence claim); *Kearsley v Klarfeld [2005] EWCA Civ 1510; [2006] 2 All E.R. 303, CA* (further expert permitted on issue on which current opinion divided); *Radu v Houston [2006] EWHC 231 (QB)*, (permitting expert evidence on prospects for enforcement of judgment in foreign jurisdiction on application for security for costs); *Arroyo v Equion Energia [2013] EWHC 3173 (TCC)*, (individual claimants granted permission to rely on report of single expert on technical issues arising in circumstances where the corporate defendants had access to substantial “in-house” expertise and expert evidence relevant to those issues); see also Final Report, p.146.

There is no absolute rule that, in every case, parties must be limited to the same number of expert witnesses. Although “equality of arms” in this respect should be the general rule, there may be circumstances in which it should give way for the sake of achieving the overriding objective of dealing with cases justly (*Kirkman v Euro Exide Corporation (CMP Batteries Ltd) [2007] EWCA Civ 66*).

When deciding the track for a claim, the matters to which the court should have regard include “the circumstances of the parties” (r.26.8(1)(i)), and that would include inequality in their circumstances.

It has been said that a factor that may weigh against allowing a party’s application to amend their statement of case made when trial is imminent is that such amendment would create a risk of prejudice and embarrassment to their opponent with the effect that the parties would not be on an equal footing (*Woods v Chaleff [1999] C.L.Y. 500, CA*). Circumstances may arise where a refusal to order security for costs for an appeal would result in the appeal being pursued on an unequal footing, an outcome which should be avoided (*Federal Bank of the Middle East v Hadkinson, The Times, 7 December 1999, CA*).

The objective of ensuring that parties are on an equal footing may be a relevant consideration where the court is considering whether it should exercise such powers as it may have to require a party to provide their opponent with information to enable the latter to make a realistic Pt 36 payment and to respond to a Pt 36 offer (*Gnitrow Ltd v Cape Plc [2000] 3 All E.R. 763, CA*) or to make an order for an interim payment following judgment on liability (*Harmon CFEM Facades (UK) Ltd v Corporate Officer of the House of Commons (Interim Payment) [2001] C.P. Rep. 20*). The “equal footing” aspect of the overriding objective was stressed as a reason for not ordering a re-trial in a defamation case where the defendant newspaper argued on appeal, contrary to their argument at trial, that a particular question should not have been left to the jury (*McPhilemy v Times Newspapers Ltd (No.3), The Times, 19 June 2001, CA*).

In *Geveran Trading Co Ltd v Skjevesland [2002] EWCA Civ 1567; [2003] 1 W.L.R. 912, CA*, the question arising was whether an advocate who is or was acquainted socially with the litigant against whom they are instructed to appear or a close member of that litigant’s family should be prevented from acting. The bearing of the equality of arms principle on this issue figured in the submissions of the parties but was not emphasised by the Court in the reasoning underlying its judgment.

5. - Court's resources (r.1.1(2)(e))

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5. - Court's resources (r.1.1(2)(e))

11-12 Dealing with a case justly includes, so far as is practicable, “allotting to it an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases” (r.1.1(2)(e)). This provision highlights the “Access to Justice” Reports’ aim of ensuring that court resources are distributed equitably amongst all court users (Final Report at 24). It recognises the fact that the consequences of excessive and disproportionate costs, and of delays brought about by the behaviour of parties, are not confined to the parties themselves (*Arrow Nominees Inc v Blackledge [2000] C.P. Rep. 59, CA, at [73]*). The burden of costs can fall on publicly provided funds and can harm the economic health of businesses. Where delays occur in one case, parties in other cases can be inconvenienced, subject to delays not of their own making, and put to additional expense. Further, limited court resources can be wasted where parties make successive applications for the same interim relief (see Vol.1, para.1.4.14), or make unnecessary applications, or where time is taken up by hearings provoked or made necessary by one party’s failure to comply with court rules or orders.

Rule 1.1(2)(e) recognises that court resources are limited, that demand is always likely to outstrip supply, that justice has to be “rationed”. It articulates the second aspect of proportionality effected by the “Access to Justice Reports”, as it was described *L (A Child), Re [2013] EWCA Civ 1778*, in [12], “collective proportionality”. The overall scheme of the CPR and the case management system in particular is designed to ensure that each case is allotted its “appropriate share of the court’s resources” (see further “Proportionality”, para.11-10 above). The significance of r.1.1(2)(e) is that it states that, in allotting each case its share of resources, the court should take into account “the need to allot resources to other cases”; see *Mitchell v News Group Newspapers Ltd [2013] EWCA Civ 1537; [2014] 1 W.L.R. 795*, at [38]–[39] and *Denton v White [2014] EWCA Civ 906* at [26]. It would seem that what is meant by determining the share of court resources which should be allotted to a case is determining what is the appropriate form of management for that case. This is not confined to determining the appropriate case management track but also includes the manner in which all of the other powers, including the powers to grant relief from sanctions for non-compliance, which the court has to control the development of the case (including the power to impose sanctions for procedural failures) is exercised. In determining the appropriate form of management the court should have regard to the need to prevent any one case being conducted in a way that interferes with the resolution of other disputes and wastes the resources of the court (see Interim Report, p.39); see e.g. *W.L. Gore & Associates GmbH v Geox SpA [2008] EWHC 462 (Pat)*, (on application to advance trial date, account taken of effects that granting application would have on parties in other cases awaiting trial). Litigants and their advisers should recognise that any delay which occurs will be assessed, not only from the point of view of the prejudice caused in their case, but also in relation to other litigants and the prejudice which is caused to the due administration of justice (*Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd*, op. cit., per Lord Woolf MR).

An important aspect of case management is the allocation of cases to judges who have specialist expertise. There is an understandable tendency to assume that a case raising complicated issues in a highly specialised area of the law would be dealt with more efficiently and effectively if it were handled and tried by a judge whose skill, training and experience matched the demands of the case (especially where there is serious conflict of esoteric expert evidence). To an extent this is accomplished by the mechanisms by which cases are allocated to particular “courts” and “lists” (especially within the High Court) with nominated judges. Directions given by the court in a particular case that the proceedings be assigned to a specialist judge, whether in accordance with a system habitually adhered to by the court or ad hoc (and whether on the application of parties or not), can be seen as a practice designed to ensure, so far as is practicable, that cases are allotted an appropriate share of the court’s resources. See e.g. *InterDigital Technology Corporation v Nokia Corporation [2008] EWHC 297 (Ch)*, (system of allocating patent cases to judges (including “career patent judges”) according to their technical complexity described as a practice designed to make maximum use of judicial time). Usually, planning by the court to ensure that particular cases can be dealt with by particular specialist judges takes place months in advance of the trials themselves. The postponement of dates fixed for trial and the

adjournment of trials can affect the resources which the court may have available at any given time (*Fitzpatrick Contractors Ltd v Tyco Fire Integrated Solutions (UK) Ltd* [2008] EWHC 1927 (TCC)) (Coulson J)).

Under the **Senior Courts Act 1981 s.42** (Restriction of vexatious legal proceedings), on the application of the Attorney General the court has power to make a civil proceedings order restraining a person from bringing or continuing legal proceedings. The need to ensure that court resources are husbanded has figured increasingly prominently as a rationale for the use of this power, e.g. *Attorney General v Foden* [2005] EWHC 1281 (Admin), the court said that a person alleged to be a vexatious litigant had “perpetrated a waste of scarce judicial resources needed for the determination of proper claims”. (Also see *Attorney General v Miles* [2007] EWHC 1729). It has also figured in the development of the power of the court to make civil restraint orders against both litigants (see r.3.11) and *McKenzie Friends (Ex p. Purvis)* [2001] EWHC 827 (Admin); *Attorney General v Purvis* [2003] EWHC 3190 (QB)), (see further Vol.1 para.3.11.1.) The procedures supporting this jurisdiction themselves are designed to protect the court’s resources by providing that certain applications must be made on paper and may be dealt with without a hearing.

It has also been said that by exercising its powers of summary disposal under Pt 24 the court gives effect to the particular objective stated in r.1.1(2)(e) by “avoiding the court’s resources being used up on cases where it would serve no purpose” (*Swain v Hillman* [2001] 1 All E.R. 91, CA).

It has been said that, where an application is made to strike out a claim as an abuse of process under r.3.4(2)(b), on the ground that the claim is indistinguishable from a previous claim which was not proceeded with, the application may be granted on the basis that permitting the claim to continue would involve an inappropriate allocation of a share of the court’s resources (*Securum Finance Ltd v Ashton (No.1)* [2001] Ch. 29; [2000] 3 W.L.R. 1400, CA).

Even in an important case where the amount at stake is very large, the issues are very complex, and where both parties appear to have very substantial resources at their command, the judge is nevertheless under a duty to manage the case in a manner that, so far as is practicable, allots to it an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases (*Morris v Bank of America National Trust* [2001] 1 All E.R. 954; [2000] B.C.C. 1076; (where parties’ estimates of needed trial time varied from three months to 12 months)).

The need to ensure that cases are allocated an appropriate share of the court’s resources and that those resources are not wasted has been emphasised in cases where: the court considered exercising its discretion, on its own initiative, to make an order staying or striking out a claim on forum non conveniens grounds (*Cook v Virgin Media Limited* [2015] EWCA Civ 1287; [2016] 1 W.L.R. 1672; [2017] 1 All E.R. 929); a party has requested the court to exercise its discretion to re-consider a judgment before it is sealed or otherwise perfected (*Compagnie Noga d'Importation et d'Exploration S.A. v Abacha (No.2)* (2001) 151 New L.J. 693; *Royal Brompton Hospital NHS Trust v Hammond (No.8)* [2001] EWCA Civ 778); where parties have failed to cooperate in narrowing disputes in applications for the providing of further information under CPR Pt 18 (*Lexi Holdings v Pannone and Partners* [2010] EWHC 1416 (Ch)); it has been used as a justification for making orders striking out moribund claims entirely instead of subjecting them to indefinite stays leaving open “the possibility of applications being made to resurrect them from time to time” (*Astaldi S.p.A. v Generali-Kent Sigorta A.S.* 25 June 2002, unrep. (Judge Dean Q.C.)); as a justification in part for refusing an application to substitute a party as claimant in circumstances not directly provided for by the rules (*R. (Johnson) v Secretary of State for Health* [2006] EWHC 288 (Admin), or to remit to a costs judge an application for a prospective costs order (*Willis v Nicolson* [2007] EWCA Civ 199; [2007] C.P. Rep. 24; [2007] P.I.Q.R. P22); for refusing to substitute a new party as claimant in judicial review proceedings (ibid); as an additional reason for holding that permission to make an appeal was required where that might be a matter for doubt (*Compagnie Noga d'Importation et d'Exploration S.A. v Australia and New Zealand Banking Group Ltd* [2002] EWCA Civ 1142; [2003] 1 W.L.R. 307; [2003] C.P. Rep. 5, CA); as a consideration weighing against the granting of an application for an adjournment of the hearing of an application made at the start of the hearing (*Albon v Naza Motor Trading Sdn Bhd* [2007] EWHC 2613 (Ch); 157 New L.J. 1615 (2007) (Lightman J)); for enabling an appeal court to decline to hear submissions one ground of appeal when minded to find against the appellant on another ground in circumstances in which they had to succeed on both in order to upset the order under appeal (*Palfrey v Wilson* [2007] EWCA Civ 94; [2007] N.P.C. 18, CA) (see also *A. v B. Plc*, referred to above), or to refuse an application to set aside permission to appeal made at the start of the substantive appeal after the court had devoted preparation time to the case (*Tradigrain SA v Intertek Testing Services* [2007] EWCA Civ 154; [2007] 1 C.L.C. 188; [2007] Bus. L.R. D32, CA); as a consideration relevant in determining whether a TCC claim should continue to be handled through its pre-trial stages by a senior circuit judge at a provincial court centre or transferred to the RCJ (*Neath Port Talbot BC v Currie & Brown Project Management Ltd* [2008] EWHC 1508 (TCC); [2008] C.P. Rep. 39; [2008] B.L.R. 464). The Court of Appeal has expressed concern about the risk of valuable and scarce court time being consumed by satellite litigation where one party chooses to bring contempt proceedings against another (*JSC BTA Bank v Ereschenko* [2013] EWCA Civ 1961; [2013] All E.R. (D) 55 (Jul), CA). Parties must be careful

not to advance arguments just for the sake of academic interest, or arguments that have the effect of needlessly lengthening court hearings where there is nothing substantive in issue, as such conduct is neither proportionate nor in accordance with the overriding objective (*Lehman Commercial Mortgage Conduit Ltd v. Gatedale Ltd* [2012] EWHC 848 (Ch)). In *R. (M) v Croydon London Borough Council* [2012] EWCA Civ 595; [2012] 1 W.L.R. 2607, CA, the Court of Appeal explained (paras 36 and 44) that, where parties compromise all their differences save costs, and invite the court to determine how the costs should be dealt with, they take the risk that the court will not be prepared to make any determination other than that there be no order for costs, not only because that is the right result after analysing all the arguments, but also on the ground that such an exercise would be disproportionate, bearing in mind the pressures of other business on the court. The Court of Appeal has been critical of parties who waste court resources by contesting applications unnecessarily, especially where they had no standing to do so (*Folks v Faizay* [2006] EWCA Civ 381; [2006] C.P. Rep. 30; [2006] M.H.L.R. 239, CA (defendant opposing claimant's application for appointment of litigation friend)). In *Aldi Stores Ltd v WSP Group Plc* [2007] EWCA Civ 1260; [2008] 1 W.L.R. 748; [2008] C.P. Rep. 10, CA, a judge sitting in the Technology and Construction Court granted the defendant's application to strike out a claim against them on abuse of process grounds and did so partly for the reasons that that the claim should have been raised in an earlier action, and that the resources of the TCC should not be devoted, for a second time, to trying the same allegations. In allowing the appeal the Court of Appeal stated that, if a litigant's claim can be properly brought, they cannot be denied the right to bring it on the basis that they could have acted differently, and so made more efficient use of the court's resources.

The allocation to a case of an appropriate share of the court's resources may also be a consideration in the handling of appeals by the Court of Appeal (*Adoko v Jemal, The Times*, 8 July 1999, CA; *Stephenson (S.B.J.) Ltd v Mandy* [1999] C.P.L.R. 500, CA); and in dealing with applications for re-trials (*Coflexip SA v Stolt Comex Seaway MS Ltd* [2001] 1 All E.R. 952 (Note); [2001] R.P.C. 9, CA). Parties should keep the appeal court informed of any change of circumstances that may affect the court resources devoted to the appeal (*Re R. (A Child)* [2010] EWCA Civ 303; [2010] 2 F.L.R. 1138; [2010] Fam. Law 59, CA.), particularly where such change may affect the question of whether permission to appeal should be given or ought to be given (*Walbrook Trustee (Jersey) Ltd v Fattal* [2008] EWCA Civ 427; [2008] All E.R. (D) 109 (May), CA); see also Vol.1, para.52.3.20). In *A v B plc* [2002] EWCA Civ 337; [2003] Q.B. 195, CA, the Court of Appeal, having apparently come to the conclusion that the defendant's appeal against an interim injunction should be allowed on the merits, but reserving judgment, declined to hear oral argument on another ground of appeal (not related to the merits, but raising a procedural issue). The Court pointed out that the time allocated for the appeal was exhausted in considering the substantive appeal, and full argument on the procedural issue (which had become academic) would have extended the hearing by two days. In *Irving v Penguin Books Ltd* [2001] EWCA Civ 935, CA, very shortly before the date fixed for the commencement of a hearing before a particular panel of the Court of Appeal in a libel appeal, and after the members of the panel had done a considerable amount of preparation for the hearing, the appellant (acting in person) applied for a 21-day adjournment. In dismissing the application the Court stressed inconvenience to the Court and the waste of resources that would result should the application be granted. In *Anufrijeva v Southwark London BC* [2003] EWCA Civ 1406; [2004] Q.B. 1124, CA, the Court of Appeal undertook much more pre-reading in preparation for the appeal than usual and did this for the purpose of reducing, by using court resources in this way, the number of days needed for the oral hearing, and thereby reducing the costs incurred by the publicly funded parties. An appeal court's resources may be wasted, not only when a hearing overruns its estimate, but also when it is concluded well within it in circumstances where counsel should have appreciated that that would happen (e.g. *Wilson v Jaymarke Estates Ltd* [2007] UKHL 29; [2007] B.C.C. 833). In *Hunte v E. Bottomley and Sons Ltd* [2007] EWCA Civ 1168; [2008] C.P. Rep. 3, CA, for purposes of reducing costs and avoiding waste of court resources, the court gave guidance on the manner in which parties (1) should present plans, maps, diagrams and photographs relied on, and (2) relate them to skeleton arguments, for use by court in pre-reading and at hearing.

Particular provisions in the CPR impose duties on parties to keep the court informed of case developments which may affect the efficient administration of the court's business (e.g. claimant's duty under r.26.4(4) to inform court if settlement is reached where stay ordered).

It is the duty of the parties and of their professional advisers to inform the court (whether first instance or appeal) immediately they become aware of any development which might make it unnecessary for judgment to be delivered; the foundation of this duty is the requirement (derived from r.1.1(2)(e)) that the court's resources should be properly and efficiently deployed (*HFC Bank Plc v HSBC Bank Plc (formerly Midland Bank Plc)* [2000] F.S.R. 176, CA; *Gurney Consulting Engineers v Gleeds Health and Safety Limited* [2006] EWHC 536 (TCC); 108 Con. L.R. 58.). Similarly, for the purpose of ensuring that judges do not waste time pre-reading and preparing for hearings, parties must promptly advise the court if a listed case is not proceeding (*Tasyurdu v Secretary of State for the Home Department* [2003] EWCA Civ 447; [2003] C.P. Rep. 61, CA); *Red River UK Ltd v Sheikh* [2009] EWCA Civ 643; [2009] C.P. Rep. 41; (2009) 153(18) S.J.L.B. 27, CA. The court's resources are likely to be used inefficiently if parties do not assist the court by complying with practice directions relating to the presentation and filing of documents for an appeal and for the citation of authorities (*Bank of Scotland v Henry Butcher & Co* [2003] EWCA Civ 67; [2004] 2 All E.R. (Comm) 557, CA) or if an application is withdrawn on the day of hearing where it has become unarguable

because the point had been overtaken by another case of which counsel was, or ought to have been, aware much earlier (*Gahie v Immigration Appeal Tribunal [2003] EWCA Civ 611*). If, on an appeal to the Court of Appeal, a party wishes to file a replacement skeleton argument making an expanded case requiring additional time for argument, counsel should at the earliest date give the court full details making entirely clear what is wanted and why it is wanted (*AIC Ltd v ITS Testing Service (UK) Ltd [2006] EWCA Civ 1601; [2007] 1 Lloyd's Rep. 555, CA* (rules as to supplementary skeleton arguments explained)).

It should be noted, however, that, save in exceptional circumstances, structural deficiencies, including those arising from a shortage of resources, cannot be a reason for denying the right to a fair trial guaranteed under art.6(1) of the European Convention on Human Rights: *Bucholz v Germany (1981) 3 E.H.R.R. 597*. In *Berry Trade Ltd v Moussavi [2002] EWCA Civ 477; [2002] 1 W.L.R. 1910, CA*, the court held that, in the circumstances of this case, the judge's refusal to grant a defendant's application for a further adjournment of a committal hearing violated the defendant's Convention rights. The court said affording the defendant a proper opportunity to exercise those rights should outweigh other considerations, such as the use of court resources and the convenience of other parties.

6. - Enforcing compliance with rules, etc

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Overriding Objective of CPR

D. - Giving Effect to the “Overriding Objective”—Particular Objectives

6. - Enforcing compliance with rules, etc

11-13 Dealing with a case justly and at proportionate cost includes, so far as practicable, “enforcing compliance with rules, practice directions and orders” (r.1.1(2)(f)). This element of the overriding objective was inserted in r.1.1(2) by the [Civil Procedure \(Amendment\) Rules 2013 \(SI 2013/262\) r.4\(b\)](#), and came into effect on 1 April 2013.

In the Review of Civil Litigation Costs: Final Report (December 2009), Lord Justice Jackson stated that “courts at all levels have become too tolerant of delays and noncompliance with orders” and, in so doing, they have lost sight of “the damage which the culture of delay and non-compliance is inflicting upon the civil justice system” and concluded that “the balance ... needs to be redressed” (Ch.39 para.6.5 (p.396)); see also Review of Civil Litigation Costs: Preliminary Report (May 2009) Ch.43 paras 4.20 and 4.21 (pp.431 and 432). The principal rule change made to the CPR as a result of this particular recommendation was the amendment of [r.3.9](#) (Relief from sanctions). The problem of non-compliance with rules, practice directions and orders is a chronic one, and has to be tackled on a broad front. The merit of the addition of sub-para.(f) to [r.1.1\(2\)](#) is that it provides judges with a more secure foundation when, in the course of discharging their case management and costs management duties, they make orders and give directions, and impose or enforce sanctions for non-compliance. Logically, sub-para.(f) does not sit easily in [r.1.1\(2\)](#). The circumstances in which rules, practice directions and orders are self-enforcing, or in which they may be enforced by the court of its own initiative are limited. Consequently, generally, and for obvious reasons, taking steps to enforce compliance with rules, practice directions and orders must remain a matter for parties disadvantaged by their opponent’s non-compliance and not be a duty imposed on the court, see for instance, [Pourghazi v Kamyab \[2015\] EWCA Civ 562](#) (introduction of r.1.1(2)(f) required to be taken account of when applying the test in [Hammond Suddards Solicitors v Agrichem International Holdings Ltd \[2001\] EWCA Civ 2065; \[2002\] C.P. Rep. 21](#), as clarified by [Goldtrail Travel Ltd \(In Liquidation\) v Aydin \[2017\] UKSC 57](#), concerning the imposition of conditions upon which an appeal may be brought under r.52.18(1)(c)). Following the Court of Appeal decisions in [Mitchell v News Group Newspapers Ltd \[2013\] EWCA Civ 1537; \[2014\] 1 W.L.R. 795](#) and [Denton v White \[2014\] EWCA Civ 906; \[2014\] 1 W.L.R. 3926; \[2015\] 1 All E.R. 880](#) it is apparent that a stricter approach is now being taken to rule-compliance.

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7. - Making use of technology

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D. - Giving Effect to the “Overriding Objective”—Particular Objectives

7. - Making use of technology

11-14

Rule 1.4(1) states that the court must further the overriding objective by actively managing cases and “active case management” is described as including (amongst other things) making use of technology. This aspect of the overriding objective (though appearing in r.1.4) is related to the allocation of court resources element stated in r.1.1(2)(e).

The objective (stated in r.1.4(2)(k)) of furthering the overriding objective (of enabling the court to deal with cases justly) by “making use of technology” for the purpose of “actively managing cases”, is carried forward by rules and practice directions. Where a document is required to be signed, that requirement may be satisfied if the signature is “printed by computer or other mechanical means” (r.5.3). The court’s general powers of case management include the power to hold a hearing and receive evidence by telephone or by using any other method of direct oral communication (except where the rules provide otherwise) (r.3.1(2)(d)). As to telephone hearings of applications to the court and video conferencing, see Practice Direction (Applications) paras 6 and 7 (see para.3Lx-1+ et seq above. In *Heyward v Plymouth Hospital N.H.S. Trust [2005] EWCA Civ 939; [2006] C.P. Rep. 3, CA*, the Master of the Rolls commended the practice of carrying out case management conferences or other interlocutory matters by telephone where it is appropriate but added that, where this done, it is important that the judge who is conducting the hearing should have available before them the appropriate documentary material in a form which the parties to the proceedings are able to duplicate so that their submissions are readily intelligible. A further illustration of the use of technology is provided by r.32.3 which states that the court may allow a witness to give evidence through a video link or by other means (see further, Practice Direction (Written Evidence), para.29.1 and the “Video Conferencing Guide” annexed thereto (see Vol.1, para.32PD.29), and note *Practice Direction (Family Division: Video Conferencing) [2002] 1 W.L.R. 406*). A list of sites which are available for video-conferencing can be found on His Majesty’s Courts and Tribunals Service website at: <https://webarchive.nationalarchives.gov.uk/20130206042354/><https://www.justice.gov.uk/courts/video-conferences>. Legal representatives situated in provincial centres have been urged to use the video-conferencing facilities available for making applications to the Court of Appeal sitting at the Royal Courts of Justice (*Babbings v Kirklees Metropolitan BC (2004) 101(45) L.S.G. 32*). In *Black v Pastouna [2005] EWCA Civ 1389; [2006] C.P. Rep. 11; (2005) 155 N.L.J. 1847, CA*, the Court of Appeal stated that, in every case involving an application to the court which is likely to last half an hour or less, parties should consider whether VCF would be desirable, and warned that, if the Court is not satisfied that there are any features of the application which warrant an oral hearing with the applicant or their advisers present in court, it may direct that any recoverable costs may be limited to the cost of conducting the hearing by video conference, if these are likely to be less than the cost of attending court and any associated travel expenses. Practice Direction (Third Party Debt Orders), para.5.5 expressly provides that, where, in a case of exceptional urgency, an application without notice to a judgment creditor for a hardship payment order is made by a judgment debtor subject to interim third party debt order, the judge where possible will normally direct that the judgment creditor be informed of the application and give them the opportunity to make representations “by telephone, fax or other appropriate method of communication”. See also Practice Direction (Costs), para.40.9(2) (notice to court by fax of settlement of detailed assessment proceedings) (see Vol.1, para.47PD.13), Practice Direction (Further Information), para.1.7 (preliminary request for further information or clarification to be served by email if reasonably practicable) (para.18PD.1 below), and Practice Direction (Third Party Debt Orders), para.5.5 (judgment creditor to be given opportunity to make representations by telephone, fax or other appropriate method of communication) (see Vol.1, para.72PD.5).

Where legal representatives refuse service of a document which the legal representatives of their client’s opponent in an emergency purported to serve on them by electronic means where such service is not expressly permitted by the rules, they are likely to have difficulty in resisting any application by the opponent for relief from sanctions imposed as a result of the defective service (*R.C. Residuals Ltd v Linton Fuel Oils Ltd [2002] EWCA Civ 911; [2002] 1 W.L.R. 2782, CA* (service of expert evidence by email attachment)).

Rule 5.5 (Filing and sending documents) was added to the CPR by the Civil Procedure (Amendment) Rules 2002 (SI 2002/2058) and came into effect on 2 December 2002. This rule states that a practice direction may make provision for documents to be filed or sent to the court by (a) facsimile, or (b) other electronic means. Rule 5.5 is supplemented by Practice Direction (Communication and Filing of Documents by E-mail), see para.5BPD.1 below).

Claim forms in certain county court proceedings may be issued through the Production Centre. The facility requires the modification of the CPR in certain respects (Practice Direction (Production Centre), see Vol.1, para.[7CPD.1](#). Rule 75.4 provides for the electronic delivery of certain documents in county court proceedings under Pt 75 (Traffic Penalties). Rule 55.10A and Practice Direction (Possession Claims Online) make provision for a claimant to start certain types of possession claim in certain courts by requesting the issue of a claim form electronically. Also see Practice Direction 51O (The Electronic Working Pilot Scheme) (see Vol.1 para.[51OPD.1](#).)

It is expressly provided that where an oral hearing is held on an application for a European order for payment, or on an application under art.8 of the ESCP Regulation, it may take place by telephone or video conference; Practice Direction—European Order for Payment and European Small Claims Procedures paras 6.2 and 17.2 (see para.[3Lx-1+](#) et seq. above).

Paragraph (3) of r.63.25 (Applications) states that in Intellectual Property Enterprise Court proceedings, the court will deal with an application without a hearing unless the court considers it necessary to hold a hearing (see Vol.2, para.[2F-17.18](#)). Paragraph 30.1 of Practice Direction 63 (Intellectual Property Claims) states that where the court considers that a hearing is necessary under r.63.25(3) the court will conduct the hearing by telephone or video conference in accordance with Practice Direction 23A paras 6.2 to 7, unless it considers that a hearing in person would be more cost effective for the parties or is otherwise necessary in the interests of justice (see Vol.2, para.[2F-47](#)).

As to use of information technology in the Chancery Division, see Chancery Guide, Chs 6 and 21 (Vol.2, para.1A-39 and 1A-186); see also *Morris v Bank of America National Trust 21 December 1999, unrep., CA* (observations on opportunities for use of information technology in complex cases).

In the King's Bench Division, see King's Bench Guide, para.2.7 (Vol.2, para.[1B-8](#)); Admiralty and Commercial Courts Guide Section J.4 (Vol.2, para.[2A-110](#)); Technology and Construction Court Guide paras 4.5 and 4.6 (Vol.2, para.2C-60).

E. - Duty of the Parties (r.1.3)

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Overriding Objective of CPR

E. - Duty of the Parties (r.1.3)

- 11-15** The structure of the rules in Pt 1 suggests that it is the duty of the court to give effect to the overriding objective in particular proceedings: see rr.1.1, 1.2, 1.4, and also r.3.1(2)(m)). No such duty is directly imposed on the parties. However, r.1.3 states that the parties are required “to help the court” to further the overriding objective (r.1.3).

It has been said that, where parties find themselves in dispute over purely procedural matters, the duty stated in r.1.3 requires them to cooperate in making a real attempt to explore the significant narrowing of, or compromise of, the dispute for the purpose of avoiding disproportionate expense and the taking up of excessive court time (*Lexi Holdings v Pannone and Partners [2010] EWHC 1416 (Ch); [2008] 1 W.L.R. 2380; [2008] 1 All E.R. 995* (Briggs J)). In *Albon v Naza Motor Trading Sdn Bhd [2007] EWHC 2613 (Ch); (2007) 157 N.L.J. 1615* (Lightman J), where the late request of an applicant (who had been remiss in complying with directions) for an adjournment of the hearing of their application was refused, the judge said that it is necessary, if the court is to deal with cases justly, that the parties and their legal representatives act justly, responsibly and in accordance with any directions of the court. Failure to cooperate may result in cost sanctions being applied: *Denton v White [2014] EWCA Civ 906, [2014] 1 W.L.R. 3296, CA* at [40]–[44].

Given the *Denton* decision, and that of *Davies v Forrett [2015] EWHC 1761* (QB), para.23 where Edis J stated in clear terms that r.1.3 imposed a duty on the parties to help the court, the breach of which would sound in costs, there may be a hardening of the court’s approach to compliance with the requirements of this provision. And see *Gotch v Enelco Ltd [2015] EWHC 1802 (TCC), [2015] 4 Costs L.R. 669* paras 42–49 and *Emmanuel v Revenue & Customs Commissioners [2017] EWHC 1253 (Ch); [2017] 3 Costs L.R. 515*.

Generally the court draws no distinction when considering whether responsibility for the conduct of civil proceedings, or some particular strategy or tactic, lies with a party or their legal advisers (*Barnett v Nigel Hall Menswear Ltd [2013] EWHC 91 (QB)*, where second proceedings struck out as an abuse of process, the first proceedings being unsuccessful because the claimants or the legal advisers failed to amend the claim in those proceedings so that they were properly constituted). Although, in terms, r.1.3 imposes a duty on “the parties” it is clear that this encompasses their legal representative, including advocates (*Geveran Trading Co Ltd v Skjevesland [2002] EWCA Civ 1567; [2003] 1 W.L.R. 912, CA*; and *Hallam Estates Ltd v Baker [2014] EWCA Civ 661; [2014] C.P. Rep. 38*), but an advocate’s duty to the court is not confined to any duties that may be derived from r.1.3 and may override their duty to their client (*Geveran Trading Co Ltd* at para.37). A legal representative’s duty to help the court may override any duty to their client: see *Hallam Estates Ltd* at para.12. An advocate’s duty to assist the court in ensuring that a case is dealt with fairly does not require them to place their own client at a substantial disadvantage by acting contrary to their interests, as whatever the scope of r.1.3 may be, it cannot extend so far as to impose upon counsel a duty in conflict with their proper duty to their client; see *Khudados v Hayden [2007] EWCA Civ 1316; [2008] C.P. Rep. 12, CA*. It has been stated that, where a judge has handed down or delivered judgment in a complex case, for the purpose of avoiding the delay and costs of an appeal an advocate ought immediately draw the judge’s attention to any material omission of which they are then aware or then believes exists and that, in many cases, the advocate ought to raise the matter with the judge “in pursuance with his duty to assist the court to achieve the overriding objective” under r.1.3 (*In re T. (A Child) (Contact: Alienation: Permission to Appeal) [2002] EWCA Civ 1736; [2003] 1 F.L.R. 531, CA*, at para.50).

Both parties are required to help the court to further the overriding objective under r.1.3. It may, therefore, no longer always be appropriate for one party to rely on the other party’s inaction when there are procedural steps it could take to ensure the proceedings are disposed of efficiently: *Khilili v Bennett [2000] E.M.L.R. 996, CA* at para 46.

In some cases, where issues have arisen as to whether a claimant has effected service of originating process, judges have been attracted to the submission that a defendant is in breach of their duty under r.1.3 where their solicitor, when requested to do so by the claimant, refuses to confirm that they have instructions to accept service or prevaricates about the matter, but the point

has not been endorsed on appeal (see *Kuenyehia v International Hospitals Group Ltd* [2006] EWCA Civ 21; [2006] C.P. Rep. 34, CA, at paras 8, 11 and 34; *Collier v Williams* [2006] EWCA Civ 20; [2006] 1 W.L.R. 1945, CA, at para.54) and judges at first instance have proceeded on the basis that a defendant's solicitors are under no obligation to the claimants to reveal the defendant's address for service (e.g. *Hallam Estates Ltd v Baker* [2012] EWHC 1046 (QB), (Tugendhat J)). This reluctance is consistent with the view that the duty imposed on a party by the rule is to the court, and not to other parties. Where it was apparent to the defendants from pre-action correspondence with the claimant that, because the claimant's solicitor had made a mistake as to the proper legal basis for the claim, it was hopelessly misconceived, the defendants were under no duty to draw the error to the attention of the claimant in responding to that correspondence, but it was material to take their lack of response in that respect into account when considering an application by the defendants for a wasted costs order against the solicitor made after the claim had failed (*R. (C) v Salford City Council* [2010] EWHC 2325 (Admin); [2011] A.C.D. 6 (Nicol J)).

There is no general duty upon one party to actual or potential civil proceedings to point out the mistakes of another party or their legal advisers, but each case depends on its facts; see *Thames Trains Ltd v Adams* [2006] EWHC 3291 (QB), (Nelson J) (where the authorities are summarised); *The Stolt Loyalty* [1993] 2 Lloyd's Rep. 281 (Clarke J); *Bethell Construction Ltd v Deloitte & Touche* [2011] EWCA Civ 1321, CA; *Barton v Wright Hassall LLP* [2018] UKSC 12; [2018] 1 W.L.R. 1119; and *Woodward v Phoenix Healthcare Distribution Ltd* [2019] EWCA Civ 985, CA. In *Beever v Ryder Plc* [2012] EWCA Civ 1737; [2013] 2 Costs L.O. 364, the defendant alerted the court, but not the claimant, to the latter's failure to file a costs estimate with the allocation questionnaire. Thereupon the court, on its own initiative, made an unless order with which the claimant failed to comply with the result that the claim was struck out. The Court of Appeal stated that the defendant's action was a "breach of good practice" and, as such, a factor to be taken into account when determining whether the claimant should be granted relief from sanction. Presumably, where one party (A) is aware that court staff have made an error in discharging the court's responsibilities in relation to the handling of a claim, by which their opponent (B) is or may be prejudiced, and A has reason to believe that B is unaware of the error and the procedural consequences of it for them or is unsure whether they have and do, A is not by virtue of r.1.3 or on any other ground under a duty clearly to alert B to their predicament. However, A's reluctance in that respect may be a matter which the court will find difficult to ignore when determining applications made by B for relief from the consequences of the court's mistakes; see e.g. *Power v Meloy Whittle Robinson Solicitors* [2014] EWCA Civ 898 (where claimant, prejudiced by court's mis-service of claim form, making application for service by an alternative method). And see *OOO Abbott v Econowall UK Ltd* [2016] EWHC 660 (IPEC); [2017] F.S.R. 1 (HHJ Hacon), where it was noted that while parties are not required to inform their opponents of mistakes they have made, this is subject to the overriding objective and the obligation to ensure that parties and the court have a clear, common understanding of the real issues in dispute and as to the proper procedural arrangements for the effective progress of the claim. A failure to ensure this is the case can lead to unnecessary and disproportionate cost and delay to the parties, to the court, and have an adverse effect on other litigants. Where parties become aware of a genuine misunderstanding on a significant issue they should take reasonable steps to dispel it. And see *Freeborn v Marcal (t/a Dan Marcal Architects)* [2017] EWHC 3046 (TCC); [2017] 6 Costs L.R. 1103, where it was stressed that in all but the most serious cases parties should work together to avoid unnecessary procedural, satellite, litigation arising from procedural error. In *Higgins v ERC Accountants & Business Advisers Ltd* [2017] EWHC 2190 (Ch), referring to the decision in *OOO Abbott*, it was held that the defendant was under no obligation to remind the claimant in long-running litigation that they had not served the claim form i.e., there was no duty to inform their opponent of procedural mistakes they had made to which they had not contributed. This point was confirmed by *Woodward v Phoenix Healthcare Distribution Ltd* [2019] EWCA Civ 985, CA, where it was held that there was no positive duty on a defendant to warn a claimant that service had been defective. It also confirmed that the duty not to engage in technical game-playing, as set out at para.41 of *Denton v TH White Ltd* [2014] EWCA Civ 906; [2014] W.L.R. 3926, was focused on the elimination of meretricious resistance to relief from sanction applications that were bound to succeed.

In *Parkin v Alba Proteins Ltd* [2013] EWHC 2036 (QB), (Holroyde J) a group litigation order was made for a series of claims, commenced in December 2010, and brought against a company (D2) for nuisance during the period 2005 and 2006, caused by rendering operations on an industrial site. Subsequently, the claimants (C) became aware that, during the relevant period, the site had been operated successively by D2 and by another company (D1) of the same group. C were given permission to add D1 as a defendant without prejudice to any point which D1 may take as to limitation. In dealing with C's application for a declaration that their claims which accrued against D1 six years before D1 were added as a defendant were not time-barred, the judge found that, until C became aware that the site had been operated successively by D1 and D2, the conduct of D2 positively led solicitors for C to believe that they were the only appropriate defendant. The judge stated that the failure of D2 to inform the court when the application for a GLO was made that D1 were responsible for the site for most of the period to which C's claims related was a serious breach of D2's duty under r.1.3. Far from assisting the court to further the overriding objective, D2's conduct ensured that the parties were not on an equal footing, and made it harder for the court to deal with the case justly.

One important way in which parties can assist the court in furthering the objective of dealing with cases fairly and expeditiously is by cooperating with the court in the fixing of trial dates, particularly by providing timely and accurate information as to the availability of expert witnesses (*Matthews v Tarmac Bricks & Tiles Ltd [1999] C.P.L.R. 463, CA*). It is contrary to the duty stated in r.1.3 for a party to delay until trial was imminent the making an application which would, if successful, necessarily have the effect of causing the trial to be adjourned to an uncertain date, thereby causing the court and other parties to have wasted time and resources in preparing for trial on the fixed date (see *JSC BTA Bank v Alyazov (No. 9) [2012] EWCA Civ 1551, [2013] 1 W.L.R. 1845, CA*, where appeal from trial judge's refusal of defendant's late application for recusal on ground of judge's apparent bias dismissed). Where, when trial is imminent, parties make an application to vacate a trial date, they having been aware for several months that, because of the failure of either or both of them to meet deadlines imposed by the court's directions it was unlikely that that date could be met, they are in plain breach of their duty under r.1.3 (*Giggs v News Group Newspapers Ltd [2012] EWHC 431 (QB); [2013] E.M.L.R. 5* (Tugendhat J)).

Furthering the overriding objective is not likely to be helped where parties fail to comply with rules, practice directions or court orders. Generally, a party's legal representative inaction must be treated as inaction by the party themselves (*Training in Compliance Ltd v Dewse [2001] C.P. Rep. 46*, per Peter Gibson LJ; but considerations in asylum cases are different (see *BR (Iran) v Secretary of State for the Home Department [2007] EWCA Civ 198; [2007] 1 W.L.R. 2278, CA*, at para.18, and authorities referred to there).

The requirement that the parties should help the court to further the overriding objective (r.1.3) extends to helping the court to achieve the particular objective of allotting a case an appropriate share of the court's resources (r.1.1(2)(e)) (*Mlauzi v Secretary of State for the Home Department [2005] EWCA Civ 128*). It also extends to helping the court actively to manage cases (r.1.4). A party would not be helping the court where, for example, by their conduct, they frustrated the court in its endeavour to actively manage a case by, for example, deliberately refraining from explaining to their opponent the exact nature of a technical procedural error the opponent had unwittingly committed (e.g. *Hertsmere Primary Care Trust v Rabindra-Anand [2005] EWHC 320 (Ch)*, Lightman J) Cf. *Estates Acquisitions and Development Ltd v Wiltshire [2006] EWCA Civ 533*, parties in a legal relationship are not required to put in place a system through which should litigation commence they can receive communications relating to the litigation. An employer is under no duty to assist a claimant to serve proceedings on their employee; further the latter should not make life difficult for the claimant, but they are not obliged to help by giving positive assistance and they certainly are not under any obligation to forego their legal rights (*Drury v British Broadcasting Corporation [2007] EWCA Civ 497*, at para.45).

The obligation of a party to help the court to further the overriding objective, in particular to assist the court to save expense and to deal with the case proportionately (r.1.1(2)), requires that a publicly funded party should meet their continuing obligation to keep the Legal Aid Agency informed of any information which may be relevant to the continuance of their certificate or contract (*R. (Murray) v Hampshire CC (No.2) [2003] EWCA Civ 760; [2003] J.P.L. 1602, CA*).

For the duty of the parties and their professional representatives to keep the court advised of developments that may enable judges to abandon or re-schedule pre-reading or the completion of written judgments, see para.11-12 above.

1. - Source of Power to Make CPR

White Book 2023 | Commentary last updated November 28, 2014

Volume 2

Section 12 - CPR: Application, Amendments and Interpretation

CPR: Application, Amendments and Interpretation

A. - Extent and Application of CPR

1. - Source of Power to Make CPR

12-2

[Section 1\(1\) of the Civil Procedure Act 1997](#) states that there are to be rules of court called “Civil Procedure Rules” (CPR) and provides that the CPR shall govern the practice and procedure to be followed in the civil division of the Court of Appeal, the High Court (except in relation to its jurisdiction under the [Extradition Act 2003](#)), and the County Court. This is reflected in [CPR r.2.1](#) which states that, subject to exceptions, the CPR shall apply “to all proceedings” in those courts. [Schedule 1 of the 1997 Act](#) (brought into effect by [s.1\(2\)](#)) makes further provision about the extent of the power to make such rules. The CPR are to be made by statutory instrument ([s.3](#)). Accordingly, the [Civil Procedure Rules 1998](#) were made in 1998 (see SI 1998/3132). They came into force on 24 April 1999, although before they did so they were amended by the [Civil Procedure \(Amendment\) Rules 1999](#) (SI 1999/1008).

The power to make [Civil Procedure Rules \(CPR\)](#) is to be exercised with a view to securing (a) that “the civil justice system is accessible, fair and efficient” ([s.1\(3\)](#)) and (b) that rules which are both simple and simply expressed” ([s.2\(7\)](#)). The rules are to be made by the Civil Procedure Rule Committee (see [s.2](#)). [Section 1 of and Sch.1 to the 1997 Act](#) are not the sole legislative source of the rule-making power. Examples of other statutory provisions authorising the making of rules (some coming into being before the CPR were enacted, and some after) are: [Limitation Act 1980 s.35](#) (new claims in pending actions), [Senior Courts Act 1981 s.32](#) (interim payments), [s.32A](#) (orders for provisional damages for personal injuries) and [s.58](#) (rules of court affecting Court of Appeal), [Damages Act 1996 s.2A](#) (periodical payments), [Access to Justice Act 1999 s.54](#) (permission to appeal). Such statutory provisions may impose conditions as to how the rule-making power is to be exercised in certain contexts. Amending the CPR is not a matter lying exclusively in the hands of the Rule Committee. For example, powers exercised by a Secretary of State under the [Regulatory Reform Act 2001](#) may have the consequential effect of amending CPR provisions. Note also, powers exercisable by the Lord Chancellor under the [European Communities Act 1972](#).

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2. - Extent of Power to make CPR

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Section 12 - CPR: Application, Amendments and Interpretation

CPR: Application, Amendments and Interpretation

A. - Extent and Application of CPR

2. - Extent of Power to make CPR

12-3 Section 1(1) of the Civil Procedure Act 1997 states that the CPR is to consist of rules of court “governing the procedure and practice to be followed”. Section 1(2) brings into effect Sch.1 to the Act.

Paragraph 1 of Sch.1 states that the CPR may deal with matters which were governed by the former RSC and CCR. Section 84 of the 1981 Act stated that the former Supreme Court Rule Committee was empowered to make rules of court “for the purpose of regulating and prescribing … practice and procedure” including all such matters regulated by rules of court before the 1981 Act came into force (see also the County Courts Act 1984 s.75(4)) and certain particular matters for which rules of court might provide were listed in sub-ss.(1) and (2) of s.87. It should be noted that neither the RSC nor the CCR covered all proceedings which, conceivably, could come within the jurisdiction of, on the one hand, the High Court, and on the other, the (then) county courts (e.g. proceedings covered by the Family Procedure Rules 2010 (made in exercise of powers conferred by the Courts Act 2003 ss.75 and 76 and other legislation) and by the Insolvency Rules (made under the Insolvency Act 1986 s.411)).

Paragraph 2 of Sch.1 states that the CPR may provide for the exercise of the jurisdiction of any court within the scope of the rules by officers or other court staff. In modern times, increasingly the discharge of certain judicial tasks has been devolved to court staff, particularly in the County Court. Usually, this was accomplished by expanding the definition of “proper officer” in CCR Ord.1, r.3 to include the court manager (or an officer acting on his behalf in accordance with directions given by the Lord Chancellor), and by further rule amendments increasing the range of matters that could be dealt with by the proper officer. (See now CPR r.2.5.) Paragraph 2 makes it clear (as did the County Courts Act 1984 s.75(3)) that rules devolving judicial responsibilities in this way are not ultra vires.

The language of s.1(1) and Sch.1 raises the questions: what is the scope of “practice and procedure”, and what is the scope of “matters governed by” the former RSC and CCR. In practice, these questions are unlikely to arise; where the second arises, considerable historical research may be involved (as in *Masri v Consolidated Contractors International (UK) Ltd (No.4) [2009] UKHL 43; [2009] 3 W.L.R. 385, HL*, at [10] et seq per Lord Mance (rejecting the submission that the rule-making power in respect of extraterritorial jurisdiction was limited to matters covered by specific statutory authority)).

Paragraph 3 of Sch.1 states that the CPR may provide for the transfer of proceedings (or any part of proceedings) within the High Court and within the single County Court. The allocation of business between the High Court and the County Court is not a matter to be dealt with by the CPR. Legislation regulating the allocation of business is found in the Courts and Legal Services Act 1990 s.1 and in Orders made by the Lord Chancellor under that section (see the High Court and County Court Jurisdiction Order 1991, as amended). The question whether the presumption against the extra-territorial effect of legislation applies to particular provisions in the CPR is one that has to be determined in context; ibid (see also *Dar Al Arkan Real Estate Development Co v Al Refai [2014] EWCA Civ 7125; [2003] J.P.L. 1602, CA* where submission that certain provisions in Pt 6 and Pt 81 did not have the effect of enabling a committal order to be made against a foreign director who was not within the jurisdiction was rejected).

Paragraph 4 of Sch.1 states that the CPR “may modify the rules of evidence” as they apply to proceedings in the civil division of the Court of Appeal, the High Court, and County Court. The scope of this paragraph is not immediately apparent. The RSC and the CCR contain provisions dealing with the taking of evidence. In some instances the authority for such rules comes from the general power to make rules as to practice and procedure, in other instances they are derived from particular statutory provisions, for example, the Civil Evidence Act 1968 s.8 (hearsay) and the Courts and Legal Services Act 1990 s.5 (service of witness statements). The County Courts Act 1984 s.64 states that in relation to proceedings referred to arbitration rules of court may prescribe “the rules of evidence” to be followed and may make provision with respect to the taking and questioning of

evidence. Generally, in the past it has been accepted that what could be called the substantive law of evidence, in particular the exclusionary rules rendering inadmissible relevant and material evidence, lay outside the rule-making power. The reform of the exclusionary hearsay rule was accomplished by primary legislation in the form of the [Civil Evidence Act 1995](#). In terms, [para.4](#) seems to make the whole of the law of evidence susceptible to changes wrought by rules of court but, presumably, it does not extend to matters that cannot be regarded as mere rules of evidence (e.g. rules of law relating to claims of privilege).

[Paragraph 5 of Sch.1](#) states that the [CPR](#) may apply any rules of court which relate to courts “outside the scope of” the [CPR](#) (see [s.9\(1\)](#)). Consequently, for example, rules made for the criminal division of the Court of Appeal, the Crown Court, Family Court, or Court of Protection, could be applied by the [CPR](#) to the civil division of the Court of Appeal, the High Court and, the County Court (just as, in the past, the [CCR](#) could apply rules relating to the practice and procedure of courts other than the, then, county courts: see [s.75\(6A\)\(a\) of the 1984 Act](#)). Paragraph 5 further states that any rules of court not made by the Civil Procedure Rule Committee (see [s.2](#)), but which apply to particular proceedings in the civil division of the Court of Appeal, the High Court and County Court for example, the [Family Procedure Rules](#) and the [Insolvency Rules](#), may be applied by the [CPR](#) to other proceedings in those courts.

[Paragraph 6](#) states that the [CPR](#) may, instead of providing for any matter, refer to provision made or to be made about that matter by directions. The process by which practice directions are made is regulated by [s.5](#) (as substituted in the Act by the [Constitutional Reform Act 2005](#)).

[Paragraph 7 of Sch.1](#) states that the power to make [CPR](#) includes the power to make different provision for different cases “including different provision … for specific proceedings, or a specific jurisdiction” (e.g. Circuit Commercial courts sitting at district registries). To that extent [para.7](#) is unremarkable. However, the paragraph also states that different provision may be made for different areas, “including different provision … for a specific court or specific division of a court” (see also [s.5](#)). This aspect of the rule making power opens up the possibility that, in relation to proceedings which are indistinguishable, rules of practice and procedure may vary from court centre to court centre, perhaps for the purpose of taking account of the state of business at particular centres (cf., [s.40\(4\) of the 1984 Act](#)).

The source of rule-making power is not confined to the [1997 Act](#). Many other statutes contain provisions stating that rules of court may be made for the purpose of supporting particular types of civil proceedings (e.g. [Crown Proceedings Act 1947 s.35](#)) or for dealing with particular procedural circumstances that may arise (e.g. [Limitation Act 1980 s.35](#) (New claims in pending actions)). Some statutory provisions expressly state that the power to make rules in [Sch.1 of the 1997 Act](#) shall include power to make rules for particular circumstances (e.g. [Charging Orders Act 1979 s.5](#) (Stop orders and notices)). Some statutes expressly authorise the making of rules of court having exceptional effects, and which surely would be regarded as ultra vires without such authorisation; e.g. rules excluding a party from all or part of proceedings (e.g. [Equality Act 2010 s.117](#)), or permitting an appeal to be made without notice to the respondent ([Policing and Crime Act 2009 s.48](#)). The [Civil Jurisdiction and Judgments Act 1982 s.48](#) states that rules of court may make provision for regulating the procedure to be followed in any court in connection with any provisions of that Act (or the Conventions), especially as to the registration and enforcement of judgments. Note also the [Legal Services Act 2007 s.194](#) (rules for payment orders in respect of pro bono representation) and the [Legal Aid, Sentencing and Punishment of Offenders Act 2012 s.55](#) (rules for “additional amount” payments where defendant rejects successful claimants offer to settle).

It should be noted that [s.84 of the 1981 Act](#) (power to make rules of court), though substantially amended by the [1997 Act](#) remains. As amended, it had the effect of providing authority for the making of rules of court in relation to the Crown Court. Such rules, in so far as they do not relate to criminal proceedings, are made by the Lord Chief Justice under [s.86A of the 1981 Act](#).

It should also be noted that the [County Courts Act 1984 s.76](#) (Application of practice of High Court) was unaffected by the [1997 Act](#). This section does not confer a power to make rules but says that “the general principles of High Court practice” may be adopted and applied to proceedings in the County Court where there is, as it were, a “gap” in County Court practice and procedure because the matter is “not expressly provided for by or in pursuance of this Act”, that is to say, provided for by sections in the Act or in delegated legislation made under the Act, including, principally, rules of court. Before the [CPR](#) came into force, the [CCR](#) were made under [s.75 of the Act](#) (now omitted) and the rules found therein were significantly different in many respects to those found in the [RSC](#) and, generally, much simpler. In these circumstances, [s.76](#) was occasionally brought into play to deal with “gaps” apparent in the [CCR](#). [CCR Ord.1, r.6](#) said that where by virtue of [s.76](#) provisions of the [RSC](#) were applied in relation to proceedings in a County Court, that provision “shall have effect with the necessary modifications”. The [CPR](#) govern County Court and High Court proceedings and, in the main, the procedures for both levels of court are the same. Nevertheless, some differences do remain and this leaves open the possibility that “gaps” in County Court practice will continue to emerge and that [s.76](#) may still have a role to play (e.g. [Ager v Ager \[1998\] 1 W.L.R. 1074, CA](#), where it was held

that the jurisdiction conferred on the High Court by the [Senior Courts Act 1981 s.15\(4\)](#) could be conferred on county courts, as they then were, by operation of [s.76](#)). Further, there remains the possibility that, in County Court proceedings to which rules in Sch.2 of the CPR apply (viz., former CCR rules), rules in Sch.1 (viz., former RSC rules) may be applied by operation of [s.76](#). This prospect is specifically acknowledged by [CCR Ord.1, r.6](#) (referred to above) which has survived in the CPR as one of the “schedule rules” (see Vol.1, para.cc1.6, and commentary thereon) (see *Jephson Homes Housing Association Ltd v Moisejevs [2001] 2 All E.R. 901, CA*, application to set aside warrant for possession).

Under UN terrorism orders, HM Treasury has exceptional powers under which, without prior court order, it may make decisions freezing the assets of individuals and organisations. Further, HM Treasury may also make an asset freezing order by way of statutory instrument under [Pt 2 of the Anti-terrorism, Crime and Security Act 2001](#). In [Ch.6 of the Counter-Terrorism Act 2008](#), [s.63](#) provides that any person affected by a decision of HM Treasury under the UN terrorism orders, or by a freezing order under [Pt 2 of the 2001 Act](#), may apply to the High Court to set aside the decision or order. Proceedings on an application under [s.63](#), or on a claim arising from any matter to which such an application relates, are known as “financial restrictions proceedings”. Such proceedings are brought in the High Court, and are assigned to the King’s Bench Division ([s.71](#)); specifically, an application must be started and heard in the Administrative Court ([r.79.4](#)). Other sections in [Ch.6](#) provide for the making of rules of court relating to such proceedings. Among them is [s.72](#) which states that rules made for the first time after the passing of the [2008 Act](#) (26 November 2008) may be made, not by the Civil Procedure Rule Committee, but by the Lord Chancellor (after consultation with the Lord Chief Justice). However, unlike rules made by the Rule Committee, any such rules made by the Lord Chancellor are subject to positive resolution by each House of Parliament. (Accordingly, [s.3\(6\) of the Civil Procedure Act 1997](#) is expressly disappled; see para.9A-746 above.) In exercise of this power by the Lord Chancellor, [CPR Pt 79](#) (Financial Restrictions Proceedings Under the [Counter-Terrorism Act 2008](#)) was inserted in the [CPR](#) by the [Civil Procedure \(Amendment No.2\) Rules 2008 \(SI 2008/3085\)](#) (see further, commentary on [CPR Pt 79](#) in Vol.1).

In a number of cases it has been argued at first instance that particular provisions in the [CPR](#) are outside the rule-making power as stated in [s.1](#) and [Sch.1 of the 1997 Act](#). In *All-in-One Design & Build Ltd v Motcomb Estates Ltd [2000] 144 S.J.L.B. 219, r.36.21(2)* (power of court to award interest on damages awarded to a claimant in case where he recovers more than he proposed in his Pt 36 offer) was held to be intra vires. In *General Mediterranean Holdings SA v Patel [2000] 1 W.L.R. 272, r.48.7(3)* (power of court to order disclosure of privileged documents on wasted costs application) was held to be ultra vires (subsequently the paragraph in Practice Direction (Pt 48—Costs—Special Cases) Section II, drawing attention to [r.48.7\(3\)](#), was revoked). In *Safeway Stores Plc v Tate [2001] 2 W.L.R. 1377, CA*, it was said that the power to make procedural rules under [s.4](#) does not permit the restriction of a party’s right to trial by jury in a defamation claim (cf. *Alexander v Arts Council of Wales, The Times, 27 April 2001, CA*). In 2006, amendments to [CPR r.5.4C](#), as inserted by the [Civil Procedure \(Amendment\) Rules 2006](#), were challenged in judicial review proceedings. The proceedings were settled on the basis that the rule should be amended so as to prevent its retrospective operation and the necessary amendment was accomplished by the [Civil Procedure \(Amendment No.2\) Rules 2006](#). The [1997 Act](#) contains no saving provision similar to that found in the [Senior Courts Act 1981 s.84\(7\)](#). Where a statute provides that rules of court may be made by a rule-making authority with the concurrence of the Treasury, and such rules are included in the [CPR](#) without that concurrence, they will be ineffective (*Simcoe v Jacuzzi UK Group Plc [2012] EWCA Civ 137; [2012] 2 All E.R. 60, CA* (where [CPR r.40.8](#) held ineffective to an extent in county court proceedings)). In *R. (MD (Afghanistan)) v Secretary of State for the Home Department [2012] EWCA Civ 194; [2012] 1 W.L.R. 2422, CA*, the Court of Appeal explained that sub-rule (3) of [CPR r.54.12](#) (Judicial review permission decision without a hearing), insofar as it purported to prohibit the exercise by the Court of Appeal of its statutory jurisdiction under the [Senior Courts Act 1981 s.16](#) to hear and determine appeals from a judgment or order of the High Court, was ultra vires. In *Dunhill v Burgin [2014] UKSC 18; [2014] 1 W.L.R. 933, SC*, the Supreme Court rejected the submission that the provision in [r.21.10](#) (Compromise etc. by or on behalf of a child or protected party) to the effect that a settlement is invalid unless approved by the court is ultra vires.

(a) - Application to proceedings issued before 26 April 1999

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3. - Application of the CPR

(a) - Application to proceedings issued before 26 April 1999

12-4 CPR Pt 51 included a provision (CPR r.51.1) for a Practice Direction (PD 51A) to be issued to provide for the extent to which the CPR was to apply to proceedings issued before 26 April 1999. This rule and Practice Direction were omitted, as being obsolete, as from 6 April 2021 by Civil Procedure (Amendment) Rules 2021 (SI 2021/117) and CPR Update 127. For a detailed explanation of how these provisions operated, see “Application of CPR to proceedings issued before 26 April 1999 (CPR Pt 51)” at para.12-35 below.

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(b) - Proceedings to which CPR do not apply (CPR r.2.1)

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A. - Extent and Application of CPR

3. - Application of the CPR

(b) - Proceedings to which CPR do not apply (CPR r.2.1)

12-5 CPR r.2.1 reflects s.1(1) of the 1997 Act and states that, subject to exceptions, the CPR shall apply “to all civil proceedings” in the County Court, the High Court and the civil division of the Court of Appeal. The exceptions are as stated in para.(2) of r.2.1 and the table therein.

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(i) - Insolvency proceedings

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CPR: Application, Amendments and Interpretation

A. - Extent and Application of CPR

3. - Application of the CPR

(b) - Proceedings to which CPR do not apply (CPR r.2.1)

(i) - Insolvency proceedings

12-6

The [CPR](#) do not apply to insolvency proceedings. This is not because such proceedings are not civil proceedings, but “because they are specialised proceedings which need special rules” (*Stubbs v Gonzales (Practice Note) [2005] 1 W.L.R. 2730*, PC, at para.5). Under the [Insolvency Act 1986 s.411](#) rules may be made in relation to England and Wales by the Lord Chancellor with the concurrence of the Secretary of State for the purposes of giving effect to [Pts I to VIII of that Act](#) (company insolvency and companies winding-up), and under [s.412](#) for the purpose of giving effect to [Pts VII to IX](#) (insolvency of individuals, bankruptcy). Nothing in the [Insolvency Act s.411](#) or [s.412](#) prejudices any power to make rules of court. The Lord Chancellor is required to consult the Insolvency Rules Committee before making any rules under [s.411](#) or [s.412 of the 1986 Act](#). The [Insolvency \(England and Wales\) Rules 2016 \(SI 2016/1024\)](#), amongst other rules, are made under those provisions. Although [CPR r.2.1](#) states that the [CPR](#) do not apply to insolvency proceedings, as [r.12.1 of the 2016 Rules](#) indicates the:

“provisions of the CPR (including any related Practice Directions) apply for the purposes of proceedings under [Parts 1 to 11 of the \[1986\] Act](#) with any necessary modifications, except so far as disapplied by or inconsistent with these [the 2016] Rules”.

Certain provisions in the [2016 Rules](#) expressly incorporate [CPR](#) provisions; see e.g. [r.12.27](#), which incorporates the power to seek further information and disclosure under [CPR Pts 18 and 31](#); and [r.12.58](#), which incorporates [CPR Pt 52](#), subject to variation by an applicable Practice Direction. As *Re HS Works Ltd [2018] EWHC 1405 (Ch)*, unrep., made clear care needs to be taken in considering the extent to which provisions of the CPR are applicable, as it held that neither [CPR r.7.5](#) nor [r.7.6](#) applied to insolvency proceedings.

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(ii) - Probate proceedings

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3. - Application of the CPR

(b) - Proceedings to which CPR do not apply (CPR r.2.1)

(ii) - Probate proceedings

12-7

Probate rules may be made under the [Senior Courts Act 1981 s.127](#) for regulating and prescribing the practice and procedure of the High Court with respect to noncontentious or common form probate business. The [Non-contentious Probate Rules 1987 \(SI 1987/2024\)](#) were made in exercise of this power (see Vol.2, para.[6C-68](#)).

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(iii) - Prize Court proceedings

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3. - Application of the CPR

(b) - Proceedings to which CPR do not apply (CPR r.2.1)

(iii) - Prize Court proceedings

12-8

Under the [Prize Courts Act 1894 s.3](#), rules of court may be made for regulating, subject to the provisions of the [Naval Prize Act 1864](#) and the [1894 Act](#), the procedure and practice of prize courts; see the Prize Court Rules 1939 (S.R. & O. No.1466).

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(iv) - Court of Protection proceedings

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A. - Extent and Application of CPR

3. - Application of the CPR

(b) - Proceedings to which CPR do not apply (CPR r.2.1)

(iv) - Court of Protection proceedings

12-9

The [CPR](#) do not apply to proceedings before the Court of Protection, being proceedings for which rules may be made under the [Mental Capacity Act 2005](#), except to the extent that they are applied to those proceedings “by another enactment”. The Court of Protection is a court of record created by [s.45 of the 2005 Act](#). In effect, the Court took over the responsibilities under the [Mental Health Act 1983](#) formerly discharged by an office of the Supreme Court, which was also called “the Court of Protection”, but its jurisdiction is greater than that exercised under that Act. [Section 51\(1\)](#) states that rules of court may be made “with respect to the practice and procedure” of the Court. Rules of court and supplementing practice directions are made under [s.51](#) and [s.52 of the 2005 Act](#) as, respectively, amended by and substituted by, the [Lord Chancellor \(Transfer of Functions and Supplementary Provisions\)\(No.2\) Order 2006 \(SI 2006/1016\) Sch.1 para.35](#)). The current rules are the [Court of Protection Rules 2017 \(SI 2017/1035\)](#). Rule 2.5 provides for the Court of Protection to apply the Civil Procedure Rules or Family Procedure Rules in any case where the CtPrR or Practice Directions do not expressly make provision, albeit with any necessary modifications and in so far as it is necessary to further the overriding objective. Certain provisions in the CPR are expressly incorporated in the CtPrR by reference (with any necessary modifications and disapplications). Notable examples are: [r.19.6](#) (costs) and [r.24.2](#) (enforcement).

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(v) - Family proceedings

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CPR: Application, Amendments and Interpretation

A. - Extent and Application of CPR

3. - Application of the CPR

(b) - Proceedings to which CPR do not apply (CPR r.2.1)

(v) - Family proceedings

- 12-10 The **CPR** do not apply to family proceedings ([r.2.1\(2\)](#)). Upon the coming into effect of the **CPR**, the **Family Proceedings (Miscellaneous Amendments) Rules** (SI 1999/1012) provided for the **RSC** and **CCR** generally to continue to apply in the **Family Proceedings Rules 1991** (SI 1991/1247) subject to the exception that the **CPR** provisions as to assessment of costs should apply. The significance of this preservation of **RSC** and **CCR** rules was lessened when the reformed procedures for applications for ancillary relief were introduced by the **Family Proceedings (Amendment No.2) Rules 1999** (SI 1999/3491). Rule 1.3 of the **1991 Rules** stated that, subject to the provisions of those rules and any enactment, the **CCR** and the **RSC** should apply, with the necessary modifications, to family proceedings in a county court and the High Court respectively. Further, for these purposes, any provision of the **1991 Rules** authorising or requiring anything to be done in family proceedings should be treated as if it were, in the case of proceedings pending in a county court, a provision of the **CCR** and, in the case of proceedings pending in the High Court, a provision of the **RSC**. In *Norris v Norris [2003] EWCA Civ 1084* (a case raising issues as to costs in ancillary relief cases where offers to settle without prejudice to costs were made) the Court of Appeal referred to the desirability of working towards the “harmonious integration” of the **CPR** and the **1991 Rules**.

That process of integration was carried a long way forward by the enactment of the **Family Procedure Rules 2010** (SI 2010/2955). The **FPR** were made under various statutory powers (principally the **Courts Act 2003** ss.75 and 76) and came into effect on 6 April 2011, whereupon the **1991 Rules** were revoked. The **FPR** apply to family proceedings in the High Court, County Court and magistrates' courts. Certain provisions in the **CPR** (including **RSC** and **CCR** rules in Schs 1 and 2) are expressly incorporated in the **FPR**. Many **CPR** provisions that were incorporated in the **1991 Rules** expressly or by implication are enacted in the **FPR**, in effect duplicating in the **FPR** provisions in the **CPR** and thereby making the **FPR** less dependent than the **1991 Rules** on the **CPR**. Where the **FPR** apply the **CPR**, they apply the **CPR** as amended from time to time ([r.2.3](#)).

In the **FPR**, most of the express references to the **CPR** (including references to **RSC** and **CCR** provisions in Schs 1 and 2 to the **CPR**) consist of provisions incorporating (sometimes with modifications) **CPR** provisions relating to appeals, to costs and, in particular, to enforcement. The establishment (with effect from 22 April 2014) of the Family Court, required substantial amendments to the **FPR**. Among them were the insertion of a new Part, **Part 37**, containing free-standing rules for family proceedings on contempt and committal, modelled on provisions contained in **CPR Part 81**.

The making of practice directions in relation to family proceedings is dealt with by the **Courts Act 2003** s.81 and it is expressly provided there that such directions may provide for any matter which, by virtue of the **Civil Procedure Act 1997** Sch.1 para.3, may be provided for by **CPR**.

CPR r.57.15(2) states that the **CPR** apply to proceedings under the **Inheritance (Provision for Family and Dependants) Act 1975** (which are brought in the Family Division of the High Court), except that the provisions of the **Family Procedure Rules 2010** (SI 2010/2955) relating to the drawing up and service of orders apply instead of the provisions of **CPR Pt 40** and its practice direction. Provisions relating to the drawing up and service of orders are contained in **Pt 29 of the FPR 2010**.

(vi) - Adoption proceedings

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3. - Application of the CPR

(b) - Proceedings to which CPR do not apply (CPR r.2.1)

(vi) - Adoption proceedings

- 12-11 The [Adoption Act 1976](#) was a consolidating measure, bringing together the law of adoption as found in several Acts of Parliament, including the [Adoption Act 1958](#). [Section 9 of the 1958 Act](#) consolidated several former rule-making powers and provided that Adoption Rules shall be made by the Lord Chancellor; see now [s.66 of the 1976 Act](#). Former CCR Ord.1, r.2(2) stated that, in relation to proceedings of a particular kind in county courts (e.g. adoption proceedings), the [CCR](#) should have effect subject to any rules made by an authority other than the County Courts Rules Committee (e.g. the Adoption Rules). As a result of the [Civil Procedure \(Amendment\) Rules 1999 \(SI 1999/1008\) r.2](#), the effect of that provision was preserved by the addition, by the [Civil Procedure \(Amendment\) Rules 1999](#), of a reference to adoption proceedings and to the [Adoption Act 1976 s.66](#) in the Table attached to [r.2.1\(2\)](#). The 1976 Act was overtaken by the [Adoption and Children Act 2002](#) and, as a consequence, by the [Civil Procedure \(Amendment No.4\) Rules 2005](#). A reference to s.141 of that Act was substituted in the Table.

(vii) - Election petitions in the High Court

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(b) - Proceedings to which CPR do not apply (CPR r.2.1)

(vii) - Election petitions in the High Court

12-12

Provisions of the Representation of the People Act 1983 and the Election Petition Rules 1960 take priority over the CPR (*Ullah v Pagel [2002] EWCA Civ 1793; [2003] 1 W.L.R. 1820; [2003] 2 All E.R. 440, CA* (failure to comply with requirements of the 1983 Act and 1960 Rules not curable irregularity)). Accordingly, by the Civil Procedure (Amendment No.2) Rules 2003 (SI 2003/1242), proceedings in the form of election petitions in the High Court under the 1983 Act were added to the table following r.2. This makes it clear that the CPR do not apply directly to such proceedings, although they apply indirectly with modifications by virtue of r.2(4) of the 1960 Rules.

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(c) - Lands Tribunal proceedings

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A. - Extent and Application of CPR

3. - Application of the CPR

(c) - Lands Tribunal proceedings

- 12-13 Procedure in the Lands Tribunal is governed, not by the [CPR](#), but by the [Lands Tribunal Rules 1996 \(SI 1996/1022\)](#) made under the [Lands Tribunal Act 1949](#). Practice directions issued from time to time by the President of the Lands Tribunal contain information on the way in which procedure contained in the [1996 Rules](#) is operated. In a practice direction issued on 5 April 2001, the President confirmed that the CPR have no application in the Lands Tribunal. Nevertheless, in following its procedures the Tribunal does so “on the basis of the same overriding objective as that in the CPR” (para.2.1). Further, costs are in the discretion of the Tribunal and this discretion “will usually be exercised in accordance with the principles applied in the High Court and county courts” (para.19.2). In *Purfleet Farms Ltd v Secretary of State for Transport, Local Government and the Regions [2002] EWCA Civ 1430; [2003] 1 P. & C.R. 20; [2003] 1 E.G.L.R. 9, CA*, the Court of Appeal considered the principles underlying the award of costs in a Lands Tribunal compulsory purchase claim and doubted whether they are or should be the same as those applicable in ordinary civil litigation under the CPR.

(d) - Proceedings to which CPR apply with necessary modifications

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A. - Extent and Application of CPR

3. - Application of the CPR

(d) - Proceedings to which CPR apply with necessary modifications

- 12-14 Prior to the UK's withdrawal from the European Union on 31 December 2020, CPR Pt 78 contained a number of provisions that gave effect to European Union procedural law. See Civil Procedure 2020 and previously for details.

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B. - Structure of CPR

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CPR: Application, Amendments and Interpretation

B. - Structure of CPR

- 12-15+** The **CPR** consists of rules of court made by statutory instrument. Many of the rules are supplemented by practice directions. Schedules attached to the CPR include some rules formerly found in the **RSC** and in the **CCR** (see **Pt 50**). Other former **RSC** and **CCR** provisions, dealing with “specialist proceedings”, were not re-enacted in that way but were converted to practice directions.

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(a) - Generally

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B. - Structure of CPR

1. - Structure of the CPR

(a) - Generally

- 12-16+** The [CPR](#) is divided into Parts (originally 51 of them), each dealing with a discrete matter of practice or procedure, and each containing rules of court. Since their enactment in 1998, the CPR have been subject to many amending statutory instruments. (These are listed below in para.[12-31+](#) where their commencement dates are noted, and in paras [12-32](#) to [12-34](#) any transitional provisions within them are explained.) The process of amending the CPR to take account of new forms of work coming before the courts and to effect improvements is unending. In some significant respects amendments have been made to put into rules of court from procedural innovations emanating from the Court of Appeal in cases decided by that Court since the CPR came into effect (see e.g. *YD (Turkey) v Secretary of State for the Home Department [2006] EWCA Civ 52; [2006] 1 W.L.R. 1646, CA*, per Brooke LJ at para.22).

Paragraph 6 of Sch.3 to the 1997 Act states that [CPR](#) “may, instead of providing for any matter, refer to provisions made or to be made about that matter by directions”. [Section 9\(2\) of the 1997 Act](#) states that in that Act *practice directions* means directions as to the practice and procedure “of any court within the scope of the Civil Procedure Rules”. For the purpose of distinguishing them from other directions (being directions not within the scope of the CPR but nevertheless dealing with the practice and procedure for the handling of civil proceedings), such directions could be called “CPR Practice Directions” (but this is not a term of art). Practice Directions as provided by para.6 supplement most parts of the CPR. The CPR Practice Directions apply (as do the rules themselves) to proceedings in the King’s Bench Division and the Chancery Division of the High Court, and in the County Court. Where relevant they also apply to appeals to the Court of Appeal (Civil Division).

There are a number of Practice Directions containing provisions relevant to particular civil proceedings that do not supplement [CPR](#) Parts, or [RSC](#) or [CCR](#) Orders in the Schedules to the CPR, and which have a provenance other than para.6 of Sch.3 to the 1997 Act. (Sometimes they are referred to, colloquially, as “free-standing” practice directions.) For example, Practice Direction—Insolvency Proceedings (see para.3E-0.1 above) (insolvency proceedings fall outside the scope of the CPR, see [r.2.1\(2\)](#)); Practice Direction—Directors Disqualification Proceedings (see para.3J-0.1 above); Practice Direction—Civil Recovery Proceedings (see para.3K-1 above). Note also miscellaneous practice directions and practice statements, the latter of which simply provide guidance, in Vol. 1 Section B. Where senior judges issue “practice guidance”, e.g., *Practice Guidance (McKenzie Friends: Civil and Family Courts* (see para.[13-22](#) above) and *Practice Guidance (Interim Non-Disclosure Orders)* (see Vol. 1 para:[B13-001](#)), for the avoidance of doubt it is stressed that such guidance “is issued not as a Practice Direction”.

By TSO CPR Update 51 (March 2010), and with effect from 6 April 2010, the CPR Practice Directions were all renamed by the addition of the number of the [CPR](#) Part they supplemented. Thus, for example, the two Practice Directions supplementing [Pt 2](#), formerly named Practice Direction (Court Offices) and Practice Direction (Allocation of Cases to Levels of Judiciary), became Practice Direction 2A (Court Offices) and Practice Direction 2B (Allocation of Cases to Levels of Judiciary). Practice Direction About Costs Supplementing [Pts 43 to 48 of the Civil Procedure Rules](#) was renamed as, simply, The Costs Practice Direction. References to practice directions within CPR provisions were accordingly amended by the *Civil Procedure (Amendment No.2) Rules 2009 (SI 2009/3390)*.

The extent to which rules in particular [CPR](#) Parts make express reference to practice direction provisions supplementing rules varies. Where reference is made, generally the practice direction referred to will be one supplementing the Part wherein the rule is found; but this will not always be the case (e.g. [r.26.2\(6\)](#) refers to the practice direction supplementing [r.7.10](#)). Where a

rule refers, simply, to “the practice direction”, what is meant is the practice direction supplementing the Part wherein the rule is situated (e.g. r.69.2 and r.75.1(1)). (There are, of course, many other practice directions of a different provenance (some pre-dating the CPR) which affect the administration of civil justice in the courts.)

By stating that practice directions “may provide for any matter” which might be provided for by rules in the [CPR](#), in a given case para.6 of Sch.1 may provide the basis for the contention that a particular practice direction provision is ultra vires because it purports to deal with a matter that cannot be dealt with by such rules (e.g. *R. (Ewing) v Department for Constitutional Affairs [2006] 2 All E.R. 993* (Sullivan J), where a practice direction enabling an application by a vexatious litigant to be dismissed without a hearing was unsuccessfully challenged).

CPR Practice Directions i.e. ones that supplement [CPR](#) provisions differ from rules in the CPR and other practice directions in that (a) in general they provide guidance that should be followed, but do not have binding effect, and (b) they should yield to rules in the CPR where there is a clear conflict between them (*R. (Mount Cook Land Limited) v Westminster City Council* op. cit., at para.68 per Auld LJ). They are “at best a weak aid to the interpretation of the rules themselves” (*Godwin v Swindon BC [2001] EWCA Civ 1478; [2002] 1 W.L.R. 997, CA*, at para.11 per May LJ). Practice directions must also yield to legislation. See, for example, *Floyd v S. [2010] EWHC 906 (QB)*, where the court noted that paragraphs in the Costs Practice Direction summarised certain provisions in Regulations concerning the court’s jurisdiction to make an order for costs against the LSC, and held that, insofar as those paragraphs purported to give the court a discretion to extend a time limit for service by a non-funded party of a bill of costs, they were wrong as they were clearly incompatible with the Regulations. For further information on practice directions as aids to the interpretation of CPR provisions, see commentary below under heading “Practice directions as aids to interpretation” at para.[12-43](#).

(b) - Process for making or giving practice directions

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B. - Structure of CPR

1. - Structure of the CPR

(b) - Process for making or giving practice directions

- 12-17+** The power to make practice directions is regulated by [s.5 of the 1997 Act](#) (as substituted by the [Constitutional Reform Act 2005 s.13\(2\), Pt 2 of Sch.2](#) and [Constitutional Reform Act 2005 \(Commencement No. 5\) Order 2006 \(SI 2006/1014\)](#) art.7 and [Sch.1, para.7](#)). For discussion of the position pre-2005, see the 2004 edition of the White Book.

Within [s.5](#), *practice directions* means directions as to the practice and procedure “of any court within the scope of the Civil Procedure Rules” (see [s.9\(2\)](#)). [Section 5\(1\)](#) states that practice directions may be given in accordance with the process set out in [Pt 1 of Sch.2 to the 2005 Act](#). The power to give practice directions by this process include the supplementary powers referred to in [s.5\(4\)](#). That is to say, it includes the power (a) to vary or revoke directions given by any person, (b) to give directions containing different provision for different cases (including different areas), (c) to give directions containing provision for a specific court, for specific proceedings or for a specific jurisdiction. Generally, under the process set out in [Pt 1 of Sch.2 to the 2005 Act](#), the Lord Chief Justice may make CPR Practice Directions. The Lord Chief Justice may nominate another judicial office holder to exercise his power to make practice directions. With effect from 3 April 2006, the Master of the Rolls was so nominated. Subject to certain exceptions, the Lord Chief Justice or his nominee may make or give practice directions only with the agreement of the Lord Chancellor. The exceptions are stated in [sub-paras \(2\) and \(3\) of para.3 in Pt 1 of Sch.2 to the 2005 Act](#).

[Section 5\(2\)](#) indicates that CPR Practice Directions may be made otherwise than in accordance with the process set out in [Pt 1 of Sch.2 to the 2005 Act](#). And [s.5\(3\)](#) expressly states that directions falling into that category may include directions providing for any matter which, by virtue of [para.3 of Sch.1 to the 1997 Act](#), may be provided for by [CPR](#); that is to say, for the removal of proceedings (either by providing for the transfer of proceedings from one court to another, or for the exercise of jurisdiction by one court over proceedings in another court without those proceedings being transferred for that purpose). There is nothing in the [1997 Act](#) or the [2005 Act](#) to indicate how or by whom any such alternative process may be used or invoked. However, [s.5\(2\)](#) states that practice directions given otherwise than under the process set out in [Pt 1 of Sch.2 to the 2005 Act](#) may not be given without the approval of the Lord Chancellor and the Lord Chief Justice (or nominee). If, for instance the judge-in-charge of the Commercial Court wished to issue a CPR Practice Direction, it would presumably be subject to this process. The rationale behind this restriction presumably is to ensure consistency in approach and to provide a check on the development of ‘local practices’. The Lord Chancellors’ approval is not however required in the circumstances referred to in [subs.\(5\) of s.5](#). Further, the approval of the Lord Chancellor is not required in the circumstances referred to in [subs.\(6\) of s.5](#), but in those circumstances the Lord Chancellor must be consulted

In [Bovale Ltd v Secretary of State for the Communities and Local Government \[2009\] EWCA Civ 171](#), in amplification of what is said above, the Court of Appeal explained (at para.23) that, after the amendments to [s.5 of the 1997 Act](#) made by the [2005 Act](#) came into effect, it became the custom for new, or amendments to existing, CPR Practice Directions or amendments to be issued only after consideration by the Civil Procedure Rule Committee. That Committee is de facto chaired by the deputy head of civil justice. After such consideration, the Master of the Rolls, as the Lord Chief Justice’s delegate, issues such practice directions with the Lord Chancellor’s agreement.

Before the [2005 Act](#) reforms came into effect, the powers to make CPR Practice Directions and other directions affecting civil proceedings were examined by the courts in several cases; e.g. [In re C. \(Legal Aid: Preparation of Bill of Costs\) \[2001\] 1 F.L.R. 602, CA](#); [Leigh v Michelin Tyre Plc \[2003\] EWCA Civ 1766; \[2004\] 1 W.L.R. 846, CA](#); [R. \(Mount Cook Land Limited\) v](#)

Westminster City Council [2003] EWCA Civ 1346; [2004] C.P. Rep. 12, CA; R. (Ewing) v DCA [2006] 2 All E.R. 993 (Sullivan J)). After the 2005 reforms came into force, in *Bovale Ltd v Secretary of State for the Communities and Local Government*, op cit, the Court of Appeal traced the history of the inherent, common law, power of the court to make practice directions and explained the restrictions on the exercise of that power imposed, first by provisions in the *1997 Act*, and secondly by provisions in the *2005 Act*. In this appeal the Court held that the lead judge of the Administrative Court, by giving standard directions in a judgment handed down in a particular case (*[2008] EWHC 2143 (Admin)*), had exceeded his powers. A majority of the judges on the appeal regarded it as significant that, in doing so, the judge did not simply provide guidance as to the interpretation and application of the rules and practice directions applicable to cases of a particular type coming before his court or fill in a gap apparent therein, but attempted to vary them.

Practice Direction—County Court Closures (published in TSO CPR Update 57 (October 2011) (see Vol.1, para.B11-001)) is rather unusual, as it is an instance of the practice direction-making power being exercised by the Lord Chief Justice with the agreement of a Parliamentary Under Secretary of State rather than the Master of the Rolls (or the President of the Family Division or Chancellor of the High Court, to whom the practice direction making power is delegated for family and insolvency proceedings). It provides for the transfer of work from county courts that are being discontinued to county courts remaining in operation and affects, not only ordinary civil proceedings to which the *CPR* apply, but also family proceedings and insolvency proceedings.

Before the *CPR* came into effect, commonly any directions given by the courts were referred to as “practice directions”. Since the coming into effect of the *CPR*, where judges give directions on behalf of the courts in which they serve (insofar as they have power to do so) they are usually referred to as “practice statements” or “practice guidance”. Such statements or guidance do not have the force of law: see *Bovale Ltd v Secretary of State for the Communities and Local Government*, op.cit. This is so, not only in relation to directions given for proceedings to which the *CPR* apply, but also for proceedings to which they do not. (For examples, see Vol.1 Section B.) For an explanation of the status and application of Practice Statements relevant to insolvency proceedings, see *Brook v Reed [2011] EWCA Civ 331; [2011] 3 All E.R. 743, CA*.

(c) - Modification or disapplication of rules or practice directions —pilot schemes

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B. - Structure of CPR

1. - Structure of the CPR

(c) - Modification or disapplication of rules or practice directions—pilot schemes

- 12-18+ Paragraph 7 of Sch.1 to the Civil Procedure Act 1997 states that the power to make Civil Procedure Rules includes the power to make different provision for different cases or different areas, including different provision (a) for a specific court or specific division of a court, or (b) for specific proceedings, or a specific jurisdiction, specified in the rules.

And, as was noted above, the power to give practice directions by the process stated in s.5(1) of the 1997 Act includes the power to give directions containing different provision for different cases (including different areas), or to give directions containing provision for a specific court, for specific proceedings or for a specific jurisdiction.

The result is that rules and practice directions apparently of general application may be modified or disapplied in particular contexts. A good example of the disapplication of rules is provided by CPR r.27.2 which states that several Parts of the CPR shall not apply to proceedings allocated to the small claims track.

CPR r.51.2 states that practice directions may modify or disapply “any provisions of these rules” for specified periods and in relation to proceedings in specified courts during the operation of pilot schemes for assessing the use of new practices and procedures in connection with proceedings. Obviously, there must be a good justification for this. One of the basic themes of justice is that like cases should be treated alike, both procedurally and substantively. The justification given in r.51.2 is the purpose of assessing by pilot schemes the use of new practices and procedures. The mechanism for effecting the modification or disapplication of CPR provisions for such purpose is practice directions made under the rule. This makes it possible for a pilot scheme to be mounted, and in the course of its operation, modified, without it being necessary to enact by statutory instrument amendments to the CPR.

For details of pre-2014 pilot schemes, see the 2013 edition of the White Book.

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2. - Specialist and Specific Proceedings (CPR Pt 49)

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CPR: Application, Amendments and Interpretation

B. - Structure of CPR

2. - Specialist and Specific Proceedings (CPR Pt 49)

- 12-19+** In the light of the Report of the Civil Justice Review Body and the “Access to Justice” reports, it was expected that the [CPR](#) would constitute “a single procedural code” making provision, not only for “general High Court and county court business”, but also for “specialist jurisdictions and procedures” in each court. When the CPR were enacted in 1998, rules of court dedicated to “specialist proceedings” previously dealt with in dedicated Orders in the [RSC](#) and the [CCR](#) were not included. Instead, by operation of [CPR Pt 49](#) (Specialist Proceedings) these proceedings were dealt with in practice directions made and brought into effect with the CPR. In [r.49\(1\)](#), as it was originally, it was stated that “these Rules” shall apply to each of the proceedings designated as “specialist proceedings” listed in [r.49\(2\)](#) subject to the provisions of the “relevant practice direction” which applies to those proceedings. (Presumably, *these Rules* meant the provisions of CPR Parts and Schedule rules.)

Listed below are the several types of specialist proceedings originally referred to in [r.49\(2\)](#) (seven in all) followed in each case by the relevant practice direction made and brought into effect with the [CPR](#). The title of each practice direction is followed by a note indicating the former [RSC](#) and [CCR](#) provisions which it replaced. It may be noted that applications for judicial review are not included amongst the list of specialist proceedings. Rules of court relating to these applications were found in [RSC Ord.53](#). The survival of the provisions found there was secured by the inclusion of that Order (with some modifications) in the CPR among the Schedule rules (see further below), and not as a specialist proceedings practice direction.

Admiralty proceedings

Practice Direction—Admiralty (replacing with modifications RSC Ord.75)

Arbitration proceedings

Practice Direction—Arbitrations (replacing with modifications RSC Ord.73)

Commercial and Circuit Commercial actions

Practice Direction—Commercial Court (replacing with modifications RSC Ord.72) Practice Direction—Mercantile Courts and Business Lists (replacing with modifications CCR Ord.48C and several practice directions establishing circuit commercial (formerly mercantile) courts in provincial cities)

Patents Court business

Practice Direction—Patents Etc. (replacing with modifications RSC Ord.104, Ord.100 and Ord.93, r.24 and CCR Ord.48A and [O.49](#), [r.4A](#))

Technology and Construction Court business

Practice Direction—Technology and Construction Court (replacing with modifications RSC Ord.36)

Proceedings under the Companies Acts (RSC Ord.102)

Practice Direction—Applications Under the Companies Act 1985 and the Insurance Companies Act 1982 (replacing with modifications RSC Ord.102 and CCR Ord.49, r.3)

Contentious probate proceedings

Practice Direction—Contentious Probate (replacing RSC Ord.76 and CCR Ord.41)

From April 1999, the practice directions relating to all but one of the seven types of specialist proceedings listed in r.49(2) were withdrawn and replaced by new provisions inserted in the CPR by statutory instruments. By 2007, the sole specialist proceedings were proceedings under legislation relating to companies, for which there was one relevant practice direction. Following changes in relevant primary legislation, r.49(2) was recast by the Civil Procedure (Amendment) Rules 2007 (SI 2007/2204) r.17, with effect from 1 October 2007, and again (as a consequence of remaining provisions of the Companies Act 2006 being brought into force) by the Civil Procedure (Amendment) Rules 2009 (SI 2009/2092) r.9, with effect from 1 October 2009. The effect of these amendments was to replace the sole remaining variety of specialist proceedings with three discrete (but related) forms of such proceedings: viz proceedings under (a) the Companies Act 1985, (b) the Companies Act 2006 and (c) other legislation relating to companies and limited liability partnerships. The relevant practice directions which apply to these proceedings, as published in TSO CPR Update 50, and coming into effect on 1 October 2009 (replacing with amendments the two practice directions published in TSO CPR Update 45, and which came into effect on 2 October 2007), are: Practice Direction 49A—Applications under the Companies Acts and Related Legislation (see Vol.2 Section 2G), and Practice Direction 49B—Order Under Section 127 Insolvency Act 1986 (ibid). Following CPR Update 149 (July 2022) a new r.49.1 was introduced to make provision for specialist proceedings to be dealt with in Practice Directions made under it. The two extant PD 49A was retained and a number of Practice Directions in revised form were moved to form new PD49B to PD49F: see Vol.1 para.49.0.1.

For a detailed explanation of CPR amendments that have had the effect of replacing specialist proceedings practice directions, see para.12-30+ below.

The CPR is concerned with the procedures to be followed in the courts to which they apply, and they are not concerned with the jurisdiction of those courts. However, the facts (1) that express provision is not made in the CPR for particular proceedings brought under statute, in circumstances where such provision could have been made (as it is made for specialist proceedings) and might have been expected, and (2) that express provision is made in rules governing procedure in another forum, may lend weight to the submission that the court lacked jurisdiction (*R. (A) v Director of Establishments of the Security Service [2009] EWCA Civ 24; [2009] 3 W.L.R. 717, CA*, at [48] and [49] per Dyson LJ, and *[2009] UKSC 12; [2010] 2 W.L.R. 12* at [14] per Lord Brown J.S.C. (whether High Court was, within the Human Rights Act 1998 s.7(1)(a), “the appropriate court or tribunal” in which proceedings should be brought against a particular public authority where it was alleged that the authority acted in a way which was made unlawful by s.6(1) of that Act)).

(a) - Schedule rules

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CPR: Application, Amendments and Interpretation

B. - Structure of CPR

3. - Schedules (CPR Pt 50)

(a) - Schedule rules

- 12-20+ To a considerable extent the [CPR](#) do no more than re-enact (in re-arranged form and usually in updated language) provisions formerly found in the [RSC](#) and the [CCR](#) and which, before the CPR came into effect, dealt with practice and procedure in civil proceedings. It was intended that the CPR should be a uniform set of rules, bringing together (but with some substantial amendments) provisions formerly found in the [RSC](#) and [CCR](#). When the CPR were enacted in 1998, the task of drafting a uniform set of rules had not been completed, and remains uncompleted. The solution adopted was to attach to the CPR (which, as enacted, consisted of 51 Parts) two Schedules enacting those [RSC](#) and [CCR](#) provisions that were still required but which had not been re-drawn and included in the main body of the CPR. [Schedule 1](#) contains the [RSC](#) provisions and [Schedule 2](#) the [CCR](#) provisions.

The position of the Schedules in the [CPR](#) is explained in [CPR Pt 50](#). [Rule 50\(1\)](#) states that the Schedules set out, with modifications, certain provisions previously contained in the [RSC](#) and the [CCR](#). [Rule 50\(2\)](#) states: “These Rules apply in relation to the proceedings to which the Schedules apply subject to the provisions in the Schedules and the relevant practice directions”.

[RSC Ord.116](#) (The Criminal Procedure and Investigations Act 1996) was added to the [RSC](#) by the [Civil Procedure \(Amendment\) Rules 1999](#) and is included in Sch.1. [CCR Ord.48D](#) (Enforcement of Fixed Penalties, etc) was added by the same statutory instrument and was included in Sch.2 until it was revoked by the [Civil Procedure \(Amendment No.4\) Rules 2003](#) (SI 2003/2113).

In the period since the [CPR](#) came into effect, as a consequence of the insertion of new Parts and provisions in the CPR dealing with matters covered by “Schedule rules”, several of the [RSC](#) and [CCR](#) provisions contained in the Schedules have been omitted. Eventually, the CPR will be a true set of uniform of rules and the “Schedule rules” will disappear.

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(b) - Content of the Schedules

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B. - Structure of CPR

3. - Schedules (CPR Pt 50)

(b) - Content of the Schedules

- 12-21+ Generally, Schs 1 and 2 include former RSC and CCR Orders dealing with procedural matters that had not been subjected to reform recommendations arising from the “Access to Justice” reports, or from elsewhere. Various general comments on the content of the Schedules are made immediately below. In the years since the CPR were enacted most of the RSC and CCR provisions included in the Schedules have been revoked. Those surviving in Schs 1 and 2 are listed in paras 12-27 and 12-28 below.

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(i) - Enforcement of judgments

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CPR: Application, Amendments and Interpretation

B. - Structure of CPR

3. - Schedules (CPR Pt 50)

(b) - Content of the Schedules

(i) - Enforcement of judgments

12-22+ Many of the former RSC and CCR Orders included in Schs 1 and 2 when the CPR were enacted dealt with the enforcement of judgments and orders. It was expected then that, in due course, the rules relating to the enforcement of domestic judgments would be reformed and that some proposals would emerge which would enable many of the provisions re-enacted in the two Schedules to be represented as a single coherent code in new Parts to be included in the CPR. That has not yet been accomplished, but a start was made when, with effect from 25 March 2002, Pts 70 to 73 were inserted in the CPR by the Civil Procedure (Amendment No.4) Rules (SI 2001/2792). This facilitated the omission from Schs 1 and 2 of a number of former RSC and CCR provisions (in particular RSC Ord.48, 49 and 50, and CCR Ord.30 and 31).

By the Civil Procedure (Amendment) Rules 2002 (SI 2002/2058), with effect from 2 December 2002, Pt 74 (Enforcement of Judgments in Different Jurisdictions) was added to the CPR. This Part deals with (1) the enforcement in England and Wales of judgments from abroad, (2) the enforcement abroad of judgments of courts in England and Wales, (3) the enforcement in England and Wales, Scotland and Northern Ireland of judgments made in other jurisdictions, and (4) the enforcement of European Community judgments. As a consequence, Sch.1, RSC Ord.71 was revoked.

The Civil Procedure (Amendment) Rules 2007 (SI 2007/2204), which came into effect on 1 October 2007, inserted Section IV (Statutory Rights of Appeal) into CPR Pt 52 (Appeals) and, at the same time, significant additions were made to Practice Direction (Alternative Procedure for Claims) (supplementing CPR Pt 8). As a consequence, Sch.1, RSC Ord.93, 94 and 95, and Sch.2 CCR Ord.45 were revoked.

(ii) - Statutory Proceedings

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CPR: Application, Amendments and Interpretation

B. - Structure of CPR

3. - Schedules (CPR Pt 50)

(b) - Content of the Schedules

(ii) - Statutory Proceedings

- 12-23+ A number of the former **RSC** and **CCR** Orders included in **Schs 1** and **2** when the **CPR** were enacted dealt with the proceedings under particular Acts of Parliament. There are many statutes under which proceedings in the High Court or County Court (or both) can be taken and for which it was thought special provision had to be made in separate Orders found in the **RSC** from **O.74** onwards and in the **CCR** in **O.49** (Miscellaneous statutes). Most of these provisions still remain in the Schedules, but some have been revoked, either because they became redundant or because separate arrangements are now made in CPR Parts.

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(iii) - Uniform process for applications

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B. - Structure of CPR

3. - Schedules (CPR Pt 50)

(b) - Content of the Schedules

(iii) - Uniform process for applications

- 12-24+ Many of the former [RSC](#) and [CCR](#) rules re-enacted in the Schedules to the [CPR](#) contained, either within themselves or by cross-reference to other [RSC](#) and [CCR](#) Orders, provisions regulating the manner in which applications may be made to the court. Many of these rules incorporated by reference (sometimes with modifications) provisions found in former RSC Ord.32 (Applications and proceedings in chambers) and [CCR Ord.13](#) (Applications and orders in the course of proceedings). In the CPR RSC Ord.32 and [CCR Ord.13](#) are in effect replaced by [Pt 23](#) (General rules about applications for court orders). Consequently, references to former RSC Ord.32 and [CCR Ord.13](#) in the [RSC](#) and [CCR](#) provisions re-enacted in the Schedules to the CPR have been replaced with references to [Pt 23](#).

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(iv) - Specialist jurisdictions (judicial review applications)

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CPR: Application, Amendments and Interpretation

B. - Structure of CPR

3. - Schedules (CPR Pt 50)

(b) - Content of the Schedules

(iv) - Specialist jurisdictions (judicial review applications)

- 12-25+ It was expected that the [CPR](#) would constitute “a single procedural code” making provision, not only for “general High Court and county court business”, but also for “specialist jurisdictions and procedures” in each court. The [RSC](#) contained a number of particular Orders containing rules of court dedicated to specialist jurisdictions. As is explained elsewhere, those several Orders were brought into the CPR, not as rules, but as practice directions connected to the CPR by [Pt 49](#) (Specialist Proceedings). However, it may be noted that the rules contained [RSC Ord.53](#), the Order dealing with specialist proceedings in the form of applications for judicial review, were not brought into the CPR by this method. Instead, when the CPR were introduced in April 1999, this Order was re-enacted (with some significant modifications) in [Sch.1](#). With effect from 2 October 2000, [Ord.53](#) was revoked and replaced by [CPR Pt 54](#) (Judicial Review) inserted in the CPR by [Civil Procedure \(Amendment No.4\) Rules 2000 \(SI 2000/2092\)](#). By this statutory instrument [RSC Ord.57](#) (Divisional Court Proceedings, Etc.: Supplementary Provisions), which also had been re-enacted in [Sch.1](#) and which contained rules relevant to judicial review proceedings, was also revoked. Consequently, neither [O.53](#) nor [O.57](#) are now included in [Sch.1](#).

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(c) - Schedule rules remaining in effect

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B. - Structure of CPR

3. - Schedules (CPR Pt 50)

(c) - Schedule rules remaining in effect

- 12-26+ As is explained elsewhere, as a result of amendments made to the [CPR](#) since they came into effect in 1999, a number of the [RSC](#) and [CCR](#) provisions included in the Schedules have been revoked. The list below indicates the provisions that have not been revoked and which remain in effect.

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(i) - Schedule 1—RSC provisions

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B. - Structure of CPR

3. - Schedules (CPR Pt 50)

(c) - Schedule rules remaining in effect

(i) - Schedule 1—RSC provisions

12-27+

[Order 79](#) (Criminal proceedings)



[Order 109](#) (The Administration of Justice Act 1960)

[Order 110](#) (Environmental Control Proceedings)

[Order 115](#) (Confiscation and forfeiture in connection with criminal proceedings)

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(ii) - Schedule 2—CCR provisions

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B. - Structure of CPR

3. - Schedules (CPR Pt 50)

(c) - Schedule rules remaining in effect

(ii) - Schedule 2—CCR provisions

12-28+

 Order 1 (Application of RSC to county court proceedings) r.6

By r.40 of the Civil Procedure (Amendment) Rules 2014 (SI 2014/407), r.A1 and r.1A were inserted in CCR Order 28 before r.1 of that Order.

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1. - Introduction

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CPR: Application, Amendments and Interpretation

C. - Statutory Instruments Amending CPR

1. - Introduction

12-29 Since the **CPR** were enacted, they have been amended by a steady stream of statutory instruments. These instruments (together with their commencement dates) are listed in para.[12-31+](#) (in chronological order) and the transitional provisions contained in them (if any) are set out in paras [12-32 to 12-34](#).

The significant changes made to the **CPR** by these statutory instruments have been, in the main, those that have introduced new provisions replacing (a) practice directions dealing with the several specialist proceedings listed in [r.49\(2\)](#), and (b) **RSC** and **CCR Orders** re-enacted in [Schs 1 and 2 of the CPR](#). These are detailed at para.[12-30+](#).

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2. - Amendments to CPR Parts affecting specialist proceedings and Schedule rules

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C. - Statutory Instruments Amending CPR

2. - Amendments to CPR Parts affecting specialist proceedings and Schedule rules

- 12-30+** Since the [CPR](#) came into effect in April 1999, by a series of statutory instruments significant additions have been made to certain CPR Parts and some new Parts have been added. In some instances, these additions have consisted of the insertion of new Parts replacing practice directions dealing with “specialist proceedings” connected to the CPR by [Pt 49](#), with the relevant practice direction being withdrawn as a consequence. In other instances, the additions have consisted of the insertion of new rules in existing Parts or the insertion of entirely new Parts dealing with matters previously dealt with by [RSC](#) and [CCR](#) provisions found in [Schs 1](#) and [2](#), with such provisions being revoked or amended accordingly (subject to relevant transitional provisions).

New Parts added to the [CPR](#) and replacing practice directions dealing with “specialist proceedings” connected to the CPR by [Pt 49](#), include: [Pt 57](#) (Probate and Inheritance), [Pt 58](#) (Commercial Court), [Pt 59](#) (Circuit Commercial (formerly Mercantile) Court), [Pt 60](#) (Proceedings in the Technology and Construction Court), [Pt 61](#) (Admiralty Claims), [Pt 62](#) (Arbitration Claims), [Pt 63](#) (Patents and Other Intellectual Property Claims).

Other new Parts added to the [CPR](#) include the following (most, but not all of them, have had the revocation or amendment of Schedule rules as a consequence): [Pt 52](#) (Appeals), [Pt 53](#) (Defamation Claims), [Pt 54](#) (Judicial Review), [Pt 55](#) (Possession Claims), [Pt 56](#) (Landlord and Tenant Claims and Miscellaneous Provisions about Land), [Pt 57](#) (Probate Claims: Rectification of Wills: Substitution and Removal of Personal Representatives), [Pt 64](#) (Estates, Trusts and Charities), [Pt 57A](#) (Business and Property Courts), [Pt 65](#) (Proceedings Relating to Anti-Social Behaviour and Harassment), [Pt 66](#) (Crown Proceedings), [Pt 67](#) (Proceedings Relating to Solicitors), [Pt 68](#) (References to the European Court), [Pt 69](#) (Court’s Power to Appoint a Receiver), [Pt 70](#) (General Rules about Enforcement of Judgments and Orders), [Pt 71](#) (Orders to Obtain Information from Judgment Debtors), [Pt 72](#) (Third Party Debt Order), [Pt 73](#) (Charging Orders, Stop Orders and Stop Notices), [Pt 74](#) (Enforcement of Judgments in Different Jurisdictions), [Pt 75](#) (Traffic Enforcement), [Pt 76](#) (Proceedings Under the [Prevention of Terrorism Act 2005](#)) and [Pt 89](#) (Attachment of Earnings).

Significant additions to certain Parts of the [CPR](#) which have resulted in the revoking of Schedule rules include: [Pt 6](#), [Section III](#) (Special Provisions About Service Out of the Jurisdiction) and [Section IV](#) (Service of Foreign Process), [Pt 19](#), [Sections II](#) and [III](#) (Representative Parties and Group Litigation), [Pt 25](#), [Section II](#) (Security for Costs), [Pt 34](#), [Section II](#) (Evidence for Foreign Courts), [Pt 55](#), [Section III](#) (Interim Possession Orders), [Pt 57](#), [Section IV](#) (Claims under the [Inheritance \(Provision for Family and Dependants\) Act 1975](#))). When [Sch.1 RSC Ord.81](#) (Partners) and [Sch.2 CCR Ord.25, rr.9 and 10](#) (Enforcement against firm or between firm members) were revoked, with some modifications their effects were continued by amendments to several existing CPR Parts and practice directions, including provisions in [Pts 7, 70, 72](#) and [73](#). In some instances, since the coming into effect of the CPR, Schedule rules have been revoked, not because they have been replaced by new Parts inserted in the CPR or by additions to existing Parts, but by new CPR practice directions; e.g. by TSO CPR Update 42 (October 2006), [Sch.1 RSC Ord.112](#) (Applications for Use of Scientific Tests) and [Sch.2 CCR Ord.47, r.5](#) ([Family Law Reform Act 1969](#)) were replaced by Practice Direction (Applications Under Particular Statutes), a practice direction supplementing [Pt 23](#), and [Sch.2 CCR Ord.49, r.17](#) ([Sex Discrimination Act 1975](#) etc) was replaced by Practice Direction (Proceedings Under Enactments Relating to Discrimination), a free-standing CPR practice direction. When the CPR came into force in April 1999, provisions in [CCR Ord.6](#) (Particulars of claim) dealing with claims for the recovery of land ([r.3](#)), claims by mortgagees ([rr.5 and 5A](#)), and claims for delivery of goods let on hire purchase ([r.6](#)) survived in [Sch.2](#). Subsequently, when [CPR Pt 55](#) (Possession Claims) and [Pt 56](#) (Landlord and Tenant Claims and Miscellaneous Provisions About Land) were brought into effect on 1 October 2001,

by [Civil Procedure \(Amendment No.2\) Rules 2001 \(SI 2001/256\)](#), rr.3, 5 and 5A were revoked. [Rule 6](#) was always surplus to requirements; see Practice Direction (How to Make Claims in Schedule Rules and Other Claims) para.6.1 (formerly para.7.1) (supplementing [CPR Pt 16](#)). It was belatedly revoked by [Civil Procedure \(Amendment No. 2\) Rules 2003 \(SI 2003/1242\)](#) with effect from 2 June 2003.

Further revocations of Schedule rules were made by the [Civil Procedure \(Amendment\) Rules 2002 \(SI 2002/2058\)](#) rr.35 and 36 and [Sch.10](#). By that statutory instrument, with effect from 2 December 2002, [Section IV to Pt 6](#), [Section II to Pt 34](#), [Section III to Pt 55](#), [Section IV to Pt 57](#), and new [Pts 64, 68, 69, 74](#) and [75](#), were added to the [CPR](#). As a consequence, seventeen [RSC](#) and [CCR](#) Orders in [Schs 1](#) and [2](#) were wholly revoked and four in part, thus reducing considerably the number of Schedule rules.

3. - Commencement dates for statutory instruments amending CPR

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C. - Statutory Instruments Amending CPR

3. - Commencement dates for statutory instruments amending CPR

- 12-31+ The Civil Procedure Rules 1998 (SI 1998/3132) were made on 10 December 1998 and came into force on the appointed day, 26 April 1999. These Rules have been amended on a number of occasions. Amendments made by the Civil Procedure (Amendment) Rules 1999 (SI 1999/1008) also came into force on the appointed day.



- Civil Procedure (Amendment) Rules 2000 (SI 2000/221)—28 February and 2 May 2000
- Civil Procedure (Amendment No.2) Rules 2000 (SI 2000/940)—2 May 2000
- Civil Procedure (Amendment No.3) Rules 2000 (SI 2000/1317)—3 July 2000
- Civil Procedure (Amendment No.4) Rules 2000 (SI 2000/2092)—2 October 2000
- Postal Services Act 2000 (Consequential Modifications No.1) Order 2001 (SI 2001/1149)—26 March 2001
- Civil Procedure (Amendment) Rules 2001 (SI 2001/256)—26 March, 1 April and 15 October 2001
- Civil Procedure (Amendment No.2) Rules 2001 (SI 2001/1388)—31 May, 1 June and 15 October 2001
- Civil Procedure (Amendment No.3) Rules 2001 (SI 2001/1769)—31 May and 15 October 2001
- Civil Procedure (Amendment No.4) Rules 2001 (SI 2001/2792)—15 October 2001 and 25 March 2002
- Civil Procedure (Amendment No.5) Rules 2001 (SI 2001/4015)—14 January and 1 & 25 March 2002
- Civil Procedure (Amendment No.6) Rules 2001 (SI 2001/4016)—20 December 2001
- Civil Procedure (Amendment) Rules 2002 (SI 2002/2058)—2 December 2002
- Civil Procedure (Amendment No.2) Rules 2002 (SI 2002/3219)—1 April 2003
- Civil Procedure (Amendment) Rules 2003 (SI 2003/364)—1 April 2003
- Civil Procedure (Amendment No.2) Rules 2003 (SI 2003/1242)—2 June 2003
- Civil Procedure (Amendment No.3) Rules 2003 (SI 2003/1329)—9 June 2003
- Civil Procedure (Amendment No.4) Rules 2003 (SI 2003/2113)—10 October 2003, 1 January and 1 April 2004
- Civil Procedure (Amendment No.5) Rules 2003 (SI 2003/3361)—1 February, 1 March, 1 April and 1 May 2004
- Civil Procedure (Amendment) Rules 2004 (SI 2004/1306)—1 & 30 June 2004
- Civil Procedure (Amendment No.2) Rules 2004 (SI 2004/2072)—1 September and 1 October 2004
- Civil Procedure (Amendment No.3) Rules 2004 (SI 2004/3129)*—1 April 2005

- Civil Procedure (Amendment No.4) Rules 2004 (SI 2004/3419)—1 April 2005
- Civil Procedure (Amendment) Rules 2005 (SI 2005/352)—4 April 2005
- Courts Act 2003 (Consequential Provisions) (No.2) Order 2005 (SI 2005/617)—1 April 2005
- Civil Procedure (Amendment No.2) Rules 2005 (SI 2005/656)—11 March 2005
- Civil Procedure (Amendment No.3) Rules 2005 (SI 2005/2292)—1 & 21 October 2005, and 6 April 2006
- Civil Procedure (Amendment No.4) Rules 2005 (SI 2005/3515)—6 April 2006
- Civil Procedure (Amendment) Rules 2006 (SI 2006/1689)—2 October 2006
- Regulatory Reform (Agricultural) Tenancies (England and Wales) Order 2006 (SI 2006/2805)—10 December 2006
- Civil Procedure (Amendment No.2) Rules (SI 2006/3132)—18 December 2006
- Civil Procedure (Amendment No.3) Rules 2006 (SI 2006/3435)—6 April 2007
- Civil Jurisdiction and Judgments Regulations 2007 (SI 2007/1655)—1 July 2007
- Civil Procedure (Amendment) Rules 2007 (SI 2007/2204)—1 October 2007
- Civil Procedure (Amendment No.2) Rules 2007 (SI 2007/3543)—31 March and 6 April 2008
- Civil Procedure (Amendment) Rules 2008 (SI 2008/2178)—1 October and 12 December 2008, and 1 January 2009
- Civil Procedure (Amendment No.2) Rules 2008 (SI 2008/3085)—4 December 2008
- Civil Procedure (Amendment No.3) Rules 2008 (SI 2008/3327)—6 April 2009
- Civil Procedure (Amendment) Rules 2009 (SI 2009/2092)—31 August 2009 and 1 October 2009
- Civil Jurisdiction and Judgments Regulations 2009 (SI 2009/3131)—1 January 2010
- Civil Procedure (Amendment No.2) Rules 2009 (SI 2009/3390)—1 & 15 February and 6 April 2010
- Civil Procedure (Amendment) Rules 2010 (SI 2010/621)—1 and 30 April 2010
- Civil Procedure (Amendment No.2) Rules 2010 (SI 2010/1953)—1 October 2010, and the date of the coming into effect of the Policing and Crime Act 2009
- Civil Procedure (Amendment No.3) Rules 2010 (SI 2010/2577)—20 October 2010
- Terrorist Asset-Freezing etc. Act 2010 s.45(1) and Sch.1 Pt 1—24 December 2010
- Civil Procedure (Amendment No.4) Rules 2010 (SI 2010/3038)—24 December 2010
- Civil Procedure (Amendment) Rules 2011 (SI 2011/88)—6 April 2011
- Civil Procedure (Amendment No.2) Rules 2011 (SI 2011/1979)—1 September and 1 October 2011
- Family Procedure (Modification of Enactments) Order 2011 (SI 2011/1045)—6 April 2011
- Civil Procedure (Amendment No.2) Rules 2011 (SI 2011/1979)—1 September and 1 October 2011.
- Civil Procedure (Amendment No. 3) Rules 2011 (SI 2011/2970)—15 December 2011
- Civil Procedure (Amendment No.4) Rules 2011 (SI 2011/3103)—19 March 2012
- Civil Procedure (Amendment) Rules 2012 (SI 2012/505)—19 March 2012
- Civil Procedure (Amendment No.2) Rules 2012 (SI 2012/2208)—1 October 2012

Civil Procedure (Amendment) Rules 2013 (SI 2013/262)—1 April 2013

Civil Procedure (Amendment No.2) Rules 2013 (SI 2013/515)—1 April 2013.

Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Consequential, Transitional and Saving Provisions) Regulations 2013 (SI 2013/534) reg.14—1 April 2013

Civil Procedure (Amendment No.3) Rules 2013 (SI 2013/789)—1 April 2013

Civil Procedure (Amendment No. 4) Rules 2013 (SI 2013/1412)—1 July 2013

Civil Procedure (Amendment No. 5) Rules 2013 (SI 2013/1571)—26 June 2013

Civil Procedure (Amendment No.6) Rules 2013 (SI 2013/1695)—31 July 2013

Civil Procedure (Amendment No.7) Rules 2013 (SI 2013/1974)—1 October 2013

Civil Procedure (Amendment No.8) Rules 2013 (SI 2103/3112)—1 January 2014

Civil Procedure (Amendment) Rules 2014 (SI 2014/407)—1, 6 & 22 April 2014

Civil Procedure (Amendment No. 2) Rules 2014 (SI 2014/482)—6 April 2014

Civil Procedure (Amendment No. 3) Rules 2014 (SI 2014/610)—6 April 2014

Civil Procedure (Amendment No. 4) Rules 2014 (SI 2014/867)—22 April 2014

Civil Procedure (Amendment No. 5) Rules 2014 (SI 2014/1233)—5 June 2014

Civil Procedure (Amendment No. 6) Rules 2014 (SI 2014/2044)—1 October 2014

Civil Procedure (Amendment No. 7) Rules 2014 (SI 2014/2498)—10 January 2015

Civil Procedure (Amendment No. 8) Rules 2014 (SI 2014/3299)—9 & 11 January and 6 April 2015

Civil Procedure (Amendment) Rules 2015 (SI 2015/406)—27 February 2015

Civil Procedure (Amendment No.2) Rules 2015 (SI 2015/670)—5 & 6 April 2015 and the date of the coming into effect of the sections 84 and 87 Criminal Justice and Courts Act 2015

Civil Procedure (Amendment No 3) Rules 2015 (SI 2015/877)—17 April 2015

Civil Procedure (Amendment No.4) Rules 2015 (SI 2015/1569)—1 October 2015

Civil Procedure (Amendment No.5) Rules 2015 (SI 2015/1881)—3 December 2015

Civil Procedure (Amendment) Rules 2016 (SI 2016/234)—6 April 2016

Civil Procedure (Amendment No.2) Rules 2016 (SI 2016/707)—8 August 2016

Civil Procedure (Amendment No.3) Rules 2016 (SI 2016/788)—3 October 2016

Civil Procedure (Amendment) Rules 2017 (SI 2017/95)—28 February, 6 March and 6 April 2017

Civil Procedure (Amendment No.2) Rules 2017 (SI 2017/889)—1 October 2017

Civil Procedure (Amendment) Rules 2018 (SI 2018/239)—6 April 2018

Civil Procedure (Amendment No.2) Rules 2018 (SI 2018/479)—7 May 2018

Civil Procedure (Amendment No.3) Rules 2018 (SI 2018/975)—1 October 2018.

Civil Procedure (Amendment) Rules 2019 (SI 2019/342)—6 April 2019

Civil Procedure (Amendment No.2) Rules 2019 (SI 2019/1034)—31 July 2019

Civil Procedure (Amendment No.3) Rules 2019 (SI 2019/1118)—1 October 2019

Civil Procedure (Amendment) Rules 2020 (SI 2020/82)—30 March and 6 April 2020

Civil Procedure (Amendment No.2) (Coronavirus) Rules 2020 (SI 2020/582)—25 June 2020

Civil Procedure (Amendment No.3) Rules 2020 (SI 2020/747)—23 August 2020 and 1 October 2020

Civil Procedure (Amendment No.4) (Coronavirus) Rules 2020 (SI 2020/751)—23 August 2020

Civil Procedure (Amendment No.5) (Coronavirus) Rules 2020 (SI 2020/889)—22 August 2020

Civil Procedure (Amendment No.6) Rules 2020 (SI 2020/1228)—27 November 2020

Civil Procedure (Amendment) Rules 2021 (SI 2021/117)—6 April 2021

Civil Procedure (Amendment No.2) Rules 2021 (SI 2021/196)—31 May 2021

Civil Procedure (Amendment No.3) Rules 2021 (SI 2021/553)—31 May 2021

Civil Procedure (Amendment No.4) Rules 2021 (SI 2021/855)—1 October 2021

Civil Procedure (Amendment) Rules 2022 (SI 2022/101)—6 April 2022

Civil Procedure (Amendment No.2) Rules 2022 (SI 2022/783)—1 October 2022

4. - Amendments and Transitional Arrangements in Amending Statutory Instruments

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Section 12 - CPR: Application, Amendments and Interpretation

CPR: Application, Amendments and Interpretation

C. - Statutory Instruments Amending CPR

4. - Amendments and Transitional Arrangements in Amending Statutory Instruments

- 12-32 In some instances, special transitional arrangements were made for bringing into force amendments to the [CPR](#) taking effect after 26 April 1999. These provisions are as follows.

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(a) - 2000 to 2013

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CPR: Application, Amendments and Interpretation

C. - Statutory Instruments Amending CPR

4. - Amendments and Transitional Arrangements in Amending Statutory Instruments

(a) - 2000 to 2013

- 12-33 For transitional provisions affecting amendments made to the [CPR](#) by statutory instruments enacted in the years 2000 to 2004 (inclusive), see the 2012 edition of the White Book. For transitional provisions affecting amendments enacted in the years 2005 to 2013 (inclusive), see the 2013 edition of the White Book.
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(b) - 2014 to date

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C. - Statutory Instruments Amending CPR

4. - Amendments and Transitional Arrangements in Amending Statutory Instruments

(b) - 2014 to date

- 12-34 The Civil Procedure (Amendment No.2) Rules 2022 (SI 2022/783)—1 October and 1 December 2022. Amended CPR Pts 55, 56 and 65. Introduced a new, simplified, CPR Pt 15 and revised Pt 49. Effectuated changes to IPEC scale costs in CPR Pts 45 and 46.

The Civil Procedure (Amendment) Rules 2022 (SI 2022/101)—6 April 2022. It effectuated a number of amendments, including the introduction of a simplified Pt 10 and Pt 12. Transitional provisions effectuated the application of amendments to CPR rr.16.3, 26.6(1)(a)(ii)(cc), 27.1(2) and 45.29E so that they did not apply to where either the date on which a cause of action accrued or the date of knowledge of an injured person was on or after 6 April 2022.

The Civil Procedure (Amendment No.4) Rules 2021 (SI 2021/855)—16 October 2021. It effectuated amendments to Pts 2, 21, 24, 25, 27, 40, 52, 61, 70, 83 and the Glossary.

The Civil Procedure (Amendment No.3) Rules 2021 (SI 2021/533)—28 and 31 May 2021. Made further amendments to Pt 27.

The Civil Procedure (Amendment No.2) Rules 2021 (SI 2021/196)—31 May 2021. It made provision to introduce in the CPR the scheme relating to Claims Under the Pre-Action Protocol for Personal Injury Claims Below the Small Claims Limit in Road Traffic Accidents.

The Civil Procedure (Amendment) Rules 2021 (SI 2021/117)—6 April 2021. Made various amendments to the CPR. Specific amendments made to Pts 15, 17, 18, 19 and 20 were subject to transitional provisions that disapplicated them in so far as applications for contempt of court and writs of sequestration made before 1 April 2021 were concerned.

The Civil Procedure (Amendment No.6) Rules 2020 (SI 2020/1228)—27 November 2020. It made minor amendments to r.81.3 and inserted a new r.83.13(4A).

The Civil Procedure (Amendment No.5) (Coronavirus) Rules 2020 (SI 2020/889)—22 August 2020. It amended r.55.29 to extend the duration of the stay on possession proceedings it imposed.

The Civil Procedure (Amendment No.4) (Coronavirus) Rules 2020 (SI 2020/751)—23 August 2020. It inserted a new, temporary, r.55.1, which made provision for a temporary PD 55C, which provided the procedure for dealing with those possession proceedings that had been subject to a stay under r.55.29 once the stay expired.

The Civil Procedure (Amendment No.3) Rules 2020 (SI 2020/747)—23 August 2020 and 1 October 2020. It inserted, as from 1 October 2020, a new Pt 81. It further amended Pts 3, 7, 30, 31, 32, 34, 45, 61, 70, 73, 77, 83 and 89. Transitional provisions provided that the omitted Pt 81 continued to apply for the purposes of CPR r.83.1A. That provision was ultimately revoked by Civil Procedure (Amendment) Rules 2021 (SI 2021/117); and, that notice of eviction further to CPR r.83.8A could not be delivered before a date specified in the transitional provision.

The Civil Procedure (Amendment No.2) (Coronavirus) Rules 2020 (SI 2020/582) came into force on 25 June 2020. It introduced a stay on possession proceedings in light of the COVID-19 pandemic by inserting a temporary r.55.29.

The Civil Procedure (Amendment) Rules 2020 (SI 2020/82) came into force on 4 March 2020 in respect of amendments made to CPR Pt 45 and Pt 73. It otherwise came into force on 6 April 2020, clarifying a number of provisions in CPR Pts 12, 52, 53

and 55. Its most significant amendment was that to CPR Pt 73, which introduced rules to replace the pilot scheme previously contained in Practice Direction 51T—The County Court Legal Advisers Pilot Scheme—Final Charging Orders.

The Civil Procedure (Amendment No.3) Rules 2019 (SI 2019/1118) came into force on 1 October 2019. It amended the definition of Aarhus Convention claim in r.45.42(2)(a) and substituted a new CPR Pt 53, which established the Media and Communications List as a specialist High Court list. The amendment introducing the new Pt 53 was subject to a transitional provision, which meant that it did not apply to claims issued before 1 October 2019.

The Civil Procedure (Amendment No.2) Rules 2019 (SI 2019/1034) came into force on 31 July 2019. It introduced a new Section VII to CPR Pt 57 and made a minor amendment to r.57.24.

The Civil Procedure (Amendment) Rules 2019 came into force on 6 April 2019. It made a number of technical amendments. It reintroduced reference to r.5.4A in the contents to CPR Pt 5. It clarified the application of costs and expenses in CPR Pt 21. It corrected the wording of CPR Pt 61 and also introduced provision to rectify a lacunae in the rules that had been identified in *The Atlantik Confidence* [2014] 1 Lloyd's Rep 586, CA. It also substantively amended CPR Pt 39.

The Civil Procedure Rules 1998 (Amendment) (EU Exit) Regulations 2019 (SI 2019/521) come into force on implementation i.e., the day on which the transition period following the UK's withdrawal from the European Union takes effect. On that day, various amendments, including the making of transitional provisions, are to be made to CPR Pts 5, 6, 8, 12, 13, 25, 30, 31, 32, 34, 63, 68, 75 and 78. This statutory instrument was originally issued to deal with the situation, should it have arisen, that the UK left the EU without entering into a Withdrawal Agreement (a no-deal Brexit).

The Civil Procedure (Amendment) Rules 2019 (SI 2019/342) came into force on 6 April 2019. It made various amendments, including ones to clarify costs and expenses recoverability under Pt 21, to revise Pt 39 and update Pt 61 to render its language consistent with the Senior Courts Act 1981 and to make provision for the giving of security in admiralty claims to rectify a lacunae in the rules identified in the *Cosmotrade SA v Kairos Shipping Ltd (The Atlantik Confidence)* [2014] 1 Lloyd's Rep. 586, CA.

The Civil Procedure (Amendment) (EU Exit) Rules 2019 (SI 2019/147) came into force on 1 March 2019. These rules were not made by the Civil Procedure Rule Committee under powers contained in the Civil Procedure Act 1997. They were made by the Lord Chancellor under a rule-making power contained in s.40 of the Sanctions and Anti-Money Laundering Act 2018. They amend CPR Pt 79 to enable closed material proceedings to be applied to challenges to decisions made under the 2018 Act concerning the imposition of sanctions.

The Civil Procedure (Amendment No.3) Rules 2018 (SI 2018/975) came into force on 1 October 2018. It introduced a new r.1.5 and r.5.6, both of which emphasised the importance of Welsh language use in legal proceedings conducted in Wales. It formalised the introduction of the Business and Property Courts via a new Pt 57A. It clarified the power of district judges on applications for committal for breaches of injunction through a new r.81.4(6). It also amended r.82.2(3)(e) in respect of the issue of writs or warrants for possession. It deleted rr.65.2 to 65.7.

The Civil Procedure (Amendment No.2) Rules 2018 (SI 2018/479) came into force on 7 May 2018. It introduced a new r.2.4A which provides the basis for CPR PD 2E to confer jurisdiction on legal advisers to exercise the County Court's jurisdiction. It also made amendments to Pt 36 and Pt 45 to apply the costs provisions applicable to the EL/PL Pre-Action Protocol to the Pre-Action Protocol for Resolution of Package Travel Claims.

The Civil Procedure (Amendment) Rules 2018 (SI 2018/239) came into force on 6 April 2018. It made three amendments to Pt 45 concerning costs protection in Aarhus Convention claims and applications to vary cost caps.

The Civil Procedure (Amendment No.2) Rules 2017 (SI 2017/889) came into force on 1 October 2017. It introduced a clarifying amendment to Pt 3 to make clear that the court has power to require any proceedings to be heard before a Divisional Court of the High Court. It made various changes to Pts 30, 52, 59, 61, 62, consequent upon the renaming of the Mercantile Court as the Circuit Commercial Court. It further made minor amendments to Pts 47, 52, 78 and 83.

Subject to transitional provisions and specified exceptions, the Civil Procedure (Amendment) Rules 2017 (SI 2017/95) came into force on 6 April 2017. The amendments it effected to CPR rr.45.41 to 45.55, Pt 52 and Pt 61 came into force on 28 February 2017, while those it effected to CPR rr.3.7A1(1) to 3.7AA, Pt 25 and Pt 44 came into force on 6 March 2017. It effected significant changes to rr.3.15 and 3.18, in order to correct the problem that arose as a result of the Court of Appeal's decision in *Sarpd Oil International Ltd v Addax Energy SA* [2016] EWCA Civ 120; amend CPR rr.45.29B to 45.29E to reflect the Court of

Appeal's decision in *Qadar v Esure Services Ltd [2016] EWCA Civ 1109*; and to introduce provisions governing costs protection in environmental claims in CPR Pt 45, Section III and CPR Pt 52.

The Civil Procedure (Amendment No.3) Rules 2016 (SI 2016/788) came into force on 3 October 2016, subject to transitional provisions. It amends r.2.4(a), inserts a new r.26.2A(5A), amends r.40.2(4), r.54.5(6) and r.63.19. It further substitutes a new Pt 52 in place of the previously in force Pt 52. This latter amendment is subject to transitional provisions that maintain the pre-3 October 2016 in force for appeals where the appellant's notice was issued before 3 October 2013.

The Civil Procedure (Amendment No.2) Rules 2016 (SI 2016/707) contained amendments to the following rules: r.3.19; the Table following r.46.14; and rr.46.16–46.19. It came into force on 8 August 2016, subject to transitional provisions concerning the continuing application of the pre-8 August 2016 provisions to judicial review proceedings where the judicial review claim form was filed prior to that date.

The Civil Procedure (Amendment) Rules 2016 (SI 2016/234) contained amendments to the following rules: Pt 3, r.45.8 Table 5, Pt 66, Pt 70, Pt 73, Pt 75 and RSC Ord.115 r.4(4). It introduced a new Pt 89 (attachment of earnings) and deleted CCR Ord.27. It came into force on 6 April 2016, subject to transitional provisions which provide for that the amendments to the following only take effect as to proceedings commenced on or after 6 April 2016: rr.3.13, 45.8, 66.6(1), 70.1, 70.5, 73.17, 75.6(d), 75.10; RSC Ord.115 r.4(4) and Pts 73, 89 and CCR Ord.27.

The Civil Procedure (Amendment No.5) Rules (SI 2015/1881) contained amendments to r.26.2A concerning the transfer of a claims in the County Court to a defendant's home court or to a preferred hearing centre.

The Civil Procedure (Amendment No.4) Rules 2015 (SI 2015/1569) contained a number of amendments to CPR rr.3.1(2)(m), 3.1A, 5.4D, 7.4(3) and 47.6(1). It inserted a new r.3.1A (litigants-in-person), new provision in respect of statutory planning appeals in the Pt 52 Table of Contents, 52.15B, and a new r.63A establishing a specialist financial list. It came into force on 1 October 2015, save in respect of the amendments concerning Pt 52 and r.52.15B which come into force on the day on which s.91 of the Criminal Justice and Courts Act 2015 comes into force.

The Civil Procedure (Amendment No.3) Rules 2015 (SI 2015/877) contained a number of amendments clarifying and correcting the following rules: 76.29, 79.21, 80.25(1), 82.14, 88.2(2), 88.24, 88.28 and 88.9(1).

The Civil Procedure (Amendment No.2) Rules 2015 (SI 2015/670) contained two types of amendments. First, it introduced a simplified approach to cost assessment for children and protected parties under r.46.4. Secondly, it implemented reforms to r.54 (judicial review) consequent on statutory changes effected by Criminal Justice and Courts Act 2015 ss.84 and 87. Saving provisions applied to applications for judicial review where claims were filed before the day on which ss.84 and 87 of the 2015 Act came into force.

The Civil Procedure (Amendment) Rules 2015 (SI 2015/406) contained a new Pt 88, which provides rules governing proceedings under the Counter-Terrorism and Security Act 2015. Consequential modifications were also made to r.1.2(d).

The Civil Procedure (Amendment No.8) Rules 2014 (SI 2014/3299) contained amendments to various rules. Most significantly it substituted a new Pt 36, as from 6 April 2015. It also included a new Pt 87, by way of replacement for RSC Ord. 54, governing applications for writs of habeas corpus. Additionally, it contained a number of revisions to Pt 21 (expenses incurred by a litigation friend), Pt 30 (transfer of specialist proceedings), Pt 45 (costs of medical reports in respect of claims under the RTA Protocol), and a new Section VI to Pt 74 concerning changes to the procedure for recognition and enforcement of protection measures. Transitional provisions provide for the continuing application of the new provisions relating to Pt 36 and applications for writs of habeas corpus to certain matters arising prior to 6 April 2015.

The Civil Procedure (Amendment No.7) Rules 2014 (SI 2014/2948) introduced a number of amendments consequent on the entry into force of the recast Brussels I Regulation to Pt 6 and Pt 74. The amendments substitute references to the original Regulation with ones to the recast Regulation, remove references to exequatur, and provide for the enforcement of remedies absent from English and Welsh law contained in foreign judgments. Transitional provisions provide for the continuance in force of the relevant rules in Pt 6 and Pt 74 for the purposes of proceedings commenced prior to the entry into force of the recast Brussels I Regulation.

The Civil Procedure (Amendment) Rules 2014 (SI 2014/407) contained (1) a series of amendments to give effect to (and which were consequential upon) the implementation of the single County Court on the coming into force (on 22 April 2014) of provisions in s.17 of, and Sch.9 to, the Crime and Courts Act 2013, (2) a series of amendments (the enforcement amendments),

taking effect on 6 April 2014, in particular the insertion of new Pts 83 to 86, to implement Pt 3 of, and Sch.12 to, the Tribunals, Courts and Enforcement Act 2007, and to incorporate into the body of the CPR rules on enforcement contained in Schs 1 and 2 to the CPR, and to make necessary consequential amendments, (3) amendments (the mediation amendments) to Pt 26 to formalise with effect from 1 April 2014, a scheme for referring money claims to the Small Claims Mediation Service, (4) amendments to r.42.1, r.45.30(2) and r.66.14(2) coming into effect on 6 April 2014, and (5) a rule inserting new r.52.21 requiring the grant of permission by the High Court in respect of appeals from determinations and directions by the Pensions Ombudsman and the Pension Protection Fund Ombudsman filed on or after 6 April 2014. In the statutory instrument transitional provisions (1) affecting the enforcement amendments were contained in r.41(1) to (5), and (2) affecting the mediation amendments in r.41(6) and (7). Rule 3 of the Crime and Courts Act 2013 (Commencement No.10 and Transitional Provision) Orders 2014 (SI 2014/954) stated that any judgment, order, warrant, direction or other act of a county court before 22 April 2014 (except one in relation to proceedings under jurisdiction transferred to the family court established under s.31A of the Matrimonial and Family Proceedings Act 1984, as amended by the 2013 Act, for which separate transitional provision is made) is to have the same effect on or after that date as if it had been a judgment etc of the single County Court.

The Civil Procedure (Amendment No.2) Rules 2014 (SI 2014/482) inserted in Pt 84 (Enforcement by Taking Control of Goods) a new Section IV (rr.84.17 to 84.20) providing rules in support of the Certification of Enforcement Agents Regulations 2014 (SI 2014/421) and coming into force on 6 April 2014. Rule 5 of the statutory instrument made transitional provision to cover the effects of rr.84.18 to 84.20 during the period between the date of the coming into effect of the enforcement amendments in SI 2014/407 (see above), i.e. 6 April 2014, and the date of the establishment of the single County Court, i.e. 22 April 2014.

The Civil Procedure (Amendment No.3) Rules 2014 (SI 2014/610) amended Pt 54 (Judicial Review and Statutory Review) with effect from 6 April 2014, by inserting in a second Section new rules (rr.54.21 to 54.24) creating the Planning Court as a specialist list for judicial review claims or statutory challenges involving specified matters made on or after that date. Rule 4(2) of the statutory instrument provides that where a claim issued before 6 April 2014, is transferred to the Planning Court after that date, the new rules apply to the claim from the date of transfer.

The Civil Procedure (Amendment No.4) Rules 2014 (SI 2014/867) came into effect on 22 April 2014, and contained (1) amendments to r.3.12 and r.3.15 altering the scope of proceedings to which costs management rules apply and clarifying circumstances in which the court will make a costs management order (the costs management amendments), (2) amendments to r.81.13 and r.81.18 to enable certain permission applications in contempt proceedings to be dealt with by any High Court judge, (3) amendments to r.66.6 consequential upon the enactment of Pt 81 by SI 2012/2208, (4) amendments to r.83.2 and the insertion of r.83.2A to remedy oversights in enactment of Pt 83 by SI 2014/407, and (5) a series of amendments to numerous provisions consequential upon rules enacted by SI 2014/407 (see above) for the purposes of implementing bailiff and enforcement reform (the enforcement amendments), and the introduction of the single County Court (the County Court amendments). Rule 25 of this statutory instrument contains transitional provisions affecting the costs management amendments (r.25(1)) (subsequently amended by SI 2014/1233, see below), the enforcement amendments (r.25(3) and (4)), and the County Court amendments (r.25(5)).

The Civil Procedure (Amendment No.5) Rules 2014 (SI 2014/1233) came into effect on 5 June 2014, and contained (1) an amendment to r.3.8 (Sanctions have effect unless defaulting party obtains relief) making provision for the extension of certain procedural time limits by party agreement, (2) an amendment to r.54.22 as inserted by SI 2014/610 (see above) to provide for the nomination of specialist planning judges to deal with certain Planning Court claims, and (3) for purposes of clarification, an amendment to the transitional provision in r.25(1) of SI 2014/867 affecting r.3.12(1) (see above). This statutory instrument contains no transitional provision.

The Civil Procedure (Amendment No.6) Rules 2014 (SI 2014/2044) came into effect on 1 October 2014, and contained amendments (1) to Pt 35, Part 36 and Pt 45 (subject to a transitional provision) to provide for fixed costs in relation to medical reports in relation to certain claims started under the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents, (2) to Pt 52 to make separate provision for judicial review appeals from the Upper Tribunal and for the providing of transcripts at public expense, (3) to Pt 57 to make provision (a) for proceedings commenced under the Inheritance (Provision for Family Dependents) Act 1975 before grant of representation has been obtained, and (b) for application for presumed death etc under the Presumption of Death Act 2013, (4) to Pt 65 to make provision for injunctions under the Anti-social Behaviour, Crime and Policing Act 2013 Pt 1, and (5) to Pt 83 for purpose of rectifying a practical problem that had arisen in the application of r.83.6. In addition this statutory instrument made some other minor amendments. The transitional provision relating to the amendments made to Pts 35, 36 and 45 (r.14) states that they apply only to soft tissue injury claims under the RTA Protocol where the claim notification form was sent on or after 1 October 2014.

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D. - Application of CPR to Proceedings Issued Before 26 April 1999 (CPR Pt 51)

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CPR: Application, Amendments and Interpretation

D. - Application of CPR to Proceedings Issued Before 26 April 1999 (CPR Pt 51)

- 12-35 CPR r.51.1, in force from 26 April 1999 to 6 April 2021, stated that a practice direction shall make provision for the extent to which these Rules shall apply to proceedings issued before 26 April 1999. The practice direction supplementing the rule was Practice Direction 51A (Transitional Arrangements). CPR r.51.1 and PD 51A were omitted as from 6 April 2021 by the [Civil Procedure \(Amendment\) Rules 2021 \(SI 2021/117\)](#).

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1. - Proceedings coming before judge before 26 April 2000

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D. - Application of CPR to Proceedings Issued Before 26 April 1999 (CPR Pt 51)

1. - Proceedings coming before judge before 26 April 2000

- 12-36+ Paragraph 19(1) of Practice Direction 51A stated that, subject to exceptions (see para.12-37+ below) any proceedings (a) which were started before 26 April 1999, and (b) which did not come before a judge, at a hearing or on paper, between 26 April 1999, and 25 April 2000, were automatically stayed. Paragraph 2 of the Practice Direction stated that where such proceedings did come before a judge at a hearing or on paper, between those dates the general approach to be adopted was that the previous rules of court should be applied to undefended cases, “allowing them to progress to their disposal”, but to apply the [CPR](#) to defended cases “so far as practicable”. Detailed provisions in the Practice Direction gave guidance as to when the previous rules will normally apply and where the CPR will normally apply. In the event, courts had to give directions in a large number of proceedings to which the transitional scheme applied and the scheme worked well. The scheme, having long since fulfilled its purpose was omitted as from 6 April 2021. (For commentary, see editions of the White Book before 2011.)

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2. - Stay of existing proceedings after one year

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CPR: Application, Amendments and Interpretation

D. - Application of CPR to Proceedings Issued Before 26 April 1999 (CPR Pt 51)

2. - Stay of existing proceedings after one year

- 12-37+ Paragraph 19(3) of the Practice Direction 51A stated that certain proceedings would not be stayed as a result of para.19(1). Those proceedings were: (a) where the case had been given a fixed trial date which was after 25 April 2000, (b) personal injury cases where there was no issue on liability but the proceedings had been adjourned by court order to determine the prognosis, (c) where the court was dealing with the continuing administration of an estate or a trust or a receivership (applied in *Ministry of Defence v Foxley [2007] EWHC 2874 (Admin)*), (d) applications relating to funds in court (this last was added in March 1999). For these purposes, proceedings were not “existing proceedings” once final judgment had been given (see para.19(4), a provision added in May 2000).

Paragraph 19(2) of Practice Direction 51A stated that any party to existing proceedings automatically stayed by operation of para.19(1) “may apply for the stay to be lifted”. In the event, in the period following 25 April 2000, the courts had to deal with a large number of applications under this provision by claimants seeking to proceed with claims that had been caught by para.19(1). Also, applications by defendants seeking to strike out such claims under r.3.4 were not uncommon. In that period, in a number of reported cases the High Court and the Court of Appeal dealt with such questions as whether or not the automatic stay should be lifted in particular circumstances, whether the relief from sanctions criteria in r.3.9 applied, whether stayed proceedings should be struck out, and whether, where the stay was not lifted, a claimant could bring fresh proceedings. (For detailed commentary, see editions of the White Book before 2011.)

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1. - The Purposive Method of Interpretation

White Book 2023 | Commentary last updated December 1, 2014

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Section 12 - CPR: Application, Amendments and Interpretation

CPR: Application, Amendments and Interpretation

E. - Construction and Interpretation of Rules

1. - The Purposive Method of Interpretation

- 12-38 In the Access to Justice Interim Report it was said (at p.215) that the exercise of drafting the single procedural code involved three specific objectives. They were: (a) to identify the core propositions in the rules and to cut down the number of interconnecting provisions which are used; (b) to provide procedures which apply to the broadest possible range of cases and to reduce the number of instances in which a separate regime is provided for a special type of case; and (c) to reduce the size of the rules and the number of propositions contained in them, to remove verbiage and to adopt a simpler and plainer style of drafting. The Interim Report said (at p.215) that these specific objectives can only be fully achieved if a new approach is taken by the judges applying the rules under a managed system of litigation. Instead of the overtechnical way the rules have been applied in the past:

“... the new rules will have to be used in a different way: they will have to be read as a whole, not dissected and viewed word by word under a microscope.”

The new rules have been deliberately framed so that the approach of those construing them can be more purposive and less technical. It is the responsibility of the judiciary to make the new system work.

In the Access to Justice Final Report it was said (at p.275) that the [CPR](#) are deliberately not designed expressly to answer every question which could arise. The statement of the overriding objective in those rules “provides a compass to guide courts and litigants and legal advisers as to their general course” (see further “Interpretation to give effect to overriding objective”, para.12-40 below).

The construction of the [CPR](#), like the construction of any legislation, primary or delegated, requires the application of ordinary canons of construction (*Vinos v Marks & Spencer Plc [2001] 3 All E.R. 784, CA* at [26] per Peter Gibson LJ). In *James Buchanan & Co Ltd v Babco Forwarding and Shipping (UK) Ltd [1977] Q.B. 208*, Lord Denning MR explained that under the purposive method of interpretation the judges do not go by the literal meaning of the words or by the grammatical structure of the sentence. They go by the design or purpose behind it. When they come upon a situation which is to their minds within the spirit but not the letter of the legislation, they solve the problem by looking at the effect it was sought to achieve.

“They then interpret the legislation so as to produce the desired effect. This means they fill in gaps, quite unashamedly, without hesitation. They ask simply: what is the sensible way of dealing with this situation so as to give effect to the presumed purpose of the legislation?”

In *Collier v Williams [2006] EWCA Civ 20; [2006] 1 W.L.R. 1945, CA*, the Court of Appeal stated that the rules should, if possible, be interpreted in a practical way which permits certainty and minimises the risk of satellite litigation. However, this does not warrant re-writing rules “so as to make them bear a meaning which they plainly do not have”.

A feature of the [CPR](#) (subject to very few exceptions) is that each discrete rule is given a heading. A rule heading may be considered in interpreting the rule to which it relates, provided due account is taken of the fact that the function of a heading is to provide a brief and therefore a necessarily inexact guide to the material to which it applies (*Brown v Innovatorone Plc. [2009] EWHC 1376 (Comm); [2010] 2 All E.R. (Comm) 80; [2010] C.P. Rep. 2*. (Andrew Smith J) at [17] (examining provisions in [CPR Pt 6](#), and contrasting interpretive value of headings in primary and delegated legislation)).

Rights and obligations created by international treaties have no effect in UK domestic law unless legislation is in force giving effect to them. Where legislation intended to bring a treaty into effect is ambiguous or discretionary, there is in English law a presumption (based on the principle that Parliament cannot have intended to act in breach of international obligations) that the legislation is to be construed so as to avoid a conflict with international law. The presumption applies to delegated legislation and circumstances may arise where it comes into play in interpreting and applying CPR provisions (*Morgan v Hinton Organics (Wessex) Ltd [2009] EWCA Civ 107; [2009] Env. L.R. 30, C.A.* (relevance of Aarhus Convention to CPR costs in private nuisance proceedings).

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2. - The Access to Justice Reports as Aids to Interpretation

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CPR: Application, Amendments and Interpretation

E. - Construction and Interpretation of Rules

2. - The Access to Justice Reports as Aids to Interpretation

12-39 Many of the provisions in the [CPR](#) carry into effect reform proposals made in the Access to Justice Reports. It would be expected, therefore, that judges and lawyers would have recourse to those Reports, for the purpose of better understanding the meaning and application of such provisions. Numerous examples may be given of cases in which the courts have relied (sometimes quite heavily) on passages from the Access to Justice Reports (both Interim and Final) for the purposes of informing and supporting their decisions on rules relating to innovative aspects of the CPR; e.g. *Trustees of Stokes Pension Fund v Western Power Distribution (South West) Plc* [2005] EWCA Civ 854; [2005] 1 W.L.R. 3595, CA (exercise of discretion as to costs where offer to settle a money claim not made in accordance with Pt 36); *ES v Chesterfield and North Derbyshire Royal Hospital NHS Trust* [2003] EWCA Civ 1284; [2004] Lloyd's Med. Rep. 90, CA ("equality of arms" in relation to expert witnesses); *Hawley v Luminar Leisure Plc* [2006] EWCA Civ 30 (offers to settle); *Shah v HSBC Private Bank (UK) Ltd* [2011] EWCA Civ 1154; [2012] Lloyd's Rep. F.C. 105, CA, (documents to be included in standard disclosure). However, it must be remembered that a number of the recommendations in the Access to Justice Reports that were implemented underwent considerable revision following further consultation and deliberation before enactment by the Rule Committee in 1998 and some have been subject to significant revisions since and the value of the Reports as aids to the proper interpretation of the CPR has thus been reduced. The same may be said of other Reports leading to major changes in the CPR; e.g. the Bowman Report (see *George Wimpey UK Ltd v Tewkesbury BC* [2008] EWCA Civ 12; [2008] 1 W.L.R. 1649, CA), and, most recently, the Jackson Costs Reports and the Briggs Chancery Modernisation Review.

Other reports produced by various sources, and forming at least background to the implementation of additions and amendments to the [CPR](#), have been dealt with variously by the courts as aids to interpretation; see e.g. *Jirehouse Capital v Beller* [2008] EWCA Civ 908; [2009] 1 W.L.R. 751; [2009] Bus. L.R. 404 at para.16 per Arden LJ. (DCA Consultation Paper "Civil Procedure Rules—Security for Costs" provided no assistance and not admissible as an aid to interpretation of r.25.3(2)(c)); *Digicel (St Lucia) Ltd v Cable & Wireless Plc* [2008] EWHC 2522 (Ch); [2009] 2 All E.R. 1094 (Morgan J) at para.37 (Cresswell Report on subject of electronic disclosure referred to in determining application of r.31.7 as supplemented by Practice Direction (Disclosure and Inspection) para.2A).

3. - Interpretation to Give Effect to Overriding Objective

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3. - Interpretation to Give Effect to Overriding Objective

- 12-40 The overriding objective is stated in r.1.1. It is specifically provided (subject to the exceptional modification imposed by rr.76.2, 79.2, 80.2, 82.2 and 88.2) that the court must seek to give effect to the overriding objective, not only when it exercises any power given to it by the CPR, but also when it interprets any rule (r.1.2(b)). In this context “any rule” includes any former RSC or CCR rule re-enacted in Schs 1 or 2 of the CPR (*Ali v Esure Services Ltd [2011] EWCA Civ 1582; [2012] 1 W.L.R. 1868; [2012] C.P. Rep. 12*). In the Final Report it was said (at p.274) that every word in the rules of court should have a purpose, but every word cannot be given “a minutely exact meaning”. Civil procedure involves more judgment and knowledge than rules can directly express. Ultimately their purpose is to guide the court and litigants towards the just resolution of the case. Although rules of court can offer detailed directions for the technical steps to be taken, the effectiveness of those steps depends upon the spirit in which they are carried out. That in turn depends on an understanding of the fundamental purpose of the rules and of the underlying system of procedure. The use of the word “seek” in r.1.2(b) acknowledges that, in giving effect to the overriding objective when interpreting any rule, the court can only do what is possible. The express words of a particular rule falling for interpretation may be so clear in what it commands or orders that the court cannot use the overriding objective to give effect to, what the court may otherwise consider to be, the just way of dealing with the case (*Vinos v Marks & Spencer Plc [2001] 3 All E.R. 784, CA*, at para.26 per Peter Gibson LJ, and *Totty v Snowden [2001] EWCA Civ 1415; [2001] 4 All E.R. 577, CA*, para.34 per Simon Brown LJ). The court should avoid the slavish application of individual rules, practice directions and Pre-Action Protocols if such a formal application undermines the overriding objective (*Orange Personal Communications Services Ltd v Hoare Lea [2008] EWHC 223 (TCC); 117 Con. L.R. 76; [2009] Bus. L.R. D24* (Akenhead J)). In CPR Pt 76 (Proceedings under the Prevention of Terrorism Act 2005), Pt 79 (Proceedings under the Counter Terrorism Act 2008 etc), and Pt 80 (Proceedings under the Terrorism Prevention and Investigation Measures Act 2011) there are provisions imposing a duty on the court in proceedings to which those Parts relate to ensure that information is not disclosed contrary to the public interest. Those provisions state that, in such proceedings, the overriding objective in Pt 1, and so far as relevant, any other rule, must be read and given effect in a way which is compatible with that duty (see r.76.2(1), r.79.2(1) and r.80.2(1)).

For extended commentary on the ways in which the courts have made use of the various elements of the overriding objective when interpreting CPR rules (and when exercising powers given to them by the CPR), see Section 11—The Overriding Objective, paras 11-4 to 11-6. Note also below at para.12-51 (Significance of CPR as “a new procedural code”), and para.12-52 (Reliance on pre-CPR authorities).

4. - Interpretation Act 1978

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4. - Interpretation Act 1978

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Former RSC Ord.1 r.3 stated that the [1978 Act](#) should apply to the interpretation of those rules. The [CPR](#) contain no such provision but, for the reasons which follow, the effect is the same. The provisions of the [1978 Act](#), except [ss.1 to 3](#) and [4\(b\)](#), apply, so far as applicable and unless the contrary intention appears, to subordinate legislation made after 1 January 1979 ([s.23\(1\)](#)). In this context, “subordinate legislation” includes rules made under any Act ([s.21\(1\)](#)). Consequently, those provisions in the [1978 Act](#) apply to the CPR. [Section 5 of the Act](#) states that, in any Act (or subordinate legislation), unless the contrary intention appears, words and expressions listed in [Sch.1 to the Act](#) are to be construed according to that Schedule. Several words and expressions in [Sch.1](#) are relevant to matters of practice and procedure dealt with by the CPR. Note also [s.7](#) (references to service by post).

[Section 11 of the 1978 Act](#) states that, where an Act confers power to make subordinate legislation, expressions used in that legislation have, unless the contrary intention appears, the meaning which they bear under the Act. By operation of this section, expressions used in the [CPR](#) have, unless the contrary intention appears, the meaning which they bear under the [Civil Procedure Act 1997](#). It would seem that the [Interpretation Act 1978 s.11](#) does not have the effect of incorporating into the CPR meanings assigned to expressions found in the [Senior Courts Act 1981](#) (particularly by [s.151](#)) in the [County Courts Act 1984](#) (particularly by [s.147](#)).

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5. - Meaning of Particular Words and Expressions—Glossary (CPR rr.2.2 and 2.3)

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5. - Meaning of Particular Words and Expressions—Glossary (CPR rr.2.2 and 2.3)

- 12-42 The former [RSC](#) and [CCR](#) contained provisions of general application giving definitions of particular expressions (see former RSC Ord.1 r.4 and CCR Ord.1 r.3) and particular expressions were specially defined in the context of particular rules. Further, definitions were incorporated by reference from the [Senior Courts Act 1981](#) and the [County Courts Act 1984](#). The [CPR](#) follows a similar pattern.

The definitions given in [r.2.3](#) (Interpretation) apply throughout the [CPR](#). Other words and phrases are defined in context. For example, in the text of [Pt 23](#) (General rules about applications for court orders) “application notice” and “respondent” are defined in [r.23.1](#) and in [Pt 31](#) (Disclosure and Inspection of Documents) “document” and “copy” of a document are defined. Further, many of the Parts added to the CPR since they came into effect in April 1999 have “local” interpretation provisions (sometimes quite extensive), defining certain words and phrases in the context of particular Parts or Sections of Parts; e.g. [r.52.1\(3\)](#) (appeals), [r.54.1\(2\)](#) (judicial review), [r.54.21](#) (statutory review), [r.55.1](#) (possession claims), [r.57.1\(2\)](#) (probate claims), [r.58.1\(2\)](#) (commercial claims), [r.62.2\(1\)](#) (arbitration claims), and [rr.70.1\(2\)](#) and [74.2\(1\)](#) (enforcement of judgments). Where such Parts or Sections of Parts are dedicated to the purpose of providing procedures to support particular statutory schemes with their own terms of art, such “local” interpretation provisions are unavoidable.

An innovative feature of the [CPR](#) is the Glossary at the end. It contains a number of legal expressions, some of which were defined in rules found in the former [RSC](#) and [CCR](#). (Definitions for “Base rate” and “Exemplary damages” were added by the [Civil Procedure \(Amendment\) Rules 2013](#).) In [r.2.2](#) it is stated that the meanings given for the expressions listed in the Glossary are meant as guides only and do not give those expressions “any meaning in the Rules which they do not have in law generally”. The [Civil Procedure Act 1997 s.1\(3\)](#) (as amended) states that the rule committee when making rules must “try to make rules which are both simple and simply expressed”. The Glossary may be seen as an attempt to discharge that duty.

For commentaries on the particular words and phrases listed in [para.\(1\) of r.2.3](#), see commentary following that rule in Vol.1.

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6. - Practice Directions as Aids to Interpretation

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6. - Practice Directions as Aids to Interpretation

12-43 In relation to many matters relevant to the handling of cases by the civil courts, a complete understanding of the relevant practice and procedure may involve reference to, what has been called, a “somewhat cumbrous and confusing three-tier hierarchy of rules and guidance” consisting of statutory provisions, rules of court, and practice directions (*R. (Mount Cook Land Limited) v Westminster City Council [2003] EWCA Civ 1346; [2004] C.P. Rep. 12, CA* at para.67 per Auld LJ). And to that structure may be added a fourth and a fifth tier, pre-actions protocols, and practice guidance and court guides. One source (e.g. practice directions) can aid the interpretation of another (e.g. rules of court); but there is a potential for conflict between them.

A broad distinction may be drawn between CPR Practice Directions and other practice directions affecting civil proceedings in the civil division of the Court of Appeal, the High Court and the County Court (whether made before or after the coming into effect of the **CPR**) (see para.17 above).

The **CPR** are made by the Civil Procedure Rule Committee under statutory powers (*Civil Procedure Act 1997 s.2*). Practice directions may provide for any matter which, by virtue of *Sch.1 para.3 of the 1997 Act*, may be provided for by the CPR (*ibid. s.5(1)*). Practice directions are not the responsibility of the Rule Committee. However, the CPR may, instead of providing for any matter, refer to provisions made about that matter by directions (*ibid. Sch.1, para.6*) (e.g. **r.56.1(2)** states that a practice direction may set out special provisions with regard to any particular category of landlord and tenant claim). Thus, practice directions are subordinate to the CPR. In any conflict between the two the rule, as a delegated legislation, takes precedence over the practice direction; the latter being an exercise of inherent common law power: see *Bovale Ltd v Secretary of State for the Communities and Local Government*, op cit, at para.28. There is no necessary clash where a practice direction provision spells out explicitly what is implicit in a broad power conferred on the court by a rule (*Leigh v Michelin Tyre Plc [2003] EWCA Civ 1766; [2004] 1 W.L.R. 846, CA*). In *Hormel Foods Corp v Antilles Landscape Investment [2003] EWHC 1912 (Ch); (2004) 27(I) I.P.D. 27005*, Lindsay J refused to strike out a defendant’s statement of case for failure to comply with a mandatory rule where the defendant could be said to have complied with a permissive provision in a practice direction supplementing the rule but apparently in conflict with it. In *Binks v Securicor Omega Express Ltd [2003] EWCA Civ 993*, where there was an apparent clash between **r.22.1(2)** (reverification of amended statement of case) and Practice Direction (Amendments to Statements of Case) para.1.4, the Court of Appeal said precedence should be given to the rule. In *Godwin v Swindon BC [2001] EWCA Civ 1478; [2002] 1 W.L.R. 997, CA*, May LJ expressed the opinion that CPR Practice Directions (i.e. of the former variety referred to above) are “at best a weak aid to the interpretation of the rules themselves” (*ibid. at para.11*). It has been argued that, where a rule is capable of two possible constructions, then the relevant practice direction may be a legitimate aid to interpretation (*Van Aken v London Borough of Camden [2002] EWCA Civ 1724; [2003] 1 W.L.R. 684; [2003] 1 All E.R. 55*). In the *Mount Cook* case (op. cit.) Auld LJ said (para.68) that it is important that all involved in civil proceedings ought to be able to rely on practice directions as indicating the normal practice of the courts unless and until amended. However, the practice directions supplementing CPR provisions differ from rules in the CPR in that (a) in general they provide guidance that should be followed, but do not have binding effect, and (b) they should yield to rules in the CPR where there is a clear conflict between them. Where there is a conflict between a CPR rule and a practice direction provision, it is the rule that must apply (*Harlow & Milner Ltd v Teasdale [2006] EWHC 1708 (TCC); [2006] B.L.R. 359* (Judge Peter Coulson Q.C.); *Brennan v ECO Composting Ltd [2006] EWHC 3153 (QB); [2007] 1 W.L.R. 773* (Silber J)). Where rules of court implement a statutory provision a supplementing practice direction may prove to be an aid to the construction of the primary legislation (e.g. *St Helens MBC v Barnes [2006] EWCA Civ 1372; [2007] 1 W.L.R. 879, CA*).

Rule 49(1) states that the **CPR** shall apply to certain listed proceedings subject to the provisions of “the relevant practice direction which applies to those proceedings”. Thus, within the CPR, the expression “relevant practice direction” is a term of art. The expression is found in various places (e.g. **r.6.7** (Deemed service)). A “relevant practice direction” is not the same as a practice

direction supplementing a particular CPR Part. Since the CPR came into effect, the number of “relevant practice directions” has been steadily reduced and, eventually, all will disappear as new Parts are inserted in the CPR.

Examples may be found of rules within the [CPR](#) which provide that, for certain purposes, practice directions may modify or disapply particular CPR rules; e.g. [r.55.10A](#) (Electronic issue of certain possession claims). In [r.66.2](#) (Application of CPR to civil proceedings to which the Crown is a party) it is expressly stated that CPR rules and their practice directions apply to civil proceedings by or against the Crown and to other civil proceedings to which the Crown is a party unless [Pt 66](#), a practice direction or any other enactment provides otherwise. Obviously, in a given case, provisions such these may affect the interpretation of CPR.

Unfortunately, before 2010, no consistent style for giving titles to supplementing practice directions or for referring to them in cross-references within the [CPR](#) had been developed. The result was that it was not always the case that the number of the Part to which it related was included in the title of a supplementing practice direction, and sometimes no clue was given is given in the title as to whether it was the sole, or one of several, practice directions supplementing the Part. Further, forms of citation for cross-references varied. (The confusion was reflected in judgments and in legal writing.) During 2009 and 2010, in statutory instruments amending rules and in TSO CPR Updates amending practice directions, steps were taken to remedy this problem. However, it remains the case that the system for citing practice directions in cross-references within the CPR now in place gives the reader no clue as to the subject matter of the practice direction. For example, although a reader coming across the citation “Practice Direction 25B” will now know that that is a reference to the second practice direction supplementing [Pt 25](#), he or she is unlikely to know, without looking it up expressly, that [Pt 25](#) is concerned with the subjects of interim remedies and security for costs, and that the second practice supplementing that Part contains provisions dealing with interim payments.

7. - Court Guides

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7. - Court Guides

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In modern times, various “Court Guides” have been published (both before and after the coming into effect of the [CPR](#)), e.g. Chancery Guide (see Vol.2, para.[1.1](#)), King’s Bench Guide (see Vol.2, para.[1B-1](#)), and Commercial Court Guide (see Vol.2, para.[2A-36](#)). To a large extent, these guides consist of narrative accounts of rules of court found in the CPR and practice directions (of various varieties), together with additional guidance on practice approved by judges. Much of the material is concerned with pre-trial applications (see commentary on [CPR Pt 23](#) in Vol.1). In some instances, parts of these narrative accounts have not always been in accord with the rules and practice directions on which they were based (this was particularly true of the Commercial Court Guide). However, it is clear that the effect of rules and directions cannot be suspended or disapplied by what may be said in Court Guides: *Lomax v Lomax [2019] EWCA Civ 1467; [2019] 1 W.L.R. 6527* at [28]. They are not sources of law; see *Bovale Ltd v Secretary of State for Communities and Local Government [2009] EWCA Civ 171*. In matters not covered by the CPR (or other sources of law) the Guides should however be carefully observed (see [Practice Statement \(Admiralty and Commercial Courts: Procedure\)](#), *The Times*, 2 April 2002). Where ambiguity exists in the primary sources, the Guides may assist as aids to interpretation.

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8. - Cross-References as Aids to Interpretation

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8. - Cross-References as Aids to Interpretation

- 12-45** One feature of the [CPR](#) which distinguishes them from the [RSC](#) and [CCR](#) is that, in various places, the texts of particular rules are interleaved with bracketed cross-references (or “signposts”) to other CPR provisions. For example, [r.2.11](#) contains cross references to [r.3.8](#), [r.28.4](#) and [r.29.5](#). In the “Access to Justice” Final Report (July 1996) it was explained that the purpose of this system of cross-referring is to avoid duplication where it makes sense to do so by referring in the text of one rule to other contextually relevant rules in such a way as to make it clear what those other rules do (*ibid.* Ch.20, paras 18 to 22). In the Stationery Office version of the CPR, as published in early 1999 shortly before the CPR came into effect (and regularly updated subsequently), there were attached to certain rules a number of additional cross-references, most of them drawing attention to provisions found in [Schs 1 and 2 of the CPR](#). Thus there appeared to be a distinction between, what could be called, “formal” and “informal” (or “non-statutory”) cross-references. The provenance of the informal cross-references (which were amended from time to time) was unclear; certainly they had never formed part of the CPR as enacted by statutory instrument. By HMSO CPR Update 29, 2002, these informal cross-references were removed from the Stationery Office version of the CPR (many had become out-of-date as Schedule rules became revoked). Curiously, [Civil Procedure \(Amendment\) Rules 2002 \(SI 2002/2058\)](#) [rr.12\(d\)\(i\)](#) and [13](#) purported to omit cross-references from [r.34.15](#) and [r.40.4](#) despite the fact that they were informal cross-references and never appeared in the [Civil Procedure Rules 1998](#) as enacted (see [SI 1998/3132](#)). It is obvious that many of the cross-references appended to particular CPR rules do not have any force, as opposed to being mere guidance to the reader as to where to find matters elsewhere in the rules. Formal cross-references of this type may be seen as efforts by the Rule Committee to discharge its statutory duty “to try to make rules which are both simple and simply expressed” ([Civil Procedure Act 1997 s.1\(3\)](#)). But some other cross-references (particularly of the formal variety) appear to have been inserted in particular rules for the purpose of making clear what the rule means where there might otherwise be room for doubt. In a number of cases, the question of the status of cross-references as aids to interpretation of the CPR rules to which they are attached has arisen; see e.g. *Re Casserly* 23 October 2000, unrep. (Johnson J) (cross-reference to [r.7.5](#) in [r.8.2](#)); *Anderton v Clwyd County Council [2001] C.P. Rep. 110* (McCombe J) (cross-reference to [r.2.8](#) in [r.6.7\(1\)](#)); *Montrose Investments Ltd v Orion Nominees [2001] C.P. Rep. 109; [2002] I.L.Pr. 21* (Sir Donald Rattee) (cross-reference to [r.15.4](#) in [r.11\(4\)](#)); *Henriksen v Pires [2011] EWCA Civ 1720* (cross-reference in [r.12.3](#) to [r.6.17](#) not imposing extra condition to be satisfied). In *Godwin v Swindon BC [2001] EWCA Civ 1478; [2001] 4 All E.R. 641, CA*, the approach adopted by the judge in the *Anderton* case was approved (*ibid.* at paras [37] and [47] per May LJ). In the *Montrose* case, the judge did not accept the proposition that the setting of words referring to other CPR provisions in parentheses deprived them of any effect that they would otherwise have. What matters is, not whether the words are in brackets, but what they say. In *Anderton v Clwyd County Council [2002] EWCA Civ 933; [2002] 3 All E.R. 813, CA*, Mummery LJ said (para.44) the fact that the express mention “by way of seemingly informal cross-reference in brackets” of [r.2.8](#) in [r.6.7\(1\)](#) was, in the circumstances, beside the point as what mattered is “the language of [r.2.8](#), whether in or out of brackets, and whether it is apt to apply to [r.6.7](#)”. The cross-reference in [r.6.7\(1\)](#) was removed by the [Civil Procedure \(Amendment No.3\) Rules 2005 \(SI 2005/2292\)](#).

See further “The significance of the [CPR](#) as ‘a new procedural code’” para.[12-51](#), and “Reliance on pre-CPR authorities” para.[12-52](#), below.

9. - CPR Check-Lists and Judge-Made Check-Lists

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9. - CPR Check-Lists and Judge-Made Check-Lists

- 12-46** In *Biguzzi v Rank Leisure Plc [1999] 1 W.L.R. 1926, CA*, Lord Woolf MR referred to the wide powers that the courts have under the **CPR** to enable them to respond to procedural defaults on the part of parties and said (at p.1934) “judges have to be trusted to exercise the wide discretion which they have fairly and justly in all circumstances”. It is to be expected that a judge, in giving a reasoned judgment explaining how he has gone about exercising his broad discretion in a particular procedural context (whether or not it is one involving a procedural default), will be anxious to demonstrate that he has proceeded in a principled way and directed himself properly, especially where the consequences of his decision are serious for the parties involved. He is likely therefore to itemise at a reasonable level of abstraction in a “check-list” style the considerations that seem to him to be relevant, particularly where the considerations laid down by rules or practice directions are obviously incomplete, sketchy, bland or non-existent, and then to apply them to the case in hand. Doubtless, in doing so he will draw inspiration from, amongst other sources, the judgments of other judges similarly placed, bearing in mind that judgments in cases dealt with before the **CPR** came into effect should be treated with caution. All this sounds like a perfectly innocent, indeed commendable, judicial exercise. However, it should be noted that the Court of Appeal has gone out of its way to discourage the reliance of judges on check-lists made by other judges when interpreting and applying **CPR** provisions.

An example of the Court of Appeal’s position on this matter is provided by *Audergon v La Baguette Ltd [2002] EWCA Civ 10; [2002] C.P. Rep. 27; [2002] C.P.L.R. 192, CA*. In this case the judge refused an application to lift an automatic stay imposed on proceedings by Practice Direction (Transitional Arrangements), para.19(1) and, in coming to that decision, was guided by the matters listed by Neuberger J in *Annadeus Ltd v Gibson, The Times, 3 March 2000*, as being relevant considerations. In allowing the appeal, the Court expressed the opinion that the value of relying on judicially created check-lists, which do not appear in the **CPR** provision being applied, is doubtful; inherent in such an approach is the danger that a body of “satellite authority” might be built up leading in effect to the re-writing of the provision through the medium of judicial authority (as occurred in relation to dismissal for want of prosecution under the former **RSC**). The point has been reinforced by the Court of Appeal in subsequent cases. (It may be noted that, despite the Court’s strictures, in applications to strike out under r.3.4, judges have continued to refer to the list of considerations adumbrated by Neuberger J in the *Annadeus Ltd* case; e.g. *McLoughlin v Grovers [2005] EWHC 803 (QB)* and *Sweetman v Shepherd [2007] EWHC 137 (QB); [2007] B.P.I.R. 455* (Irwin J).)

The Court’s attitude to this matter is not so much based on a hostility to judge-made check-lists as such, but to the growth of procedural case law generally. In *Woodhouse v Consignia Plc [2002] EWCA Civ 275; [2002] 1 W.L.R. 2558, CA*, Brooke LJ explained (at para.32) that one of the great demerits of the former procedural regimes was that simple rules “got barnacled with case-law”. Under the **CPR** regime, in various procedural contexts, the draftsman has sought to dispense with the need for litigants to be familiar with judge-made case-law by drawing together in one place the most common of the considerations a court must take into account when making its procedural decision. In *Anglo-Eastern Trust Ltd v Kermanshahchi [2002] EWCA Civ 198; [2002] C.P. Rep. 36, CA*, Brooke LJ said that Practice Direction (Summary Judgment) para.4 is clearly intended to set out a new code of practice which could be understood without the need to refer to case law. The clearest illustration of a rule-made check-list designed to be applied unencumbered by case law glosses is the list of considerations set forth in the original i.e. pre-April 2013 version of r.3.9 (Relief from sanctions), and it was this rule that was the centre of attention in both the *Audergon* case and the *Woodhouse* case. It was a rule that was pressed into service in circumstances for which, arguably, it was not designed. The Court of Appeal even went so far as to hold that it should be used in a context in which, as the court admitted, it clearly did not in terms apply (see *Sayers v Clarke Walker (Practice Note) [2002] EWCA Civ 645; [2002] 1 W.L.R. 3095, CA* (application for extension of time for appealing); cf., *Cottrell v General Cologne Re UK Ltd [2004] EWHC 2402* (Morison J) (r.3.9 does not apply where breach of r.33.2(4)(a)). This may suggest that there is perhaps a shortage in the **CPR** of rules and practice directions setting out in a codified form the various matters that the court should take into account when deciding how

to exercise its discretion, and that a market for judge-made check-lists exists. But the fear that particular CPR provisions may be re-written through the medium of judicial authority, leading to the kind of over-elaboration that occurred following *Birkett v James* and the consequences of that, is still very real. So the Court of Appeal's discouragement of judge-made check-lists and preference for rule-made check-lists is understandable, if perhaps a little heavy-handed. In *Hashtroodi v Hancock [2004] EWCA Civ 652; [2004] 1 W.L.R. 3206, CA*, the Court of Appeal noted, and regarded as significant, the fact that r.7.6 (extension of time for serving a claim form), unlike r.3.9 (see above), contains no checklist of relevant factors to be taken into account by the court when exercising its discretion. Instances can arise in which parties to appeals to the Court of Appeal request the Court to give "guidance" on particular procedural matters and, in effect, to design a check-list (usually to guide the exercise of discretion). For example, in *Glaxo Group Limited v Genentech Inc [2008] EWCA Civ 23*, the court acknowledged that a check-list "is a convenient way of making sure that the court has all the information it needs and of collating the information" and endeavoured to give guidance as to the factors to be taken into account by a judge in determining, in the exercise of discretion, an application for a stay of patent proceedings.

10. - Case Law as Aid to Construction

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10. - Case Law as Aid to Construction

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In the Interim Report it was said (at p.217) that it would be of fundamental importance that the new rules “are not hidebound by previous authorities on the old rules”. It was also said that the procedural innovations in the **CPR** “will make most of the old authorities redundant”. Doubtless that was and is an exaggeration. However, to the extent that provisions in the CPR are shorter and more clearly expressed than the provisions in the **RSC** and **CCR** they replace, they ought to have made the task of the judge and practitioner easier. Furthermore, the plainer, simpler form of drafting of the new rules should have meant “that there should be less need to seek instructions from the courts on what the rules mean” (Interim Report, p.217). It is clear that many provisions in the CPR have been drafted on the assumption that previous case law will continue to apply. This is particularly true of provisions that simply re-enact in simpler language procedural rules which drew no criticism in the “Access to Justice” Reports. It is also largely true of the case law on former **RSC** and **CCR** provisions incorporated in **Schs 1 and 2 of the CPR**. It would be expected that pre-CPR authorities most likely to be treated as redundant in those circumstances where the CPR rules falling for examination are provisions that were drafted and included in the CPR for the purpose of overcoming known difficulties in previous procedural rules; e.g. *Akram v Adam [2004] EWCA Civ 1601; [2005] 1 W.L.R. 2762, CA* (service by post at last known address). The Court of Appeal has said that the thinking behind the CPR, especially behind the innovative provisions as to costs, was that they would “speak for themselves” and that courts would not have to refer to an ever increasing body of authority in order to apply them (see *ABCv Banque Franco-Tunisienne [2003] EWCA Civ 295*, at para.68, and *Somatra Ltd v Sinclair Roche & Temperley (No.2) [2003] EWCA Civ 1474; [2003] 2 Lloyd's Rep. 855*, at para.86). However, it has to be said that, for various reasons, certain CPR provisions have proved to be difficult to apply and quite naturally and properly case law has been expected to supply the deficiencies. Indeed, in some respects innovative aspects of the CPR have generated an enormous amount of case law, complicating the work of judges considerably. For example, in *Rackham v Sandy (Costs) [2005] EWHC 1354 (QB); [2006] 1 Costs L.R. 34* (Gray J), the judge ruefully noted that in dealing with an issue as to the apportionment of costs in libel proceedings he was faced with a joint bundle of 24 authorities and skeleton argument totalling 49 pages. Where particular provisions have become encrusted with case law the explanation lies in the fact that the subject matter has inherent difficulties that cannot all be anticipated and resolved in rules that are meant to be simply expressed or that the response of the courts has been uncertain. Further, as is increasingly recognised, references to former **RSC** and **CCR** rules and the authorities decided under them may be instructive, but will not necessarily be determinative, of the meaning and effect of CPR provisions (*S.T. Dupont v E.I. du Pont de Nemours & Co [2003] EWCA Civ 1368; [2006] 1 W.L.R. 2793; [2006] C.P. Rep. 2*, at para.86 per May LJ).

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11. - Doctrine of Precedent and Restrictions on Citation

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12-48 Rules of court, being a form of legislation, have to be read and applied in the light of relevant case law. In procedural law (whether derived from rules of court or other sources), as well as in substantive law, the doctrine of precedent applies and lower courts are obliged to apply the decisions of higher courts. Uncertainty in the law, whether procedural or substantive, can exacerbate costs and delays in individual cases. The rules that make up the doctrine of precedent seek to avoid uncertainty and their effects in the field of procedural law are justified as much by judicial administration and case management considerations as by any others.

In modern times, courts have complained about the tendency of legal representatives to over-burden legal submissions (1) by citing several authorities where one would do, (2) by citing authorities that (a) are not relevant, or only marginally so, or (b) are as no value as precedents. As a consequence, efforts have been made to restrict the “over-citation” of authority by lawyers handling civil proceedings.

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(a) - Doctrine of precedent

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(a) - Doctrine of precedent

12-49 Only the outlines of the precedent rules need to be explained here. The Court of Appeal regards itself as being bound by its own previous decisions. For an explanation of the per incuriam exception to this rule, see *Desnousse v Newham London BC* [2006] EWCA Civ 547; [2006] Q.B. 831, CA, at paras 70 to 77 per Lloyd LJ. This self-denying ordinance applies as strictly to decisions on procedural law as to substantive law. It also applies equally to decisions of two-judge and three-judge courts made on an appeal (as distinct from an application for permission to appeal) (*Langley v North West Water Authority* [1991] 1 W.L.R. 697, CA, at p.697 per Lord Donaldson MR; see also *Limb v Union Jack Removals Ltd* [1998] 1 W.L.R. 1354, CA, at para.34). (The position may have been otherwise in the days when the division of work between two-judge and three-judge courts was determined by whether there was a need for other than brief argument or the point was of minimal importance other than to the immediate parties; see *Welsh Development Agency v Redpath Dorman Long* [1994] 1 W.L.R. 1409, CA at p.1423 per Glidewell LJ). In *Actavis UK Ltd v Merck and Co Inc* [2008] EWCA Civ 444; [2009] 1 W.L.R. 1186; [2008] 1 All E.R. 196, CA, the Court of Appeal held that it was free to depart from its own previous decision where it was satisfied that the EPO Boards of Appeal had formed a settled view of European patent law which was inconsistent with that earlier decision. Generally, where higher authority does not bind, a Divisional Court will follow an earlier decision of another Divisional Court of the High Court, and will do so as a matter of judicial comity unless convinced that the previous judgment is wrong (*R. v Greater Manchester Coroner, Ex p. Tal* [1985] 1 Q.B. 67, DC; and see, *Jones v Chichester Harbour Conservancy* [2017] EWHC 2270 (QB)). Similarly, a High Court judge, whether sitting at first instance or as an appeal court, will follow an earlier decision by a High Court judge (as above) (for an example of a previous decision on a procedural issue not being followed, see *Ansari v Puffin Investment Co Ltd* [2002] EWHC 1243). On the operation of the doctrine of precedent between levels of judge within a court, see *Coral Reef Ltd v Silverbond Enterprises Ltd* [2016] EWHC 3844 (Ch); [2018] 4 W.L.R. 104 at [55]–[68], discussed in Vol.1 para.2.4.3.

Decisions of the High Court, whether made on appeal or at first instance (and whether made by a High Court judge or a deputy High Court judge) are binding on the County Court. Further, for these purposes a decision of the High Court does not cease to be a decision of a higher court binding on the County Court when it is made in the exercise of the same first instance jurisdiction as is conferred on the latter court (*Howard de Walden Estates Ltd v Aggio* [2007] EWCA Civ 499; [2007] 3 W.L.R. 542, CA).

The problem of the over-citation of authorities in skeleton arguments in cases in which submissions related to procedural issues are made (especially as to costs) appears to be a perennial problem, continuing despite regular pleas from the Court of Appeal and from judges sitting at first instance for legal representatives to be more discriminating (see e.g. *Cel Group Ltd v Nedlloyd Lines UK Ltd* [2003] EWCA Civ 1716; [2004] 1 Lloyd's Rep. 388, CA, at para.23 per Carnwath LJ; *Hedrich v Standard Bank Ltd* [2008] EWCA Civ 905; [2009] P.N.L.R. 3, at para.40 per Ward LJ). See further para.12-50 below.

Where there is an apparent conflict of authority between two previous decisions of the Court of Appeal, it is not unknown for the matter to be argued before a full court of the Court, as the decision of such a court holds greater weight (*Young v Bristol Aeroplane Co* [1944] K.B. 718, CA at p.728). In modern times, the Court has resorted to this device for the purpose of clarifying aspects of procedural law (e.g. *Taylor v Lawrence* [2002] EWCA Civ 90; [2003] Q.B. 528, CA (power of Court of Appeal to reopen appeal)).

It is conceivable that a judge sitting in the High Court or the County Court may find himself confronted with Court of Appeal decisions on procedural questions which, though apparently binding on him, are contradictory or, at best, not ad idem. The rule of precedent seems to be that a judge finding himself in this predicament should prefer the later decision if it was reached after full consideration of the earlier; otherwise he should follow one or the other (*Minister of Pensions v Higham* [1948] 2 K.B.

153). In *Colchester Estates (Cardiff) v Carlton Industries Plc* [1984] 3 W.L.R. 693, Nourse J stated that, where a High Court judge is confronted with two High Court authorities, one conflicting with the other, the later decision is to be preferred if it was reached after full consideration of the earlier decision, unless the judge is convinced that the second was wrong in not following the first. In the case of *In re Taylor (A Bankrupt)* [2006] EWHC 3029 (Ch); [2007] 2 W.L.R. 148, this dictum was doubted by Judge Kershaw Q.C., who preferred the view that, as decisions of co-ordinate courts are persuasive and not binding, the judge should make his decision on the merits of the submissions, giving appropriate weight but no more to the conflicting authorities, especially when the issue is one of jurisdiction rather than the exercise of discretion.

As a practical matter, in many instances decisions made by judges and courts on procedural issues (both at first instance and on appeal) involve the exercise of discretion. A long time ago it was said that, in a question of discretion “authorities are not of much value”, as no two cases are exactly alike, and even if they were, the court cannot be bound by a previous decision to exercise its discretion in a particular way (because that would be in effect putting an end to the discretion) (*Jenkins v Bushby* [1891] 1 Ch. 484, CA at p.495 per Kay LJ). Certainly, it is dangerous for a court, in the exercise of a discretion in a case, to take a reported case as a guide for that exercise (*Bragg v Crossville Motor Services Ltd* [1959] 1 W.L.R. 324, CA at p.236 per Hodson LJ). Much of the modern judicial criticism levelled at legal representatives for their “over-citation” of authorities (see further below) is derived from the fact that, all too frequently, they attempt to use decisions illustrating the exercise of discretion and dicta therein as persuasive authorities, rather than as mere inspiration for forensic argument (*Koller v Secretary of State for the Home Department* [2001] EWCA Civ 1267).

The operation of the doctrine of precedent is affected by the Human Rights Act 1998. Section 6 of that Act makes it unlawful for a court “to act in a way which is incompatible with a Convention right”. Section 2 provides that, in determining any question concerning a Convention right (e.g. the right to a fair trial granted by art.6) a court “must take into account” the Strasbourg jurisprudence. If an English court (at any level) concludes that, in the s.6 sense, it would be acting unlawfully should it follow a previous decision apparently binding on it, then it should apply the ECHR rule rather than that decision. (As to the effects of the 1998 Act on the application of the rules of statutory interpretation, see para.12-53 below).

Frequently, judges dealing with interlocutory applications and applications for permissions to appeal are faced with the problem of giving definitive interpretations of rules of court. Sometimes such applications may be unopposed or attended by one party only, with the result that any value the decision may have as a binding or persuasive authority is weakened for that reason alone.

(b) - Citation of previous authority—restrictions on

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(b) - Citation of previous authority—restrictions on

- 12-50** The Court of Appeal has criticised parties for over-burdening courts with skeleton arguments (and supplementary skeletons) of disproportionate length (see e.g. *AIC Ltd v ITS Testing Services (UK) Ltd* [2006] EWCA Civ 1601; [2007] 1 Lloyd's Rep. 555, CA; *Raja v Van Hoogstraten (No.9)* [2008] EWCA Civ 1444; [2009] 1 W.L.R. 1143, CA; *Midgulf International Ltd v Groupe Chimique Tunisien* [2010] EWCA Civ 66; [2010] 1 C.L.C. 113, CA; *Khader v Aziz* [2010] EWCA Civ 716; [2010] 1 W.L.R. 2673; [2011] E.M.L.R. 2, CA.); *Tchenguiz v Director of the Serious Fraud Office* [2014] EWCA Civ 1333; [2015] 1 W.L.R. 838.). In part this criticism has focused on the “over-citation” of authority; in particular on issues that are highly fact-specific (e.g. *Straker v Rose* [2007] EWCA Civ 368; [2007] C.P. Rep. 32; [2008] 2 Costs L.R. 205, CA) or are concerned with the judge’s exercise of discretion as to costs (e.g. *Widlake v BAA Ltd* [2009] EWCA Civ 1256; [2010] C.P. Rep. 13; [2010] 3 Costs L.R. 353, CA; *AXA Insurance Plc. v Sulaman* [2009] EWCA Civ 1331; [2010] C.P. Rep. 19; [2010] 3 Costs L.R. 391, CA). Paragraph 29.4 of Practice Direction 52C states that, in general, a bundles of authorities filed for an appeal in the Court of Appeal should not contain more than 10 authorities “unless the scale of the appeal warrants more extensive citation”. (See too, Practice Direction 62 (Arbitration) para.12.2 (limiting the page length of skeleton arguments).)

When it comes to the citation of previous authorities (in skeleton arguments and legal submissions), whether of binding or persuasive authority, and whether on procedural or substantive issues, *Practice Direction (Citation of Authorities)* [2001] 1 W.L.R. 1001, must be borne in mind (see Vol.1, para.39MPD.2). Paragraphs 6.1 and 6.2 of this Practice Direction provide that (1) judgments given on applications attended by one party only, (2) applications for permission to appeal, and (3) decisions given on applications that only decide that the application is arguable, may not in future be cited before any court “unless it clearly indicates that it purports to establish a new principle or to extend the present law”. To be citable, decisions rendered after 9 April 2001, must have an express statement to that effect.

Decisions on procedural issues containing such express statement include: *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] EWCA Civ 796; [2002] 4 All E.R. 376, CA; *Seray-Wurie v Hackney London BC* [2002] EWCA Civ 909; [2003] 1 W.L.R. 257, CA; [2002] 3 All E.R. 490; *Sayers v Clarke Walker (Practice Note)* [2002] EWCA Civ 645; [2002] 1 W.L.R. 3095, CA; *Sohal v Sohal* [2002] EWCA Civ 1297; *Gregory v Turner* [2003] EWCA Civ 183; [2003] 2 All E.R. 114, CA; *Bhamjee v Forsdick (Application for Permission to Appeal)* [2003] EWCA Civ 799; *Jeyapragash v Secretary of State for the Home Department* [2004] EWCA Civ 1260; [2005] All E.R. 412, CA; *Uphill v B.R.B. (Residuary) Ltd* [2005] EWCA Civ 60; [2005] 1 W.L.R. 2070, CA; *Perotti v Westminster City Council* [2005] EWCA Civ 581; [2005] C.P. Rep. 38; [2005] R.V.R. 321, CA; *Black v Pastouna* [2005] EWCA Civ 1389; [2006] C.P. Rep. 11; (2005) 155 N.L.J. 1847, CA; *YD (Turkey) v Secretary of State for the Home Department* [2006] EWCA Civ 52, [2006] 1 W.L.R. 1646, CA; *R. (Pereira) v Inner South London Coroner* [2007] EWHC 1723 (Admin); [2007] 1 W.L.R. 3256; [2007] *Inquest* L.R. 16, DC; *R. (England) v Tower Hamlets LBC* [2006] EWCA Civ 1742, CA; *Boyland & Son Ltd v Rand* [2006] EWCA Civ 1860; [2007] H.L.R. 24, CA; *Jaffray v The Society of Lloyds* [2007] EWCA Civ 586; [2008] 1 W.L.R. 75; [2007] C.P. Rep. 36, CA; *Poole BC v Hambridge* [2007] EWCA Civ 990; [2008] C.P. Rep. 1, CA; *Gawler v Raettig* [2007] EWCA Civ 1560, CA; *Jackson v Marina Homes Ltd* [2007] EWCA Civ 1404; [2008] C.P. Rep. 17, CA; *R (V) v. Secretary of State for the Home Department* [2012] EWHC 1499 (Admin). The Court of Appeal expressly released for citation its judgment in *Hutcheson v Popdog Ltd (Practice Note)* [2011] EWCA Civ 1580; [2012] 1 W.L.R. 782, CA, where the court, in dismissing an application for permission to appeal, gave guidance on issues relating to the discharge of interim non-disclosure orders and to “academic” appeals, being issues which would have been raised if permission to appeal had been granted. In the judgment released for citation in *Lockheed Martin Corporation v Willis Group Ltd* [2010] EWCA Civ 972; [2010] C.P. Rep. 44; [2010] P.N.L.R. 34, CA, the Court’s ruling on the principal procedural point involved (joinder of party after expiry of limitation period) was obiter. In *Johann MK Blumenthal GmbH & Co KG v Itochu Corporation*

[2012] EWCA Civ 996; [2013] 1 All E.R. (Comm) 504; [2012] 2 Lloyd's Rep. 437, CA, the judgment released for citation by the Court of Appeal dealt with the application of the Arbitration Act 1996 s.15(3) where parties to an arbitration agreement invoke the failure to appoint procedure under s.18). In *Bunge SA v Kyla Shipping Co Ltd* [2013] EWCA Civ 734; [2013] 3 All E.R. 1006; [2013] 2 All E.R. (Comm) 577, CA, the Court of Appeal released for citation a judgment explaining the limits of the court's jurisdiction to entertain an application for permission to appeal to it from a decision of the High Court on a point of law in an arbitration claim. An important judgment not containing an express statement releasing for citation, when surely it ought to have done, is the judgment of the Court of Appeal in *George Wimpey UK Ltd v Tewkesbury BC* [2008] EWCA Civ 12; [2008] 1 W.L.R. 1649, CA (applicant, not party to proceedings below (in which the claimant succeeded), added as party for purposes of bringing appeal). In *Bank of Scotland v Breytenbach* [2012] B.P.I.R. 1 (Registrar Baister), where two conflicting first instance decisions (both reported in the Law Reports), of which the later, but not the earlier, was caught by para.6.2 of the Practice Direction, were relevant to the issue to be decided (whether the court had jurisdiction retrospectively to grant permission to commence insolvency proceedings), the court adhered to the earlier decision. Examples of cases not released for citation but, nevertheless, cited in later cases include *Crystal Decisions (UK) Ltd v Vedatech Corp* [2008] EWCA Civ 848 (whether failure to satisfy costs order bar to defending), cited in *Musion Systems Ltd v Activ8-3D Ltd* [2012] EWPCC 5.

Further, County Court cases may not be cited in any court unless (1) cited in order to illustrate the conventional measure of damages in a personal injury case, or (2) cited in a county court in order to demonstrate current authority at that level on an issue in respect of which no decision at a higher level of authority is available. On a number of occasions the courts have had cause to stress the importance of complying with the practice direction (see e.g. *Jennings v Cairns* [2003] EWCA Civ 1935; [2004] W.T.L.R. 361, CA). In *Mandrake Holdings Ltd v Countrywide Assured Group Plc* [2005] EWHC 311 (Ch), the defendants, in resisting the claimants' application to add an additional head of damage, alleged that the new claim was bad in law, and cited in support of that submission a pre-9 April 2001, decision given by the Court of Appeal when granting an application for permission to appeal. The judge (Lightman J) ruled that the bar on citation had been breached, because there was no indication present in, or clearly deductible from, the language used in the judgment that the decision "purports to establish a new principle or to extend the present law". The judge concluded that, in these circumstances, he was precluded from relying on the judgment, even though it had been published in an established and respected series of law reports.

Usually, any express statement to the effect that a decision purports to establish a new principle or to extend the present law (freeing a case for citation) will be made at the time when the decision is given. However, that is not necessary; e.g. *Smith v Brough* [2005] EWCA Civ 261; [2006] C.P. Rep. 17, CA (decision on extension of time for applying for permission to appeal freed for citation several months after made).

The problem of the over-citation of authorities on interlocutory applications to the court was referred to in *A v B Plc* [2002] EWCA Civ 337; [2003] Q.B. 195, CA. In this case, the Court of Appeal laid down guidelines according to which judges at first instance should direct themselves when hearing applications for interim injunctions restraining publication in breach of confidence claims, and did so, not only for the purpose of clarifying the law, but also for the purpose of making it possible generally for judges to ignore other authorities, even if referred to them by the parties. The Court said that the pursuit of the latter purpose was consistent with the duty of courts under the overriding objective, in particular, the saving of cost and dealing with cases in ways which are proportionate. In a number of cases where Convention rights issues have arguably arisen on procedural applications, the courts have criticised the tendency towards the over-citation by parties of authorities on the impact on English law of the Strasbourg jurisprudence in areas where a growing number of cases make the same point in similar language (e.g. *Chase v News Group Newspapers Ltd* [2002] EWHC 1101, QB (Eady J)).

Practice Direction (Citation of Authorities) [2012] 1 W.L.R. 780 Sen Cts (see Vol.1 para.39MPD.4) states that, in all English courts (despite its published title its scope is not confined to the Senior Courts), if a case referred to by a party has been reported in the official Law Reports published by the Incorporated Council of Law Reporting for England and Wales, that report should be cited, and sets forth the practice to be followed where a party wishes to refer to an authority that has not been so reported. In particular it sets out that where an authority is not so reported but is reported in both the Weekly Law Reports and the All England Law Reports either may properly be cited i.e neither is accorded preference. (For Supreme Court practice in this respect, see para.6.5.2 et seq of PD 6 (The Appeal Hearing) (see Vol.2, para.4A-144). Where it is necessary for a party to give evidence of an authority referred to in the Human Rights Act 1998 s.2 (Strasbourg jurisprudence), para.8.1 of Practice Direction (Miscellaneous Provisions Relating to Hearings (supplementing CPR Pt 39) applies. The authority to be cited should be an authoritative and complete report, and the party must give to the court and any other party a list of authorities he intends to cite and copies of the reports not less than three days before the hearing.

12. - The Significance of the CPR as “A New Procedural Code”

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In [CPR r.1.1\(1\)](#), the [CPR](#) are described as “a new procedural code”. This concept was not referred to in the penultimate draft of the CPR published in July 1998, although it was clear from the Access to Justice Interim Report (at page 207 – 209) Final Report (at page 4) that a ‘new code’ of procedure was to be introduced to replace both the [RSC](#) and [CCR](#). While a new code the bulk of the CPR however consists of former [RSC](#) and [CCR](#) provisions, in most instances revised and expressed in modern language. The [Civil Procedure Act 1997 s.2\(7\)](#) (as amended) enjoins the rule committee to try “to make rules which are both simple and simply expressed”. This, of course, is a counsel of perfection. The risk is, that in attempting to express rules in modern, and preferably simple, language, important distinctions may be lost. In [Société Eram Shipping Co Ltd v Compagnie Internationale de Navigation \[2003\] UKHL 30; \[2004\] 1 A.C. 260, HL](#), Lord Millett (para.112) drew attention to the fact that certain provisions of [CPR Pt 72](#) (which replaced [RSC Ord.49](#)) are unsatisfactory in this respect, and cannot easily be understood without a knowledge of their history and antecedents. Lack of understanding as to the provenance (found in the former [CCR](#)) of [CPR Pt 14](#) (Admissions) created problems in relation to the question whether a party may resile from a pre-action admission which had to be rectified by amendment to the CPR ([Sowerby v Charlton \[2005\] EWCA Civ 1610; \[2006\] 1 W.L.R. 568, CA](#)).

Nevertheless, the judiciary has stressed the concept of the [CPR](#) as “a new procedural code” in many cases. It appears that the courts may place emphasis on the concept for various reasons, including (1) adding force to the fact that the court must seek to give effect to the overriding objective when it exercises any power given to it by the Rules or interprets any rule ([r.1.2](#)), (2) ensuring that the truly innovative provisions in the CPR are given their full and proper intended effects and are not limited by practices and attitudes that attached to the former rules of court which they supplant, and (3) making it clear that provisions in the CPR plainly based on provisions formerly found in the [RSC](#) and [CCR](#) will not necessarily be interpreted and applied in accordance with the case law that had been built up around those provisions over the years. Reference to the assertion that the CPR constitutes “a new procedural code” in these circumstances does no harm. However, it is submitted that the assertion should not be relied upon as an excuse for dealing with important procedural issues as matters of first impression rather than as matters requiring rigorous legal analysis (in their historical context, if necessary).

In some cases, for the purpose of maintaining that the [CPR](#) do constitute a new procedural code introducing greater flexibility into the law, the courts have tended to caricature certain pre-CPR rules, portraying them as being much more rigid in application than they really were (e.g. [Warren v Secretary of State for Trade and Industry \[2006\] EWHC 1992 \(Ch\)](#), (admissibility of additional evidence on appeal)). On occasion, the lengths that the Court of Appeal has gone to in order to avoid having to have recourse to well-settled and accepted pre-CPR principles for the purpose of solving particular procedural problems not clearly or adequately dealt with by the CPR, have been extreme (e.g. [Nelson v Clearsprings \(Management\) Ltd \[2006\] EWCA Civ 1252; \[2007\] 1 W.L.R. 962; \[2007\] 2 All E.R. 407, CA](#) (setting aside irregular judgment)).

The requirement, stated in [r.1.2](#), that the court must seek to give effect to the overriding objective when it exercises any power given to it by the [CPR](#), or interprets any rule, can readily provide a basis upon which a judge may proceed on the basis that pre-CPR authorities do not govern. For further explanation and examples, see Section 11—The Overriding Objective, para.[11-5](#) above.

In cases where the courts have necessarily been driven to pre-CPR authorities for the purpose of understanding and properly applying particular provisions in the CPR, the bald assertion in [r.1.1\(1\)](#) that the CPR “are a new procedural code” is either studiously ignored (e.g. [Drinkall v Whitwood \[2003\] EWCA Civ 1547; \[2004\] 1 W.L.R. 462, CA](#)), or gamely acknowledged with some such qualification made as “generally speaking” cases decided under the former rules “are not helpful in interpreting the new code” or “will only occasionally provide assistance” (e.g. [Flynn v Scougall \(Practice Note\) \[2004\] EWCA Civ 873; \[2004\] 1 W.L.R. 3069, CA](#), at para.23, per May LJ; [Parsons v George \[2004\] EWCA Civ 912; \[2004\] 1 W.L.R. 3264, CA](#), at para.41,

per Dyson LJ). Often the courts are more positive and, whilst accepting that recourse to earlier authorities is inappropriate, frankly admit that they “provide valuable guidance”, especially where this is common ground (*Ultraframe (U.K.) Ltd v Eurocell Building Plastics Ltd* [2005] EWHC 2111 (Ch); (2005) 28(10) I.P.D. 2807 (Pumfrey J)). Where pre-CPR authorities were used to fill serious gaps in the RSC, they have also been relied upon for the purpose of filling such gaps surviving in the CPR, and instances have arisen of such authorities being incorporated in the CPR without embarrassment through the exercise of the court’s power under r.3.10 (General power to rectify matters where there has been an error of procedure) (e.g. *Nesheim v Kosa* [2006] EWHC 2710 (Ch); [2007] W.T.L.R. 149 (Briggs J) (retrospective permission to serve claim form out of jurisdiction)). In some instances the courts have seized on the freedom given by the CPR and have relished the opportunity to ignore certain well-established pre-CPR authorities; e.g. *Morgan Est (Scotland) Ltd v Hanson Concrete Products Ltd* [2005] EWCA Civ 134; [2005] 1 W.L.R. 2557, CA (mistaken service on wrong party where claim statute barred). Paradoxically, sometimes recourse to pre-CPR authorities is justified on the ground that that is required by the court’s duty to deal with cases justly in accordance with the overriding objective, so far as is practicable (r.1.1); e.g. *Humber Work Boats Ltd v Owners of the Selby Paradigm* [2004] EWHC 1804 (Admty); [2004] 2 Lloyd’s Rep. 714; (2004) 154 N.L.J. 1362 (David Steel J). Obviously, whatever significance may be given to the CPR being “a new procedural code”, necessarily the requirement that the court must seek to give effect to the overriding objective when it exercises any power given to it by the CPR or interprets any rule (r.1.2) may loosen the hold that pre-CPR authority may have in particular contexts (see para.12-45). For examples of the application of pre-CPR authorities for purpose of applying particular CPR provisions, see below.

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13. - Reliance on Pre-CPR Authorities

12-52 Despite the fact that the **CPR** constitutes “a new procedural code”, most of the provisions in the CPR have been copied from former **RSC** and **CCR** provisions, often virtually word-for-word, but mostly with some modest attempt at simplifying the language. Instances have arisen of the Court of Appeal holding that phrases found in pre-CPR rules, but which have been omitted from their leaner CPR analogues, should be read into the latter (e.g. *Bailey v Warren* [2006] *EWCA Civ* 51; [2006] *C.P. Rep.* 26; [2006] *M.H.L.R.* 211, *C.A.*, (words found in RSC Ord.80, r.11 (Approval of settlement), to be read into CPR r.21.10 (Compromise etc. by or on behalf child or patient)). Where former **RSC** and **CCR** provisions were to the same effect, though differently expressed, a tendency to use **CCR** rather than **RSC** formulations is apparent (see e.g. *Anderton v Clwyd CC (No.2)* [2003] *EWCA Civ* 933; [2002] *1 W.L.R.* 3174, *CA*, explaining CPR service out of jurisdiction rules). Where they were not to the same effect a choice had to be made. Since the CPR have come into effect, in interpreting and applying CPR provisions where their provenance in the **RSC** and **CCR** is obvious, the courts have routinely relied on, and re-affirmed, case law relating to the former provisions in those circumstances where, by doing so, the key case management policies introduced by the CPR are not undermined. Illustrations of this are legion.

A few examples arising recently are as follows (for many earlier examples, see this paragraph in the 2012 edition of the White Book): *Capewell v Revenue and Customs Commissioners* [2007] *UKHL* 2; [2007] *1 W.L.R.* 386, *HL* (indemnity of receiver in respect of costs and expenses); *Moat Housing Group-South Ltd v Harris* [2007] *EWHC* 3092 (*QB*); *158 New L.J.* 67 (2008) (Christopher Clarke J) (detailed assessment proceedings where two solicitors representing receiving party); *Kostic v Chaplin* [2007] *EWHC* 2909 (*Ch*); [2008] *2 Costs L.R.* 271; [2008] *W.T.L.R.* 655 (Henderson J) (costs in contentious probate claim); *Phillips v Nussberger* [2008] *UKHL* 1; [2008] *1 W.L.R.* 180, *HL* (application of authorities on RSC Ord.2, r.1, to **CPR** r.3.10); *West London Pipeline & Storage Ltd v Total UK Ltd* [2008] *EWHC* 1296 (*Comm*); [2008] *C.P. Rep.* 35; [2008] *1 C.L.C.* 935 (David Steel J) (providing of additional information in relation to liability insurance arrangements); *Harris v Society of Lloyd's* [2008] *EWHC* 1433 (*Comm*); [2009] *Lloyd's Rep. I.R.* 119 (David Steel J) (court's power to order disclosure for the purpose of interlocutory proceedings); *Emerald Supplies Ltd v British Airways plc* [2009] *EWHC* 741 (*Ch*); [2010] *Ch.* 48 (Sir Andrew Morritt C.) (whether “other persons” whom the claimant sought to represent had “the same interest” within r.19.6(1)); *SSL International Plc v TTL LIG Ltd* [2011] *EWCA Civ* 1170; [2012] *1 W.L.R.* 1842, *CA* (whether service on director of foreign company valid under r.6.5(3) where company not carrying on business within the jurisdiction); *Test Claimants in FII Group Litigation v Revenue & Customs Comrs (No.2)* [2012] *EWCA Civ* 57; [2012] *1 W.L.R.* 2375, *CA* (proper construction of condition for interim payment in **CPR** r.25.7(1)(c) to be derived from authorities on RSC Ord. 25 r.11(1)(c)); *Summers v Fairclough Homes Ltd* [2012] *UKSC* 26; [2012] *1 W.L.R.* 2004, *SC* (exercise of exceptional power to strike out statement of case under rule or inherent jurisdiction for abuse of process even after the trial of an action in circumstances where the court has been able to make a proper assessment of both liability and quantum); *SG (A Child) v Hewitt (Costs)* [2012] *EWCA Civ* 1053; [2013] *1 All E.R.* 1118, *CA* (costs implications of claimant's late acceptance of defendant's pre-action settlement offer); *San Vicente v Secretary of State for Communities and Local Government* [2013] *EWCA Civ* 817; [2014] *1 W.L.R.* 966, *CA* (application under r.17.2 for late amendment to “in-time” challenge to planning decision).

It is often said that one of the advantages that follows from the **CPR**'s being a new procedural code is that enables the courts to apply rules flexibly for the primary purpose of giving effect to the overriding objective. In cases where it can be strongly argued that a particular provision should be interpreted or applied in a certain manner, and that manner happens to yield a more restrictive result than the comparable pre-CPR rules and the authorities thereon would have yielded, the courts do not shrink from reverting to the earlier position (see *George Wimpey UK Ltd v Tewkesbury BC* [2008] *EWCA Civ* 12; [2008] *1 W.L.R.* 1649, *CA*, where authorities on RSC Ord.59, r.3 relied on in holding that **CPR** r.52.1 countenanced appeal by party not a party to the proceedings below).

Cases have arisen where the failure of counsel to recognise that pre-CPR authorities continue to be of considerable persuasive force (if not strictly binding) have caused avoidable confusion and lead to unnecessary appeals (e.g. *Garratt v Saxby* [2004] EWCA Civ 341; [2004] 1 W.L.R. 2152, CA (inadvertent disclosure of defendant's payment into court)). In *Drinkall v Whitwood* [2003] EWCA Civ 1547; [2003] EWCA Civ 1547; [2004] 1 W.L.R. 462, CA, relevant pre-CPR authority dealing conclusively with the procedural point in issue came to light only after permission to appeal to the Court of Appeal had been given.

In *Nomura International Plc v Granada Group Ltd* [2007] EWHC 642 (Comm); [2007] 2 All E.R. (Comm) 878; [2008] Bus. L.R. 1, Cooke J neatly summarised points made above (and in para.1.3.9), by noting that whereas, on the one hand, there are numerous authorities stressing that detailed reference to decisions on particular rules in the RSC are of little value in interpreting provisions of the CPR where the wording and the substance of a particular provision are different, there are, on the other, numerous instances where the courts have drawn upon decisions relating to the RSC where the new rule under the CPR follows the same form and appears to have the same underlying intention.

14. - Human Rights Act 1998 and the CPR

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Section 12 - CPR: Application, Amendments and Interpretation

CPR: Application, Amendments and Interpretation

E. - Construction and Interpretation of Rules

14. - Human Rights Act 1998 and the CPR

- 12-53** The [Human Rights Act 1998](#) gives further effect to rights and freedoms guaranteed under the European Convention on Human Rights (see Vol.2, para.3D-2). The Act came into effect on 2 October 2000. [Section 1\(1\)](#) states that, under the Act, *Convention rights* means the rights and fundamental freedoms set out in arts 2 to 12 and 14 of the Convention, arts 1 to 3 of the First Protocol, and arts 1 and 2 of the Sixth Protocol, as read with arts 16 to 18 of the Convention. The Convention articles, the First Protocol articles, and the Sixth Protocol articles referred to in this definition are set out, respectively, in [Pts I, II](#) and [III of Sch.1 to the Act](#).

[Section 2 of the Act](#) states that a court, in determining a question which has arisen under the Act in connection with a Convention right, must take into account judgments of the European Court of Human Rights and certain other related sources of law, for convenience sometimes compendiously and colloquially described as “the Strasbourg jurisprudence”. [Section 3](#) states that, so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights. [Section 4](#) states that, in certain circumstances, a court may make a declaration that a provision of primary or subordinate legislation is incompatible with a Convention right. [Section 6](#) states that it is unlawful for a “public authority” to act in a way which is incompatible with a Convention right. In this context, *public authority* includes a court.

Guidance on the approach which the courts should adopt to the difficult task of interpreting primary legislation and subordinate legislation in a manner which is compatible with Convention rights was given by the House of Lords in [R. v A. \(No.2\) \[2001\] UKHL 251; \[2001\] 2 W.L.R. 1546, HL](#). In that case Lord Steyn said (at para.[44]) that the interpretative obligation under [s.3 of the 1998 Act](#) is a strong one. It applies even if there is no ambiguity in the language in the sense of the language being capable of two different meanings. The section places on the court a duty to strive to find a possible interpretation compatible with Convention rights. In complying with the will of Parliament as expressed in [s.3](#), it will sometimes be necessary for a court 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 a statutory provision but also their implications. A declaration of incompatibility is a measure of last resort.

The Convention rights most likely to find their voice (either separately or in conjunction) in relation (1) to questions concerning the proper interpretation of primary and subordinate legislation affecting (what broadly could be called) civil procedural law, or (2) to questions about whether certain aspects of such law should be declared incompatible with Convention rights, are arts 6(1) and 8 of the Convention (right to a fair trial and right to respect for private life) and art.1 of the First Protocol (right to property) (see Vol.2, paras [3D-76, 3D-78](#) and [3D-87](#)). Other Convention rights may also come into play, but perhaps less frequently. The potential applicability of each of these rights is considered in more detail in the notes to individual [CPR](#) rules. As to the circumstances where art.6 may be said to have been violated by delays in completing proceedings, see Section 11 —The Overriding Objective para.[11-8](#).

The European Court of Human Rights has recognised the legitimacy of certain restrictions on the right of access to a court guaranteed by art.6. The governing test, set out in the judgment of the court in [Ashingdane v UK \(1985\) 7 E.H.R.R. 528](#), is that such restrictions must not impair the essence of the right of access; they must have a legitimate aim, and the means used must be reasonably proportionate to the aim sought to be achieved. In applying this test, the Court has recognised that the enactment of limitation periods represents the pursuit of a legitimate aim (see [Stubbing v UK \(1996\) 23 E.H.R.R. 524](#)). Other examples are restrictions placed on the bringing of proceedings by vexatious litigants and by persons under disability, and procedural rules providing for the striking out of actions for want of prosecution.

In recent times, the Court of Appeal has dealt with cases in which it has been argued that, in discharge of their obligation under s.3 of the 1998 Act, the Court was required to interpret primary legislation and subordinate legislation on limitation of actions in a manner that was compatible with a party's art.6 Convention rights. Examples are: *Cachia v Faluyl* [2001] EWCA Civ 998; [2001] 1 W.L.R. 1966, CA (Fatal Accidents Act 1976 s.2(3)); *Goode v Martin* [2001] EWCA Civ 1899, CA (Limitation Act 1980 s.35 and CPR r.17.4); *A. v Hoare* [2006] EWCA Civ 395; [2006] 1 W.L.R. 2320; [2006] 2 F.L.R. 727, CA (s.3 cannot be applied retrospectively for the purpose of depriving a defendant of his accrued rights under the Limitation Act 1980 s.2; *Re W (A Child) (Care Proceedings: Non Party Appeal)* [2016] EWCA Civ 1140; [2017] 1 W.L.R. 2415; [2017] 1 F.L.R. 1629, CA (witnesses able to appeal adverse findings made against them in a judgment, where the possibility of such findings was not put to them during the hearing, able to challenge the decision by way of appeal on the basis that the court had acted unlawfully contrary to s.6 of the 1998 Act by failing to provide them with a fair process.).

It has been said that it should be remembered that the CPR "were drafted with the ECHR in the background and were clearly intended to be compliant with it" (*Less v Benedict* [2005] EWHC 1643 (Ch)). It is clear from r.1.1 that the overriding objective of the CPR is to enable courts to provide a fair trial process. This aim is consistent with the purpose of art.6(1). The overriding requirement of a fair hearing under art.6(1) places the court under a duty "to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant to its decision": *Kraska v Switzerland* (1994) 18 E.H.R.R. 188, para.30, ECtHR. The Court of Appeal has stated that art.6 does no more than reflect the approach of the common law as indicated in *R. v Lord Chancellor, ex. p. Witham* [1998] Q.B. 575, DC; *Ebert v Birch* [2000] Ch. 484, CA.

In *Bow Spring (Owners) v Manzanillo II (Owners) (Note)* [2004] EWCA Civ 1007; [2004] 4 All E.R. 899, CA, the Court of Appeal said that the fairness required by both the common law and by art.6 requires that the parties should have knowledge of, and be able to comment on, all evidence adduced or observations filed with a view to influencing the court's decision, and held that, where the Admiralty judge sits with assessors (see CPR r.61.13), the practice of the judge putting questions to the assessors after discussion with counsel should be complemented by a practice of disclosing their answers to counsel, either orally or in writing, in order that any appropriate submission could be made as to whether the judge should accept their advice.

In *Secretary of State for Health v Norton Healthcare Ltd* [2003] EWHC 1905 (Ch); [2004] Eu. L.R. 12, where witnesses were unavailable to the defendants because of outstanding criminal charges against them, the defendants were unsuccessful in arguing that, on equality of arms grounds, the trial proceedings against them should be stayed.

The fairness of a trial is assessed by reference to the proceedings as a whole, including any appeal: *Dombo Beheer BV v Netherlands* (1994) 18 E.H.R.R. 213, para.31, ECtHR; *Official Receiver v Stern* [2000] 1 W.L.R. 2230, CA; *Daisystar Limited v Woolwich Plc* [2000] EWCA Civ 79, CA. A fair hearing before an appeal court may "cure" breaches of ECHR, art.6(1) at the first instance: *Edwards v United Kingdom (A/247B)* (1993) 15 E.H.R.R. 417, and *De Cubber v Belgium* (1985) 7 E.H.R.R. 236, ECtHR. See also *R. (on the application of Holding & Barnes Plc) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23; [2003] 2 A.C. 295; [2001] 2 W.L.R. 1389, HL.

The rights which the ECHR has found to be inherent in art.6 include the following:

- (a)The right to equality of arms, under which each party must be afforded a reasonable opportunity to present his case under conditions which do not place him at a substantial disadvantage vis-à-vis his opponent: *De Haes v Belgium* (1998) 25 E.H.R.R. 1. This principle is echoed in the r.1.1(2)(a) principle of ensuring that the parties are on an equal footing.
- (b)The right of access to a court: *Golder v United Kingdom (A/18)* (1979–80) 1 E.H.R.R. 524, para.35, ECtHR. This principle is echoed in the r.1.1(2) generally, and specifically r.1.1(2)(e). This concept is now familiar to English law: *R. v Lord Chancellor Ex p. Witham* [1998] Q.B. 575, DC. This right is not absolute, and may be circumscribed by procedural rules, provided that such rules do not restrict court access to such an extent that the "very essence of the right is impaired": *Ashingdane v UK* (1985) 7 E.H.R.R. 528, para.57, ECtHR. See also *Kreuz v Poland* (28249/95) 11 B.H.R.C. 456, ECtHR, 1st section (excessive court fees unduly restricted right of access to court). A practical and effective right of access to a court may require the provision of legal assistance or representation in certain cases, depending on their complexity or the importance of what is at stake for the individual: *Airey v Ireland* (1979) 2 E.H.R.R. 305, ECtHR. The test is whether a claimant has had a reasonable opportunity of putting his or her case. Legal assistance may be required where its absence would make assertion of a civil claim practically impossible or lead to an obvious unfairness: *R. (Jarrett) v Legal Services Commission* [2001] EWHC Admin 389. The fact that the Legal Services Commission (now Legal Aid Agency) has refused

funding may be a significant factor in support of the contention that ECHR, art.6(1) has not been breached: *R. v Secretary of State for the Environment, Transport and the Regions Ex p. Challenger [2001] Env. L.R. 12; [2000] H.R.L.R. 630, QBD*. See also *Simon John Pine v Law Society, sub nom Re a Solicitor [2001] EWCA Civ 1574*.

(c)The right to a properly adversarial procedure. This entails the right of a party not only to have the opportunity to make known any evidence needed for his claims to succeed, but also to have knowledge of and to comment on all evidence adduced or observations submitted with a view to influencing the court's decision: *Mantovanelli v France (1997) 24 E.H.R.R. 370, para.33, ECtHR*. See also *Pellegrini v Italy (30882/96) (2002) 35 E.H.R.R. 2*.

Section 6 of the Human Rights Act 1998 provides that it is unlawful for a court to act in a way which is incompatible with a Convention right (see Vol.2, para.3D-23). In *Jones v Warwick University [2003] EWCA Civ 151, CA*, the question was whether the court, by not excluding evidence unlawfully obtained by the defendant's agents in breach of the claimant's art.8 rights (right to respect for private and family life), had properly exercised its discretion under r.32.1 (power of court to control evidence). Lord Woolf CJ said that, once a court had decided upon the order that it should make for the purpose of exercising, in accordance with the overriding objective (r.1.1), its discretion under r.32.1, then it was required or was necessary for the court to make that order and there was no breach of the claimant's art.8 rights by the court.

A. - Qualification or Entitlement to Act as an Advocate

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Rights of Audience

A. - Qualification or Entitlement to Act as an Advocate

13-2

At common law, nobody had a right to act as an advocate without the leave of the court which, as part of its power to regulate its own proceedings, had a discretion to control who addressed it. Nevertheless, by ancient usage in the superior courts barristers and others similarly qualified could not be prevented from acting as advocates (*Paragon Finance Plc v Noueiri (Practice Note) [2001] 1 W.L.R. 2357; CA*, at para.52). Since 1 January 2010, the right to act as an advocate—to exercise a right of audience—is governed exclusively by the [Legal Services Act 2007 ss.12–21](#) and [Schs 2–3](#). The [2007 Act](#) preserved the position of persons having rights of audience before it came into effect i.e., those which were regulated by the statutory scheme set out in the [Courts and Legal Services Act 1990 Pt 2](#), as amended by [Pt III of the Access to Justice Act 1999 \(Gregory v Turner \[2003\] EWCA Civ 183; \[2003\] 1 W.L.R. 1149, CA, at para.50 et seq\)](#).

Under the [1990 Act](#) the ability to attain rights of audience was expanded so that it became possible for solicitors to attain rights of audience in the higher courts and for other professional groups (in addition to barristers and solicitors) to be designated by statutory instrument as bodies authorised to grant rights of audience to their members for particular purposes. Professional bodies that took advantage of this opportunity included the Institute of Legal Executives ([SI 1998/1077](#)), the Chartered Institute of Patent Agents ([SI 1999/3137](#)), the Institute of Trade Mark Attorneys ([SI 2005/240](#)), and the Association of Law Costs Draftsmen ([SI 2006/3333](#)). Under regulations made by such authorised bodies, a member of the professional group concerned may be granted a right of audience (or a right to conduct litigation) restricted in certain respects (see *Atrium Medical Corporation v Atrium Europe BV [2011] EWHC 74 (Pat)*, where a question arose as to the extent to which rights enjoyed by a patent agent before the 2007 Act came into effect, and surviving thereafter, complemented limited rights conferred by the relevant regulations). For a summary of the different rules which governed rights of audience prior that the 1990 Act, see White Paper “Legal Services: a Framework for the Future”, Cm 740 July 1989.

The [Legal Services Act 2007](#) established the Legal Services Board (LSB). In part, the LSB’s function is to regulate the professional bodies (“approved regulators”) that are permitted to grant rights of audience (and rights to carry on other legal activities) to their members. That is to say, to regulate in this respect, in addition to the four bodies authorised to grant rights of audience mentioned in the previous paragraph, the Law Society and the General Council of the Bar. Where rights of audience are granted under the 2007 Act’s regulatory scheme, they are exercisable in accordance with the qualification regulations and rules of conduct of the authorised body as approved under the scheme. The commentary which follows is based on provisions in the [2007 Act](#).

B. - Authorised Persons and Exempt Persons

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Rights of Audience

B. - Authorised Persons and Exempt Persons

13-3

In the [2007 Act](#) the term “legal activities” is used to describe generally activities which consist of the provision of legal advice or assistance or of representation, and the term “reserved legal activities” is used to describe some particular activities, including the exercise of a right of audience ([s.12\(1\)](#)). A *right of audience* means the right to appear before and address a court, including the right to call and examine witnesses ([s.12](#) and [Sch.2 para.3\(1\)](#)).

[Section 13\(1\) of the 2007 Act](#) states that the question whether a person is entitled to carry on an activity which is “a reserved legal activity” is to be determined solely in accordance with the provisions of this Act. [Section 13\(2\)](#) states that a person is entitled to carry on an activity (“the relevant activity”) which is a reserved legal activity where (a) the person is an authorised person in relation to the relevant activity, or (b) the person is an exempt person in relation to that activity. In this context, an “authorised person” is a person able to exercise rights of audience (whether limited to particular courts and proceedings or unlimited) in accordance with regulations of an authorised body under the statutory scheme. An “exempt person” (see [s.19](#)) is a person determined as such by [para.1 of Sch.3 to the 2007 Act](#). By this provision, the [2007 Act](#) recognises (as did the [1990 Act](#)) that, in certain circumstances, a person who is not authorised in accordance with the statutory scheme to exercise rights of audience may nevertheless do so. Commentary on the various categories of exempt person is set out below.

In particular proceedings, the question may arise as to whether an authorised person’s rights of audience (being rights that are limited) extend to those proceedings. But, as a practical matter, the question that is more likely to arise is whether a person (not being an authorised person) falls into one of the categories of exempt person and has a right of audience in those proceedings, or should be granted such right, by that route. So [Sch.3 para.1 of the 2007 Act](#) is a key provision. It should be noted that it plays a similar role to that formerly played by [s.27 of the 1990 Act](#), a provision that has figured in the case law on the granting of rights audience to persons not authorised to exercise such rights under the statutory scheme.

Under the [Senior Courts Act 1981 s.51](#), the court may order a “legal or other representative” to meet wasted costs as may be determined by rules of court (see [CPR r.44.14](#) and [r.48.7](#)). In this context *legal or other representative*, in relation to a party to proceedings, means any person exercising a right of audience (or a right to conduct litigation) on his behalf ([s.51\(13\)](#)). Thus, a person qualified or entitled to exercise a right of audience on any of the bases, which would include an individual granted a right of audience by the court i.e., a so-called McKenzie Friend, described in the following paragraphs may be exposed to liability for a wasted costs order in appropriate circumstances.

It is a criminal offence for a person to carry on a reserved legal activity (including an activity in the form of the exercise of a right of audience) ([2007 Act ss.14 to 17](#)). It is also an offence for a person who is not: (i) a barrister (a) willfully to pretend to be a barrister, or (b) with the intention of implying falsely that that person is a barrister to take or use any name, title or description ([s.181](#)); and (ii) a solicitor to act as a solicitor ([Solicitors Act 1974 s.20](#)).

In [Baxter v Doble \[2023\] EWHC 486 \(KB\)](#) reviewed the authorities on what amounted to the conduct of litigation ([2007 Act, ss.12, 14, scheduled 12\(2\), para.4](#)). Cavanagh J concluded that in assessing whether an individual had carried out the conduct of litigation the question had to be considered in the round by looking at the totality of the activities that the individual had undertaken on behalf of a litigant (at [208]). While activities prior to the issue or commencement of proceedings and the provision of legal advice did not amount to the conduct of litigation, they could be taken into account in considering the totality of activities (at [207]). It was clear that steps taken in relation to statements of case, including drafting, preparing enclosures, checking bundles, paying court fees, ensuring documents complied with and were filed in accordance with the CPR amounted to the conduct of litigation. As did sending documents for review by an advocate and taking decisions concerning how to effect service (at [187]–[207]).

C. - Right of Audience Granted by or under Any Enactment

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Rights of Audience

C. - Right of Audience Granted by or under Any Enactment

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Certain provisions granting rights of audience are considered below. It should be noted that various other provisions enable persons who are not parties to proceedings “to appear and be heard” or “to appear and make representations” in particular circumstances. It is not always clear whether such dispensations give the person a right of audience in the sense of enabling him to address the court and call and examine witnesses. Some examples are: [Orders for the Delivery of Documents \(Procedure\) Regulations 2000 \(SI 2000/2875\) reg.7](#) (Commissioners entitled to appear and be heard at hearing of taxpayer’s application to resolve dispute as to legal privilege in documents); [Community Legal Service \(Costs\) Regulations 2000 \(SI 2000/441\) reg.13](#) (LSC Regional Director and any other person authorised to act on his behalf, given right to appear at certain hearings where issues as to costs payable by a funded client or the LSC); CPR PD 8 para.15A.6 (Civil Aviation Authority entitled to be heard in application to amend aircraft mortgages register); CPR r.52.12A, in a statutory appeal, any person may apply for permission “to make representations” at the appeal hearing, and [CPR r.54.17](#) makes similar provision in relation to hearings for judicial review claims.

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1. - Lay Representatives in Small Claims (s.11 of 1990 Act)

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Rights of Audience

C. - Right of Audience Granted by or under Any Enactment

1. - Lay Representatives in Small Claims (s.11 of 1990 Act)

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An exempt person includes a person who is not an authorised person in relation to the reserved legal activity, meaning, the exercise of a right of audience, but who has a right of audience “in relation to those proceedings granted by or under any enactment”: [2007 Act Sch.3 para.1\(3\)](#).

One example of an enactment granting a right of audience is the [Courts and Legal Services Act 1990 s.11](#) (Representation in certain county court and family court cases). This provision was not affected by the [2007 Act](#). It states that the Lord Chancellor may (with the concurrence of the Lord Chief Justice) by Order provide that there shall be no restriction on the persons who may exercise rights of audience “in relation to proceedings in the county court of such a kind as may be specified in the Order”. For these purposes *right of audience* means the right to exercise all or any of the functions of appearing before and addressing a court including the calling and examining of witnesses as defined ([1990 Act s.119\(1\)](#)). The [Lay Representatives \(Rights of Audience\) Order 1999 \(SI 1999/1225\)](#) was made in exercise of this power. It enables lay representatives to exercise rights of audience in proceedings dealt with as small claims in accordance with rules of court (see further Vol.1 para.[27.8.2](#)). [Article 3\(2\) of the Order](#) provides that this right of audience may not be exercised (a) where the lay representative’s client does not attend the hearing, (b) at any stage after judgment, or (c) on any appeal brought against any decision made by the district judge in the proceedings. Read literally, this would appear to exclude any discretion to allow appearance by a lay representative where those conditions are not met. However, CPR PD 27 (Small Claims Track) para.3.2 recites [Art.3\(2\)](#) and further states that the court “exercising its general discretion to hear anybody” may hear a lay representative even in circumstances excluded by the Order (see Vol.1 para.[27PD.3](#)). The “general discretion” referred to here is that referred to in [2007 Act Sch.3 para.1\(2\)](#) (formerly [1990 Act s.27\(2\)\(c\)](#); see further below). (This confirms the view that [s.11](#) is intended to widen rights of audience which would otherwise be available, and therefore does not detract from the general discretion; see [Gregory v Turner](#), op cit.) Provisions in [s.11](#) give the court various powers to restrict a lay representative in the exercise of their right of audience where they behave in an unruly manner or intentionally mislead the court or otherwise demonstrate that they are unsuitable to exercise that right.

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2. - Housing Authority Officers and Employees of Housing Management Bodies (ss.60 and 60A of 1984 Act)

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Section 13 - Rights of Audience

Rights of Audience

C. - Right of Audience Granted by or under Any Enactment

2. - Housing Authority Officers and Employees of Housing Management Bodies (ss.60 and 60A of 1984 Act)

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[County Courts Act 1984 s.60](#) contains a long-standing provision of practical importance providing for the grant of rights of audience to local authority housing officers where “certain housing claims are brought in a county court by a local authority then, in so far as the proceedings in the claim are heard by a district judge”. The modern tendency is, however, for local housing authorities to contract out their responsibilities to non-government agencies (known as Arm’s Length Management Organisations (ALMOs)). Such agency employees are not within the scope of [s.60](#). To remedy this deficiency, s.191 of the 2007 Act inserted a new provision, s.60A (Rights of audience etc of employees of housing management bodies), into the [1984 Act](#). This provides that in certain housing proceedings in the county court before a district judge, brought (a) in the name of a local housing authority and (b) by the housing management body in the exercise of functions of the authority delegated to that body under a housing management agreement, an authorised employee of the body has a right of audience (including a right to call an examine witnesses). The type of housing proceedings to which this dispensation applies are stated in [s.60A\(3\)](#) and [\(6\)](#). The authorisation must be in writing ([s.60A\(4\)](#)). (“Housing management agreement” and “housing management body”) are defined in [s.60A\(7\)](#).) For some reason, perhaps oversight, [s.60A](#) has not been brought into force.

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3. - Representation at Trial of Corporations (CPR r.39.6)

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3. - Representation at Trial of Corporations (CPR r.39.6)

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The general rule, subject to the important exception below, is that a corporate body can only be represented at a court hearing by its legal advisers with appropriate rights of audience. It has no right, comparable to the right that a litigant in person enjoys, to represent itself. However, the court may be prepared to exercise its discretion to relax this rule. This was demonstrated in cases decided before the CPR came into effect. For example, it was held that a director of a company might appear as an advocate on its behalf where the company's assets were frozen by a freezing order so that it could not instruct solicitors (*Arbuthnot Leasing International Ltd v Havelet Leasing Ltd [1992] 1 W.L.R. 455*, ChD), or where the director and his company were both parties to proceedings the court might allow the director to appear in person for purposes which were those also of the company (*Radford v Samuel [1993] B.C.C. 870, CA*).

CPR r.39.6 provides an important exception to the general rule. It states that the court may give permission for a company or other corporation "to be represented at trial" by an employee if the employee has been authorised by the company to appear at trial on its behalf. In effect, the rule enacts what had been a quite common practice in county courts but its practical usefulness in those courts has been diminished by the expansion of the small claims jurisdiction. CPR PD 39 (Miscellaneous Provisions Relating to Hearings) para.5 states that r.39.6 "is intended to enable a company or other corporation to represent itself as a litigant in person" and goes on to state that permission should be given "unless there is some particular or sufficient reason why it should be withheld". Presumably, therefore, the employee representing the company at trial may, in addition to appearing before and addressing the court, call and examine witnesses. Paragraph 5 further states that the court's permission should be obtained in advance of the hearing and may be obtained informally and without notice to the other parties, and also describes some of the considerations relevant to the grant or refusal of permission (Vol.1, paras 39.6.1 and 39APD.5). The rule opens up the possibility that a company may be represented at a trial by in-house counsel (possibly one already the holder of restricted rights of audience not extending to trials). In the Admiralty and Commercial Courts Guide para.M3.1, it is said that, because of the complexity of most cases in the Commercial Court, permission under r.39.6 is likely to be given only in unusual circumstances (Vol.2 para.2A-129). See also the Chancery Guide (Vol.2, para.1A-183). For examples of applications of r.39.6, see *Watson v Bluemoor Properties Ltd [2002] EWCA Civ 1875*, CA; *Tamglass Limited OY v Luoyang North Glass Technology Company Limited [2006] EWHC 65 (Ch)* (employee of defendant foreign company permitted to represent company in patent action). A company or other corporation representing itself as a litigant in person may, with the court's permission, be represented by a McKenzie Friend, see further below *Milne v Kennedy, The Times, 11 February 1999, CA* (unincorporated association, grant of representation to lay person should only be permitted in exceptional circumstances); *Bank St Petersburg PJSC v Arkhangelsky [2015] EWHC 2997 (Ch)* paras 73–75 (confirming court's power to permit representation via a McKenzie Friend).

CPR r.39.6 is confined to the representation of companies or other corporations by their duly authorised employees at trial. In terms, the rule does not confer on such employees rights of audience in relation to other hearings.

4. - Official Receivers

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4. - Official Receivers

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[Insolvency Rules \(England and Wales\) 2016 \(SI 2016/1024\) r.13.1\(2\)](#) states that official receivers and deputy official receivers have a right of audience in insolvency proceedings, whether in the High Court or the county court. Additionally, Practice Direction—Directors Disqualification Proceedings para.3.1 states that official receivers and deputy official receivers have a right of audience in any proceedings to which the Practice Direction applies. The right extends to cases where a disqualification application is made under the [Company Directors Disqualification Act 1986](#) by the Secretary of State or by the official receiver at his direction, and whether made in the High Court or a county court. For further information on the effect of this provision, see commentary on para.3.1 (Vol.2, para.[3J-12](#)).

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5. - Detailed Assessment Proceedings

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C. - Right of Audience Granted by or under Any Enactment

5. - Detailed Assessment Proceedings

- 13-9 For an account of the persons who may exercise rights of audience in detailed assessment proceedings, including assessments involving litigants in person, see Vol.1 para.[47.14.10](#).

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D. - Person Assisting in the Conduct of Litigation or Engaged in Legal Employment

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D. - Person Assisting in the Conduct of Litigation or Engaged in Legal Employment

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The combined effect of [2007 Act](#), ss.13, 19, and Sch.3 para.1(7), is to provide that in certain circumstances a person “whose work includes assisting in the conduct of litigation” is an exempt person for the purpose of exercising a right of audience. Before the [Courts and Legal Services Act 1990](#) came into effect, solicitors’ general rights of audience in the High Court and county courts when sitting in chambers, extended to their responsible representatives; particularly to solicitors’ clerks and legal executives, and to persons providing clerk’s services and who were not employed but acted under instructions. There was no such right in open court although, in the exercise of a discretion, a judge could grant this. These statutory provisions were designed to preserve that position and must be seen against that background.

Some unqualified persons who offer advocacy services describe themselves as “solicitor’s agents”. This is a misleading term in this context as it implies an authority which does not exist. “Solicitor’s agent” is not a term used in the [2007 Act](#). Such persons are generally self-employed and obtain work through an agency. Being unqualified they are not subject to the disciplinary process of any profession. Importantly, they are not “authorised persons” within [s.18 of the 2007 Act](#) nor “exempt persons” within [s.19](#) and [Sch.3 para.1\(7\)](#) states that a right of audience accrues to such a person when they are: assisting in the conduct of litigation (see [Sch.2 para.4\(1\)](#), *Agassi v Robinson [2006] 1 W.L.R. 2126, CA*, paras 54-5); acting under the instructions and supervision of an authorised litigator e.g., a solicitor; acting in proceedings that are not being heard in chambers and which are not reserved family proceedings (see [s.67 Senior Courts Act 1981](#) and [CPR r.39.2](#)). There is, unfortunately, a lack of clarity within the [CPR](#) as to what amounts to a hearing in ‘chambers’. It is however, apparent, that a hearing ‘in chambers’ is not a hearing ‘in private’, but rather one held in a judge’s chambers rather than a court room; *Hodgson v Imperial Tobacco Ltd [1998] 1 W.L.R. 1056, CA*, at 1069 and following, and see *R v Bow County Court [1999] 1 W.L.R. 1807, CA*, at 1813. Furthermore, there has yet to be authoritative general guidance on the application of [Sch.3 para.1\(7\)](#). Two County Court decisions concerning the application of the provision are illustrative of the need for a court to consider each aspect of the provision: *McShane v Lincoln*, 28 June 2016, unrep., County Court at Birkenhead (DJ Peake); *Ellis v Larson* 20 September 2016, unrep., County Court at Manchester (DDJ Hampson). Where the criteria in [Sch.3 para.1\(7\)](#) are satisfied, the court retains no discretion to refuse a right of audience (see *In re HS (Minors) (Chambers Proceedings: Right of Audience) [1998] 1 F.L.R. 868, CA*, in respect of the position under statutory predecessor to the current provision, [s.27\(2\)\(e\)](#) of the 1990 Act).

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E. - European Lawyers

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E. - European Lawyers

- 13-11 In *Masri v Consolidated Contractors International (UK) Ltd [2007] EWCA Civ 702, CA*, on an application in an appeal to the Court of Appeal a single lord justice permitted an advocate of the Brussels bar, being a person who lacked a right of audience but who was an “EEC lawyer” within [Art.5 of the 1978 Order](#), to address the court on the appellant’s behalf and to speak to a note prepared by him on issues arising in the appeal.
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F. - Right of Audience for Parties Acting in Person

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F. - Right of Audience for Parties Acting in Person

- 13-12** A party acting in person has, and as always had, a common law right to represent themselves in proceedings to which they are a party. This includes both the right to conduct litigation and a right of audience (*Clarkson v Gilbert* op. cit., at para.10, and 2007 Act ss.13 and 19, Sch.3 para.1(6) and para.2(4)). These provisions play the same role in the 2007 Act as did s.27(2) (d) of the 1990 Act. Such a party is an “exempt person” for the purposes the 2007 Act and is to be referred as a “Litigant in Person” (LiP) (*Practice Guidance (Litigants in Person: Terminology) [2013] 1 W.L.R. 1318*). It is conceivable (but perhaps unlikely) that a party may be assisted in the proceedings by a person with rights to conduct litigation (and to that extent will not be acting in person) whilst exercising himself the right of audience (and to that extent will be acting in person). It is also possible that a party to legal proceedings will be a lawyer with rights of audience that would in any event entitle him to act as an advocate in those proceedings.

The right to act in person is non-delegable: see *Gregory v Turner [2003] EWCA Civ 183; [2003] 1 W.L.R. 1149, CA*, a party may not by power of attorney confer on another the right to appear in court as his lay advocate. This decision concerned the restrictions applicable under the *Courts and Legal Services Act 1990*. It was affirmed and applied to the comparable provisions concerning reserved legal activities (the right to conduct litigation and the right to exercise rights of audience) under the *Legal Services Act 2007* in *Ndole Assets Ltd v Designer M&E Services UK Ltd [2018] EWCA Civ 2865; [2019] B.L.R. 147*, unrep., CA. That decision also affirmed that formal service of process came within the definition of ‘the conduct of litigation’ and could not therefore be delegated. It went on to hold though that the simply administrative or mechanical process of service carried out by the post office or process services did not amount to the conduct of litigation.

Presumably, where a party retains a qualified advocate to act on his behalf at a hearing, that party’s personal right of audience derived from para.1(6) of Sch.3 of the 2007 Act lies in abeyance for the period during which the advocate remains instructed. Therefore, the party has no right to top-up (as it were) the assistance of his advocate by speaking either before or after him or by interrupting him. (This was the conclusion reached in a modern New South Wales case where early English authorities on the point were examined; see *Malouf v Malouf (2006) 65 N.S.W.L.R. 449*.)

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1. - The Source of the Court's Discretion

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G. - Right of Audience Granted by the Court in Relation to the Proceedings

1. - The Source of the Court's Discretion

- 13-13 The 2007 Act Sch.3, para.1(2) (as did 1990 Act s.27(2)(c)), recognises and assumes the long-standing existence of a court's inherent ability to grant a right of audience to any person in respect of particular proceedings (the special right of audience) (see *Arbuthnot Leasing International Ltd v Havelet Leasing Ltd [1992] 1 W.L.R. 455*, ChD; *D. v S. (Rights of Audience) [1997] 1 F.L.R. 724*, CA; *Bank St Petersburg PJSC v Arkhangelsky [2015] EWHC 2997 (Ch)* at para.75). It is a power designed to be exercised on a case by case basis (see McKenzie Friends below).

The statutory scheme for the granting of rights of audience by authorised bodies, formerly set out in [Pt II of the 1990 Act](#) and now found in the [2007 Act](#), is designed with a view to maintaining the proper and efficient administration of justice, but it will always be susceptible to the criticism that it is in some respects too restrictive.

The inherent discretionary power acknowledged in [Sch.3 para.1\(2\)](#) may be seen as the frontier on which, on a case by case basis, the defences of the scheme are constantly probed. The provision has given rise to a good deal of case law in which a clash can be observed between, on the one hand, the need to preserve the integrity of the statutory scheme (and other arrangements for granting rights of audience), and on the other, the need to do justice in individual cases to parties acting in person, and to provide the court in such cases with at least some of the assistance that it might normally expect to receive from a qualified advocate.

In dealing with applications for the granting of rights of audience on this basis the courts have stressed that the statutory scheme is in the public interest, enabling those engaged in legal proceedings to know that they are briefing a person who has been properly trained and approved by an appropriate professional body, and it provides judges with the assurance that they can rely on the professionalism and integrity of advocates appearing before them. It has been said that to permit any person unknown to the court with no legal training and no professional accreditation to represent a party "may be unfair to the litigant, unfair to the other parties, and unfair to the court" (*Izzo v Philip Ross & Co [2002] B.P.I.R. 310*).

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2. - The Context for Exercise of the Discretion

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2. - The Context for Exercise of the Discretion

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In *Clarkson v Gilbert [2000] 2 F.L.R. 839, CA*, Lord Woolf C.J. explained that, normally, there are two options open to a person bringing or defending civil proceedings. First, a lawyer who has the appropriate rights of audience can be instructed to appear on their behalf. Secondly, they can act in person. If a party chooses the second option they have, by operation of law, a right of audience which may be exercised personally (Sch.3 para.1(6), formerly s.27(2)(d) of the 1990 Act but which cannot be delegated (*Gregory v Turner* op. cit)). If a party, having chosen the second option, does not want to exercise the right of audience personally, but wants somebody who is not an advocate and who has no rights of audience to appear on their behalf, they may request the court to exercise its inherent discretion acknowledged in Sch.3 para.1(2) and grant that person a special right of audience in relation to the proceedings.

The reported cases show that, as a practical matter, the persons for whom rights of audience have been sought in this way (sometimes successfully, sometimes not) fall into various categories. They include, for example, a member of the party's family or a personal friend (perhaps a work colleague), or a person acting as a so-called McKenzie Friend or as a lay representative in small claim proceedings. (It is possible that a person falling into one of these categories may have some legal qualifications; e.g. a person who has completed his training as a barrister but has not undergone pupillage.) The categories also include a person exercising on behalf of the party a right to conduct litigation, or enjoying restricted rights of audience not broad enough to cover the instant proceedings or a person who is a member of a professional or other body that has not attained the status of a body authorised to grant rights of audience under the statutory scheme, but which may reasonably aspire to such accreditation. A person appointed as a party's litigation friend under CPR Pt 21 does not, by virtue of that appointment, have a right of audience, but there is no reason why he should not apply for a special right (*Gregory v Turner*, op cit., at para.64). The important point to notice is that the exercise by a court of the inherent discretionary power is not confined to granting a special right of audience to holders of restricted rights, but may be exercised to enable a lay person to act as advocate for a party acting in person.

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3. - Application Practice

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3. - Application Practice

- 13-15 In *Clarkson v Gilbert*, op cit, Waller LJ said that the normal time for the making of an application by a party in person for the exercise of the court's discretion is at the first inter partes hearing with the party in person and the other side present. Normally it will be wrong to deal with the matter on an ex parte application. The person for whom the special right of audience is sought should also be present, at least where that person is a lay person, as it is only in those circumstances that the court can make a fully informed decision. The application is the application of the party acting in person, and not the person that that party wishes to have as his advocate. (There is, of course, a chicken and egg problem here, and as a practical matter it may be the latter who will address the court on the application.)

In *Durkan v Madden [2013] EWHC 4409 (Ch)*, at the start of a hearing for the continuation of a freezing injunction a lay person (X) applied for a right of audience so that he might represent a party (C) in her absence. C had signed an application notice in which the first item of relief sought was the grant of rights of audience to X. The judge said a court must be extremely cautious about granting a right of audience to a lay representative in the absence of the party themselves, and refused the application, principally on the grounds that there was nothing in the evidence to explain the circumstances in which that application notice had come to be signed and there were matters which the judge wished to put to C and explore with her before granting a right of audience to X.

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(a) - Generally

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G. - Right of Audience Granted by the Court in Relation to the Proceedings

4. - Exercise of the Discretion

(a) - Generally

13-16 Some guidance concerning the exercise of the discretion may be gained from reported decisions of the Court of Appeal made before the [2007 Act](#) came into force. Just as the context of [s.27\(2\)\(c\)](#) (now [Sch.3 para.1\(2\)](#)), as provided by other provisions of [Pt II of the 1990 Act](#), was called in aid to justify the existence of the discretionary power (see “The source of the court’s discretion” above), so too was it called in aid to illuminate the manner in which it should be exercised. In particular, in [D. v S. \(Rights of Audience\)](#), op cit., and subsequent cases the Court of Appeal called attention to the “statutory objective” and the “general principle for the development of legal services” as stated in [s.17 of the 1990 Act](#), and to the “statutory duty” to adhere to them imposed by [s.18 of that Act](#) on “any person” called upon to exercise any functions which were conferred by [Pt II](#) “with respect to … the granting of rights of audience”. In addition, after it was added to [s.27](#) in 1999, the Court drew attention to the duties imposed on advocates by [s.27.2\(a\)](#). It is obvious that the provisions of [s.17](#) and [s.18](#) applied to persons engaged in operating the statutory scheme as it existed under [Pt II of the 1990 Act](#) for the granting of rights of audience by authorised bodies; for example, the members of the consultative panel established by the Act and the designated judges (institutions that do not figure in the statutory scheme in the [2007 Act](#)). But it is much less obvious that they applied to an individual judge confronted with an application under [s.27\(2\)\(c\)](#) for the grant of a special right of audience for particular proceedings. (The point being that he or she is to be regarded as “any person” within [s.18](#).) And it has to be said, that the calling in aid of [s.17](#) and [s.18](#) originated in cases where the Court was anxious to stress that [s.27\(2\)\(c\)](#) should not be habitually relied on by unqualified persons for the purpose of setting themselves up as providers of advocacy services (whether for reward or not) for parties acting in person (particularly in family law proceedings). That, according to Lord Woolf M.R., would be “monstrously inappropriate”, and totally out of accord with the spirit of the [1990 Act](#), having regard to the stringent requirements as to training and conduct imposed upon those who gain normal rights of audience from authorised bodies ([D. v S. \(Rights of Audience\)](#), op cit).

It has to be noted that, since the replacement of the 1990 Act’s statutory scheme with that now found in the [2007 Act](#), the usefulness of much of this contextual analysis (repeated by the court in [Clarkson v Gilbert](#), see below) as a guide to the exercise of the discretion is diminished. That is because, although [s.27.2\(a\)](#) of the 1990 Act is re-enacted in the [2007 Act](#) (see [s.188](#) and note, [s.1\(3\)\(d\)](#)), [s.17](#) (The statutory objective and the general principle) and [s.18](#) (The statutory duty) are not. Nevertheless, it is submitted that Lord Woolf’s concluding point still holds good. ([Section 1\(1\) of the 2007 Act](#) states a series of *regulatory objectives* which includes promoting and maintaining adherence by authorised persons to “the professional principles” elaborated in [s.1\(3\)](#). The contexts in which the regulatory objectives are referred to in the Act do not include that of a court considering an application for a special right of audience.)

It is submitted that where an application is made in ordinary civil proceedings to grant a right of audience to a person who is not authorised to exercise it the judge should take as their starting point the judgment of the Court of Appeal in [Clarkson v Gilbert](#) op. cit. In that case, Lord Woolf C.J. said that if a party, having chosen to act in person, wants somebody who is not an advocate and who has no rights of audience to appear on their behalf, instead of someone who has rights of audience, that has to be justified; the litigant in person must satisfy the court that that is appropriate. This was a case in which a claimant in person made allegations of conspiracy, inducement to breach of contract, and libel, and wished to have, as her advocate throughout the proceedings, her husband (a man who had completed the Bar finals but had not been called to the Bar). Here the Court held (overruling the judge) that a special right of audience should be granted to the party’s husband. The Court accepted that for reason of ill-health the claimant was unable to conduct the proceedings herself and needed assistance. If the separate judgments of Lord Woolf and Clarke LJ (with whom Waller LJ agreed) are put side by side it can be seen that the Court was of the opinion (1) that (what is now) [para.1\(2\) of Sch.3](#) in no way fetters the discretion, (2) that “all will depend on the circumstances” of the case, (3) that here there was “good reason on the facts” to permit the husband to speak on behalf of the claimant and it

was “just to permit him to do so”, (4) that the fact that the husband could not comply with (what is now s.188) did not mean that he should not be allowed to act as his wife’s advocate. The Court expressly rejected the contention that the discretion could be exercised only in “exceptional circumstances”. The requirement that exceptional circumstances are needed to justify the grant of a right of audience applies, however, where the grant of such rights is sought by a lay person (however so described i.e., including a McKenzie Friend) on a regular basis (*Clarkson v Gilbert* op cit. at para.20, explaining *D. v S.* (Rights of Audience). For comparable provision and explanation, albeit in respect of the criminal courts, see *R v Conaghan [2017] EWCA Crim 597, CACD*). Particular care should be taken when considering an application for the grant of a right of audience to a former barrister, who had been disbarred as the grant of such a right raises a substantial risk that the regulatory scheme for barristers would be undermined, which is contrary to the interests of justice: *Malik v Governor of HM Prison Hindley [2022] EWHC 2684 (Admin)*.

In *Huntingdon Life Sciences Group Plc v Stop Huntingdon Animal Cruelty [2005] EWHC 2233 (QB); [2005] 4 All E.R. 899*, a judge hearing an appeal against a third party debt order, made against an unincorporated association in an harassment claim in which the association was one of several defendants, permitted an unqualified person to represent the association (apparently acting on the instruction of a person who was one of the other defendants in the proceedings). In *R. (England) v Tower Hamlets London BC [2006] EWCA Civ 1742*, CA, the Court of Appeal permitted a solicitor lacking the appropriate rights of audience to make a renewed application to the court for permission to appeal in circumstances where it was not clear whether his client had an interest in continuing judicial review proceedings. For an example of a court permitting a litigation friend to make representations on behalf of an unrepresented defendant, see *SmithKline Beecham Plc v Avery [2007] EWHC 948 (QB)* (hearing of claimant’s application to continue interim injunction made without notice).

In *Zappia Middle East Construction Co Ltd v Clifford Chance [2001] EWCA Civ 1383, CA*, in an application to the Court of Appeal for an extension of time for complying with an order for security for costs, the appellant contended that counsel of his choice was unavailable and applied for permission to enable his solicitor to act as advocate. The Court found that no good reason had been shown, and dismissed the application. In *Harris v Society of Lloyd’s [2008] EWHC 1433 (Comm)*, on the commencement of the hearing of the defendant’s application for summary judgment, an application was made on behalf of a litigant in person (represented in previous interlocutory proceedings by spouse) for permission for that claimant to be represented by a person who, though not an unqualified advocate purporting to offer advocacy services, was a person closely concerned with the events out of which the proceedings arose and who had made witness statements used in parallel proceedings. The judge refused the application and in doing so relied, not on the Clarkson test, but on the “exceptional circumstances” test. A solicitor who has been struck off or suspended from practice is unlikely to be granted a right of audience as that would undermine the sanction imposed by the Solicitors’ Disciplinary Tribunal (*Azumi Ltd v Zuma’s Choice Pet Products Ltd [2017] EWHC 45 (IPEC)* (also see *In re D (A Child) [2005] EWCA Civ 347, CA*).

(b) - Unqualified advocates providing advocacy services

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G. - Right of Audience Granted by the Court in Relation to the Proceedings

4. - Exercise of the Discretion

(b) - Unqualified advocates providing advocacy services

13-17

In *Clarkson v Gilbert* op. cit., the Court of Appeal confirmed, as it had held in *D. v S. (Rights of Audience)*, that in a case where the proposed advocate is a person who has set themselves up as an unqualified advocate and holds themselves out as providing advocacy services, whether for reward or not, the discretion of the court is wide enough to enable a court to grant them a special right of audience in the proceedings. However, in these circumstances, the court will only make an order in exceptional circumstances, as noted above. The courts should pause long before granting rights of audience to individuals who do not meet the stringent requirements laid down in the statutory scheme now found in the *2007 Act* and who make a practice of seeking to represent otherwise unrepresented parties. This was confirmed by the Court of Appeal in *Paragon Finance Plc v Noueiri (Practice Note)* op. cit., a case going well beyond that issue and in which the Court said there was a need for the development of an administrative system to help courts identify such individuals. (It should be explained that, in some instances, these individuals have been experienced and frequently obsessive litigants in their own causes, often subject to civil restraint or civil proceedings orders, making their services available to others as a matter of course. Obviously, a court should be very reluctant to permit a litigant in person to speak through someone whose attitude to his own litigation has justified a court in making such order against him; see *Izzo v Philip Ross & Co*, op. cit. Where an individual is subject to a civil proceedings order it ought to be expected that that order will also apply to such a situation; see *Attorney General v Vaidya [2017] EWHC 2152 (Admin)*.

The key feature of the Court's decision in *Clarkson v Gilbert* was the holding that the judge erred in acting on the assumption that in all applications for the exercise of the court's discretion to grant a right of audience in particular proceedings to a person not authorised to exercise the right the test to be applied was the "exceptional circumstances" test. In some cases, the facts will be such as to make it apparent that the proposed advocate is a person who has set themselves up as an unqualified advocate and is holding themselves out as providing advocacy services, whether for reward or not, and therefore that the court should apply the "exceptional circumstances" test. But it is interesting to note that in some cases dealt with since *Clarkson v Gilbert* op. cit. and *Paragon Finance Plc v Noueiri* op. cit. the courts have, in error, continued to apply the "exceptional circumstances" test in situations that do not fall clearly into the "unqualified advocate holding himself out" category. For example, *Official Receiver v Mularkey [2003] EWCA Civ 404; [2003] C.P. Rep. 59, CA* (forensic accountant with professional relationship with party acting in person and suffering from ill-health granted special right for application for permission to appeal in director's disqualification case); see also *Gregory v Turner*, op cit., at para.57. On the confusion concerning the proper application of the "exceptional circumstances" test see *Re N (A Child) (McKenzie Friend: Rights of Audience) Practice Note [2008] 1 W.L.R. 2743*, Fam., at paras 38–42.

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(c) - McKenzie Friend

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4. - Exercise of the Discretion

(c) - McKenzie Friend

- 13-18 An unrepresented party before the court has a right to receive reasonable assistance from any lay person, commonly known as a McKenzie Friend. Such assistance includes taking notes, quietly making suggestions and giving advice (*McKenzie v McKenzie [1971] P. 33, CA; R. v Leicester City Justices, ex parte Barrow [1991] 2 Q.B. 260* at 289, CA; *R. v Bow County Court, Ex p. Pelling [1999] 1 W.L.R. 1807, CA*). The practice of permitting a party in person to have such reasonable assistance first emerged in county court family proceedings and spread into ordinary civil proceedings. It became more important when the jurisdiction of county courts was significantly increased in the 1990s, and spread to the higher courts. McKenzie Friends do not have a right to conduct litigation or a right of audience. However, once a litigant in person is allowed to have the assistance of a McKenzie Friend, the question might then arise whether the court should exercise its discretion under Sch.3 para.1(2) and grant the assistant a right of audience.

In July 2010, the Master of the Rolls and the President of the Family Division issued *Practice Guidance (McKenzie Friends: Civil and Family Courts) [2010] 1 W.L.R. 1881* (see paras 13-20 et seq., below). It contains guidance for judges, practitioners and parties and is intended as a reminder of the principles set out in the authorities relevant to the role which the courts may permit McKenzie Friends to play in assisting parties in person in the conduct of proceedings. References to the practice (descending to various levels of detail) are found in the Court Guides. See: Chancery Guide para.2.55 (Vol.2 para.1A-16); King's Bench Guide para.2.28 (Vol.2 para.1B-18); Administrative Court Judicial Review Guide para.4.6 (Vol.2 para.1BA-23); Senior Courts Costs Office Guide paras 1.2(h) and 22.1(b) (Vol.2 paras 1C-9 and 1C-137).

In *In re F (Children) [2013] EWCA Civ 726, CA*, the Court of Appeal stated that it is important, particularly in these current times where legal aid is being withdrawn from significant areas of the family justice system, for the courts to look keenly at requests for assistance by McKenzie Friends in family proceedings and to apply the extant guidance i.e., the Practice Guidance and case law which encourages courts to permit litigants in person to have a McKenzie Friend to assist them. It is important that that guidance is given its full weight in any decision-making process. In *In re H (Children) [2012] EWCA Civ 1797; [2013] 1 F.L.R. 1234, CA*, the judge in family proceedings rejected the father's application that a named individual, who was his McKenzie Friend in the proceedings at that time, should be granted rights of audience and allowed to conduct the proceedings on his behalf, and went on to exclude him from acting as the father's McKenzie Friend at future hearings. The Court of Appeal, in dismissing the father's appeal, noted that the judge's rulings were case management decisions made in the exercise judicial discretion and should not be interfered with on appeal unless the judge was plainly wrong. In *In re F (Children)*, op cit, the Court upheld a judge's decision in child care proceedings refusing permission to an individual who had embarked upon a campaign in relation to the family justice system and the local authority's role in it and who had demonstrated disregard of the rules of confidentiality and a lack of understanding of the role of a McKenzie Friend. In *Bank St Petersburg PJSC v Arkhangelsky [2015] EWHC 2997 (Ch); [2016] 1 W.L.R. 1081* established that a company may be represented by a McKenzie Friend.

On the approach to take where a party applies for a McKenzie Friend to be granted a right of audience, see *Graham v Eltham Conservative and Unionist Club [2013] EWHC 979 (QB)* at [35]-[38]

5. - Withdrawal of Special Right

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G. - Right of Audience Granted by the Court in Relation to the Proceedings

5. - Withdrawal of Special Right

13-19

The court retains its inherent power to refuse to hear any person who would otherwise have a right of audience from exercising that right in specific proceedings before court (2007 Act s.192(1), and previously 1990 Act s.27(4)). Where the court exercises this power it must give its reasons for doing so (2007 Act s.192(2)). The circumstances in which a court would be justified in having recourse to the power cannot be shortly stated; but among them would be the situation where the advocate repeatedly took hopeless points and advanced completely futile arguments (see further *Paragon Finance Plc v Noueiri (Practice Note)*, op. cit., and authorities referred to therein, in particular *Mensah v Islington London BC [2000] EWCA Civ 405, CA*).

End of Document

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6. - Miscellaneous Observations

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G. - Right of Audience Granted by the Court in Relation to the Proceedings

6. - Miscellaneous Observations

- 13-20 Various points relevant to what has been said above about the special right of audience may now be explained briefly and in no particular order.

It is clear that a special right of audience cannot be conferred on a person by the consent of the parties to the proceedings (*D. v S. (Rights of Audience)* op. cit.). Even though it may be a matter of no importance to the parties, the court has to be mindful of the need to protect the integrity of the statutory scheme and the other legislation and their several objectives. However, the fact that the party acting in person's opponent (whether himself represented or not) is prepared to consent to permission being granted may weigh with the court.

The situation where a party in person makes an application at a hearing at which his opponent does not appear is different to that where the opponent does appear and does object to the application (*In re D. (A Child)* [2005] EWCA Civ 347, CA).

The fact that a party in person's opponent is represented by an advocate may be a factor to be taken into account in the exercise of the discretion. This can cut two ways. The court's estimation of the opponent's advocate's ability and willingness to conduct the case in a manner that shows the cases of both parties in their best light may go against the exercise of discretion. On the other hand, fairness and level playing field considerations may suggest otherwise. Allowance has to be made for the fact that it is an advocate's duty to promote and protect fearlessly and by all proper means their client's best interests, and would fail in that duty were they to supplement deficiencies as to evidence in the case of their client's unrepresented opponent (*Khudados v Hayden* [2007] EWCA Civ 1316, CA). (For duties of advocate for a represented party when that party's opponent is a litigant in person, see Admiralty and Commercial Courts Guide para.M2, Vol.2 para.2A-128.)

The functions embraced by a right of audience include all of the activities traditionally associated with advocacy. In a given case, the full range of those activities may be deployed including the making of opening and closing speeches, putting legal and factual submissions, and examining and cross-examining witnesses. It would be unrealistic not to admit that in many cases where a litigant in person wishes to have a lay person as their advocate the exercise by the court of its discretionary power is influenced by the court's expectation of the extent to which that person might take advantage of the special right if it were granted. It might be anticipated that the court is likely to be yielding where the a litigant in person simply wishes to have someone else "speak on their behalf", as the party would do but feels they cannot do so adequately without assistance (perhaps because of language difficulties), and perhaps less yielding where there is bad blood between the parties (perhaps shared by the proffered advocate) and heated cross-examination likely.

The court's estimation of the proffered advocate's capacity to cope with the complexity of the issues arising in the proceedings in a manner which does not impair proper and efficient administration of justice is a matter to be considered. Courts are familiar with the way in which court resources can be wasted where a litigant in person, in acting as their own advocate, performs erratically and is impervious to guidance from the bench (and perhaps deaf to help offered by their opponent's qualified advocate). The same thing can happen where the discretion to grant a special right of audience is exercised unwisely. The possibility that the party may be a better advocate than the person they say they wish to have act for them should not be overlooked.

Where a court grants a special right of audience it may do so in terms that restricts that right to a particular hearing. The extent to which a person, were they granted a special right of audience, might take advantage of such right is related to the nature of the hearing for which the right is sought. It seems that courts are more willing to grant special rights of audience for the hearing of interlocutory matters than for trials (reflecting the fact that rights of audience granted by authorised bodies sometimes draw a

similar distinction), in particular contested trials. And it is not uncommon for a right granted for one hearing to be extended for a later hearing. However, neither the litigant in person nor their chosen and approved advocate should be misled into thinking that because a special grant was made for a hearing early on in the proceedings that further grants will be made for later hearings as the case develops.

Where a lay representative acts as advocate for a litigant in person in a small claim (see “Lay representatives in small claims ([s.11](#))” above), the right of audience may not be exercised where their client does not attend the hearing. Presumably, where a court is minded to grant a person a special right of audience in any proceedings it may do so on the understanding that the client will attend the hearings at which the advocate appears. In *Clarkson v Gilbert*, op cit., Lord Woolf stressed (at para.21) it is the client who has the conduct of the proceedings and normally they would be expected to be present on occasions where matters directly affecting their interests were involved.

When the court exercises any power given to it by provisions in the [CPR](#), or interprets any rule, the court must seek to give effect to the overriding objective ([r.1.2](#)). The court is not exercising such power when it grants or refuses an application by a litigant in person to grant a right of audience to a person who is not authorised to exercise it, nor does the task of determining such application involve the interpretation of a rule. Nevertheless, it is not uncommon for courts to call the overriding objective in aid when ruling on an application (e.g. *Mensah v Islington London BC*, op. cit.; *Izzo v Philip Ross & Co*, op. cit.).

7. - Practice Guidance (McKenzie Friends: Civil and Family Courts) [2010] 1 W.L.R. 1881

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Rights of Audience

G. - Right of Audience Granted by the Court in Relation to the Proceedings

7. - Practice Guidance (McKenzie Friends: Civil and Family Courts) [2010] 1 W.L.R. 1881

13-21

- 1) This Guidance applies to civil and family proceedings in the Court of Appeal (Civil Division), the High Court of Justice, the County Courts and the Family Proceedings Court in the Magistrates' Courts.¹ It is issued as guidance (*not* as a Practice Direction) by the Master of the Rolls, as Head of Civil Justice, and the President of the Family Division, as Head of Family Justice. It is intended to remind courts and litigants of the principles set out in the authorities and supersedes the guidance contained in *Practice Note (Family Courts: McKenzie Friends) (No.2) [2008] 1 W.L.R. 2757*, which is now withdrawn.² It is issued in light of the increase in litigants-in-person (litigants) in all levels of the civil and family courts.

The Right to Reasonable Assistance

13-22

- 2) Litigants have the right to have reasonable assistance from a layperson, sometimes called a McKenzie Friend (MF). Litigants assisted by MFs remain litigants-in-person. MFs have no independent right to provide assistance. They have no right to act as advocates or to carry out the conduct of litigation.

What McKenzie Friends may do

13-23

- 3) MFs may: i) provide moral support for litigants; ii) take notes; iii) help with case papers; iv) quietly give advice on any aspect of the conduct of the case.

What McKenzie Friends may not do

13-24

- 4) MFs may not: i) act as the litigants' agent in relation to the proceedings; ii) manage litigants' cases outside court, for example by signing court documents; or iii) address the court, make oral submissions or examine witnesses.

Exercising the Right to Reasonable Assistance

13-25

- 5)** While litigants ordinarily have a right to receive reasonable assistance from MFs the court retains the power to refuse to permit such assistance. The court may do so where it is satisfied that, in that case, the interests of justice and fairness do not require the litigant to receive such assistance.
- 6)** A litigant who wishes to exercise this right should inform the judge as soon as possible indicating who the MF will be. The proposed MF should produce a short curriculum vitae or other statement setting out relevant experience, confirming that he or she has no interest in the case and understands the MF's role and the duty of confidentiality.
- 7)** If the court considers that there might be grounds for circumscribing the right to receive such assistance, or a party objects to the presence of, or assistance given by a MF, it is not for the litigant to justify the exercise of the right. It is for the court or the objecting party to provide sufficient reasons why the litigant should not receive such assistance.
- 8)** When considering whether to circumscribe the right to assistance or refuse a MF permission to attend the right to a fair trial is engaged. The matter should be considered carefully. The litigant should be given a reasonable opportunity to argue the point. The proposed MF should not be excluded from that hearing and should normally be allowed to help the litigant.
- 9)** Where proceedings are in *closed court*, i.e. the hearing is in chambers, is in private, or the proceedings relate to a child, the litigant is required to justify the MF's presence in court. The presumption in favour of permitting a MF to attend such hearings, and thereby enable litigants to exercise the right to assistance, is a strong one.
- 10)** The court may refuse to allow a litigant to exercise the right to receive assistance at the start of a hearing. The court can also circumscribe the right during the course of a hearing. It may be refused at the start of a hearing or later circumscribed where the court forms the view that a MF may give, has given, or is giving, assistance which impedes the efficient administration of justice. However, the court should also consider whether a firm and unequivocal warning to the litigant and/or MF might suffice in the first instance.
- 11)** A decision by the court not to curtail assistance from a MF should be regarded as final, save on the ground of subsequent misconduct by the MF or on the ground that the MF's continuing presence will impede the efficient administration of justice. In such event the court should give a short judgment setting out the reasons why it has curtailed the right to assistance. Litigants may appeal such decisions. MFs have no standing to do so.
- 12)** The following factors should not be taken to justify the court refusing to permit a litigant receiving such assistance:
- (i)The case or application is simple or straightforward, or is, for instance, a directions or case management hearing;
 - (ii)The litigant appears capable of conducting the case without assistance;
 - (iii)The litigant is unrepresented through choice;
 - (iv)The other party is not represented;
 - (v)The proposed MF belongs to an organisation that promotes a particular cause;
 - (vi)The proceedings are confidential and the court papers contain sensitive information relating to a family's affairs
- 13)** A litigant may be denied the assistance of a MF because its provision might undermine or has undermined the efficient administration of justice. Examples of circumstances where this might arise are: i) the assistance is being provided for an improper purpose; ii) the assistance is unreasonable in nature or degree; iii) the MF is subject to a civil proceedings order or a civil restraint order; iv) the MF is using the litigant as a puppet; v) the MF is directly or indirectly conducting the litigation; vi) the court is not satisfied that the MF fully understands the duty of confidentiality.

14) Where a litigant is receiving assistance from a MF in care proceedings, the court should consider the MF's attendance at any advocates' meetings directed by the court, and, with regard to cases commenced after 1.4.08, consider directions in accordance with paragraph 13.2 of the Practice Direction Guide to Case Management in Public Law Proceedings.

15) Litigants are permitted to communicate any information, including filed evidence, relating to the proceedings to MFs for the purpose of obtaining advice or assistance in relation to the proceedings.

16) Legal representatives should ensure that documents are served on litigants in good time to enable them to seek assistance regarding their content from MFs in advance of any hearing or advocates' meeting.

17) The High Court can, under its inherent jurisdiction, impose a civil restraint order on MFs who repeatedly act in ways that undermine the efficient administration of justice.

Rights of audience and rights to conduct litigation

13-26

18) MFs do *not* have a right of audience or a right to conduct litigation. It is a criminal offence to exercise rights of audience or to conduct litigation unless properly qualified and authorised to do so by an appropriate regulatory body or, in the case of an otherwise unqualified or unauthorised individual (i.e., a lay individual including a MF), the court grants such rights on a case-by-case basis.³

19) Courts should be slow to grant any application from a litigant for a right of audience or a right to conduct litigation to any lay person, including a MF. This is because a person exercising such rights must ordinarily be properly trained, be under professional discipline (including an obligation to insure against liability for negligence) and be subject to an overriding duty to the court. These requirements are necessary for the protection of all parties to litigation and are essential to the proper administration of justice.

20) Any application for a right of audience or a right to conduct litigation to be granted to any lay person should therefore be considered very carefully. The court should only be prepared to grant such rights where there is good reason to do so taking into account all the circumstances of the case, which are likely to vary greatly. Such grants should not be extended to lay persons automatically or without due consideration. They should not be granted for mere convenience.

21) Examples of the type of special circumstances which have been held to justify the grant of a right of audience to a lay person, including a MF, are: i) that person is a close relative of the litigant; ii) health problems preclude the litigant from addressing the court, or conducting litigation, and the litigant cannot afford to pay for a qualified legal representative; iii) the litigant is relatively inarticulate and prompting by that person may unnecessarily prolong the proceedings.

22) It is for the litigant to persuade the court that the circumstances of the case are such that it is in the interests of justice for the court to grant a lay person a right of audience or a right to conduct litigation.

23) The grant of a right of audience or a right to conduct litigation to lay persons who hold themselves out as professional advocates or professional MFs or who seek to exercise such rights on a regular basis, whether for reward or not, will however *only* be granted in exceptional circumstances. To do otherwise would tend to subvert the will of Parliament.

24) If a litigant wants a lay person to be granted a right of audience, an application must be made at the start of the hearing. If a right to conduct litigation is sought such an application must be made at the earliest possible time and must be made, in any event, before the lay person does anything which amounts to the conduct of litigation. It is for litigants to persuade the court, on a case-by-case basis, that the grant of such rights is justified.

25) Rights of audience and the right to conduct litigation are separate rights. The grant of one right to a lay person does not mean that a grant of the other right has been made. If both rights are sought their grant must be applied for individually and justified separately.

26) Having granted either a right of audience or a right to conduct litigation, the court has the power to remove either right. The grant of such rights in one set of proceedings cannot be relied on as a precedent supporting their grant in future proceedings.

Remuneration

13-27

27) Litigants can enter into lawful agreements to pay fees to MFs for the provision of reasonable assistance in court or out of court by, for instance, carrying out clerical or mechanical activities, such as photocopying documents, preparing bundles, delivering documents to opposing parties or the court, or the provision of legal advice in connection with court proceedings. Such fees cannot be lawfully recovered from the opposing party.

28) Fees said to be incurred by MFs for carrying out the conduct of litigation, where the court has not granted such a right, cannot lawfully be recovered from either the litigant for whom they carry out such work or the opposing party.

29) Fees said to be incurred by MFs for carrying out the conduct of litigation after the court has granted such a right are in principle recoverable from the litigant for whom the work is carried out. Such fees cannot be lawfully recovered from the opposing party.

30) Fees said to be incurred by MFs for exercising a right of audience following the grant of such a right by the court are in principle recoverable from the litigant on whose behalf the right is exercised. Such fees are also recoverable, in principle, from the opposing party as a recoverable disbursement: [CPR 48.6\(2\)](#) and [48\(6\)\(3\)\(ii\)](#).

Personal Support Unit & Citizen's Advice Bureau

13-28

Litigants should also be aware of the services provided by local Personal Support Units and Citizens' Advice Bureaux. The PSU at the Royal Courts of Justice in London can be contacted on 020 7947 7701, by email at cbps@bello.co.uk or at the enquiry desk. The CAB at the Royal Courts of Justice in London can be contacted on 020 7947 6564 or at the enquiry desk.

Lord Neuberger of Abbotsbury, Master of the Rolls

Sir Nicholas Wall, President of the Family Division

12 July 2010

Personal Support Unit

- 13-29 The Personal Support Unit is now known as “Support through Court”. Its Royal Courts of Justice contact email is now: rcj@supportthroughcourt.org. Its website is: <https://www.supportthroughcourt.org/locations/london/royal-courts-of-justice>. Contact details for the CAB at the Royal Courts of Justice are now: 020 3475 4373. Its website is: <https://www.rcjadvice.org.uk>.

Footnotes

- 1 References to the judge or court should be read where proceedings are taking place under the [Family Proceedings Courts \(Matrimonial Proceedings etc\) Rules 1991](#), as a reference to a justices' clerk or assistant justices' clerk who is specifically authorised by a justices' clerk to exercise the functions of the court at the relevant hearing. Where they are taking place under the [Family Proceedings Courts \(Childrens Act 1989\) Rules 1991](#) they should be read consistently with the provisions of those Rules, specifically rule 16A(5A).
- 2 *R v Leicester City Justices, ex parte Barrow [1991] 2 Q.B. 260, Chauhan v Chauhan [1997] FCR 206, R v Bow County Court, ex parte Pelling [1999] 1 W.L.R. 1807, Attorney-General v Purvis [2003] EWHC 3190 (Admin), Clarkson v Gilbert [2000] C.P. Rep. 58, United Building and Plumbing Contractors v Kajla [2002] EWCA Civ 628, Re O (Children) (Hearing in Private: Assistance) [2005] 3 W.L.R. 1191, Westland Helicopters Ltd v Sheikh Salah Al-Hejailan (No 2) [2004] 2 Lloyd's Rep 535. Agassi v Robinson (Inspector of Taxes) (No 2) [2006] 1 W.L.R. 2126, Re N (A Child) (McKenzie Friend: Rights of Audience) Practice Note [2008] 1 W.L.R. 2743.*
- 3 Legal Services Act 2007 s12 - 19 and Schedule 3.

1. - Introduction to ADR and its promotion

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Volume 2

Section 14 - Alternative Dispute Resolution

Alternative Dispute Resolution

1. - Introduction to ADR and its promotion

Introduction

14-1

The use of alternative dispute resolution (ADR) to resolve disputes is an integral part of the litigation process. Its promotion, and through it the promotion of consensual settlement, was an aim of the Woolf Reports. The Woolf Reports' endorsement of the importance of ADR was echoed in the Jackson Costs Review ("Review of Civil Litigation Costs: Final Report"). Jackson LJ stated in his Executive Summary that ADR:

"... (particularly mediation) has a vital role to play in reducing the costs of civil disputes, by fomenting the early settlement of cases. ADR is, however, underused. Its potential benefits are not as widely known as they should be" (para.6.3, p.xxii).

The broad approach taken by Jackson LJ relating to ADR in his Costs Review was endorsed by the Court of Appeal in *PGF II SA v OMFS Co 1 Ltd [2013] EWCA Civ 1288; [2014] 1 W.L.R. 1386, CA*.

The summer of 2021 saw a major milestone for civil dispute resolution. Mandatory mediation was declared lawful by the Civil Justice Council in its July 2021 Report: Compulsory ADR (<https://www.judiciary.uk/wp-content/uploads/2022/07/Civil-Justice-Council-Compulsory-ADR-report-1.pdf>). It concluded that, contrary to the view taken in *Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576; [2004] 1 W.L.R. 3002*, mandatory ADR was, in some circumstances, consistent with art. 6 of the European Convention on Human Rights. If accepted by the Civil Procedure Rule Committee this may see amendments to CPR Pt 3 to provide for the court to order mandatory ADR. It, equally, may see courts directing parties to engage in mediation and other forms of ADR as they currently do in respect of ENE: see, for instance, Sir Geoffrey Vos MR in *Ralph v Ralph [2021] EWCA Civ 1106* at [45]: "... how important it is for the courts to be able to direct mediation in appropriate cases."

In July 2023 the Ministry of Justice (MoJ) outlined its plans for integrating the mediation of small claims in the civil justice system. It described its plans as a fundamental contribution to the transformation in the way disputes are resolved, adding that it had an overarching objective to standardise participation in mediation. There will be a staged approach starting, during the current Parliament, with all specified money claims issued through standard procedure (Pt 7) and allocated to the small claims track. These statements were made in Increasing the use of Mediation in the Civil Justice System, the Government's response to its consultation on this subject. The response paper also (a) confirmed the Government's ambition to integrate mediation in higher value claims processes and (b) referenced The Digital Markets, Competition and Consumers Bill, then progressing through parliament, which will introduce, a mediation scheme for consumer contracts including sale of goods, transfer of goods, hire and hire-purchase agreements (<https://www.gov.uk/government/consultations/increasing-the-use-of-mediation-in-the-civil-justice-system>).

The MoJ and the senior judiciary have both welcomed the centrality of what have previously been regarded as "alternative" methods of dispute resolution and the role of ADR as an integral part of the developing online processes. Although, Halsey remains good law for the time being its future influence is likely to be one of terminal decline until it is formally set aside either by the Rule Committee or the Court of Appeal. In the Autumn of 2023 the Court of Appeal is expected to review *Halsey* in *Churchill v Merthyr Tydfil County Borough Council*. It has been reported that the Civil Mediation Council, The Chartered Institute of Arbitrators and the Centre for Effective Dispute Resolution are intervening.

The changes arising from this significant policy shift on ADR will take time to implement but the Master of the Rolls' leadership has seen the beginning of a change in culture: "I intend to try to make sure that the provision of ADR is at the heart of all parts of the civil justice firmament." (<https://www.judiciary.uk/wp-content/uploads/2021/03/MoR-Hull-Uni-260321.pdf>). On the broader development of ADR, and particularly the integration of online dispute resolution into civil procedure as part of the HMCTS reform project, see: Ministry of Justice, Dispute Resolution in England and Wales: Call for Evidence (August 2021) (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1008487/dispute-resolution-in-england-and-wales-call-for-evidence.pdf). See also mediated interventions within the Court Dispute Resolution Process (<https://www.judiciary.uk/wp-content/uploads/2021/10/Master-of-the-Rolls-GEMME-Mediated-interventions-within-the-Court-Dispute-Resolution-Process.pdf>), How Judges Work: a Reappraisal for the 21st Century Justice (<https://www.judiciary.uk/wp-content/uploads/2021/11/Master-of-the-Rolls-How-Judges-Work-A-Reappraisal-for-the-21st-Century.pdf>), The Future for Dispute Resolution—Horizon Scanning (<https://www.judiciary.uk/wp-content/uploads/2022/03/MR-to-SCL-Sir-Brain-Neill-Lecture-2022-The-Future-for-Dispute-Resolution-Horizon-Scannings-pdf>) and "Mandating mediation: the digital solution" <https://www.judiciary.uk/announcements/speech-by-the-master-of-the-rolls-ciarb-roebuck-lecture>.

The term "ADR" may become anachronistic and be replaced by "Dispute Resolution" or "DR". The Commercial Court Guide (incorporating The Admiralty Court Guide) 2022, Section N, refers to Negotiated Dispute Resolution or "NDR" which was "referred to in previous editions of the Guide as 'ADR'".

For an exemplar of ADR as fully integrated with the litigation process, see the procedural discussion about the role of ADR in the second case management conference in *Abdel-Kader v Kensington and Chelsea RLBC (Grenfell Tower Litigation) [2022] EWHC 2006 (QB)* (Senior Master Fontaine).

The entire content of Section 14 should be viewed in the context of these developments.

ADR's promotion

14-2

ADR is promoted by both the CPR and its pre-action protocols, which form an integrated means of managing litigation (*Jet 2 Holidays Ltd v Hughes [2019] EWCA Civ 1858* at [36]–[43]; see Vol.1 para.C1A-002). Its promotion is an explicit aim of the Pre-Action Protocols (See Vol.1 paras C1A-004, C1-002). Its use is also to be encouraged by the courts, while it is both encouraged by a number of provisions in the CPR (see Vol.1 paras 1.4.9 and 3.1.15). Additionally, in respect of Early Neutral Evaluation, at least, it may be mandated by court order (*Lomax v Lomax [2019] EWCA Civ 1467; [2019] 1 W.L.R. 6527*, CA; see Vol.1, para.3.1.13.1).

Particular encouragement by the courts, and specifically the Court of Appeal, has been given in the following dicta: (i) Ward LJ in *Burchell v Bullard [2005] EWCA Civ 358; [2005] C.P. Rep. 36* (at [42]), in *Egan v Motor Services (Bath) Ltd [2007] EWCA Civ 1002; [2008] 1 W.L.R. 1589* (at [50]), and in *Dibble v Pfluger [2010] EWCA Civ 1005* (at [28]); (ii) Longmore LJ in *Vahidi v Fairstead House School Trust Ltd [2005] EWCA Civ 765; [2005] E.L.R. 607, CA* (at [27]); and in *Painting v University of Oxford [2005] EWCA Civ 161; [2005] 3 Costs L.R. 394* at [27]); (iii) Mummery LJ in *Bradford v James [2008] EWCA Civ 837* (at [1]); (iv) Pitchford LJ in *Kinsley v Commissioner of Police of the Metropolis [2010] EWCA Civ 953* (at [70]); (v) Rix LJ in *Iqbal v Dean Manson Solicitors [2011] EWCA Civ 123* (at [67]); (vi) Smith LJ in *Uren v Corporate Leisure (UK) Ltd [2011] EWCA Civ 66* (at [28]); (vii) Elias LJ and Ward LJ in *Oliver v Symons [2012] EWCA Civ 267* ([1] and [53]); (viii) Lloyd LJ, Jackson LJ and Ward LJ in *Hameed Faidi, Inam Faidi v Elliot Corp [2012] EWCA Civ 287* ([32]–[39]); (ix) Longmore LJ in *Ghaith v Indesit Co UK Ltd [2012] EWCA Civ 642* (at [26]); (x) Briggs LJ in *PGF II SA v OMFS Co [2013] EWCA Civ 1288*; (xi) Jackson LJ in *Thakkar v Patel [2017] EWCA Civ 117* ([31]); (xii) Vos LJ in *NJ Rickard Ltd v Holloway [2015] EWCA Civ 1631* ([34]), Sir Geoffrey Vos, then Chancellor of the High Court, in *OMV Petrom SA v Glencore International AG [2017] EWCA Civ 195* (at [39] and [41]) (and, as Master of the Rolls, in *Ralph v Ralph [2021] EWCA Civ 1106* at [45]), Males LJ in *Gregor Fisken Ltd v Carl [2021] EWCA Civ 792* (at [116]–[117]) and Males LJ and Aspin LJ in *TMO Renewables Ltd (In Liquidation) v Yeo [2022] EWCA Civ 1409* (at [38] and [40]). See also para.14-1.

ADR in pre-action protocols

14-3

Pre-action conduct is dealt with by Practice Direction—Pre-Action Conduct, as amended in April 2015 (para.[C1-001](#)) and the various pre-action protocols listed below. Specifically, see paragraphs 8-11 and 13-16 of the Practice Direction. The various pre-action protocols all include provisions relating to ADR similar to those in the Practice Direction—Pre-Action Conduct as summarised above (except the one relating to Possession Claims (Mortgage)). They also make reference to the terms of the Practice Direction—Pre-Action Conduct and provide that, where either party fails to comply with the terms of the protocol, the court may impose sanctions. See *AP (UK) Ltd v West Midland Fire & Civil Defence Authority [2013] EWHC 385 (QB)* and *Rana v Tears of Sutton Bridge [2015] EWHC 2597 (QB)*.

The several protocols are distinguished by the fact that each covers distinctive forms of civil proceedings. Obviously, parties in person and the legal representatives of parties engaged in such proceedings are well advised to read carefully what is said about ADR in the appropriate protocol. (In some forms of proceedings arising out of commercial transactions methods of pre-action resolution are well established and habitually used by parties falling into dispute and the relevant pre-action protocols take account of that.)

Reference to ADR can be found in the several protocols as follows (for complete texts, see Vol.1, Section C (Pre-Action Protocols)):

- Pre-Action Protocol for Personal Injury Claims, para.9;
- Pre-Action Protocol for the Resolution of Clinical Disputes, para.5;
- Pre-Action Protocol for Construction and Engineering Disputes, paras 3.1.2 and 9.3;
- Pre-Action Protocol for Media and Communication Claims, para.3.8;
- Pre-Action Protocol for Professional Negligence, para.12;
- Pre-Action Protocol for Judicial Review, para.9;
- Pre-action Protocols for Disease and Illness Claims, paras 2A.1 to 2A.4;
- Pre-Action Protocol for Housing Condition Cases (England) para.4;
- Pre-Action Protocol for Housing Disrepair Claims (Wales), para.4;
- Pre-Action Protocol for Possession Claims by Social Landlords, para.2.10;
- Pre-Action Protocol for Claims for Damages in Relation to the Physical State of Commercial Property at Termination of a Tenancy (The Dilapidations Protocol), para.8;
- Pre-Action Protocol for Debt Claims, para 6; and
- Pre-Action Protocol for Resolution of Package Travel Claims, para.14.

ADR in Court Guides and Handbooks

14-4

Several Court Guides make reference to ADR procedures. To an extent the Guides repeat what is said in CPR provisions and in practice directions. Necessarily, the Court Guides are more broadly focused than the pre-action protocols and refer to the application of ADR procedures in claims falling across the court's jurisdiction. However, litigants in person and the legal representatives of parties engaged in proceedings before those courts that have issued Court Guides are well advised to read carefully what is said about ADR, particularly if they are unfamiliar with the subject. The jurisdiction of the TCC is more

specific than the other courts and the coverage of ADR procedures in that Guide is rather more detailed than that provided in the other Guides (see further “ADR in Technology and Construction Court”, below). References to ADR in the Court Guides are as follows (for complete texts, see Section 1 (Court Guides) and Section 2 (Specialist Proceedings) above):

- Chancery Guide 2022, Ch.10 (Alternative Dispute Resolution), Appendix K and L;
- King’s Bench Guide 2022, para.10.5;
- The Commercial Court Guide (incorporating The Admiralty Court Guide) 2022, Section G (Negotiated Dispute Resolution “NDR” “referred to in previous editions of the Guide as “ADR”), and App.3 (Draft ADR Order). See also the Commercial Court working party report on long trials, which includes a number of provisions about ADR at https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/rep_comm_wrkg_party_long_trials.pdf;
- Technology and Construction Court Guide, Section 7 (Alternative Dispute Resolution and ENE) paras 7.1 to 7.5), Section 8 (Preliminary Issues) para.8.5 (Use of PI (Preliminary Issues) as an adjunct to ADR), and App.E (Draft ADR Order).

Lomax v Lomax [2019] EWCA Civ 1467; [2019] 1 W.L.R. 6527, CA, is authority for the proposition that Court Guides can assist where there is ambiguity, as stated at para.12-44, but that the effect of rules and directions cannot be suspended or disapplied by what may be said in Court Guides. Similarly, the court will not regard the commentary in the White Book as determinative.

2. - ADR and Case Management

White Book 2023 | Commentary last updated August 9, 2023

Volume 2

Section 14 - Alternative Dispute Resolution

Alternative Dispute Resolution

2. - ADR and Case Management

ADR as part of active case management

14-5

Once legal proceedings are commenced, the rules of court which apply, and the case management powers available to the court, in various ways encourage settlement by simple negotiation between the parties. There is a belief that the quality of settlements might be improved and the incidence of settlements increased if recourse was had to ADR procedures during the pre-trial process. Accordingly, r.1.4(2)(e) states that active case management includes the court's encouragement of the parties to use ADR procedures "if the court considers that appropriate". Such encouragement may be given at various points in the procedure laid down in the CPR and related practice directions and may be given, either on the court's own initiative, or in response to an initiative of the parties (as to the latter, see r.26.4). The Glossary attached to the CPR explains that ADR is a collective description of methods of resolving disputes "otherwise than through the normal trial process". In terms, this includes simple negotiation between the parties not involving third parties (apart from the parties' legal representatives). However, it would seem that the purpose of r.1.4(2)(e) is to draw attention to methods other than simple negotiation. Post April 2013 the court's duty to encourage the parties to use ADR has to be interpreted in light of the amendments relating to the overriding objective relating to proportionality. Moreover, the parties are equally enjoined to assist the court in furthering the overriding objective, which as Sir Geoffrey Vos, then Chancellor of the High Court stated in *OMV Petrom SA v Glencore International AG [2017] EWCA Civ 195* at [9], obliges them "to conduct litigation collaboratively and to engage constructively in a settlement process".

The ADR process most often used, apart from negotiation, is mediation. Although it is a process that requires some time and cost, in difficult cases a skilled mediator can oil the wheels of settlement in ways that are likely to be more effective than the normal process of negotiation by discussion and offer and counter-offer (*Hickman v Blake Lapthorn [2006] EWHC 12 (QB)*). It should also be remembered that, when considering case management, mediation can be successfully deployed to deal with particular issues in a case if there are reasons not to attempt to settle the entire claim at that juncture—see para.14-12. Another dispute resolution process is known as med-arb. In *IDA Ltd v Southampton University [2006] EWCA Civ 145; [2006] R.P.C. 21; (2006) 29(5) I.P.D. 29038, CA*, the Court of Appeal stated that this process (where a mediator trusted by both sides is given authority to decide the terms of a binding settlement agreement) is particularly apt for the resolution of disputes about entitlements to patents. Also note that Early Neutral Evaluation is referred to in the Court Guides listed in para.14-4 above. Further, in October 2015 the court's general powers of management at CPR r.3.1(2)(m) "take any other step or make any other order for the purpose of managing the case and furthering the overriding objective" were amended by the addition of the following words: "including hearing an Early Neutral Evaluation with the aim of helping the parties settle the case."

Active case management in relation to ADR

14-6

This section should be read in the context of recent developments and the move towards mandatory mediation referred to in para.14-1 above. It is clear from the Access to Justice reports and cases such as *Thompson v Commissioner of Police of the Metropolis [1998] Q.B. 498* and *Dyson v Leeds City Council [2000] C.P. Rep. 42* that Lord Woolf was always of the view that encouragement to use ADR was to be robust and reinforced by the teeth of costs sanctions. As the CPR became established it was also clear that the courts' initial interpretation (prior to *Halsey*, see below) of the CPR on this issue was that parties could

be ordered to use ADR. In *Cable & Wireless Plc v IBM United Kingdom Ltd [2002] EWHC 2059 (Comm); [2002] 2 All E.R. (Comm) 1041; [2003] B.L.R. 89* Coleman J, faced with parties who resisted ADR, said:

“Occasionally, the circumstances of a dispute may appear to the court so strongly to demand a reference to ADR that, even in the face of objections from both parties, [ADR orders] have been made and have led to settlements much to the surprise of the parties concerned.”

In *Shirayama Shokusan v Danovo Ltd [2003] EWHC 3306 (Ch)* Blackburn J concluded that the court did have jurisdiction to direct ADR even though one party may not be willing. This was on the basis that the provisions of the CPR were not confined to cases where the parties jointly wished to use alternative dispute resolution procedures. Similar first instance authorities suggesting that a party might be ordered to submit their dispute to mediation against their will are *Kinstreet Ltd v Balmargo Corporation Ltd [2000] C.P. Rep. 62* (Arden J), *Muman v Nagasena [2000] 1 W.L.R. 299, CA* and *Guinle v Kirreh Ch D [2000] C.P. Rep. 62. Dunnett v Railtrack Plc [2002] EWCA Civ 303; [2002] 2 All E.R. 850, CA* came to be regarded as the high water mark of judicial encouragement. Notwithstanding advice from the court that the parties use ADR, the defendants failed to agree to mediation, with the consequence that, despite succeeding before the Court of Appeal, they failed to recover their costs.

Post April 2013 the court’s duty to encourage the parties to use ADR has to be interpreted in the context of the Jackson Costs Review and its focus upon achieving proportionality between the cost of litigation and the value of that which is at stake, his conclusion that ADR was under-used and the amendments to the overriding objective in Pt 1 of the CPR relating to proportionality. The Court of Appeal in *PGF II SA v OMFS Co 1 Ltd [2013] EWCA Civ 1288; [2014] 1 W.L.R. 1386*, CA stated that the constraints which now affect the provision of state resources for the conduct of civil litigation call for an ever-increasing focus upon means of ensuring that court time, both for trial and for case management, is proportionately directed towards those disputes which really need it, with an ever-increasing responsibility thrown upon the parties to civil litigation to engage in ADR, wherever that offers a reasonable prospect of producing a just settlement at proportionate cost. The message is that parties should seriously consider engaging in ADR without troubling the court or waiting for case management directions requiring this. *PGF II SA* was followed in *NJ Rickard Ltd v Holloway [2015] EWCA Civ 1631*.

In *Northrop Grumman Mission Systems Europe Ltd v BAE Systems (Al Diriyah C4I) Ltd (No.2) [2014] EWHC 3148 (TCC)* Ramsey J referred to *PGF II SA v OMFS Co* before going on to find that a successful party’s refusal to mediate, although unreasonable, did not warrant a costs sanction in the particular circumstances of the case. See also *Page v Hewetts Solicitors [2013] EWHC 2845 (Ch)* for a judicial encouragement to parties to mediate to avoid disproportionate costs (at para.61) and similarly *Grace v Black Horse Ltd [2014] EWCA Civ 1413* at 54].

Proportionality and the mantra that litigation should be the last resort were two of the key issues in *Briggs v First Choice Holidays and Flights Ltd [2016] 9 WLUK 445*, 23 September 2016, unrep., Senior Courts Costs Office. A large number of tourists had stayed at an all-inclusive holiday resort which they had booked through the defendant tour operator. Some developed gastrointestinal illnesses and others endured sub-standard accommodation and service, and had their holidays spoiled. The court decided that the claimants who had not become ill should have pursued their claims via mediation under an Association of British Travel Agents scheme. On appeal, however, Singh J held that:

“The costs judge’s conclusion that it was inherently unreasonable for the appellants to enter into a CFA rather than a voluntary mediation scheme went too far. The costs judge had erred” *Briggs v First Choice Holidays and Flights Ltd [2017] EWHC 2012 (QB); [2017] 4 Costs L.R. 595*, QBD.

The benefits of ADR and mediation are not restricted to the savings of costs and court time. ADR and mediation have the potential to play a powerful role in cases involving high personal emotion and tragedy. This was demonstrated by the case of baby Charlie Gard, which attracted public attention around the world in 2017. It was the court’s duty, in *Great Ormond Street Hospital for Children NHS Foundation Trust v Yates [2017] EWHC 1909 (Fam)*, to consider whether to confirm declarations previously made that it was in the child’s best interests for artificial ventilation to be withdrawn and for his treating clinicians to provide him with palliative care only. Francis J explained why, even if the prospects of reaching agreement between the parties appears impossible, mediation should be used. He said:

“... it is my clear view that mediation should be attempted in all cases such as this one even if all that it does is achieve a greater understanding by the parties of each other’s positions. Few users of the court system will be in a greater state of turmoil and grief than parents in the position that these parents have been in and anything which

helps them to understand the process and the viewpoint of the other side, even if they profoundly disagree with it, would in my judgment be of benefit..."

The passage immediately above was referred to by one of the parties in the Grenfell Tower Litigation in support of a submission for a stay for ADR [\[2022\] EWHC 2006 \(QB\)](#) at [54].

This advice has been noted. For example, in [X \(A Child\), Re v \[2020\] EWHC 1958 \(Fam\)](#) Ms Justice Russell DBE reported that :

"... the Court had to insist that mediation was imperative, both to assist in narrowing the issues to be decided, and to reduce the levels of distress for this family."

See also [Newcastle Upon Tyne Hospitals NHS Foundation Trust v H \(A Child\) \[2022\] EWCOP 14](#) (Hayden J, pp.25)

"The availability of such a (mediation) service strikes me as having invaluable potential, even where it doesn't achieve its stated objectives. It may for example, establish a greater respect for and understanding of different views. This in turn may defuse some distress and anger and benefit the parties in the court process that follows."

ADR, Halsey and the prohibition on compulsory mediation

14-7

All of this part should be read in the context of the 2021 Civil Justice Council report "Compulsory ADR" and its conclusion that mandatory (alternative) dispute resolution is compatible with art.6 of the European Human Rights Convention and is, therefore, lawful. See also para.14-1 and the final paragraph below which deals with developments in 2023. In [Halsey v Milton Keynes General NHS Trust \[2004\] EWCA Civ 576; \[2004\] 1 W.L.R. 3002](#), CA, the Court of Appeal expressly adopted the proposition that the hallmark of ADR procedures, and perhaps the key to their effectiveness in individual cases, is that they are processes voluntarily entered into by the parties in dispute with outcomes, if the parties so wish, which are non-binding. It also took the view that r.1.4(2)(e) does not expressly permit the court to direct that such ADR procedures be used, but may merely encourage and facilitate. The court heard argument on the question whether the court has power to order parties to submit their disputes to mediation against their will. The court said it was likely that compulsion of ADR would be regarded as an unacceptable constraint on the right to access to the court and, therefore, a violation of art.6 of the European Convention on Human Rights (see further below), and even if (contrary to the court's view) the court does have jurisdiction to order unwilling parties to refer their disputes to mediation the court found it difficult to conceive of circumstances in which it would be appropriate to exercise it. It should also be mentioned, however, that, in terms of case management, the Court of Appeal made it clear that it was in favour of robust encouragement of ADR. Dyson LJ referred to the type of order known an "Ungley Order" (see para.14-13) and said:

"We can see no reason why such an order should not also routinely be made at least in general personal injury litigation, and perhaps in other litigation too. A party who refuses even to consider whether a case is suitable for ADR is always at risk of an adverse finding at the costs stage of litigation, and particularly so where the court has made an order requiring the parties to consider ADR."

Notwithstanding *Halsey*, on occasion some courts have taken the view that they have power to direct mediation. For example, in [Honda Giken Kogyo Kabushiki Kaisha \(A Firm\) v Neesam \[2009\] EWHC 1213 \(Pat\)](#) Judge Fysh QC concluded an application for a trial of preliminary issues saying, "In summary, then, I shall dismiss the application and direct that both parties use their best endeavours to ensure that a mediation is heard before (date)". Similarly, in [Uren v Corporate Leisure \(UK\) Ltd \[2011\] EWCA Civ 66](#) Smith LJ concluded:

"73 For the reasons I have given, I would allow the appeal and dismiss the cross appeal. I would remit the action for retrial by a different High Court Judge... I would also direct that, before the action is listed for retrial, the parties should attempt mediation."

In 2012 there were apparently conflicting messages from the Court of Appeal. In *Ghaith v Indesit Co UK Ltd [2012] EWCA Civ 642* (at [26]) Longmore LJ, commenting on a new mediation pilot in the Court of Appeal, said “the Court has ... decided that any claim for less than £100,000 will be the subject of compulsory mediation.” Lloyd LJ, however, in *Swain Mason v Mills & Reeve [2012] EWCA Civ 498* (at [76]) endorsed *Halsey*: “In Halsey, the Court of Appeal was concerned to make clear that parties are not to be compelled to mediate.”

As the 10th anniversary of *Halsey* approached, 2013 saw two further chapters in the controversy that has followed this appeal, each written by one of the three Lord Justices who heard that appeal. First, Lord Dyson M.R. reviewed the case and reiterated his support for the central proposition that it would be an unacceptable fetter on access to justice if truly unwilling parties were required to mediate. He noted that some have said that the court did not go far enough to support mediation and added:

“I thought then, and I still think now, that it struck the right balance. It was careful to protect the interests of defendants who had a genuine and entirely proper desire to resist claims that they reasonably believed to be without merit. It was equally careful to support the promotion of settlement. In doing so, it sent out a clear message that neither litigation nor mediated settlement are devices which could or should be used as a means to secure unjustified windfalls for individuals who are trying it on.” (See <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Speeches/mr-speech-compensation-culture.pdf>.)

Secondly, Ward LJ re-visited *Halsey* when giving judgment in *Wright v Michael Wright (Supplies) Ltd [2013] EWCA Civ 234*. This concerned an appeal from a trial about a bitter dispute between two self-represented businessmen who had steadfastly rejected judicial attempts to persuade them to mediate. Lamenting this, Ward LJ suggested that perhaps “it is time to review the rule in Halsey, for which I am partly responsible.” He then referred the judgment of the Court in *Halsey* where Dyson LJ set out the central proposition stated immediately above and asked a series of questions:

“Was this observation obiter? Some have argued that it was. Was it wrong for us to have been persuaded by the silky eloquence of the éminence grise for the ECHR, Lord Lester of Herne Hill QC, to place reliance on *Deweerd v Belgium (1980) 2 EHRR 439*? See some extra-judicial observations of Sir Anthony Clarke, *The Future of Civil Mediations*, (2008) 74 Arbitration 4 which suggests that we were wrong. Does CPR 26.4(2)(b) allow the court of its own initiative at any time, not just at the time of allocation, to direct a stay for mediation to be attempted, with the warning of the costs consequences, which Halsey did spell out and which should be rigorously applied, for unreasonably refusing to agree to ADR? Is a stay really ‘an unacceptable obstruction’ to the parties right of access to the court if they have to wait a while before being allowed across the court’s threshold?”

Ward LJ concluded:

“Perhaps some bold judge will accede to an invitation to rule on these questions so that the court can have another look at Halsey in the light of the past 10 years of developments in this field.”

Mostyn J, in *Mann v Mann [2014] EWHC 537 (Fam)* referred to these remarks on *Halsey* by Ward LJ. He thought that, in fact, a stay for “a while” would hardly amount to an order obliging the parties to engage in ADR. He added:

“For my part I am not sure that the kind of order proposed by Sir Alan in fact requires the Court of Appeal ‘to review the rule in Halsey’.

I cannot see that it is in fact inconsistent with what was said there, nor in fact inconsistent now with the terms of CPR r.26.4(2A) whereby the court may, on its own initiative, and whether or not the parties agree, impose a stay on proceedings for a specified period. A variation on this theme is a mandatory order to consider ADR, as follows: ‘The parties shall give consideration to resolving this dispute by means of ADR by (date).’ ”

It was mentioned in *Al Hamadani v Al Khafaf [2015] EWHC 38 (QB)* that Master Yoxall had made such an order at a case management conference earlier in those proceedings.

Norris J continued the debate, at least in relation to right of way and boundary disputes, in *Bradley v Heslin [2014] EWHC 3267 (Ch)*. He said:

“23. Perhaps in times of scarce resources and limited (and in any event expensive) representation it is time to give those who know the worth of mediation in this context (both to the parties and to all Court users) some help. If in any boundary dispute or dispute over a right of way, where the dispute could not be disposed of by some more obvious form of ADR (such as negotiation or expert determination) and where the costs of the exercise would not be disproportionate having regard to the budgeted costs of the litigation, any District Judge (a) imposed a 2 month stay for mediation and directed that the parties must take all reasonable steps to conduct that mediation (whatever the parties might say about their willingness to engage in the process) (b) directed that the fees and costs of any successful mediation should be borne equally (c) directed that the fees and costs of any unsuccessful mediation should form part of the costs of the action (and gave that content by making an “Ungley Order”) and (d) gave directions for the speedy further conduct of the case only from the expiration of that period, for my own part (recognising that certainly others may differ) I think that such a case management decision would be difficult to challenge on appeal.

“24. I think it is no longer enough to leave the parties the opportunity to mediate and to warn of costs consequences if the opportunity is not taken. In boundary and neighbour disputes the opportunities are not being taken and the warnings are not being heeded, and those embroiled in them need saving from themselves. The Court cannot oblige truly unwilling parties to submit their disputes to mediation: but I do not see why, in the notorious case of boundary and neighbour disputes, directing the parties to take (over a short defined period) all reasonable steps to resolve the dispute by mediation before preparing for a trial should be regarded as an unacceptable obstruction on the right of access to justice.” (See also, regarding right of way and boundary disputes, *Oliver v Symons [2012] EWCA Civ 267* (Elias LJ at [1] and Ward LJ at [53]); *Bramwell v Robinson [2016] 10 WLUK 495*, 21 October 2016, unrep., (Behrens HHJ at [1]) and, regarding domestic property renovation building contract disputes, *The Sky's the Limit Transformations Ltd v Mirza [2022] EWHC 29 (TCC)* (HHJ Stephen Davies at [6]–[9]).

2019 saw a step change on this issue when the Court of Appeal in *Lomax v Lomax [2019] EWCA Civ 1467* decided that a court had the power pursuant to CPR r.3.1(2)(m) to order Early Neutral Evaluation (ENE), even though one party had not consented to it. The rule did not impose a limitation to the effect that consent of all the parties was necessary; that would be contrary to the overriding objective. Although this decision related to ENE the ramifications for mediation were clear and shortly afterwards Sir Geoffrey Vos, then Chancellor of the High Court said in *McParland and Partners Ltd v Whitehead [2020] EWHC 298 (Ch)* at [42]

“... Lomax inevitably raised the question of whether the court might also require parties to engage in mediation despite the decision in *Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576; [2004] 1 W.L.R. 3002*.” Sir Geoffrey Vos went on, in the Preface to Civil Procedure 2020 (Vol.1 p.xiii): “Lomax lays the basis for a principled and overdue reconsideration of the courts approach to mediation. As a matter of principle, it is difficult to see how, in the light of *Lomax*, *Halsey* can continue to be relied upon as justifying a rejection by the court of judge-led mediation carried out as part of the case management process. There is an increasing emphasis on ADR generally ... during 2020 there may well be significant developments in the CPR’s approach to settlement.”

The question whether Halsey’s obiter prohibition on compulsory mediation is one therefore that is likely to be, or at the least ought to be, reconsidered by the Court of Appeal or the Civil Procedure Rule Committee. If this happens the approach taken by the Court of Justice of the European Union, which held that in certain circumstances compulsory mediation was permissible, may be taken into account (*Alassini v Telecom Italia SpA (C-317/08) EU:C:2010:146; [2010] 3 CMLR 17*, [64]–[65], *Menini v Banco Popolare Societa Cooperativa (C-75/16) EU:C:2017:457* at [61]). See also the findings of the Civil Justice Council Report “Compulsory Mediation” para.14-1.

See *The Sky's the Limit Transformations Ltd v Mirza [2022] EWHC 29 (TCC)* for a suggestion that in some circumstances the court may now be willing to order mediation (HHJ Stephen Davies at [6]–[9]).

The focus on *Halsey* rumbled on in 2023. In *Mills and Reeve Trust Corp Ltd v Martin [2023] EWHC 654 (Ch)* HH Judge Kelly sitting as a Judge of the High Court found the court had no power to compel the parties to mediate, declined to order a different form of alternative dispute resolution and was not satisfied that an appeal on the issue of mandatory mediation would have a real prospect of success. The court also reasoned that in the particular circumstances of the case it was not appropriate to stay the proceedings either. In *Hadley v Przybylo [2023] EWHC 1392 (KB)* Master Victoria McCloud, by way of contrast, made a direct order that parties engage in ADR. The parties, who disputed a complex costs budget, were ordered “..to engage in ADR in respect of the parties’ costs....” by a specific date. The parties duly complied and Master McCloud noted that they had agreed the budget in all but one matter. In *Hamon v University College London [2023] EWHC 1812 (KB)* Senior Master Fontaine stayed proceedings to encourage the parties to engage fully in an alternative dispute resolution procedure. In doing so the court noted (at para.49) that “..the court has power to order a stay for ADR to be attempted even where one or both or all parties oppose such a stay, ..” These three cases were all heard against the backdrop of a case involving Japanese knotweed, *Churchill v Merthyr Tydfil County Borough Council*. This is proceeding to the Court of Appeal in circumstances which make it highly likely that *Halsey* will be revisited. A number of organisations including the Civil Mediation Council are intervening in the appeal.

Case management and the duty of the parties

14-8

The encouragement and facilitation of ADR by the court is an aspect of active case management which in turn is an aspect of achieving the overriding objective. The parties have a duty to help the court in furthering that objective and, therefore, they have a duty to consider seriously the possibility of ADR procedures being utilised for the purpose of resolving their claim or particular issues within it, particularly when encouraged by the court to do so. In *Garratt-Critchley v Ronnan [2014] EWHC 1774 (Ch)* (at [25]) the court clearly took the view this was a continuing duty, throughout the litigation. The discharge of the parties’ duty in this respect may be relevant to the question of costs because, when exercising its discretion as to costs, the court must have regard to all the circumstances, including the conduct of all the parties (r.44.3(4), see too r.44.5). In *Dunnett v Railtrack Plc [2002] EWCA Civ 303; [2002] 2 All E.R. 850*, CA at [12]–[15], Brooke LJ quoted the foregoing commentary with approval and said that parties and their legal representatives should be alert to the possibility that, if they “turn down out of hand” the chance of ADR when suggested by the court they may have to face “uncomfortable costs consequences”. See also (a) the remarks with reference to *PGF II SA v OMFS Co [2013] EWCA Civ 1288* and *Northrop Grumman Mission Systems Europe Ltd v BAE Systems (Al Diriyah C4) Ltd [2014] EWHC 3148 (TCC)* in para.14.6 above and (b) further below.

Case management: facilitation of ADR procedures and criteria for referral to ADR

14-9

The overriding objective in the CPR, which is to enable “... the court to deal with cases justly and at proportionate cost” (r.1.1(1)), requires the court to encourage the use of an ADR procedure, in appropriate cases, and to facilitate the use of such procedure, as one of the elements of active case management (r.1.4(2)(e)). The concept of proportionality reinforces the need for the court to keep the potential of ADR procedures under review whenever it deals with any aspect of case management. It should be noted, when considering case management, that although ADR, and mediation in particular, often leads to settlement of the entire action, there is the potential to use an ADR process to attempt settlement or agreement of discrete issues. This can be particularly useful in multi-party cases; see, for example *Supershield Ltd v Siemens Building Technologies FE Ltd [2010] EWCA Civ 7; [2010] 2 All E.R. (Comm) 1185; [2010] 1 Lloyd’s Rep. 349* and *Mouchel Ltd v Van Oord (UK) Ltd [2011] EWHC 72 (TCC); 135 Con. L.R. 183*. The report on Senior Master Fontaine’s case management of the Grenfell Tower Litigation at *[2022] EWHC 2006 (QB)* illustrates many facets of how ADR can be deployed during the case management of a multi-party case and that both the court and lawyers now demonstrate a sophisticated grasp of how to interweave an ADR process in with the litigation process of a complex action. Master Fontaine said (at para.105):

“I consider that the ADR process being established is the obviously appropriate course to attempt before proceeding with litigation involving more than 1,000 Claimants and multiple Defendants. Although it may be that

not all issues will be capable of settlement, it is highly likely that there will be a sufficient number of settlements and/or narrowing of issues so that when the stay is lifted more efficient progress to resolution of these claims can be made in the litigation.”

The manner in which the court may facilitate the use of an ADR procedure includes the following:

- (i)by ensuring that the opportunity to explore ADR prospects is not prejudiced by the rigours of case management procedures generally. (For example, see *Electrical Waste Recycling Group Ltd v Philips Electronics UK Ltd [2012] EWHC 38 (Ch)* where the court considered how ordering a split trial might impact on the prospects of mediating the matter.) In *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd [2014] EWHC 3546 (TCC); [2015] 1 All E.R. (Comm) 765; 156 Con. L.R. 202* Coulson J suggested “A timetable for trial that allows the parties to take part in ADR along the way is a sensible case management tool”;
- (ii)by acting as a source of information about professional and commercial bodies providing ADR services (for example, see <https://civilmediation.org/about-mediation>);
- (iii)by verbally encouraging the parties to consider ADR at a hearing or telephone conference, such as a case management conference or a pre-trial review;
- (iv)by ordering a stay of the whole or part of the proceedings, for mediation or some other ADR procedure, pursuant to the application of the parties or one of them (r.3.1(2)(f) and r.3.3(1) (see *Andrew v Barclays Bank [2012] C.T.L.C. 115* at [24], [28] and [41], *Hussain v Chowdhury [2020] EWHC 790 (Ch)* at [18], the Grenfell Tower Litigation at [2022] EWHC 2006 (QB)), and *Hamon v University College London [2023] EWHC 1812 (KB)*);
- (v)by ordering such a stay of its own initiative (r.3.1(2)(f) and r.3.3(1)). An appropriate time to make such an order might be upon perusal of the parties’ statements about ADR in their directions questionnaires;
- (vi)by ordering such a stay upon the written request of a party or of its own initiative when considering completed directions questionnaires (r.26.4). (See also Standard Directions Model Paragraph B05-stay for settlement which provides:

“1....

2.The claim is stayed until xxxx, during which period the parties will attempt to settle the matter or to narrow the issues.

3.By 4pm on xxxx the Claimant must notify the court in writing of the outcome of negotiations (without disclosing any matters which remain subject to “without prejudice” terms) and what, if any, further directions are sought. Failure to comply with this direction or to engage properly in negotiations may result in the application of sanctions. If settlement has been reached, the parties must file a consent order signed by all of them.” (See <https://www.justice.gov.uk/courts/procedure-rules/civil/standard-directions/list-of-cases-of-common-occurrence/menu-of-sd-paragraphs> (B05-ADR.doc)).

- (vii)By ordering the parties to consider ADR (including Mediation) using, for example a direction in the form of Standard Directions Model Paragraph A03-ADR.doc, whether at the time of giving standard directions or otherwise as follows:

“1....

2.At all stages the parties must consider settling this litigation by any means of Alternative Dispute Resolution (including Mediation); any party not engaging in any such means proposed by another must serve a witness statement giving reasons within 21 days of that proposal; such witness statement must not be shown to the trial judge until questions of costs arise.

3.’21 days’ can be altered manually. The words ‘and not less than 28 days before trial’ can always be added after the word ‘proposal’ by the managing judge if appropriate. Not necessary for every Order.” (See <https://www.justice.gov.uk/courts/procedure-rules/civil/standard-directions/list-of-cases-of-common-occurrence/menu-of-sd-paragraphs> (A03-ADR.doc)). It might be particularly appropriate to consider directions of the type referred to immediately above when considering cost budgets and proportionality during the costs management

and case management process. Such directions might be combined with directions designed to facilitate the holding of an immediate mediation. For example, provision could be made for early disclosure of a particular category of documents that would facilitate a mediation prior to full disclosure. See *Mann v Mann [2014] EWHC 537 (Fam); [2014] 1 W.L.R. 2807; [2014] 2 F.L.R. 928* at [525]. In respect of directions for a stay in boundary disputes see the observations about *Bradley v Heslin [2014] EWHC 3267 (Ch)* in para.14-7 above.

(viii)By making an order, whether on directions for allocation or a later stage, of the type referred to in the Multi-Track Practice Direction (sometimes referred to as an “Ungley Order”) (29PD4.10(9)).

(ix)By making an ADR order on the basis of the draft in App.7 to the Admiralty and Commercial Courts Guide. The draft order includes the following paragraph: “4. The parties shall take such serious steps as they may be advised to resolve their disputes by ADR procedures before the neutral individual or panel so chosen by no later than [*].”

(x)By making an ADR order on the basis of the draft order in App.E to and Section 7 of the Technology and Construction Court Guide. Although these Guides refer to their particular courts there appears to be no reason why the type of ADR orders made in these courts could not be made, where appropriate, in other courts.

(xi)By ordering Early Neutral Evaluation. See CPR r.3.1(2)(m) and *Lomax v Lomax [2019] EWCA Civ 1467; [2019] 1 W.L.R. 6527.*

(xii)By arranging, in the Admiralty and Commercial Court or the Technology and Construction Court, for the court to provide Early Neutral Evaluation. Further, in the Technology and Construction Court the court can provide a judge to act as a mediator. (See <http://www.justice.gov.uk/downloads/courts/tech-court/tech-con-court-guide.pdf>.)

(xiii)By, in a case which is suitable to be resolved by an ADR procedure except for one sticking point, ordering the hearing of that point as a preliminary issue with a view to the case then being referred to ADR (see s.8 of the Technology and Construction Court Guide, again there is no reason why the approach taken by the Technology and Construction Court cannot be taken by other courts, where appropriate).

(xiv)By, ordering a stay for mediation followed, if necessary, by either an order for mediation or for compulsory early neutral evaluation. Such a tiered approach was suggested by HHJ Stephen Davies as part of a streamlined proportionate procedure for domestic property renovation building contract disputes in the *Sky's the Limit Transformations Ltd v Mirza [2022] EWHC 29 (TCC)*.

(xv)By referring a small claim to the Small Claims Mediation Service (See the MoJ’s 2023 response to “Increasing the use of Mediation in the Civil Justice System” at <https://www.gov.uk/government/consultations/increasing-the-use-of-mediation-in-the-civil-justice-system>)

(xvi)By making an appropriate costs order (or advising that such an order might be made in the future) in respect of failure to give adequate consideration to ADR prior to the commencement of proceedings.

(xvii) By providing information about Practice Direction 36V regarding the Family Mediation Voucher Scheme, which is designed to offer a financial contribution of £500 towards mediation costs for eligible cases. *Family Procedure Rules 2010 (SI 2010/2955) r.36.2*

(xviii)By refusing a party’s application to the court unless and until ADR is attempted. See *Hussain v Chowdhury [2020] EWHC 790 (Ch)* at [18] where HHJ Jarman QC refused to give permission to commence charity proceedings until the parties “engaged in a meaningful way in mediation with a professional mediator.” See also *Jaffer v Jaffer [2021] EWHC 1329 (Ch)*. Another example is *Wilmington Trust SP Services (Dublin) Ltd v Spicejet Ltd [2021] EWHC 1117 (Comm)* where the court considered (at [74]):

“that the course most conducive to the furtherance of the overriding objective and the interests of justice (was) to give judgment for the First Claimant’s undisputed claims but to stay execution. In that way, the entire dispute can be brought within the ambit of any ADR procedures that the parties may choose to adopt.”

(xix)By directing the parties to engage in ADR, in appropriate circumstances, as Master Victoria McCloud did in *Hadley v Przybylo [2023] EWHC 1392 (KB)*.

Case management: the stages at which ADR may be encouraged

14-10 The issue of timing, as in when is the best stage of a case to use an ADR procedure, is often a complex question. In *Nigel Witham Ltd v Smith [2008] EWHC 12, (TCC); [2008] T.C.L.R. 3; 117 Con. L.R. 117* Judge Peter Coulson QC offered general guidance saying that a premature mediation simply wasted time and could sometimes lead to a hardening of positions on both sides whereas, conversely, a delay in any mediation until after full particulars and documents had been exchanged could mean that the costs that had been incurred to get to that point became themselves the principal obstacle to a successful mediation. He added:

“The trick in many cases was to identify the happy medium: the point when the detail of the claim and the response were known to both sides, but before the costs that had been incurred in reaching that stage were so great that a settlement was no longer possible.”

The relevance of escalating costs was highlighted by Ward LJ in *Shoveler v Lane [2011] EWCA Civ 802; [2012] 1 W.L.R. 637; [2011] 4 All E.R. 66*. He said, at para.61:

“If the claimants are right in their assessment of their costs, then, even without a success fee, the costs incurred by them exceed the sum over which battle has been joined. The great British public must think that something has gone wrong somewhere if litigation is conducted in that way. I share that sense of horror. One answer has to be to engage in mediation constructively and at the very earliest stage.”

Similarly, in *Matthews v Matthews [2018] EWHC 906 (Fam)*, Holman J stated at para.28:

“As this case is now going off again for a period, I wish very strongly indeed to stress to both parties (as will be recorded on the face of my formal order today) that this case urgently requires to be resolved before costs and delay become disproportionate. In the exercise of my powers and duties under the overriding objective under rule 1 of the Civil Procedure Rules, I very strongly encourage all the parties to give fresh consideration to seeing if these issues cannot be resolved by mediation. I am fearful that a considerable amount of money may yet be expended, which will become completely disproportionate to the size and value of the claim.”

In *Hamon v University College London [2023] EWHC 1812 (KB)* Senior Master Fontaine added at para.66:

“The most important considerations are that both parties know the other parties' case, so that the litigation risk can be assessed, and that ADR is attempted at a sufficiently early stage to enable costs to be saved, so that parties are not discouraged from settlement by the extent of incurred costs.”

Masood Ahmed, University of Leicester has opined:

“The ADR duty is an on-going one and as such litigating parties are required to actively engage in an ADR dialogue. This on-going duty and dialogue will mean that, if the matter is not ripe for ADR at a particular time, it may be at a later stage when the issues have matured. Therefore, in exercising its discretion on costs, the courts should only penalise a party when it is clear that a party has clearly failed to respond to an invitation to ADR; to engage in a constructive ADR dialogue or where its behaviour is such that it undermines or frustrates the parties' ADR duty.” (“The ADR duty and costs: *Ali v Channel 5 Broadcast Ltd*” [2018] EWHC 298 (Ch); C.J.Q. 2018 at 37(4), 407–412.)

The first main opportunity the court has to consider ADR is at the allocation stage. One of the matters a court may then consider, in the context of ADR, is whether the parties have complied with the ADR provisions of any relevant pre-action protocol. The court will also consider the parties' directions questionnaire forms. (See Form N150 (directions questionnaire), Section A.) CPR r.26.4 provides that a party, when completing the directions questionnaire required by r.26.3, may make a written request for the proceedings to be stayed while the parties try to settle the case by alternative dispute resolution or other means.

Section A of the directions questionnaire, under the heading "Settlement", states: "Under the Civil Procedure Rules parties should make every effort to settle their case before the hearing". This could be by discussion or negotiation (such as a roundtable meeting or settlement conference) or by a more formal process such as mediation. The court will want to know what steps have been taken. Settling the case early can save costs, including court hearing fees.

Legal representatives are asked to confirm that they have explained to their client the need to try to settle, the options available, and the possibility of costs sanctions if they refuse to try to settle. The form then poses three questions, noting that answers will be considered in the context of CPR r.44.3(4):

"1) Given that the rules require you to try to settle the claim before the hearing do you want to attempt to settle at this stage? 2) If Yes, do you want a one month stay? 3) If you answered 'No' to question 1, please state below the reasons why you consider it inappropriate to try to settle the claim at this stage."

The issue of timing is always an issue, and will differ from case to case. There will be occasions when it is clear to the parties and the court that a case is ready for mediation. On other occasions it is the circumstances of the litigation that may make mediation appropriate. For example, where a court is considering making a costs management order; it may be the view of the court that it is likely to be cost effective and proportionate to stay the case for mediation immediately on the basis that it may ultimately prove to be unnecessary to make such an order. On the other hand, where the claim or defence involves some complexity, the court may want to see a matter properly pleaded before mediation is attempted: *Williams v Seals [2014] EWHC 3708 (Ch); [2015] W.T.L.R. 339*, Richards J at [48].

In *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd [2014] EWHC 3546 (TCC); [2015] 1 All E.R. (Comm) 765; 156 Con. L.R. 202* Coulson J put the emphasis on the parties consensually agreeing on the best time to mediate, suggesting: "A timetable for trial that allows the parties to take part in ADR along the way is a sensible case management tool." He added "A stay or a fixed 'window' is likely to lead to delay, extra cost and uncertainty, and should not ordinarily be ordered."

CPR r.29.2 states that, when it allocates a case to the multi-track, the court will give case management directions. This provision is supplemented by paras 4.1 to 4.11 of Practice Direction (The Multi-Track) (see Vol.1, para.29PD.4). Paragraph 4.10 states the general approach that the court will adopt where it gives directions on its own initiative without holding a case management conference and is not aware of any steps taken by the parties other than the exchange of statements of case. Subparagraph (9) of para.4.10 states that a direction requiring the parties to consider ADR is included among the directions that the court may give in these circumstances and sets out the form of Order, known as an "Ungley Order" which may be made; this is as follows:

"The parties shall by [the date determined by the court] consider whether the case is capable of resolution by ADR. If any party considers that the case is unsuitable for resolution by ADR, that party shall be prepared to justify that decision at the conclusion of the trial, should the judge consider that such means of resolution were appropriate, when he is considering the appropriate costs order to make. The party considering the case unsuitable for ADR shall, not less than 28 days before the commencement of the trial, file with the court a witness statement without prejudice, save as to costs, giving reasons upon which they rely for saying that the case was unsuitable."

A variation on the above requires a more immediate statement of parties' intentions concerning ADR:

The parties shall by [14 days from the date of this order] consider whether the claim is capable of being resolved by Alternative Dispute Resolution and:

- a) if either party considers that the claim is unsuitable for Alternative Dispute Resolution, that party shall, not less than 28 days from today, serve on the other party a witness statement giving the reasons upon which that party relies in saying the claim is unsuitable;

- b)a party served with such a statement may within 14 days after receiving it serve on the other party a witness statement in response;
- c)all witness statements so served shall be disclosed to the trial judge at, but not until, the conclusion of the trial;
- d)at the conclusion of the trial, when deciding on the appropriate costs order to make, the trial judge shall take all such witness statements into account in considering whether such means of resolution were appropriate; and
- e)a party who objected to Alternative Dispute Resolution but has not served such a witness statement may be presumed to have objected for no good reason. See also, regarding such directions, Model Paragraph A03-ADR.doc as referred to in para.14-5 above. See also *PGF II SA v OMFS Co [2013] EWCA Civ 1288; [2014] 1 W.L.R. 1386; [2014] 1 All E.R. 970* at [35] et seq where Briggs LJ outlined the desirability of requiring reasons for refusing ADR being put in writing at the time of the refusal. Failure to provide a written statement, when ordered to do so, is to invite a costs sanction: *BXB v Watch Tower and Bible Tract Society of Pennsylvania [2020] EWHC 656 (QB)*.

Case management: where a public authority is a party

14-11

In *R. (Cow) v Plymouth City Council [2001] EWCA Civ 1935; [2002] 1 W.L.R. 803*, CA, the Court of Appeal noted that, in disputes between public authorities and members of the public for whom they were responsible, insufficient attention is being paid to the paramount importance of saving cost and reducing delay by avoiding recourse to the application for judicial review procedure (This point was cited with approval in *Hamon v University College London [2023] EWHC 1812 (KB)* at [50]). The court said that the High Court should scrutinise extremely carefully such applications and should use its powers to ensure that the parties tried to resolve their dispute with the minimum involvement of the court. To achieve that objective, the court might have to hold (of its own initiative) a hearing at which the parties could explain what steps they had taken to resolve or reduce their dispute by means alternative to the procedure. In *Practice Statement (Admin Ct: Administration of Justice) v [2002] 1 W.L.R. 810*, QBD (sub nom *Practice Statement (Admin Ct: Annual Statement) [2002] 1 All E.R. 633*), the lead judge of the Administrative Court drew attention to the *Cow* case and stated that the judges of that court “were fully committed to resolving disputes by alternative means where appropriate and are exploring ways of promoting this”. It has since been suggested, in *Halsey*, that the issue of public money is not a special factor and that the list of factors outlined in *Halsey* determine when it is reasonable to refuse ADR.

See also *R. (Essex CC) v Secretary of State for Education [2016] EWHC 1724 (Admin)*, where the parties were criticised for not compromising the litigation. The court said that there was no reason why mediation or others forms of alternative dispute resolution should not have a role in judicial review cases which did not raise any recurring principle or policy.

In *JR138's Application for Judicial Review [2022] NIQB 46*, an application in Northern Ireland, the court identified the case as an example of litigation coming before the court with increasing frequency. This was where a person in need contends that a health and social care trust is not providing them with the services to which they are entitled and which they desperately need. The court analysed (at [39]) why it was often unable to be of significant assistance in such matters and urged parties dealing with these issues to give serious consideration to mediation.

Case management: miscellaneous

14-12

CPR r.3.1(2) states that the court’s general powers of case management include the power to order that a party or a party’s legal representative be required to attend the court. Such an order may be made with a view to making an ADR order (though the attendance of any party is not required for this purpose) or to otherwise facilitate settlement, but should not be made for the purpose of putting pressure on the party to discontinue the proceedings (*Tarajan Overseas Ltd v Kaye [2001] EWCA Civ 1859*).

Although the court has jurisdiction to order that parties should be adequately represented at a mediation, it has no jurisdiction to order that a particular person should attend, especially where that person was not a party to the proceedings (*Shirayama Shokusan Co Ltd v Danovo Ltd* [2004] EWHC 390 (Ch); [2004] 1 W.L.R. 2985; (2004) 101(13) L.S.G. 34; (Blackburne J) (D applying for order staying proceedings until conclusion of mediation attended by a third party (X) as a representative of C, where D contending that X's presence was essential to meaningful mediation)).

Case management: adjournment of a trial for ADR

There will rarely be circumstances where a court would be willing to adjourn a trial on the grounds that the parties wish to use ADR. See *Elliott Group Ltd v Gecc UK (formerly GE Capital Corp)* [2010] EWHC 409 (TCC).

Case management: mediation and delay

A request for mediation followed by a lengthy discussion will not justify delay: *UK Highways A55 Ltd v Hyder Consulting (UK) Ltd* [2012] EWHC 3505 (TCC).

Case management: purpose of mediation

A party should not be required to mediate merely for the purpose of finding out the other party's case: *Brooks v Armstrong* [2016] EWHC 2893 (Ch).

In a housing dispute, it would be wrong for a social landlord to use recourse to mediation as a delaying tactic having the effect of causing a tenant to lose priority status for housing (*Robinson v Hammersmith and Fulham London BC* [2006] EWCA Civ 1122; [2006] 1 W.L.R. 3295; [2007] H.L.R. 7, CA).

As to ADR in the Court of Appeal, see Vol.1 para.52.0.9.

For use of ADR procedures for purpose of resolving conflict of expert evidence in lease renewal claims, see commentary in para.56PD.1.

3. - ADR and Costs

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Volume 2

Section 14 - Alternative Dispute Resolution

Alternative Dispute Resolution

3. - ADR and Costs

Cost sanctions and ADR

14-13 *This section should be read in the context of para.14-1.* Whatever the position may be with regard to the court's power to direct mediation and the risk that seeking costs sanctions may be discouraged as satellite litigation it remains clear that judicial encouragement in the context of the court's discretion on costs can be very powerful. See, for example, *Brookfield Construction (UK) Ltd v Mott MacDonald Ltd [2010] EWHC 659 (TCC)* where Coulson J said (at para.55):

“In the present case, there is a clear and obvious alternative: ADR. In my view, the parties need to explore that option as soon as possible after the service of (... amended pleadings ...). I should make it clear that ... I will make detailed costs orders and that, on the basis of the documents, my perception of one side's willingness (or otherwise) to participate in ADR will be an important element of my deliberations on costs.”

and *Cumbria Zoo Co Ltd v The Zoo Investment Co Ltd [2022] EWHC 3379 (Ch)* where HHJ Pearce, having noted the case was ideally suited to mediation, invited the parties to consider mediation in light of the “carrot”, represented by the peace of mind and cost saving arising from settlement, and the “stick” of an adverse costs order risked by a party unwilling to engage in the process.

Jackson LJ reviewed costs sanctions in the context of encouraging ADR by costs orders post the CPR reforms in April 2013. His view was that such sanctions:

“... might include (a) reduced costs recovery for a winning party; (b) indemnity costs against a losing party, alternatively reduced costs protection for a losing party which has the benefit of qualified one way costs shifting.” (See <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Speeches/lj-jackson-speech-eleventh-lecture-implementation-programme.pdf>.)

Evidence of cost sanctions forming part of a tougher case management regime can be seen in the following cases. In *AP (UK) Ltd v West Midland Fire and Civil Defence Authority [2013] EWHC 385 (QB)* the court compared a party's actual conduct with that required by “Practice Direction—Pre-Action Conduct” (para.C1-001). It was found that failures to engage in the pre-action exchange of information, to seek a stay pending the use of that procedure and to attempt ADR in an attempt to forestall the claim proceeding beyond the issue and service stage altogether, should sound in costs. In *Rana v Tears of Sutton Bridge [2015] EWHC 2597 (QB)* the court found failure to engage in the Pre-Action Protocol and to accept a suggestion of alternative dispute resolution should be marked by adverse costs consequences. (Also see: *Roundstone Nurseries Ltd v Stephenson Holdings Ltd [2009] EWHC 1431 (TCC)*, where costs sanctions were imposed in circumstances where one party unilaterally cancelled an imminent pre-action mediation.)

In *Lewicki v Nuneaton and Bedworth BC [2013] UKUT 120 (LC)* the court stated, in agreement with the view of Jackson LJ immediately above, that in principle, the refusal of a party to participate in mediation might justify an adverse costs order on the indemnity basis. Indemnity costs were awarded by way of a sanction in *Garratt-Critchley v Ronnan [2014] EWHC 1774 (Ch)*, *Reid v Buckinghamshire Healthcare NHS Trust [2015] 10 WLUK 752*, and *Bristow v Princess Alexandra Hospital NHS Trust [2015] 11 WLUK 67*, *DSN v Blackpool Football Club Ltd [2020] EWHC 670 (QB)* and *BXB v Watch Tower and Bible Tract Society of Pennsylvania [2020] EWHC 656 (QB)*. In *PGF II SA v OMFS Co [2013] EWCA Civ 1288* the Court of Appeal

clearly contemplated that an unreasonable refusal to mediate might be met by a range of sanctions. The court suggested that the otherwise successful party might be ordered to pay part of the unsuccessful party's costs, and only in the event of the most serious and flagrant failures to engage would it be appropriate to adopt the draconian sanction of depriving it of all of its costs.

In *Lynn v Borneos LLP (t/a Borneo Linnels) [2015] 3 Costs L.R. 439* HHJ Cooke, having found that a party had unreasonably refused to mediate, stated that the sanction "ought to be proportionate and proportionate to the degree to which the court can realistically infer that there was actually an opportunity to save costs". As he concluded that it was unlikely that a mediation would have resulted in settlement he reduced the successful defendant's cost by 40%, so that it received 60% of its costs instead of 100%. In *Rana v Tears of Sutton Bridge [2015] EWHC 2597 (QB)* the court also imposed the same costs sanction on a successful defendant, namely a costs reduction of 40%.

In *Laporte v The Commissioner of Police of the Metropolis [2015] EWHC 371 (QB); [2015] 3 Costs L.R. 471* the court, having found that the defendant had failed, without adequate justification, to fully and adequately engage in the ADR process, which had a reasonable chance of success, imposed a costs sanction. Although the defendant was successful on every substantive issue and, although ADR made settlement a sufficiently likely possibility, it would not have been certain, the court ordered that he should only receive two thirds of his costs, to be assessed.

In *OMV Petrom SA v Glencore International AG [2017] EWCA Civ 195; [2017] 1 W.L.R. 3465; [2018] 1 All E.R. 703* the costs sanction took the form of enhanced interest:

"As long as the award (of interest) was proportionate to the facts of the case, it could include a non-compensatory element to encourage parties to engage in reasonable settlement negotiations and to mark the court's disapproval of unreasonable conduct."

See also *Hochtief (UK) Construction Ltd v Atkins Ltd [2019] EWHC 3028 (TCC); [2020] Costs L.R. 1* at [16].

In *Moradi v Home Office [2022] EWHC 3125 (KB)* the successful claimant suffered a 33% deduction from a portion of her costs on the ground that her failure to negotiate for a period of months had been moderately unreasonable. Reference was made to there being a costs risk in making unrealistic or inflated offers.

Cases where refusal to mediate was found not to be unreasonable

- 14-13. 1 Notwithstanding the above there are a number of authorities which demonstrate that a refusal to mediate will not always be visited by a sanction. In *Uwug Ltd (In Liquidation) v Ball [2015] EWHC 74 (IPEC)* the court considered that

"... the defendant's refusal to enter into mediation should not count against him as it would have been likely to have been unsuccessful and to have led to a waste of time and expenditure."

In *Butler v Butler [2016] EWHC 1793 (Ch)* the court said: "Mediation requires a willingness on the part of all parties to compromise; in this case it was not a realistic option." In *Gore v Naheed [2017] EWCA Civ 369; [2017] 3 Costs L.R. 509; [2018] 1 P. & C.R. 1*, Patten LJ considered *PGF II SA v OMFS Co 1 Ltd [2013] EWCA Civ 1288; [2014] 1 W.L.R. 1386; [2014] 1 All E.R. 970* in relation to a claimant who declined to mediate and said that he had:

"... some difficulty in accepting that the desire of a party to have his rights determined by a court of law in preference to mediation can be said to be unreasonable conduct particularly when, as here, those rights are ultimately vindicated."

He took into account the view of the claimant's solicitor that mediation had "no realistic prospect of succeeding" and the trial judge's view that "the case raised quite complex questions of law which made it unsuitable for mediation".

In *Richards v Speechley Bircham LLP [2022] EWHC 1512 (Comm)* HHJ Russen (sitting as a High Court judge) refused an application for indemnity costs notwithstanding that the defendants had been unreasonable in failing to mediate. He found

that, in the circumstances of the case, this was only one aspect of the conduct to be considered in the exercise of the discretion under CPR 44.2. and such a refusal did not automatically lead to costs penalties. Masood Ahmed, University of Leicester, has analysed the judgment in a Law Society Gazette article at <https://www.lawgazette.co.uk/legal-updates/unreasonable-refusal-to-engage-with-adr/5113250.article>.

In *Parker Lloyd Capital Ltd v Edwardian Group Ltd (formerly Parker Lloyd Capital Plc) [2017] EWHC 2421 (QB)* the court concluded that a refusal to mediate was founded on a belief that the offer to mediate was a mere tactic to extract payment and, therefore, was not unreasonable. See also *Tradeouts Ltd, Re [2018] EWHC 1066 (Ch)*, where a refusal to mediate was not, in the circumstances, visited with a costs sanction. In *Ali v Channel 5 Broadcast Ltd [2018] EWHC 840 (Ch); [2018] 2 Costs L.R. 373*, the court found that, in the circumstances, there had not been refusal to engage in ADR. True, the claimants did not embrace the first suggestion of ADR but they did assert that they would keep it under review and in response to the second suggestion they maintained that they were fully prepared to engage in ADR at a suitable time. A mediation did ultimately take place. In *PJSC Aeroflot - Russian Airlines v Leeds [2018] EWHC 1735 (Ch); [2018] 4 Costs L.R. 775* a refusal to mediate was not unreasonable in the context of serious allegations of fraud. Per Rose J at para 93: “.. where allegations of fraud and serious wrongdoing are made, the proceedings are intrinsically unsuitable for mediation.” In *Kelly v Kelly [2020] EWHC 1027 (QB)* a refusal to mediate was reasonable in light of the previous conduct of the party offering mediation. In *Philip Warren & Son Ltd v Lidl Great Britain Ltd [2021] EWHC 2372 (Ch)* the defendant was found to be not unreasonable in not taking up an invitation to mediate. In *Von Westenholz v Gregson [2022] EWHC 3374 (Ch)* a failure to mediate on the basis that the parties were far apart and there were allegations of malice and potential dishonesty was found to be not so unreasonable as to justify an award of indemnity costs.

In *Coldunell Ltd v Hotel Management International Ltd [2022] EWHC 3084 (TCC)* a claimant who declined a second mediation was not unreasonable, given that the first mediation had failed a few months earlier.

In *Hotel Portfolio II UK Ltd (In Liquidation) v Ruhan [2022] EWHC 3385 (Comm)*, it was found that seeking (a) an indication that that a suggestion of mediation was genuine and (b) a means of demonstrating that, did not amount to an unreasonable refusal.

See also *Benyatov v Credit Suisse Securities (Europe) Ltd [2022] EWHC 528 (QB)* (Freedman J, pp.29–34), *Huntsworth Wine Co Ltd v London City Bond Ltd [2022] EWHC 97 (Comm)*, *Ineos Upstream Ltd v Boyd [2023] EWHC 1756 (Ch)* and *Hamon v University College London [2023] EWHC 1812 (KB)*.

Contrast those findings, however, with the assertion by the Court of Appeal that: “No dispute was too intractable for mediation” (*N J Rickard Ltd v Holloway [2015] EWCA Civ 1631; [2017] 1 Costs L.R. 1*).

Costs where ADR declined

14-14

The question as to when the court should impose a costs sanction against a successful litigant on the grounds that he has refused to take part in an alternative dispute resolution (ADR), referred to in *Dunnett v Railtrack Plc*, op cit, was considered by the Court of Appeal in *Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576; [2004] 1 W.L.R. 3002*, CA. The court said the fundamental principle is that departure from the general rule (that the unsuccessful party should be ordered to pay the costs of the successful party) is not justified unless it is shown (the burden being on the unsuccessful party) that the successful party acted unreasonably in refusing to agree to ADR. The court gave guidance (see especially para.16) as to the factors that should be considered by the court in deciding whether a refusal to agree to ADR is unreasonable. See also *Reed Executive Plc v Reed Business Information Ltd [2004] EWCA Civ 887; [2004] 1 W.L.R. 3026*, CA, *Wills v Mills & Co Solicitors [2005] EWCA Civ 591*, *Daniels v Commissioner of Police of the Metropolis [2005] EWCA Civ 1312*, *Hickman v Blake Lapthorn [2006] EWHC 12 (QB)* (Jack J) (reviewing the authorities and summarising the principles). This matter is dealt with in commentary following r.44.3 (court’s discretion and circumstances to be taken into account when exercising discretion as to costs), in particular in para.44.3.13. In a given case it is quite conceivable that, before legal proceedings were commenced, the parties may have made a genuine but unsuccessful attempt to reach agreement on an ADR procedure or, indeed, may have participated in such a procedure in an unsuccessful (or only partly successful) effort to settle their dispute. The failures in these respects should not blind the parties or the court to the possibility that an opportunity may arise during the pre-trial process (or even on appeal) when an ADR procedure might yet be used to good effect.

In *Societe Internationale de Telecommunications Aeronautiques SC (SITA) v Wyatt Co (UK) Ltd [2002] EWHC 2401 (Ch)* (Park J) it was held that, in the circumstances, it was reasonable for a Pt 20 defendant to refuse to participate in a mediation between the claimant and the defendant (which led to a compromise), or a mediation between themselves and the claimant, offered by the claimant shortly before trial of the Pt 20 claim at which judgment was given in their favour, and therefore they should not be deprived of any part of their costs. Other cases in which the imposing of a costs sanction on a party for their failure to take up an offer of mediation was countenanced, and in some instances effected, include: *Hurst v Leeming [2002] EWHC 1051 (Ch); [2003] 1 Lloyd's Rep. 379* (Lightman J), *R. (Cow) v Plymouth City Council [2001] EWCA Civ 1935; [2002] 1 W.L.R. 803, CA, Leicester Circuits Ltd v Coates Brothers Plc [2003] EWCA Civ 333.*

In *Reed Executive Plc v Reed Business Information Ltd [2004] EWCA Civ 159* the Court of Appeal invited submissions on the relevance to the question of costs of the defendants' refusal of a number of offers to go to mediation. After noting that the defendants had engaged in serious settlement negotiations, Jacob LJ said (para.167) that such negotiations were not the same as mediation as:

“... a good and tough mediator can bring about a sense of commercial reality to both sides which their own lawyers, however good, may not be able to convey.”

In a similar vein, in *Garratt-Critchley v Ronnan and Solarpower PV Ltd [2014] EWHC 1774 (Ch)* and *Bristow v Princess Alexander Hospital NHS Trust [2015] 11 WLUK 67*, 4 November 2015, unrep., the court rejected arguments that a refusal to mediate was reasonable because the parties were too far apart. In *Garratt*, HHJ Waksman QC said (para.22) that:

“Parties don't know whether in truth they are too far apart unless they sit down and explore settlement. If they are irreconcilably too far apart, then the mediator will say as much within the first hour of mediation. That happens very rarely in my experience.”

See also *TMO Renewables Ltd (In Liquidation) v Yeo [2022] EWCA Civ 1409* where one of the parties dismissed a proposal to mediate as “an expensive waste of time”. Males LJ and Asplin LJ, rejecting this, were of the view that the case was ideally suited to mediation. “Instead” added Males LJ:

“... because none of the parties was prepared to be reasonable, they marched on with colours flying to the disaster which the trial proved to be for them all” (at paras 38 and 40).

In contrast, however, in *Patel v Barlows Solicitors (A Firm) [2020] EWHC 2795 (Ch)*, HHJ Mithani QC found that a party reasonably refused mediation because its lawyer:

“... felt that mediation was unlikely to be productive because of how far apart the parties were in terms of what they would be prepared to accept. In those circumstances, it is difficult for me to see what else could have been achieved by mediation. I cannot see any basis upon which the Claimants can be criticised for refusing to mediate when without prejudice communication had been attempted and proved wholly unsuccessful. Either party could have improved on the offer which they had made. Neither did so. There was, therefore, no reason to explore mediation any further. It was unlikely that either party would have been prepared at any mediation meeting to make the sort of concessions which would have resulted in the resolution of the Claim.”

In *Vale of Glamorgan Council v Roberts [2008] EWHC 2911 (Ch)* an unsuccessful litigant claimed costs against the successful defendant local authority. His application did not succeed. The court noted that the defendant had not positively suggested mediation and said that it would be going too far to disallow costs incurred by a local authority because that authority did not initiate suggestions for a mediation. Making contact with a mediation provider does not amount to an offer to mediate: *Park Promotion Ltd v Welsh Rugby Union Ltd [2012] EWHC 2406 (QB)*.

In *S v Chapman [2008] EWCA Civ 800; [2008] E.L.R. 603; (2008) 152 S.J.L.B. 29* the court found that the defendant was entitled to await the outcome of its application to strike out before deciding whether or not it was either necessary or advantageous to enter into mediation of the substantive issues with the claimant. There was no reason to depart from the normal principle that costs followed the event. See also *Mobiqa Ltd v Trinity Mobile Ltd [2010] EWHC 253 (Pat); (2010) 33(4) I.P.D. 33025*:

“... whilst it might be said that a resolute refusal to mediate or to take part in any discussions might attract adverse criticism, that certainly does not seem to have happened in the present case. Both of the suggestions of meetings were taken up and in relation to the offer of mediation, the defendant’s suggestion was simply that it should proceed, once the parties’ expert evidence had been exchanged, so it could be seen whether in fact the claimant had any case” (per Floyd J, para.29).

See also *National Museums and Galleries On Merseyside Board of Trustees v AEW Architects and Designers Ltd [2013] EWHC 3025 (TCC)*. The court will, however, disregard an offer to mediate which is made subject to an unreasonable pre condition: *R (Royal Free London NHS Foundation Trust) v Secretary of State for the Home Department [2013] EWHC 4101 (Admin)* and in *Ineos Upstream Ltd v Boyd [2023] EWHC 1756 (Ch)* the court found that the circumstances were such that no discernible weight could be attached to the offer to mediate.

For an application, and discussion, of the concept of “unreasonable refusal to mediate” and the principles established in *Halsey* see *The Claimants appearing on the Register of the Corby Group Litigation v Corby DC [2009] EWHC 2109 (TCC)* where the court also considered the approach taken by Lightman J in *Hurst v Leeming* (see above). See also *Gill v Woodall [2009] EWHC 834 (Ch)*. In *Swain Mason v Mills & Reeve [2012] EWCA Civ 498*, *Euroption Strategic Fund Ltd v Skandinaviska Enskilda Banken AB [2012] EWHC 749 (Comm)* and *ADS Aerospace Ltd v EMS Global Tracking Ltd [2012] EWHC 2904 (TCC)* the court found parties who had refused to mediate were not unreasonable. In Swain, it was held, following *Halsey*, that where a party reasonably believed that he had a watertight case, that might well be a sufficient justification for a refusal to mediate, even if on some issues the defence did not succeed.

In *Primeview Developments Ltd v Ahmed [2017] UKUT 57 (LC)* the Upper Tribunal (Lands Chamber) decided, by reference to *Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576*, that a party’s refusal to mediate was not unreasonable. The critical issues were that the prospects of success were slight and the costs of mediation were likely to be disproportionately high.

A claim that a party has a strong defence, however strong, is not of itself a guarantee that a court will find a refusal to mediate was reasonable, as the defendant found in *DSN v Blackpool Football Club Ltd [2020] EWHC 670 (QB)* where Griffiths J outlined (at para.28) the potential benefits that could arise from a mediation notwithstanding the defendants’ views on the merits.

It is often the case, where a party has refused mediation, that the court has a number of factors to consider, in relation to r.44.3(4)(a) and the parties’ conduct, rather than (as in *Halsey*) the single issue of whether refusal was unreasonable. The overall nature of the court’s discretion on costs can be seen in *Multiplex Construction (UK) Ltd v Cleveland Bridge (UK) Ltd [2008] EWHC 2280*, TCC where Jackson J made a comprehensive review of costs authorities from which he derived (at para.72) eight principles. These included:

- “(v) In many cases the judge can and should reflect the relative success of the parties on different issues by making a proportionate costs order
- “(vi) In considering the circumstances of the case the judge will have regard not only to any part 36 offers made but also to each party’s approach to negotiations (insofar as admissible) and general conduct of the litigation.”

In two cases, *Whitecap Leisure Ltd v John H. Rundle Ltd [2008] EWCA Civ 1026* and *Shah v Joshi [2008] EWHC 1766 (Ch)*, the court’s overall approach to costs was seen. Features of the parties’ conduct included the following. In *Whitecap*, the conduct of each party was described as having been as bad as the other, although one party’s obdurate attitude was more striking than the other’s conduct, and an offer of mediation was rejected as was a very favourable Pt 36 offer. In *Shah*, mediation was proposed but flatly rejected, as was a Calderbank offer. The parties did undertake mediation shortly before trial, but it was unsuccessful. On the first day of the trial, the judge emphasised to the parties the extreme desirability of a settlement but despite giving an extended adjournment to facilitate a settlement no agreement was reached. In *Whitecap* the court came to deal with costs and ordered that one party should recover only 80% of its costs of the appeal and that the costs of the claim and the costs of the appeal should be set off against each other. In *Shah* an application for indemnity costs in respect of a successful claims and counterclaim was only granted in part; the court took into account all the circumstances, including the losing party’s attitude at the time when the other party first proposed mediation. These cases perhaps demonstrate that if a party rejects an offer of mediation, or fails to give ADR adequate consideration when following a pre-action protocol or completing the directions questionnaire, it will run the risk of an adverse costs order when costs are dealt with and the court considers the overall conduct of the litigation.

This was in fact the approach taken by the Court of Appeal in *Bray (t/a Building Co) v Bishop [2009] EWCA Civ 768* when it considered conduct in relation to costs and took into account a number of factors, including one party's rejection of a Pt 36 offer and the other's refusal to engage with a suggestion of mediation. See also *Sonmez v Kebabery Wholesale Limited [2009] EWCA Civ 1386*, *Fitzroy Robinson Ltd v Mentmore Towers Ltd [2010] EWHC 98 (TCC)*, *Brookfield Construction (UK) Ltd (formerly Multiplex Constructions (UK) Ltd) v Mott MacDonald Ltd [2010] EWHC 659 (TCC)*, *Kayll v Rawlinson [2010] EWHC 1789 (Ch); [2010] W.T.L.R. 1479*, *Oliver v Symons [2011] 4 WLUK 427*, *Camertown Timber Merchants Ltd v Sidhu [2011] EWCA Civ 1041*, *Nelson's Yard Management Co v Eziefula [2013] EWCA Civ 235*, *Bristow v Princess Alexander Hospital NHS Trust [2015] 11 WLUK 67*, 4 November 2015, unrep., *Flanagan v Liontrust Investment Partners LLP [2016] EWHC 446 (Ch)*, *Kupeli v Kibris Turk Hava Yollari Sirketi (t/a Cyprus Turkish Airlines) [2016] EWHC 1478 (QB)*, *NJ Rickard v Holloway [2015] EWCA Civ 1631*, *Car Giant Ltd v Hammersmith LBC [2017] EWHC 464 (TCC)*, *Inchbald v Inchbald [2017] EWHC 616 (Ch)*; *MacInnes v Gross [2017] EWHC 127 (QB)*, *Lloyds Bank PLC v McBains Cooper [2017] EWHC 30 (TCC)*; [2017] 1 Costs L.O. 95, and *Burgess v Penny [2019] EWHC 2034 (Ch)* and *Wales (t/a Selective Investment Services) v CBRE Managed Services Ltd [2020] EWHC 1050 (Comm)* and *Geoquip Marine Operations AG v Tower Resources Cameroon SA [2022] EWHC 1408 (Comm)*.

In *Marsh v Ministry of Justice [2017] EWHC 1040 (QB)* the claimant bettered a Part 36 Offer in circumstances where the defendant had refused to engage in mediation notwithstanding an order that the parties must consider settlement by ADR, including mediation. (The order was in the form of Standard Directions Model Paragraph A03-ADR.doc <https://www.justice.gov.uk/courts/procedure-rules/civil/standard-directions/list-of-cases-of-common-occurrence/menu-of-sd-paragraphs>.) The court ordered the defendant to pay indemnity basis costs and awards under CPR r.36.17. The following two cases make no reference to mediation but demonstrate how the court is prepared to award costs sanctions where there has been a failure to engage properly in settlement negotiations: *Jordon v MGN Ltd [2017] EWHC 1937 (Ch)* and *Dickinson v Cassillas [2017] EWCA Civ 1254*. As Sir Geoffrey Vos, then Chancellor of the High Court, stated in *OMV Petrom SA v Glencore International AG [2017] EWCA Civ 195* (para.29): "The parties are obliged to conduct litigation collaboratively and to engage constructively in a settlement process." For a forensic analysis of a challenge about whether a party had failed to engage in settlement discussions see *Pallett v MGN Ltd [2021] EWHC 76 (Ch)*. See also *TMO Renewables Ltd (In Liquidation) v Yeo [2021] EWHC 2773 (Ch)* at [65] and *Moradi v Home Office [2022] EWHC 3125 (KB)*.

In *Roundstone Nurseries Ltd v Stephenson Holdings Ltd [2009] EWHC 1431 (TCC)* mediation was not declined initially but one party unilaterally cancelled an imminent pre-action mediation. The TCC held that this was wrong, that it was an agreed part of the pre-action process in which that party was obliged to participate, and that the other party was entitled to its costs thrown away by the late cancellation (albeit on a standard, not indemnity, basis). In *Gresport Finance Ltd v Battaglia [2015] EWHC 2709 (Ch)* the court found that failure to attend a mediation, having agreed to do so, may be sufficient conduct, of itself, for the court to reject an application where that party is asking the court for relief on the ground that it is just to make the order sought.

In *Rolf v De Guerin [2011] EWCA Civ 78* Rix LJ reviewed the authorities (at [42] and [47]) before opining that in this small building dispute, on the facts, negotiation and/or mediation would have had reasonable prospects of success. He concluded that:

"The spurned offers to enter into settlement negotiations or mediation were unreasonable and ought to bear materially on the outcome of the court's discretion (on the question of costs)."

Rix LJ noted that the party refusing negotiation/mediation wanted his day in court and that such a wish had been cited as a reason why the courts have been unwilling to compel parties to mediate rather than litigate. To that he said that did not seem to him to be an adequate response to a proper judicial concern that parties should respond reasonably to offers to mediate or settle and that their conduct in this respect can be taken into account in awarding costs. See also *Seef v Ho [2011] EWCA Civ 186* and *Southern Counties Fresh Foods Ltd, Re [2011] EWHC 1370 (Ch); (2011) 161 N.L.J. 882* for further examples of a refusal of mediation influencing the ultimate costs order.

The issue for Mr Recorder Furst QC in *PGF II SA v OMFS Co [2012] EWHC 83 (TCC)* was whether a failure to respond to an offer to mediate amounted to an unreasonable refusal that should sound in costs. Having considered the factors set out in Halsey he decided that it did. In particular he found that that there were reasonable prospects that a mediation would have been successful and that the parties, being well-advised commercial parties, with the benefit of lawyers, would have been able to reach an accommodation ([42]). The absence of expert evidence was cited as justification for a failure to mediate and to this he responded:

“Experience suggests that many disputes, ...are resolved before all material necessary for a trial is available. Either parties know or are prepared to assume that certain facts will be established The rationale behind the Halsey decision is the saving of costs and this is achieved (or at least attempted) by the parties being prepared to compromise without necessarily having as complete a picture of the other parties’ case as would be available at trial.” ([45]).

The court also made it clear that a party should put reasons for refusing mediation in writing at the time adding:

“... the court should be wary of arguments only raised in retrospect as why a party refused to mediate or as to why it cannot be demonstrated that a mediation would have had a reasonable prospect of success” ([44]).

This decision was subsequently upheld by the Court of Appeal (*PGF II SA v OMFS Co [2013] EWCA Civ 1288*). Briggs LJ found that silence in the face of an invitation to participate in ADR was, as a general rule, unreasonable and, as such, should be visited by a costs sanction. He went on to endorse the ADR Handbook that Jackson LJ had called for in his Costs Review. He added that this case sends out an important message to civil litigants, requiring them to engage with a serious invitation to participate in ADR, even if they have reasons which might justify a refusal, or the undertaking of some other form of ADR, or ADR at some other time in the litigation. He concluded that:

“The court’s task in encouraging the more proportionate conduct of civil litigation is so important in current economic circumstances that it is appropriate to emphasise that message by a sanction which, even if a little more vigorous than I would have preferred, nonetheless operates pour encourager les autres.”

In *Thakkar v Patel [2017] EWCA Civ 117* the Court of Appeal developed PGF. Here the defendants did not ignore or refuse an offer to mediate, “but they dragged their feet and delayed until eventually the claimants lost confidence in the whole ADR process”. Jackson LJ stated:

“The message which the court sends out in this case is that in a case where bilateral negotiations fail but mediation is obviously appropriate, it behoves both parties to get on with it. If one party frustrates the process by delaying and dragging its feet for no good reason, that will merit a costs sanction.”

The court enumerated the factors that suggested there were good prospects of a successful mediation in this case.

It is not, however, the case that silence in response to an offer to mediate will always attract a costs sanction: see *R. (Crawford) v Newcastle Upon Tyne University [2014] EWHC 1197 (Admin)* and *AL v A [2021] EWHC 1761 (QB)* at [43], where Robin Knowles J noted a proposal to mediate an interlocutory dispute had met with silence, did not impose a penalty but added “I trust this will not happen again.”. Also, a party that refuses to mediate but then changes its mind may escape a costs sanction. It is “not to be fixed with a once stated but changed intention in relation to mediation”. *Murray v Bernard [2015] EWHC 2395 (Ch); [2015] 5 Costs L.O. 567*.

The Court of Appeal in PGF II SA also made it clear that a party should put reasons for refusing mediation in writing at the time and endorsed the view of the court below:

“... the court should be wary of arguments only raised in retrospect as why a party refused to mediate or as to why it cannot be demonstrated that a mediation would have had a reasonable prospect of success” (Briggs LJ, paras 33–40).

When considering the issue of costs sanctions in relation to mediation it should be borne in mind that senior members of the judiciary frequently draw attention to the potential of mediation, particularly where costs are out of all proportion to what is at stake. See for example the observations by Ward LJ:

“If the claimants are right in their assessment of their costs, then, even without a success fee, the costs incurred by them exceed the sum over which battle has been joined. The great British public must think that something

has gone wrong somewhere if litigation is conducted in that way. I share that sense of horror. One answer has to be to engage in mediation constructively and at the very earliest stage.” [*Shovellar v Lane [2011] EWCA Civ 802; [2012] 1 W.L.R. 637; [2011] 4 All E.R. 669*].

“As I observed at the outset of this judgment, the costs are out of all proportion to what is at stake, particularly from (the defendant’s) perspective. The legal process appears to have caused the parties to become entrenched in their positions rather than seeking common ground. I suspect that the costs will themselves quickly have become an obstacle to settlement... [I]n future disputes of this nature the possibility of mediation should be explored as soon as is practicable” (*Samuel Smith Old Brewery (Tadcaster) v Lee (t/a Cropton Brewery) [2011] EWHC 1879 (Ch); [2012] F.S.R. 7; [2012] Bus. L.R. D97*).

See also *Page v Hewets Solicitors [2013] EWHC 2845 (Ch); [2014] W.T.L.R. 479* (at [61]) and *Grace v Black Horse Ltd [2014] EWCA Civ 1413; [2015] 3 All E.R. 223; [2015] 2 All E.R. (Comm) 465* (at [54]).

In *Garratt-Critchley v Ronnan [2014] EWHC 1774 (Ch); [2015] 3 Costs L.R. 453* HHJ Waksman QC sitting as a Judge of the High Court examined and dismissed a series of arguments that a refusal of mediation had been reasonable and awarded indemnity costs by way of sanction. A costs sanction for unreasonable refusal to mediate was also imposed in *Lakehouse Contracts Ltd v UPR Services Ltd [2014] EWHC 1223 (Ch)*. In *Northrop Grumman Mission Systems Europe Ltd v BAE Systems (Al Diriyah C4) Ltd [2014] EWHC 3148 (TCC); [2015] 3 All E.R. 782* Ramsey J decided that an unreasonable refusal to mediate should not result in a costs sanction because of other relevant conduct by the refusing party. There was a similar result in *Courtwell Properties Ltd v Greencore PF (UK) Ltd [2014] EWHC 184 (TCC); [2014] 2 Costs L.O. 289; [2014] C.I.L. 3481* and in *Richards v Speechly Bircham LLP [2022] EWHC 1512 (Comm)*, but contrast these cases with *Lakehouse Contracts Ltd v UPR Services Ltd [2014] EWHC 1223 (Ch)* where again there were conduct issues on both sides. In *Lynn v Borneos LLP (t/a Borneo Linnels) [2014] 1 WLUK 783*, 30 January 2014, unrep. HHJ Cooke found that there was an unreasonable refusal to mediate notwithstanding that the action was fiercely contested and that it was unlikely that a mediation would have resulted in settlement. The latter factor was taken into account in exercising discretion about the level of the sanction which, in the circumstances, was to deny the successful party 40% of its costs.

Similarly, in *Laporte v Commissioner of Police of the Metropolis [2015] EWHC 371 (QB); [2015] 3 Costs L.R. 471* the defendant, who was successful on every substantive issue, was awarded only two thirds of his costs. This was the consequence of the court’s finding that the defendant had failed, without adequate justification, to fully and adequately engage in the ADR process, notwithstanding that the outcome of such process was not certain.

In *Rana v Tears of Sutton Bridge [2015] EWHC 2597 (QB)* the court found that the defendant had, in all the circumstances, unreasonably failed to engage with ADR. His Honour Judge McKenna added:

“I am not impressed by their arguments that simply because liability was still in issue and because there was not sufficient information as to the quantification of the loss of profits claim, still less that disclosure had not taken place, an attempt at alternative dispute resolution should not have taken place.”

In *OMV Petrom SA v Glencore International AG [2017] EWCA Civ 195; [2017] 1 W.L.R. 3465; [2018] 1 All E.R. 703* Vos LJ said, at para.41, that a:

“... blank refusal to engage in any negotiating or mediation process, ... to seek to frustrate a claimant’s attempts to reach a compromise solution should be marked by the use of the court’s powers to discourage such conduct.”

In *EAXB v University Hospitals of Leicester NHS Trust* (unrep.) the court considered the conduct of a party during a joint settlement meeting. The defendant instigated the meeting but then took the position of making no offers. The claimant successfully argued that such an approach was entirely inappropriate and this was one of the reasons why the claimant secured indemnity costs (See <https://www.civillitigationbrief.com/2020/06/03/indemnity-costs-ordered-where-defendant-asked-for-jsm-but-made-no-offer-a-waste-of-time-and-money>).

In *Webster v WPP Group (UK) Ltd [2021] EWHC 2153 (Comm)* the court criticised a party’s conduct in the lead-up to a mediation and reflected this in an indemnity costs order.

Disputes about costs

14-15 ADR is as relevant to disputes about costs as it is to all other types of litigation. In particular an unreasonable refusal to mediate a costs dispute may, and in a number of cases has, resulted in a costs sanction. In *Lakehouse Contracts Ltd v UPR Services Ltd [2014] EWHC 1223 (Ch)* a failure to mediate was taken into account in dealing with the costs of a winding-up petition. In *Morris v The County Court*, 2 February 2015, unrep. (Kingston upon Hull) the defendant paying party received two CPR r.47.20 offers prior to a detailed assessment but did not respond to them. The District Judge found that the defendant failed to make any offer and/or to actively consider dispute resolution and concluded that this was a conduct issue. He said, following *Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576; [2004] 1 W.L.R. 3002* and *PGF II SA v OMFS Co 1 Ltd [2013] EWCA Civ 1288; [2014] 1 W.L.R. 1386*, that the parties were expected to engage in alternative dispute resolution. He considered it likely that further mediation could have achieved a far speedier conclusion and at less cost and concluded that the defendant's conduct was also conduct contrary to the overriding objective.

See also *Reid v Buckinghamshire Healthcare NHS Trust [2015] 10 WLUK 752*, 28 October 2015, unrep., and *Bristow v Princess Alexandra Hospital NHS Trust [2015] 11 WLUK 67*, 4 November 2015, unrep.

The fact that disputes about costs are being mediated is demonstrated by *Sugar Hut Group Ltd v A J Insurance Service [2016] EWCA Civ 46; [2016] C.P. Rep. 19*: the Court of Appeal judgment noted that Property Damage costs in the matter were agreed at a mediation.

In *Ineos Upstream Ltd v Boyd [2023] EWHC 1756 (Ch)* the party refusing to mediate a costs dispute was not penalised because of the circumstances in which the offer was made.

4. - ADR, confidentiality, without prejudice and “mediation privilege” in relation to mediation

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Volume 2

Section 14 - Alternative Dispute Resolution

Alternative Dispute Resolution

4. - ADR, confidentiality, without prejudice and “mediation privilege” in relation to mediation

14-16

It is very important, for reasons of public policy, that communications between parties to a mediation, and between those parties and the mediator, remain private and confidential. The courts will, generally, be ready to reinforce the cloak of confidentiality under which settlements are reached:

“... communications made with a view to an amicable settlement ought to be held very sacred; for if parties were to be afterwards prejudiced by their efforts to compromise, it would be impossible to attempt an amicable arrangement of differences” (per Lord Scott, quoting Romilly M.R. in *Hoghton v Hoghton* 51 E.R. 545, 321 when discussing the “without prejudice” rule in *Ofulue v Bossert* [2009] UKHL 16; [2009] 2 W.L.R. 749).

In the context of ADR, Dyson LJ said in *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576; [2004] 1 W.L.R. 3002 (at [14]):

“... parties are entitled in an ADR to adopt whatever position they wish and if, as a result the dispute is not settled, that is not a matter for the court ... if the integrity and confidentiality of the process is to be respected, the court should not know, and therefore should not investigate, why the process did not result in agreement.”

In *Woodward v Santander UK Plc (formerly Abbey National Plc)* [2010] I.R.L.R. 834, Employment Appeal Tribunal, the rationale for confidential, without prejudice discussions was put (at [61]) in this way:

“It is important that parties should be able to settle their differences (whether by negotiation or mediation) in conditions where they can speak freely. A claimant must be free to concede a point for the purposes of settlement without the fear that if negotiations are unsuccessful he or she will be accused for that reason of pursuing the point dishonestly. A respondent must be free to adhere to and explain a position, or to refuse a particular settlement proposal, without the fear that in subsequent litigation this will be taken as evidence of committing or repeating an act of discrimination or victimisation. And it is idle to suppose that parties, when they participate in negotiation or mediation, will always be calm and dispassionate. They should be able, within limits, to argue their case and speak their mind.”

Finally, in *Cumbria Waste Management Ltd v Baines Wilson (A Firm)* [2008] EWHC 786 (QB), HHJ Kirkham said: “... the court should support the mediation process by refusing, in normal circumstances, to order disclosure of documents and communications within a mediation.” There are different ways in which mediation communications are protected and, as the cases mentioned below demonstrate, it can be important to differentiate between the concepts of confidentiality, “without prejudice”, legal professional privilege, and (if it exists) “mediation privilege”. The cloak of confidentiality is, in fact, multi-layered. These cases will also demonstrate that, and again this is for reasons of public policy, confidentiality is not absolute and there are exceptions whereby a court may wish to examine mediation matters that usually remain private and confidential. Such exceptions are limited in nature and guarded by the court. Essentially, when considering whether matters in relation to a particular mediation should remain confidential, the court will usually be involved in a careful public policy balancing act, weighing the importance of encouraging parties to settle against, for example, some kind of impropriety.

The final paragraph in this section (para.14.23) mentions some less obvious aspects relating to confidentiality.

Issues that relate to confidentiality in its broadest sense are of importance in various ways; they are relevant, for example, to lawyers advising a party before a mediation, to mediation providers when drafting agreements to mediate, to lawyers and mediators in relation to the conduct of a mediation and to lawyers and the courts when there are applications, post mediation, that the court should explore what took place at a mediation.

Confidentiality, without prejudice and “mediation privilege” in relation to mediation

14-17 In *Farm Assist Ltd (in liquidation) v Secretary of State for the Environment, Food and Rural Affairs [2009] EWHC 1102 (TCC); [2009] B.L.R. 399; 125 Con. L.R. 154 (“Farm Assist 2”)* the court gave guidance on these matters. It did so in the context of an application by a mediator to set aside a witness summons that was intended to require her to give evidence about what had taken place at a mediation. Having reviewed the authorities Ramsey J gave the following summary of the different concepts or principles that are applied in the protection of the privacy of mediation:

“(1) Confidentiality:

The proceedings (at a mediation) are confidential both as between the parties and as between the parties and the mediator. As a result even if the parties agree that matters can be referred to outside the mediation, the mediator can enforce the confidentiality provision. The court will generally uphold that confidentiality but where it is necessary in the interests of justice for evidence to be given of confidential matters, the Courts will order or permit that evidence to be given or produced.

(2) Without Prejudice Privilege:

The proceedings are covered by without prejudice privilege. This is a privilege which exists as between the parties and is not a privilege of the mediator. The parties can waive that privilege.

(3) Other Privileges:

If another privilege attaches to documents which are produced by a party and shown to a mediator, that party retains that privilege and it is not waived by disclosure to the mediator or by waiver of the without prejudice privilege.”

These three concepts of privilege will be explored in more detail below.

The mediator’s application in this case to set aside the witness summons was dismissed for a number of reasons: the parties had, as they were entitled to do, waived the without prejudice privilege and, although the mediator was on the face of it entitled to enforce the confidentiality provision in the Mediation Agreement, it was held that this was: “... a case where, as an exception, the interests of justice lie strongly in favour of evidence being given of what was said and done (at the mediation).” These findings, however, had no practical consequences as the mediator did not have any relevant notes or any recall of the issues; further, the case went on to settle in any event. *Farm Assist 2* has attracted the attention of mediators and has resulted in the publication by the Civil Mediation Council of two Guidance Notes “Mediation Confidentiality—Guidance Note 1” and “Chairman’s Note on Farm Assist v DEFRA”.

Confidentiality

14-18

As in *Farm Assist 2*, most agreements to mediate include clauses providing that, in addition to the mediation being conducted on a without prejudice basis, the parties and the mediator are required to treat the proceedings as confidential. In *Farm Assist 2* Ramsey J also found that the confidentiality would have been implied, even if the mediation agreement had not agreed it expressly.

In concluding that the court can override such confidentiality, where it is necessary in the interests of justice, the court in *Farm Assist 2* took into account on the following passage in Toulson and Phipps on Confidentiality 2nd ed. (2006):

“Generally speaking, confidentiality is not a bar to disclosure of documents or information in the process of litigation, but the court will only compel such disclosure if it considers it necessary for the fair disposal of the case: see ... *British Steel Corporation v Granada Television Ltd [1981] A.C. 1096*” (para.17-001).

If there is an explicit agreement on confidentiality it will, as with any other type of agreement, fall to be construed by the court. In *Farm Assist 2* the confidentiality provisions were narrowly drawn and not as wide as the mediator might have wished.

Another particular point clarified by this case was the finding that the mediator could enforce the provisions relating to confidentiality, as against the parties. This means that where, as in *Farm Assist 2*, the parties have waived without prejudice privilege the mediator may nevertheless be able to require that confidentiality will be maintained. (As in *Farm Assist Ltd*, the Court may not always treat the mediator’s word on this issue as decisive: see the comment by Nicol J in *Commodities Research Unit International (Holdings) Ltd v King and Wood Mallesons LLP [2016] EWHC 63 (QB)* at [21].)

Where there is a risk that a party may act in breach of the agreement that proceedings at a mediation be kept confidential they may be restrained by an injunction (*Venture Investment Placement Ltd v Hall [2005] EWHC 1227 (Ch); [2005] All E.R. (D) 224* and *Instance v Denny Brothers Printing Ltd (Interim Injunction) [2000] F.S.R. 869*).

How far does the duty of confidentiality extend? In *Aujla v Aujla [2022] 10 WLUK 191* the court examined the role of the mediator, concluding that there was not a:

“... relationship between mediator and litigator that gave rise to a relationship of trust and confidence sufficient to found an assertion of undue influence. A mediator has a duty of confidentiality, but otherwise his role is simply to explore and facilitate the parties reaching their own settlement. He does not assume any fiduciary duties or invite either party to the dispute to repose in him the type of trust and confidence necessary for a finding of undue influence.”

Without prejudice

14-19

It is apparent, from the analysis in *Farm Assist 2*, that part of the mediation cloak of confidentiality is based on without prejudice privilege, and that such privilege can be waived by the parties. For a straightforward application of the without prejudice rule to mediation communications see *Mason v Walton on Thames Charity [2010] EWHC 1688 (Ch)*. For a fuller statement of the without prejudice rule or concept see *Cutts v Head [1984] Ch. 290; [1984] 1 All E.R. 597, CA; Unilever Plc v The Proctor & Gamble Co [2000] 1 W.L.R. 2436; [2001] 1 All E.R. 783; Muller v Linsley & Mortimer [1996] P.N.L.R. 74* and Vol.1, para.31.3.40. There are, however, exceptions to this privilege (helpfully summarised by Robert Walker LJ in *Unilever Plc v Procter & Gamble Co [2000] 1 W.L.R. 2436*) which are of importance in the context of mediation and ADR. A number of these exceptions, which are largely based on public policy and the better administration of justice, appear in the following cases.

In *Muller*, the claimant’s initial claim had been against his fellow shareholders in a private company following his dismissal as a director of that company. He settled that claim following without prejudice correspondence. Subsequently, he sued the solicitors who had advised him in the initial claim, alleging negligence. It was held that the without prejudice correspondence in the initial claim was disclosable in the subsequent claim. The public policy reasons that would have applied to prevent disclosure in the initial claim did not apply in the context of the subsequent claim: any without prejudice statements or offers made in the initial

claim were kept from the court, in that claim, lest they be treated as an admission of liability. Once that claim has been concluded, however, that reason fell away. (See Vol.1, para.35.12.3 and also *Bradford & Bingley Plc v Rashid [2006] 1 W.L.R. 2066*.)

The decision in *Muller* seems applicable in circumstances where there is a subsequent claim following an earlier claim and there are relevant mediation communications in the earlier claim that do, on the face of it, appear to be subject to without prejudice privilege. This was the finding in *Cattley v Pollard [2007] EWHC B16 (Ch); [2007] EWHC 5561 (Ch)*. There the claimants in the initial action were the executors of an estate who sued various defendants, including the solicitors acting in the estate, for misappropriation of estate funds. A settlement was reached at a successful mediation involving some of the defendants. A subsequent action was brought by the claimants against one of the defendants in the initial action who had not been involved in the mediated settlement. The defendant in this subsequent action was concerned about the issue of double recovery by the claimants and sought disclosure of mediation documents. The defendants resisted disclosure, arguing that mediations will not succeed if confidentiality is broken. The court held, following *Muller* and taking account of the overriding objective to deal justly with cases, that there should be disclosure limited to such parts of the mediation bundle as were factually material to the defendant's argument relating to double recovery.

See also *Youlton v Charles Russell [2010] EWHC 1032 (Ch); [2010] Lloyd's Rep. P.N. 227, Curtis v Pulbrook [2011] EWHC 167 (Ch)* and *Commodities Research Unit International (Holdings) Ltd v King and Wood Mallesons LLP [2016] EWHC 63 (QB)*. These are solicitor's professional negligence claims where it was necessary for the court to enquire into the detail of proceedings of a prior mediation to deal with the subsequent claim against the solicitors.

In *Cumbria Waste Management Ltd v Baines Wilson (A Firm) [2008] EWHC 786 (QB); [2008] B.L.R. 330*, however, the court found that *Muller* did not apply and refused to order disclosure of confidential mediation documents for the purposes of a subsequent action. The parties to the mediation did not waive privilege and the court held that the documents should remain privileged, both on the basis that they were subject to without prejudice privilege and were confidential by virtue of the agreement to mediate. HHJ Kirkham said that the court should support the mediation process by refusing, in normal circumstances, to order disclosure of documents and communications within a mediation. The court found that the disclosure sought here did not fall within the exception to the without prejudice rule set out in *Muller* and, further, noted that the court in *Muller* gave no consideration to the position of third parties.

Without prejudice—exceptions

14-19.1 *Muller* and the applicability of the without prejudice rule fell to be considered by the House of Lords in *Ofukue v Bossert [2009] UKHL 16; [2009] 2 W.L.R. 749*. This property case concerned two sets of proceedings between the same parties and, in particular, without prejudice negotiations between the parties during the first set of proceedings. The House of Lords said that the without prejudice rule was based on both the public policy of encouraging the negotiated settlement of actions and the express or implied agreement of the parties that communications in the course of such negotiations should not be admissible in evidence. It was held that the rule did extend to without prejudice negotiations conducted during earlier proceedings involving an issue which was still unresolved. The court further found that, although there were exceptions to the rule where justice required it, as where it was necessary to prevent the rule being used to further impropriety, reasons of legal and practical certainty made it inappropriate to create a further exception to limit the protection to identifiable admissions. Lord Hope referred to Ormrod J's words in *Tomlin v Standard Telephones & Cables Ltd [1969] 1 W.L.R. 1378* when he said that the court should be very slow to lift the without prejudice umbrella unless the case for doing so is absolutely plain. Lord Neuberger explained that if the House of Lords created further exceptions to the without prejudice rule this would severely risk hampering the freedom parties should feel when entering into settlement negotiations. In *Briggs v Clay [2019] EWHC 102 (Ch)* a similar line was taken, the court providing a reminder that the without prejudice rule was broad in its effect, with narrow exceptions. The exceptions to the without prejudice rule deriving from the decision in *Muller* were considered in the context of a prior mediation.

Another well-established exception to the without prejudice rule is that it does not prevent the admission in evidence of what parties said to one another when the issue is whether or not such communications resulted in a concluded settlement agreement (see Vol.1, para.31.3.40). At the trial of such issue, the fact that such communications took place between the parties at a mediation does not confer on them a status distinct from any other without prejudice communications sufficient to take them outside the scope of the exception or otherwise to render them inadmissible (*Brown v Rice [2007] EWHC 625 (Ch); [2007]*

B.P.I.R. 305; [2008] F.S.R. 3; Oceanbulk Shipping and Trading SA v TMT Asia Ltd [2010] UKSC 44 and *Aujla v Aujla [2022] 10 WLUK 191*, at [8].)

As seen in *Farm Assist 2*, parties can waive their entitlement to without prejudice confidentiality and did so in *Chantry Vellacott v Convergence Group [2007] EWHC 1774*, *Carleton (Earl of Malmesbury) v Strutt & Parker (A Partnership) [2008] EWHC 424 (QB)* and *Pedriks v Grimaux [2021] EWHC 3448 (QB)* (at [13]). In *Carleton*, Jack J made adverse findings in relation to a party's recovery of costs on the basis of that party's conduct during a mediation. He said that “the claimant's position at the mediation was plainly unrealistic and unreasonable” and found that, had they made an offer which truly reflected their position, the mediation might have succeeded. Note, however, that without prejudice privilege is effectively regarded as a joint privilege and cannot be waived by one party alone (see *Somatra Ltd v Sinclair Roche & Temperley (No.1) [2000] 1 W.L.R. 2453; [2000] 2 Lloyd's Rep. 673*, referred to in Vol.1 at para.31.3.40).

In *Smith Group v Weiss*, 22 March 2002, unrep., the court followed Somatra (see above) when considering whether material, prepared for a mediation that did not result in a settlement, should retain its without prejudice status. It was held that the material should remain without prejudice save in clear and unequivocal circumstances.

The court had to consider whether in all the circumstances it was fair and just to allow a party to rely on the material.

Where the court directs under r.35.12 that there should be a discussion between experts and that they must prepare a statement for the court, any such statement is available for use in the proceedings and is not protected by the without prejudice privilege (see Vol.1, para.35.12.3 below). Consequently, where a mediation takes place after such order, it cannot be argued in subsequent proceedings before the court that the statement cannot be referred to, even though the direction was made by the court with an eye to assisting a contemplated mediation (*Aird v Prime Meridian Ltd [2006] EWCA Civ 1866; [2007] C.P. Rep. 18; [2007] B.L.R. 105*, CA).

In *Farm Assist Ltd v Secretary of State [2008] EWHC 3079 (TCC); [2009] B.L.R. 80; [2009] P.N.L.R. 16* (the precursor to *Farm Assist 2*) the issue concerned legal advice privilege rather than the without prejudice concept. Party 1 sought to set aside the agreement resulting from a mediation on account of duress by party 2. Party 2 said that, as the allegations about duress went to party 1's state of mind, it should be able to see the (usually privileged) documents containing the legal advice to party 1. It was held that disclosure be refused, there having been no waiver of legal advice privilege. In *Aujla v Aujla [2022] 10 WLUK 191*, however, the court did review the conduct of the mediation when dealing with an application to set aside an agreement resulting from a mediation on account of duress.

See also *Berkeley Square Holdings v Lancer Property Asset Management Ltd [2020] EWHC 1015 (Ch)* and *King v Stiefel [2021] EWHC 1045 (Comm)* for an example of where the court will review confidential mediation papers in subsequent proceedings. An example of a case where the court refused to permit a party relying on matters that took place at a mediation is *E (A Child) (Mediation Privilege), Re [2020] EWHC 3379 (Fam)*.

Without prejudice—threats

14-20

In *Ferster v Ferster [2016] EWCA Civ 717; [2016] C.P. Rep. 42* a without prejudice offer to sell shares for an increased amount, on the basis that alleged wrongdoing could lead to the company taking committal proceedings against the offeree, was held to amount to blackmail. The threat fell within the unambiguous impropriety exception to prejudice and the offeree was permitted to rely on it in his unfair prejudice petition. In *Holyoake v Candy [2016] EWHC 2119 (Ch)* a text message threat made during without prejudice negotiations ahead of a commercial trial had not amounted to unambiguous impropriety and was therefore not admissible in evidence. The threat did not amount to an abuse of a privileged occasion; it was no more than the sort of negotiating tactic that the parties to the hard-fought commercial litigation would have expected. See also *Interactive Technology Corporation Ltd v Ferster [2015] EWHC 3895 (Ch)*.

Without prejudice save as to costs

- 14-21 In *Savings Advice Ltd v EDF Energy Customers Plc [2017] 1 WLUK 179*, during costs proceedings subsequent to the main action, Master Howarth allowed a party to refer to costs information provided during a mediation of the main action. This was on the basis that the duty of confidence and without prejudice privilege existed to protect the disclosure of admissions or concessions made in negotiations, not costs information in the form of purely factual statements which had been disclosed “without prejudice save as to costs”. See also *Willers v Joyce [2019] EWHC 937 (Ch)*.

Mediation privilege

- 14-22 In *Farm Assist 2* Ramsey J, having considered “other privileges” (see (3) in para.14-17 above), noted that in H. Brown & A. Marriott ADR Principles and Practice, 2nd edn (London: Sweet & Maxwell, 1999) the authors discuss the possible existence of and desirability for a distinct privilege attaching to the mediation process:

“It remains to be resolved definitively by the English Courts (if not by the legislature) whether there is a privilege attaching to the whole mediation process, including all communications passing within that process, whether the mediation relates to family matters, civil or commercial disputes or any other kind of issue” (para.22-088).

He went on to canvass the “... the need for a further ‘privilege’ which arises other than the Mediator’s right to confidentiality in relation to the mediation proceedings.” In *Brown v Rice [2007] EWHC 625 (Ch); [2007] B.P.I.R. 305; [2008] F.S.R.* the court commented, although it did not have to make a finding on the point, that: “It may be in the future that the existence of a distinct mediation privilege will require to be considered by either the legislature or the courts ...”

Mr Justice Briggs, as he then was, has written on “Mediation Privilege?” in an authoritative two part review in the New Law Journal (159 N.L.J. 506 and 159 N.L.J. 550). Having reviewed the various concepts of privilege in relation to mediation he goes on to develop a potential common law solution. This is based on a distinction between the facts that:

“... a mediator will act as a conduit for the sharing of such information between the parties as is commonly shared in without prejudice negotiations: (shared information)”

and

“... the important part of the mediator’s facilitative role (which) is to encourage the parties to share with him or her information, views, hopes and fears about the dispute which the party communicating them does not wish the other party to know, and which the mediator agrees to keep secret from the other party (mediator secrets).”

His thesis likens mediator secrets to legal professional privilege, on the basis that parties to disputes should be able to unburden themselves with absolute frankness to a mediator in the same way as with their legal advisers, and to argue that public policy may justify a new privilege strictly limited to mediator secrets. He adds that such a privilege would not be likely to interfere with the application to shared information in mediation of the recognised exceptions to the without prejudice principle, as occurred in both *Brown* and *Cattley*. Mr Justice Briggs supports the idea of a new privilege by referring to the ability of the common law to recognise a new form of privilege, where, in a new context, the public interest so requires, pointing out that a distinct form of non-status based privilege, in connection with matrimonial conciliation relating to children, has recently been recognised: see *Re D (Minors) (Conciliation: Disclosure of Information) [1993] Fam 231* at 238. He concludes:

“There is in principle therefore good reason why the courts should now recognise that the undoubted public interest in facilitating the process of mediation as a desirable and often preferable means of dispute resolution,

by comparison with the full panoply of a trial, justifies the identification of a narrow form of mediator secret privilege of the type described above. There is no reason why a party to a mediation should not be encouraged to be as frank with the mediator as with his or her legal adviser. The similarity with the underlying justification for legal professional privilege is therefore very close.”

Mr Justice Briggs’ call for a development in this area was made all the more timely by virtue of the fact that the EU Mediation Directive (Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters) carries the requirement that member states must ensure that, with reference to cross-border mediation, mediators must not be compellable to give evidence in civil proceedings or arbitration regarding information arising out of or in connection with a mediation, except where overriding considerations of public policy otherwise require, or where disclosure of the content of the mediation settlement agreement is necessary in order to implement or enforce it. The Directive is no longer, post-Brexit, operative in England and Wales.

Other aspects relating to confidentiality

- 14-23 There are other ways in which mediation confidentiality may be called into question including, for example, money laundering ([Proceeds of Crime Act 2002](#)), breaches of professional conduct, insolvency proceedings in circumstances where the court reserves the power to veto settlement agreements and, arguably, a mediation settlement involving a minor where court approval is required. Other examples might possibly include applications of the UK General Data Protection Regulation and the [Data Protection Act 2018](#) and the [Freedom of Information Act 2001](#). For a review of confidentiality in this area see “The practical significance of confidentiality in mediation” by Andrew Agapiou and Bryan Clark C.J.Q. 2018, 74.

In [Glencairn IP Holdings Ltd v Product Specialities Inc \(t/a Final Touch\) \[2019\] EWHC 1733 \(IPEC\)](#) the claimant had two similar intellectual property actions against separate defendants, and both of these instructed the same firm of solicitors. The claimant sought an order restraining the firm from acting for the defendant in the second action. This was on the grounds that the solicitors should not act in the second action because of what they had learned, in a mediation in the first action, of the claimant’s negotiating position and the terms on which the claimant was prepared to settle. The court declined to grant the order. [Bolkiah v KPMG \[1999\] 2 A.C. 222](#) considered.

Mediation costs—recoverability

- 14-24 There are three important points regarding the recoverability of mediation costs (both the fees paid to the mediator and the costs and disbursements in preparing for and attending mediation) that need to be considered before a mediation takes place. The first concerns the provisions regarding costs in the mediation agreement (that is, the agreement which forms the contractual basis under which the mediation takes place), the second relates to recoverability generally and the third is concerned with the costs of mediations which take place pre-proceedings.

The costs provisions in a mediation agreement were considered in [National Westminster Bank Plc v Thomas Feeney and Linda Feeney \[2006\] EWHC 90066 \(Costs\)](#) and [2007] (Costs Appeal). Eady J held that the successful party could not recover the mediator’s costs or its costs for preparing for and attending at the mediation because: (a) the mediation agreement entered into by the parties on the mediation provider’s standard terms was on the basis that the mediator’s fee would be borne equally by the parties who would bear their own costs; (b) the Tomlin Order agreed when settlement was reached did not deal explicitly with the costs of the mediation; and (c) it was held that the Tomlin Order did not alter the mediation agreement. This approach was followed in [Lobster Group Ltd v Heidelberg Graphic Equipment Ltd \[2008\] EWHC 413 \(TCC\); \[2008\] 2 All E.R. 1173; \[2008\] 1 B.C.L.C. 722](#).

Subject to the provisions of the mediation agreement, mediation costs are, on the face of it, recoverable. In Feeney, Eady J said that:

“... as a matter of general principle, costs incurred in a mediation would form part of the costs of the action just as any reasonable costs of negotiation would (see Costs Practice Direction para.4.6(8)).”

Whether mediation costs are recoverable in pre proceedings mediations, however, appears to depend on both the provisions of the mediation agreement (see above) and whether or not the mediation took place as part of the pre-action protocol work. This is important, because, in accordance with the pre-action protocols, mediations are increasingly carried out pre-proceedings. The cases dealing with this issue have involved the construction of [s.51 of the Senior Courts Act 1981](#). In *Lobster* Coulson J was considering mediation costs as one aspect of an application for security for costs and he put forward a number of reasons for his view that the costs of the pre-action mediation were not recoverable:

“16. First, unlike the costs incurred in a pre-action protocol, I do not believe that the costs of a separate pre-action mediation can ordinarily be described as ‘costs of and incidental to the proceedings’ (pursuant to [s.51 of the Senior Courts Act 1981](#)). On the contrary, it seems to me clear that they are not. They are the costs incurred in pursuing a valid method of alternative dispute resolution. Those costs were incurred in a form of dispute resolution which had no connection to these proceedings, and which here took place 2.5 years before the proceedings even started.”

In *McGlinn v Waltham Contractors Ltd [2005] EWHC 1419 (TCC); [2005] All E.R. 1126*, Judge Peter Coulson QC had also considered [s.51 of the Senior Courts Act](#). He held that, although costs in respect of claims dropped by a claimant prior to the commencement of proceedings were not, in unexceptional circumstances, capable of amounting to costs “incidental” to the proceedings, the costs incurred in complying with a pre-action protocol may be recoverable as costs “incidental to” any subsequent proceedings. Further, in *Roundstone Nurseries Ltd v Stephenson Holdings Ltd [2009] EWHC 1431 (TCC); [2009] 5 Costs L.R. 787* the court, noting that a pre proceedings mediation was treated by the parties as an integral part of the pre-action protocol work, applied McGlinn and held that, as a matter of principle, costs incurred during the pre-action protocol process could be recovered as costs incidental to the litigation. The court did confirm that the costs of a separate, stand-alone pre-proceedings mediation or ADR process would not usually form part of the costs of, or incidental to, litigation and would not, therefore, be recoverable.

These decisions were discussed in *North Oxford Golf Club v A2 Dominion Homes Ltd [2013] EWHC 852 (QB); [2013] 3 Costs L.R. 509*. See also *Earl of Malmesbury v Strutt & Parker [2008] EWHC 424 (QB); 118 Con. L.R. 68; [2008] 5 Costs L.R. 736* and the comments on costs sanctions in relation to conduct at a mediation, above.

Multi-tier dispute resolution clauses

14-25

Parties may enter into multi-tier dispute resolution clauses, which the courts are increasingly likely to uphold: see *Open Operations UK Ltd v Invesco Fund Managers Ltd [2019] EWHC 2246 (TCC); [2020] 1 ALL E.R. (Comm) 786* and *Children’s Ark Partnerships Ltd v Kajima Construction Europe (UK) Ltd [2022] EWHC 1595 (TCC)* at [39]–[83].

See, however, *Kajima Construction Europe (UK) Ltd v Children’s Ark Partnership Ltd [2023] EWCA Civ 292* where the Court of Appeal held that a judge had been correct to conclude that a dispute resolution procedure in a construction contract had been unenforceable for uncertainty, and that even if it had been enforceable the proper exercise of discretion under CPR r.11(1)(b) would have been to stay the claim rather than strike it out.

Miscellaneous matters

14-26

Where the parties freely consent to arbitration there is unlikely to be a denial of access to a court within the meaning of ECHR art.6(1): *Deweerd v Belgium (1979–1980) 2 E.H.R.R. 439*; *Axelsson v Sweden No.11960/86*, decision of 13 July 1990, unrep.,

EComHR, *Pastore v Italy* No.46483/*Pastore v Italy* No.46483/99, 25 May 1999, unrep., ECtHR, 2nd chamber. The key is the absence of restraint: *ibid*. Where the court was excessively forceful in its encouragement of the use of ADR, ECHR art.6(1) might be engaged. Any waiver of art.6 rights must be unequivocal: *Zumtobel v Austria* (1994) 17 E.H.R.R. 116, *Gustafson v Sweden* (1998) 25 E.H.R.R. 623.

For the enforcement of a contractual ADR clause and comparison with an arbitration clause, see *Cable & Wireless Plc v IBM United Kingdom Ltd* [2003] EWHC 316 (Comm); [2002] All E.R. (D) 277 (Colman J). In *Kaur v Malhi* [2022] EWHC 2219 (Ch), the court effectively upheld a mediation clause in refusing to grant injunctive relief where parties had not attempted mediation in contravention of the clause.

Routinely, the courts will exercise their inherent jurisdiction to stay legal proceedings where there is an extant arbitration clause, in effect enforcing the agreement to arbitrate the dispute. See, for example, *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] A.C. 334. Initially, it appeared that the English courts were tentative in edging towards the position that they should exercise their jurisdiction to stay legal proceedings where there was an agreement between the parties to negotiate or mediate (albeit an agreement that might be lacking in the certainty traditionally regarded as necessary for enforceability and perhaps even non-binding) (*ibid*; cf., *Halifax Financial Services Ltd v Intuitive Systems Ltd* [1999] 1 All E.R. (Comm) 303 (McKinnon J)). See further Vol.2, paras 9A-176 to 9A-177. See also *Ardentia Ltd v British Telecommunications Plc* [2008] EWHC 2111 (Ch) where one of the parties commenced proceedings before a tiered dispute resolution procedure had been exhausted. The procedure made an exception to the bar on commencing proceedings where, as was the case, interim relief was sought from the court. The court, however, having granted interim relief, then stayed the matter to enable the other issues between the parties to be dealt with under the procedure. See also *Sulamerica CIA Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWHC 42 (Comm); [2012] Lloyd's Rep. I.R. 198: the agreement considered by the court was found to provide no unequivocal commitment to engage in mediation. The parties had merely agreed in general, non binding, terms to attempt to resolve differences by mediation. See also *Wah v Grant Thornton International Ltd* [2012] EWHC 3198 (Ch); [2013] 1 All E.R. (Comm) 1226; [2013] 1 Lloyd's Rep. II and *Mann v Mann* [2014] EWHC 537 (Fam); [2014] 1 W.L.R. 2807; [2014] 2 F.L.R. 928.

In *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd* [2014] EWHC 2104 (Comm); [2015] 1 W.L.R. 1145; [2014] 2 Lloyd's Rep. 457, Teare J held that a dispute resolution clause in a contract which required the parties to seek to resolve a dispute by friendly discussions in good faith and within a limited period of time before the dispute could be referred to arbitration was enforceable. Further, in *R. (on the application of Med Chambers Ltd) v Medco Registration Solutions Ltd* [2017] EWHC 3258 (Admin) (*Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] A.C. 334 followed) the court had to consider an escalation procedure which included a referral to mediation. Lavender J found that this should have been followed, stating:

“ Prima facie, a Court should, in the absence of reasons to the contrary, refrain from exercising jurisdiction over a dispute which a party has promised to refer to a particular dispute resolution procedure.”

In *NWA v FSY* [2021] EWHC 2666 (Comm), however, it was held that the failure of a party to comply with a term of an arbitration agreement to seek to mediate a settlement of their dispute before referring it to arbitration did not result in the arbitral tribunal not having jurisdiction to hear the dispute. The failure was a potential breach of a procedural requirement going to the admissibility of the dispute for arbitration, and it was for the arbitrator to determine the consequence of any such breach.

See also *Ohpen Operations UK Ltd v Invesco Fund Managers Ltd* [2019] EWHC 2246 (TCC). Any agreement reached at mediation needs to be recorded carefully and arrangements need to be made to implement the agreement in a manner that reflects the outcome intended to be agreed between the parties. This involves consideration of all aspects relating to implementation e.g. the impact of any taxation provisions that may arise during implementation e.g. the impact of s.2 of the Law of Property (Miscellaneous Provisions) Act 1989. See *Moore v Revenue and Customs Commissioners* [2016] UKFTT 115 (TC) and *Abberley v Abberley* [2019] EWHC 1564 (Ch). In *ELM Property Finance Ltd v Johal* [2018] EWHC 1000 (QB) a plea of non est factum in relation to a settlement agreement reached at mediation was rejected. See also *Pedriks v Grimaux* [2021] EWHC 3448 (QB) where the court considered alleged breaches of a mediation settlement agreement in a commercial dispute relating to fiduciary relationships and estoppel by representation.

An interesting practice point arose in *Savings Advice Ltd v EDF Energy Customers Plc* [2017] 1 WLuk 179, Master Howarth stated:

“29. In my judgment it is imperative that when parties enter into a formal mediation or informal negotiations for settlement of a claim that they do so in the full knowledge of their opponent’s costs. The amount of the costs of litigation condition any subsequent negotiations or mediation that may follow.”

A. - Interim Injunctions

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Volume 2

Section 15 - Interim Remedies

Interim Remedies

A. - Interim Injunctions

15-2

In [CPR r.25.1\(1\)](#) it is noted that the court may grant various interim remedies, including an interim injunction (para.(a)). This power has to be seen in the context of the court's power to grant injunctions generally. For practice and procedure, see commentary on [CPR r.25.1\(1\)\(a\)](#) in Vol.1.

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(a) - Generally

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Volume 2

Section 15 - Interim Remedies

Interim Remedies

A. - Interim Injunctions

1. - Jurisdiction

(a) - Generally

Unlimited power

15-3

In *Broad Idea International Ltd v Convoy Collateral Ltd* [2021] UKPC 24; [2022] 2 W.L.R. 703; [2022] 1 All E.R. 289, the Privy Council approved the following statement of the law in Spry, *Equitable Remedies*, 9th edn (Sweet and Maxwell, 2014), p.333:

“The powers of courts with equitable jurisdiction to grant injunctions are, subject to any relevant statutory restrictions, unlimited. Injunctions are granted only when to do so accords with equitable principles, but this restriction involves, not a defect of powers, but an adoption of doctrines and practices that change in their application from time to time. Unfortunately there have sometimes been made observations by judges that tend to confuse questions of jurisdiction or of powers with questions of discretions or of practice. The preferable analysis involves a recognition of the great width of equitable powers, an historical appraisal of the categories of injunctions that have been established and an acceptance that pursuant to general equitable principles injunctions may issue in new categories when this course appears appropriate.”

As identified by Spry, by Lord *Scott in Fourie v Le Roux* [2007] UKHL 1; [2007] 1 W.L.R. 320, and by Lord Leggatt in *Broad Idea*, the court’s jurisdiction to grant an injunction, where it has personal jurisdiction over the respondent and the grant of relief is just and equitable, is unlimited. Many cases in which the court has held that it did not have jurisdiction are better explained by recognising that the court had the power to grant injunctive relief but declined to do so in accordance with its settled practice save in a certain way and under certain circumstances.

In particular, statements as to the limits of the court’s jurisdiction in *Siskina v Distos Compania Naviera SA (The Siskina)* [1979] A.C. 210, HL, should no longer be regarded as good law. In *Broad Idea*, Lord Leggatt demonstrated how Lord Diplock’s dictum in *The Siskina* (that the court’s power to grant an injunction, or its exercise, was dependent on the existence of a claim for substantive relief which the court had jurisdiction to grant) had been “comprehensively undermined” by subsequent developments. At [120] he said:

“It is necessary to dispel the residual uncertainty emanating from *The Siskina* and to make it clear that the constraints on the power, and the exercise of the power, to grant freezing and other interim injunctions which were articulated in that case are not merely undesirable in modern day international commerce but legally unsound. The shades of *The Siskina* have haunted this area of the law for far too long and they should now finally be laid to rest.”

Readers should note that *Broad Idea* was a decision of the Privy Council on an appeal from the BVI. Nevertheless, it is suggested that the decision plainly represents the law of England and Wales. Indeed, the Court of Appeal has confirmed that the decision is of “great weight and persuasive value” and that there is no basis not to follow it: *Re G (Court of Protection: Injunction)* [2022] EWCA Civ 1312, at [54]–[58] and [61].

Accordingly, it is now beyond doubt that injunctive relief may be granted in cases even where there is no claim for substantive relief. For example:

- A freezing injunction may be granted in support of an existing judgment (*Stewart Chartering Ltd v C&O Managements SA [1980] 1 W.L.R. 460* (Goff J), an order for costs (*Jet West Ltd v Haddican [1992] 1 W.L.R. 487*, CA) against a third party who holds or controls the defendant's assets (*TSB Private Bank International SA v Chabra [1992] 1 W.L.R. 231* (Mummery J); *Mercantile Group (Europe) AG v Aiyela [1994] Q.B. 366*, CA), in support of foreign proceedings (*Babanaft International Co SA v Bassatne [1990] Ch 13* (Hoffmann J) and even, in the exceptional case of *Republic of Haiti v Duvalier [1990] 1 Q.B. 202*, in support of foreign proceedings against a foreign defendant with no known assets in England and Wales.
- Third party disclosure orders (*Norwich Pharmacal Co v Commrs of Customs & Excise [1974] A.C. 133; [1973] 3 W.L.R. 164; [1973] 3 All E.R. 943*) and so-called Bankers Trust orders ordering an innocent third party to disclose documents to assist the claimant in locating assets to which it asserts a proprietary claim (*Bankers Trust Co v Shapira [1980] 1 W.L.R. 1274*) can each be made notwithstanding the absence of any underlying cause of action against the respondent.
- A website blocking order was made against innocent internet service providers in *Cartier International AG v British Sky Broadcasting Ltd [2016] EWCA Civ 658; [2017] 1 All E.R. 700; [2017] 1 All E.R. (Comm) 507* to block websites selling counterfeit goods despite there being no underlying cause of action against such companies and no intimated claim against the parties alleged to have infringed the claimant's intellectual property.

Existing practice

While therefore the court has the power to grant any injunction where it has personal jurisdiction and it is just and equitable to do so, it will usually only exercise such power in accordance with existing practice: *Fourie v Le Roux [2007] UKHL 1; [2007] 1 W.L.R. 320*, *Broad Idea International Ltd v Convoy Collateral Ltd [2021] UKPC 24; [2022] 2 W.L.R. 703; [2022] 1 All E.R. 289*. Such discipline ensures that the court exercises its jurisdiction to grant injunctive relief in a principled and predictable manner, and that the outcome of the application is not dependent upon the proverbial length of the Chancellor's foot. As Sir Jessel MR observed in *Beddow v Beddow (1878) 9 Ch D 89* at [93], the application must be decided "not by the caprice of the judge, but according to sufficient legal reasons or on settled legal principles."

This is not, however, to say that the court's practice is immutable. Thus, by way of example, the courts have developed the freezing injunction from its roots in the 1970s in response to the advent of electronic banking allowing money to be easily and instantaneously transferred between jurisdictions, the globalisation of commerce and the growth in the use of offshore companies. As Lord Leggatt observed in *Broad Idea* at [59], such flexibility is essential if the law and its procedures are to keep abreast of changes in society.

(b) - English proceedings

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Volume 2

Section 15 - Interim Remedies

Interim Remedies

A. - Interim Injunctions

1. - Jurisdiction

(b) - English proceedings

15-4

Subsections (1) and (2) of s.37 of the Senior Courts Act 1981 state that the High Court may by order (whether interlocutory or final) grant an injunction in all cases in which it appears to the court “just and convenient” to do so, and any such order may be made either unconditionally or on such terms as the court thinks just. The court’s powers in these respects are not derived from this section but rather confirmed by it (*Fourie v Le Roux [2007] UKHL 1; [2007] 1 W.L.R. 320, HL*, at [25], per Lord Scott). The section is traceable to the Supreme Court of Judicature Act 1873 s.25(8). Initially it was confined to interlocutory orders but was in terms extended to final orders on the basis that whatever a court could do by the former orders it could surely also do by the latter. The 1873 legislation conferred on the High Court the jurisdiction vested in, or capable of being exercised by, various courts, including courts of equity.

Under the Arbitration Act 1996 s.44 (Court powers exercisable in support of arbitral proceedings) the court has for the purposes of, and in relation to, arbitral proceedings the same power of making orders about certain matters stated therein as it has for the purposes of, and in relation to, legal proceedings. Such orders include orders made for the purpose of preserving evidence or assets. For a discussion of the question as to the circumstances in which, in exercise of the power stated in this section, the court may grant interim injunctions, including the circumstances in which it may grant freezing injunctions without notice, see *Cetelem S.A. v Roust Holdings Ltd [2005] EWCA Civ 618; [2005] 1 W.L.R. 3555, CA*; *Mobil Cerro Negro Ltd v Petroleos de Venezuela SA [2008] 1 Lloyd's Rep. 684* (Walker J) at [120].

By statute, power to grant injunctions (and, in some instances, interim injunctions) is conferred on the High Court and the County Court in particular circumstances; for example, by the Housing Act 1996 and the Policing and Crime Act 2009 (for which express procedural provision is made in the CPR in Pt 65 (Anti-Social Behaviour and Harassment)).

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(c) - Foreign proceedings

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Volume 2

Section 15 - Interim Remedies

Interim Remedies

A. - Interim Injunctions

1. - Jurisdiction

(c) - Foreign proceedings

15-5

The High Court can grant interim relief pursuant to [s.25\(1\) of the Civil Jurisdiction and Judgments Act 1982](#) in aid of substantive foreign proceedings of whatever kind and wherever in the world such proceedings have been or are to be commenced. In such a case, the court can grant interim relief of any kind which it has power to grant in domestic proceedings save only that it cannot issue a warrant for the arrest of property or make provision for obtaining evidence: [s.25\(7\)](#).

Jurisdiction before Brexit

Before 1 January 1987, the court would not grant interim relief when the substantive proceedings were taking place abroad (*Siskina v Distos Compania Naviera SA (The Siskina) [1979] A.C. 210*, HL). However, from that date, [s.25\(1\) of the Civil Jurisdiction and Judgments Act 1982](#) conferred power on the High Court to grant interim relief (as defined) when “proceedings have been or are to be commenced” in a Brussels Contracting State, namely a party to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters signed at Brussels on 27 September 1968 (“the Brussels Convention”) as amended, and the subject-matter of the proceedings was within the scope of such convention. Such states were the original members of the European Community (Belgium, France, Germany, Italy, Luxembourg and the Netherlands) and over time—as they joined the European Community—Denmark, Ireland, the UK, Greece, Spain, Portugal, Austria, Finland and Sweden.

Between 1987 and 2015, [s.25\(1\)](#) was amended on a number of occasions to give effect to subsequent international conventions and EC/EU regulations.

1. From 1 May 1992, the section extended to actions pending in a Lugano Contracting State, being a party to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters signed at Lugano on 16 September 1988 (“the 1988 Lugano Convention”) between the then 12 member states of the European Community and six members of the European Free Trade Association (EFTA) being Austria, Finland, Iceland, Norway, Sweden and Switzerland. The section was further extended to Poland upon its subsequent accession to the 1988 Lugano Convention.
2. From 1 March 2002, the section was further amended to refer to actions pending in “Regulation States”, being the then members of the EC other than Denmark. Such amendment gave effect to Council Regulation (EC) No.44/2001 (“the Judgments Regulation”) which replaced the Brussels Convention as between the then member states of the EC save Denmark. Section 25 continued to refer to the Brussels and Lugano Conventions which still governed relationships with Denmark and the EFTA states that had not by then joined the EC. Although Denmark was not bound by the Judgments Regulation, it entered into an Agreement with the EC on 19 October 2005 in respect of the application of the Judgments Regulation to Denmark (“the EC-Denmark Agreement”).
3. From 1 January 2010, the Act was amended to refer to the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters signed at Lugano on 30 October 2007 (“the 2007 Lugano Convention”) by the EC, Denmark, Iceland, Norway and Switzerland. The 2007 Lugano Convention replaced the

1988 Lugano Convention and effectively extended the rules as to jurisdiction and the recognition and enforcement of judgments enacted in the Judgments Regulation to the Lugano Contracting States.

4. From 18 June 2011, the section was extended to actions pending in a Maintenance Regulation State, being the member states of the EC. Such provision gave effect to Council Regulation (EC) No.4/2009 ("the Maintenance Regulation") and the EC-Denmark Agreement.

5. From 10 January 2015, the Act was amended to refer to Regulation (EU) No.1215/2012 of the European Parliament ("the recast Judgments Regulation") which replaced the Judgments Regulation. Again, the regulation applied throughout the EU save for Denmark. Meanwhile, the EC-Denmark Agreement lapsed.

6. From 1 October 2015, the section was further extended to actions pending in a Hague Convention State, being a state that is bound by the Convention on Choice of Court Agreements concluded on 30 June 2005 at the Hague ("the Hague Convention"). The convention entered into force in the EU (excluding Denmark) and Mexico on 1 October 2015. Subsequently, Singapore (1 October 2016), Montenegro (1 August 2018) and Denmark (1 September 2018) have become Hague Convention States.

The effect, however, of [s.25\(1\)](#) was extended by the Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997 (SI 1997/302) (made pursuant to the power under [s.25\(3\)](#) of the Act) to non-Convention countries and to proceedings outside the scope of the recast Judgments Regulation. Accordingly, from 1997, the position was reached where the High Court has power to grant interim relief in aid of substantive proceedings elsewhere of whatever kind and wherever taking place: *Credit Suisse Trust S.A. v Cuoghi [1998] Q.B. 818*, CA, at p.825, per Millett LJ.

Jurisdiction under Brexit transitional provisions

Although the UK exited the European Union on "Exit Day", 31 January 2020 ([European Union \(Withdrawal\) Act 2018 s.20](#) as amended by the [European Union \(Withdrawal\) Act 2018 \(Exit Day\) \(Amendment\) \(No.3\) Regulations 2019 \(SI 2019/1423\)](#)), European law was retained during the 11-month transition period until 11pm on 31 December 2020 ("IP completion day"): [European Union \(Withdrawal Agreement\) Act 2020 s.39](#). From IP completion day, the UK ceased to recognise the Brussels Convention, the 1988 and 2007 Lugano Conventions, and the EC-Denmark Agreement: [reg.82 of the Civil Jurisdiction and Judgments \(Amendment\) \(EU Exit\) Regulations 2019 \(SI 2019/479\)](#). Further, it ceased to be bound by the Judgments Regulation (reg.84) and the recast Judgments Regulation (reg.89). Notwithstanding these changes, transitional provisions maintain the application of the Brussels and Lugano Conventions in respect of any proceedings issued in the UK before IP completion day (11pm on 31 December 2020): [reg.92 of the Civil Jurisdiction and Judgments \(Amendment\) \(EU Exit\) Regulations 2019 \(SI 2019/479\)](#) and the recast Judgments Regulation: reg.93A; arts 67(1)(a) and 69(2) of the Withdrawal Agreement between the UK and the EU under art.50(2) of Treaty on European Union dated 17 October 2019.

Jurisdiction after Brexit

On 28 September 2020, the UK acceded to the Hague Convention in its own right. With effect from IP completion day (31 December 2020), the [Private International Law \(Implementation of Agreements\) Act 2020](#) amended the [Civil Jurisdiction and Judgments Act 1982](#) to provide that the Hague Convention has the force of law. Indeed, the 2020 Act expressly provides that the UK is to be treated as having been continuously bound by the Hague Convention since 1 October 2015. The EU has challenged this view, but the position is settled in UK law by the Act.

In any proceedings issued in the UK after IP completion day, the power of the High Court to grant interim relief in foreign proceedings is, on the face of [s.25\(1\) of the Civil Jurisdiction and Judgments Act 1982](#), now restricted to cases where:

- "proceedings have been or are to be commenced in a 2005 Hague Convention State" (i.e. the EU (including Denmark), Mexico, Singapore and Montenegro); and
- "they are or will be proceedings whose subject-matter is within scope of the 2005 Hague Convention" (i.e. cases in which there is an exclusive choice of court agreement).

That said, with effect from IP completion day, the [Civil Jurisdiction and Judgments Act 1982 \(Interim Relief\) Order 1997 \(SI 1997/302\)](#) has been amended to extend the court's power under [s.25\(1\)](#) in relation to "(a) proceedings commenced or to be commenced otherwise than in a 2005 Hague Convention State"; and "(b) proceedings whose subject-matter is not within scope of the 2005 Hague Convention". Accordingly, the position is retained post-Brexit that the High Court can continue to grant interim relief in aid of substantive proceedings elsewhere of whatever kind and wherever taking place.

On 8 April 2020, the UK applied to rejoin the Lugano Convention as an independent contracting state. The EU declined its consent and it now appears that the UK's accession is unlikely.

Exercising the power under s.25

The court should first consider whether it would grant the relief sought in domestic proceedings: [Ras al Khaimah Investment Authority v Bestfort Developments LLP \[2015\] EWHC 3383 \(Ch\)](#) (Rose J). In the case of an application for a freezing order, that requires the applicant to show that there is a good arguable claim against the defendants in the overseas proceedings. In [Ras al Khaimah](#), the applicants could not point to any assets, let alone assets of sufficient value to render the costs involved proportionate, held by the defendants anywhere in the world. On appeal, the Court of Appeal clarified that it is not enough for the respondent to be apparently wealthy or for the applicant to claim that the respondent must "have assets somewhere in the world". Rather there must be "grounds for belief" that there are assets on which the judgment will bite: [\[2017\] EWCA Civ 1014; \[2018\] 1 W.L.R. 1099](#), CA at [36]–[39].

If relief would be granted in support of domestic proceedings, then the court should consider [s.25\(2\) of the 1982 Act](#) which provides that, on any application for interim relief under [s.25\(1\)](#), the court may refuse to grant relief if:

"… in the opinion of the court, the fact that the court has no jurisdiction apart from this section in relation to the subject-matter of the proceedings in question makes it inexpedient for the court to grant it."

In [Motorola Credit Corporation v Uzan \(No.2\) \[2003\] EWCA Civ 752; \[2004\] 1 W.L.R. 113; \[2003\] 2 C.L.C. 1026](#), the Court of Appeal identified, at [115], a number of particular considerations to be borne in mind when considering the question of inexpediency:

1. whether the making of the order will interfere with case management in the primary court;
2. whether, if it be the relief sought, it is the policy in the primary jurisdiction not itself to make worldwide freezing or disclosure orders;
3. whether there is a danger that any order made will give rise to disharmony, confusion or the risk of conflicting, inconsistent or overlapping orders;
4. whether there is likely to be a conflict as to jurisdiction rendering it inappropriate and inexpedient to make a worldwide order; and
5. whether in a case where jurisdiction is resisted and disobedience to be expected, the court will be making an order which it cannot enforce.

In [Republic of Haiti v Duvalier \[1990\] 1 Q.B. 202](#), the Court of Appeal upheld worldwide freezing and disclosure orders against the former Haitian head of state and his family who were being sued in France. None of the parties were resident in England and Wales, and the case concerned assets that were wholly or mainly outside the jurisdiction. The only connection with this jurisdiction was that the defendants had used English solicitors as agents in a scheme to conceal assets said to have been stolen from the republic. The French court had no jurisdiction to grant such orders. The solicitors were ordered by Knox J to identify bank accounts holding Ds' money. A worldwide freezing order was then made in respect of assets identified under the disclosure order. Staughton LJ considered that such exceptional course was justified because of the determined effort to move vast amounts of money out of the reach of the courts. It was a case that demanded international co-operation.

The decision in [Duvalier](#)'s Case was, however, in part based on Staughton LJ's view that the Brussels Convention required

"… each contracting state to make available, in aid of the court of another contracting state, such provisional and protective measures as its own domestic law would afford" [Duvalier](#)'s Case, at p.212.

By contrast, where interim relief is sought in support of foreign proceedings other than under an international convention or the Judgments Regulations, the question of what is or is not expedient cannot be governed or informed by treaty obligations or regulations but by normal considerations of comity and the principles ordinarily going to the court's discretion to grant injunctions: per Potter LJ in *Motorola Credit Corporation v Uzan (No.2)* [2003] EWCA Civ 752; [2004] 1 W.L.R. 113; [2003] 2 C.L.C. 1026 at [65]; per Millett LJ in *Refco Inc v Eastern Trading Co.* [1999] 1 Lloyd's Rep 159. This is likely to be the position post Brexit. (Where jurisdiction can be founded upon the Hague Convention then, on the basis of *Duvalier*, it might be argued that such convention likewise requires the High Court to make available, in aid of the contracting state with the chosen court, such provisional and protective measures as the law of England and Wales would afford since the recitals talk of enhanced judicial co-operation in order to ensure the effectiveness of exclusive choice of court agreements. This would seem to be a difficult argument in view of art.7, which states in terms that interim measures of protection are not governed by the convention and that it "neither requires nor precludes the grant, refusal or termination" of such measures.)

In *Credit Suisse Fides Trust SA v Cuoghi* [1998] Q.B. 818, the Court of Appeal upheld a freezing injunction against a party domiciled, but not resident, in England in support of proceedings in Switzerland (a party to the Lugano Convention). The Swiss court lacked the jurisdiction to grant worldwide relief against a defendant not domiciled in Switzerland. Millett LJ said, at p.826:

"It is the ancillary or subordinate nature of the jurisdiction rather than its source which is material, and the test is one of expediency. The structure of subsections (1) and (2) and the way in which their scope has been progressively widened indicate ... an intention on the part of Parliament that the English court should in principle be willing to grant appropriate interim relief in support of substantive proceedings taking place elsewhere, and that it should not be deterred from doing so by the fact that its role is only an ancillary one unless the circumstances of the particular case make the grant of such relief inexpedient."

See also *Banco Nacional de Comercio Exterior SNC v Empresa de Telecommunications de Cuba SA* [2007] EWCA Civ 662; [2007] 2 Lloyd's Rep. 484, CA. It would rarely if ever be appropriate or expedient for the English court to assume jurisdiction under s.25 where the relevant defendant had no connection with the jurisdiction and the relevant assets were not located in England (*Belletti v Morici* [2009] EWHC 2316 (Comm); [2009] I.L.Pr. 57 (Flaux J)). In *Royal Bank of Scotland Plc v FAL Oil Co Ltd* [2012] EWHC 3628 (Comm); [2013] 1 Lloyd's Rep. 327, Gloster J granted a worldwide freezing injunction and worldwide disclosure order against a defendant in the United Arab Emirates notwithstanding the absence of assets within England and Wales on the grounds that it was reasonable to infer the existence of assets in other jurisdictions, there was other evidence of links with England, and where the identification and location of assets would assist the enforcement of any judgments of the UAE courts.

The extent of the English court's jurisdiction to grant applications for interim injunctions in support of foreign proceedings includes granting relief in the form of an injunction freezing the respondent's assets (see further, "Freezing injunction in aid of proceedings in other jurisdictions" para.15-79 below). It is, of course, one thing for the English court in these circumstances to grant relief in the form of an injunction freezing the respondent's assets within the jurisdiction (a "domestic" freezing injunction), and quite another for the court to grant relief in the form of an injunction freezing the respondent's assets outside the English jurisdiction (a "worldwide" freezing injunction). However, it is clear that the jurisdiction to grant interim injunctions in support of foreign proceedings extends to the latter circumstance, but special considerations may inhibit its exercise (see further, "Worldwide' Freezing Injunctions", para.15-81 below). In *Motorola Credit Corporation v Uzan (No.2)* [2003] EWCA Civ 752; [2004] 1 W.L.R. 113; [2003] 2 C.L.C. 1026, Rix LJ described the worldwide freezing injunctions as lying "at the creative divide between comity and exorbitancy".

Where a claim is made for an interim remedy under s.25(1), provision for application for service out of the jurisdiction is made by PD 6B (Service Out of the Jurisdiction) para.3.1(5). See further Vol.1, para.6HJ.13. See further commentary following **CPR r.25.4** (Application for an interim remedy where there is no related claim); Vol.1 para.25.4.2.

(d) - UK proceedings

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Interim Remedies

A. - Interim Injunctions

1. - Jurisdiction

(d) - UK proceedings

15-6

Scotland, Northern Ireland, and England and Wales, form three constituent parts of the United Kingdom as a political entity but are separate legal jurisdictions. Relations between the three jurisdictions in civil and commercial matters are regulated by a modified version of the Judgments Regulation found in [Sch.4 of the 1982 Act](#). Article 16 of that modified version is in terms comparable to art.35 of the Judgments Regulation (recast). In this context, the proposition derived from *The Siskina* is again superseded with the result that the English court has jurisdiction to grant interim relief where jurisdiction over the applicant's claim lies, not with the English court, but with a court in Scotland or Northern Ireland. [Section 25\(2\)](#) applies to such application.

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2. - Principles and Guidelines to be Applied (American Cyanamid Co. Case)

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Interim Remedies

A. - Interim Injunctions

2. - Principles and Guidelines to be Applied (American Cyanamid Co. Case)

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The grant of an interlocutory injunction is a very important matter as a defendant can be sent to prison for breach (*Rochdale BC v Anders [1988] 3 All E.R. 490*). When an application is made for an order granting such relief, the court has a very difficult jurisdiction to exercise. It is sometimes impossible to make an order which may not do some injustice to one party or the other (*Thompson v Park [1944] 1 K.B. 408, CA* at 411, per du Parcq LJ).

A claimant is not entitled to interim injunctive relief simply because they seek it. In *Caterpillar Logistics Services (UK) Ltd v Huesca de Crean [2012] EWCA Civ 156; [2012] 3 All E.R. 129; [2012] I.C.R. 981*, where the claimant brought a claim for injunctive relief to prevent its former employee from misusing its confidential information and applied for an interim injunction, it was held that the relief was properly refused because the claimant was unable to establish any arguable case that the defendant had broken or intended to break a confidentiality agreement, or even that there was a real risk that it would be broken.

The procedure to be adopted by the court in hearing an application for an interlocutory injunction, and the tests to be applied, were laid down by the House of Lords in *American Cyanamid Co v Ethicon Ltd [1975] A.C. 396; [1975] 2 W.L.R. 316, HL*.

According to the *American Cyanamid Co* case, when an application is made for an interlocutory injunction, in the exercise of the court's discretion an initial question falls for consideration. That is:

- (1) Is there a serious question to be tried? If the answer to that question is "yes", then two further related questions arise; they are:
 - (2) Would damages be an adequate remedy for a party injured by the court's grant of, or its failure to grant, an injunction?
 - (3) If not, where does the "balance of convenience" lie?

The first question indicates a threshold requirement. It marked a departure from the law that applied before the decision of the House of Lords in the *American Cyanamid Co* case. Guidance on the manner on which the court should approach the second and third questions is provided in guidelines derived from that case (to be applied in two stages). These guidelines have been much discussed in later decisions. A full account is given below. But first further comment is made on the principles that underpin the three questions.

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(a) - Principles—a serious question to be tried

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Interim Remedies

A. - Interim Injunctions

2. - Principles and Guidelines to be Applied (American Cyanamid Co. Case)

(a) - Principles—a serious question to be tried

15-8

The key principles derived from the speech of Lord Diplock in *American Cyanamid Co v Ethicon Ltd [1975] A.C. 396, HL*, at pp.406–409, may be listed as follows:

- (1)The grant of an interlocutory injunction is a remedy that is both temporary and discretionary.
- (2)The evidence available to the court at the hearing of the application for an interlocutory injunction is incomplete. It is given in written evidence and has not been tested by oral cross-examination.
- (3)It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on the written evidence as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.
- (4)When an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the claimant's legal right is made upon contested facts, the decision whether or not to grant an interlocutory injunction has to be taken at a time when ex hypothesi the existence of the right or the violation of it, or both, is uncertain and will remain uncertain until final judgment is given in the action.
- (5)It was to mitigate the risk of injustice to the claimant during the period before that uncertainty could be resolved that the practice arose of granting him relief by way of interlocutory injunction.
- (6)But (at least since the middle of the 19th century) this has been made subject to the claimant's undertaking to pay damages to the defendant for any loss sustained by reason of the injunction if it should be held at the trial that the claimant had not been entitled to restrain the defendant from doing what they were threatening to do.
- (7)The object of the interlocutory injunction is to protect the claimant against injury by violation of their right for which they could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in their favour at the trial; but the claimant's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from them having been prevented from exercising their own legal rights for which they could not be adequately compensated under the claimant's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial.
- (8)The court must weigh one need against another and determine where, "the balance of convenience" lies.
- (9)There is no rule of law or practice to the effect that the court is not entitled to take any account of the balance of convenience unless it has first been satisfied that upon the evidence adduced by both the parties on the hearing of the application the applicant had satisfied the court that on the balance of probabilities the acts of the other party sought to be enjoined would, if committed, violate the applicant's legal rights. The purpose sought to be achieved by giving to the court discretion to grant interlocutory injunctions would be stultified if the discretion were clogged by such a technical rule.
- (10)However, the court must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.

(11) So, unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the claimant has any real prospect of succeeding in their claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.

(12) It would be most exceptional for the House of Lords to give leave to appeal in a case which turned upon where the balance of convenience lay.

In the context in which they were stated (though they may not be confined to it), these principles are based on the assumption that a trial is in fact likely to take place, in the sense that the applicant's case shows that they are genuinely concerned to pursue their claim to trial, and that they are seeking the injunction as a means of a "holding operation" pending the trial. Where the contest about the grant or refusal of an interlocutory injunction is effectively the only contest between the parties, and it is clear that the action would never proceed to trial, additional considerations arise (see *N.W.L. Ltd v Woods [1979] 1 W.L.R. 1294, HL* and *Cayne v Global Natural Resources Plc [1984] 1 All E.R. 225, CA*, at p.234 per Kerr LJ) (see further para.15-17 below).

The proposition in principle (3) is frequently stressed, particularly by appeal courts. For example, in *Sukhoruchkin v Van Bekestein [2014] EWCA Civ 399*, Sir Terence Etherton C., referred to relevant authority and stated (at para.32) that it is now well-established as a general principle that, on an application for an interim injunction, the court should not attempt to resolve "critical disputed questions of fact or difficult points of law" on which the claim of either party may ultimately depend, particularly where the point of law "turns on fine questions of fact which are in dispute or are presently obscure".

The main significance of the *American Cyanamid* case lies in principles (9) and (10). Those principles were controversial when announced by the House of Lords in 1975. The case establishes that it is not necessary, as a threshold requirement, for the court to be satisfied that on the balance of probabilities the acts of the other party sought to be enjoined would, if committed, violate the applicant's legal rights. Previously the question was whether the applicant had made out a *prima facie* case of succeeding at trial and this often required "trial in miniature" involving a detailed investigation of the claimant's prospects of success as revealed by the (often conflicting) affidavit evidence and the weighing of them to see whether they were greater than their prospects of failure. The *American Cyanamid* case substituted a lower threshold test (see further below). This approach is consistent with the "great object" of the court in hearing an application for an interlocutory injunction which is to abstain from expressing any opinion on the merits of the case until the hearing (see *American Cyanamid Co v Ethicon Ltd*, op. cit., at p.408 per Lord Diplock, citing *Wakefield v Duke of Buccleuch (1865) 12 L.T. 628* at 629). It is also consistent with the view that, in the interest of husbanding scarce judicial resources, the court should not be expected to devote an inordinate amount of time to the hearing of applications for interlocutory injunctions. Further, the approach should have the effect of discouraging interlocutory appeals, because, as a practical matter, a respondent party is likely to find it more difficult to upset on appeal a judge's finding arrived at by applying a lower threshold test.

In the *American Cyanamid* case, in expounding the principles Lord Diplock said that, in addressing the threshold test, it is sufficient if the court asks itself: is the applicant's action "not frivolous or vexatious"? Is there "a serious question to be tried" (principle (10))? Is there "a real prospect that he will succeed in his claim for a permanent injunction at the trial" (principle (11))?. These may appear to be three subtly different questions. It has been said that they are intended to state the same test (see *Smith v Inner London Education Authority [1978] 1 All E.R. 411, CA*, at p.419 per Browne LJ).

A claimant seeking a "quia timet" injunction must show that there is a serious issue to be tried as to there being a real risk that the defendant intends, unless restrained, to undertake the activities sought to be enjoined. The court will not grant an injunction on the principle that if the defendant does not intend to violate the claimant's rights, the injunction would do no harm (*Rafael Advanced Defense Systems Ltd v Mectron Engenharia Industrie E Comercio SA [2017] EWHC 597 (Comm)* (Teare J)). As explained by Smith J in *Vastint Leeds B.V. v Persons Unknown [2018] EWHC 2456 (Ch)*, there are at least two necessary ingredients for a quia timet injunction application: (i) there must, if no actual damage is proved, be proof of imminent danger, in other words, a strong probability that, unless restrained by injunction, the defendant will act in breach of the claimant's rights; and (ii) there must be proof that the damage will, if it comes, be very substantial: *Fletcher v Bealey (1885) 28 Ch. D. 688* at 698. The harm must be so serious that, if it occurs, it cannot be reversed or restrained by an immediate interim injunction and cannot be adequately compensated by damages: *Lloyd v Symonds [1998] EWCA 511* per Chadwick LJ.

If there is no possible defence to the claim, there is no serious question to be decided at the trial. In those circumstances it is a misuse of the process of the court to withhold from the claimants an interim remedy, to which they are clearly entitled, while the normal stages preparatory to the trial of a genuinely contested action are being gone through with the inevitable delay (*Manchester Corp v Connolly [1970] Ch. 420, CA*, at p.426 per Lord Diplock). It follows that, if for that reason there is nothing

to be decided at the trial, the questions of balance of convenience, status quo and damages being an adequate remedy do not arise; *prima facie* the claimants are entitled to an injunction (*Patel v Smith Ltd [1987] 1 W.L.R. 853, CA; Official Custodian for Charities v Mackey [1985] Ch. 168* (Scott J)).

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(b) - The American Cyanamid principles and CPR case management

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At bottom, the principles are based on the “great object” of the court when hearing an application for an interlocutory injunction; which is, “to abstain from expressing any opinion on the merits of the case until the hearing”. The objective is to prevent the court from being bogged down with complex, highly contentious issues, not suitable for determination in interlocutory proceedings, in circumstances where the date of trial cannot be predicted and is likely to be a long way off. In a sense the principles are crude case management rules designed to reduce costs and delays and, in particular, to avoid a case being tried twice, whilst preserving the status quo insofar as this is just in cases where the prospects of ultimate success in the proceedings of either side cannot reasonably be assessed. The *American Cyanamid Co* case was decided in 1975 when concerns about pre-trial delays in civil cases were rising and when “interlocutory warfare” was seen as a prime cause for delays.

The coming into effect in 1998 of the *CPR* heralded a new, more flexible approach to case management. As a result, the context within which the *American Cyanamid* principles were designed to operate was altered significantly. Under the *CPR*, the early identification and resolution of issues likely to be dispositive of proceedings (whether by application for summary judgment or otherwise) is encouraged and the tests according to which early disposal may be achieved are different to those that applied previously. Further, in the bulk of cases delays between the issue of proceedings and trial are much reduced. However, there are tensions within the modern law of civil procedure, arising from the conflicting policies that underlie the law. Some of those policies are in accord with the policy considerations underlying the *American Cyanamid* rules (and to that extent there is no conflict with the rules), but some are not (and to that extent there is). There may come a time when the principle that, on an interlocutory application, the court should simply determine whether there is a serious question to be tried, and not enter into an investigation of the prospects of success of either party, should be re-assessed by the House of Lords (*SmithKline Beecham v Generics UK Ltd (2002) 25(I) I.P.D. 25005* (Jacob J)).

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(c) - Interim relief pending appeal

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- 15-9. 1** The court has a jurisdiction to grant interim protection by interim injunction to a party who has been unsuccessful at trial pending an appeal. An unsuccessful claimant may be granted interim protection if they are seeking to restrain some irreparable harm pending appeal, notwithstanding that they have been unsuccessful in asserting their right at trial (*Novartis AG v Hospira UK Ltd (Practice Note) [2013] EWCA Civ 583*; [2014] 1 W.L.R. 1264, CA, where authorities on principles applicable to granting of interim injunction pending an appeal in patent proceedings explained). In *Metropolitan Housing Trust v Taylor [2015] EWHC 2897 (Ch)* (Warren J), where in a supplemental judgment (given on 23 October 2015, after delivery of the main judgment on 19 October 2015) the judge granted the defendant's application to discharge a freezing order against them and refused the claimant permission to appeal to the Court of Appeal against that decision, the judge (after referring to the relevant authorities) further ordered that the discharge should take effect only after 21 days, giving the claimant the opportunity to protect its position by making an application to the Court of Appeal for a freezing order pending an appeal to that Court. See further para.2F-9.21 above. Such approach was followed by Andrew Baker J in *Skattesforvaltingen v Solo Capital Partners LLP [2021] EWHC 1683 (Comm)*.

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3. - Guidelines—Adequacy of Damages as a Remedy and the Balance of Convenience

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- 15-10** After stating the principles enumerated above, Lord Diplock gave guidance on how the balance of convenience should be determined in individual cases. In *R. v Secretary of State for Transport, Ex p. Factortame Ltd (No.2)* [1991] 1 A.C. 603, *HL*, Lord Goff said that the points made by Lord Diplock in the *American Cyanamid* case on this matter may properly be described as “guidelines” because his Lordship’s speech should not be read as intending to fetter the broad discretion conferred on the court by the *Senior Courts Act 1981* s.37 (see also *Cayne v Global Natural Resources Plc* [1984] 1 All E.R. 225 at 237, CA, per May LJ where the tendency to construe them as if they were provisions in an Act of Parliament is deprecated, and *Lansing Linde Ltd v Kerr* [1991] 1 W.L.R. 251, CA, at p.269 per Butler-Sloss, LJ).

In *Fellowes & Son v Fisher* [1976] 1 Q.B. 122, CA, at p.137, CA, Browne LJ set out Lord Diplock’s guidelines in an enumerated series (much relied upon by judges in subsequent cases) as follows.

- (1)The governing principle is that the court should first consider whether, if the claimant succeeds at the trial, they would be adequately compensated by damages for any loss caused by the refusal to grant an interlocutory injunction. If damages would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the claimant’s claim appeared to be at that stage.
- (2)If, on the other hand, damages would not be an adequate remedy, the court should then consider whether, if the injunction were granted, the defendant would be adequately compensated under the claimant’s undertaking as to damages. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the claimant would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction.
- (3)It is where there is doubt as to the adequacy of the respective remedies in damages that the question of balance of convenience arises. It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.
- (4)Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo.
- (5)The extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his succeeding at the trial is always a significant factor in assessing where the balance of convenience lies.
- (6)If the extent of the uncompensatable disadvantage to each party would not differ widely, it may not be improper to take into account in tipping the balance the relative strength of each party’s case as revealed by the written evidence adduced on the hearing of the application. This, however, should be done only where it is apparent upon the facts disclosed by evidence as to which there is no credible dispute that the strength of one party’s case is disproportionate to that of the other party.
- (7)In addition to the factors already mentioned, there may be many other special factors to be taken into consideration in the particular circumstances of individual cases.

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(a) - Stage 1—adequacy as a remedy of damages awarded at trial or payable under undertaking

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3. - Guidelines—Adequacy of Damages as a Remedy and the Balance of Convenience

(a) - Stage 1—adequacy as a remedy of damages awarded at trial or payable under undertaking

15-11 In *R. v Secretary of State for Transport, Ex p. Factortame Ltd (No.2)*, supra, Lord Goff explained that Lord Diplock approached the matter in two stages, the first stage consisting of guidelines (1) and (2) as outlined by Browne LJ and the second consisting of the remainder of those guidelines. That is to say, Lord Diplock said the relevance of the availability of an adequate remedy in damages, either to the claimant seeking the injunction or to the defendant in the event that an injunction is granted against him should be considered first. As far as the claimant is concerned, the availability to him of such a remedy will normally preclude the grant to him of an interim injunction. If that is not so, then the court should consider whether, if an injunction is granted against the defendant, there will be an adequate remedy in damages available to him under the claimant's undertaking in damages; if so, there will be no reason on this ground to refuse to grant the claimant an interim injunction.

It has been said that, as a practical matter, the nature and degree of harm and inconvenience for which an award of money can provide no adequate recompense that are likely to be sustained by the defendant (if an interlocutory injunction is granted) and by the claimant (if it is not) respectively “are generally sufficiently disproportionate to bring down by themselves the balance on one side or the other” (*N.W.L. Ltd v Woods [1979] 1 W.L.R. 1294, HL*, at p.1307 per Lord Diplock).

A literal application of guideline (2) would lead to the result that whenever a claimant puts forward a serious issue to be tried, and whenever they are also able to show that any inconvenience, let alone injustice, to the defendant by the grant of an injunction is capable of being compensated in damages against the claimant's cross-undertaking, the court would be bound to grant an injunction. This cannot possibly have been Lord Diplock's intention (*Cayne v Global Natural Resources Plc [1984] 1 All E.R. 225, CA*, at p.234 per Kerr LJ).

In *AB v CD [2014] EWCA Civ 229, [2015] 1 W.L.R. 771, CA*, where a dispute arose in relation to a contract containing a clause limiting the damages payable in the event of a breach, the contract-breaking party argued that damages were an adequate remedy, and that the contractually capped damages meant that no injunction could be granted in respect of such loss. The Court of Appeal held (i) that it was not only direct financial losses which may be relevant, (ii) that the parties' pre-quantification of recoverable losses were not an agreed price which entitled one party to breach its primary obligations to perform, and (iii) whilst such pre-quantification might affect a claim to recover damages, it did not affect a claim for an injunction to restrain further breaches (whether for an interim period or for the term of the contract), thus designed to avoid a claim to recover damages.

(b) - Stage 2—balance of convenience

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(b) - Stage 2—balance of convenience

- 15-12 As Lord Goff further explained in *R. v Secretary of State for Transport, Ex p. FactorTame Ltd (No.2)*, op. cit., if there is doubt as to the adequacy of either or both of the respective remedies in damages (see guideline (2)), then the court proceeds to the second stage, that is to say, to the “balance of convenience” and asks the question “where does the balance of convenience lie?” In practice, it is often hard to tell whether either or both of the respective remedies will be adequate. Consequently, it is frequently the case that the court is enjoined (by guideline (3)) to proceed to this stage and to consider the balance of convenience issue. The use of the word “convenience” here reflects s.37(1) of the Senior Courts Act 1981, where it is stated that an injunction may be granted if it appears to the court “just and convenient to do so”. In some cases, it has been said that the balance to be struck is more fundamental, more weighty, than mere “convenience”, and is better described as the “balance of the risk of doing an injustice” raising the question: “which course carries the lower risk of injustice” (*N.W.L. Ltd v Woods [1979] 1 W.L.R. 1294, HL*, at p.1306 per Lord Diplock; *Cayne v Global Natural Resources Plc [1984] 1 All E.R. 225, CA*, at p.237 per May LJ; *Zockoll Group Ltd v Mercury Communications Ltd [1998] F.S.R. 354, CA*, at 371 per Simon Brown LJ).

For the purpose of determining the balance of convenience, the court will consider all the circumstances of the case. In relation to this second stage Lord Goff said he had no wish to place any gloss on what Lord Diplock said but drew attention to the points made by his lordship in guidelines (3) and (7) as set forth by Browne LJ in *Fellowes & Son v Fisher*. Guideline (3) emphasises that, it would be unwise (if not impossible) for appellate courts (1) to attempt to list all the various matters which may need to be taken into consideration in deciding where the balance of convenience lies, or (2) to suggest the relative weight to be attached to them. Necessarily, these will vary from case to case. The court “has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irretrievable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld (as the case may be)” (*National Commercial Bank Jamaica Ltd v Oint Corp Ltd (Practice Note) [2009] UKPC 16; [2009] 1 W.L.R. 1405; [2009] Bus. L.R. 1110, PC*). The basic principle is that the court “should take whatever course seems likely to cause the least irretrievable prejudice to one party or the other” (above.).

The willingness of the applicant to give the respondent a cross-undertaking in damages is a very material consideration for the court in determining whether or not the interim injunction should be ordered. The fact that an ultimately unsuccessful claimant will have to compensate the defendant for losses suffered by them through their complying with the interim remedy for the duration of the period during which it took effect is a major factor in assessing the balance of convenience (*SmithKline Beecham Plc v Apotex Europe Ltd [2006] EWCA Civ 658; [2007] Ch. 71, CA* at [26] per Jacob LJ).

4. - Particular Guidelines

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- 15-13 Three of the guidelines as formulated by Browne LJ in *Fellowes & Son v Fisher [1976] 1 Q.B. 122, CA*, at p.137, CA, (see para.15-8 above) can be considered separately.

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(a) - Preserving the status quo ante

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(a) - Preserving the status quo ante

- 15-14 Guideline (4) states that where other factors appear to be evenly balanced it is “a counsel of prudence” to take such measures as are calculated to preserve the status quo. Sometimes it is said that the principal function of the interlocutory injunction is to preserve the status quo (*Siskina v Distos Compania Naviera SA [1979] A.C. 210, HL*, at p.256 per Lord Diplock; see also *Daniel v Ferguson [1891] 2 Ch. 27, CA*). However, in a given case the preservation of the status quo may on balance clearly incur the greater risk of injustice. Further, parties should not be encouraged to believe that the court will be unwilling to undo by interlocutory injunction what would otherwise be a fait accompli (*Thompson v Park [1944] 1 K.B. 408, CA*), especially where one party, by conduct that reflects little credit on them, has “stolen a march” on the other (*Zockoll Group Ltd v Mercury Communication Ltd*, op. cit., at p.371 per Simon Brown LJ). The relevant point of time for the purpose of “status quo” may be difficult to determine and may vary (*Alfred Dunhill Ltd v Sunoptic SA [1977] F.S.R. 337, CA*, at p.376 per Megaw LJ).

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(b) - “relative strength of each party’s case”

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(b) - “relative strength of each party’s case”

- 15-15** Guideline (6) is cast in terms designed to restrict a consideration of the “relative strength of each party’s case”. This factor has to be disregarded except as a last resort when the balance of convenience is otherwise even in the circumstances stated in guideline (6) and even then it should not be taken into account unless it is apparent upon the facts disclosed by evidence as to which there is no credible dispute that the strength of one party’s case is disproportionate to that of the other party. This is consistent with the whole object of the guidelines (see principle (9), *supra*) which is to avoid trying to resolve conflicts on affidavit and to avoid dealing with matters of fact or law which are for mature consideration at the trial (*Entec (Pollution Control) Ltd v Abacus Mouldings [1992] F.S.R. 332, CA*, at p.345 per Dillon LJ). However, where the court has felt able to reach, and has reached, a firm conclusion as to the applicant’s prospects of success it may be a counsel of perfection to expect the court to put that conclusion firmly on one side except for the limited purposes permitted by guideline (6).

Not surprisingly therefore, in many cases it has been argued that, in assessing the balance of convenience, the court should be able to give greater prominence to its view of the relative strength of each party’s case than that apparently allowed by guideline (6) (see, e.g. *Fellowes & Son v Fisher [1976] Q.B. 122, CA*, at p.141 per Sir Pennycuick) and it has been said that in practice this guideline is not always followed strictly (*Series 5 Software v Clarke [1996] 1 All E.R. 853*, at p.856). If the guideline is put in context and in positive terms, some room for manoeuvre is apparent. Put this way the guideline states that, (1) where the uncompensatable disadvantage to each party does not differ widely and (2) there is no credible dispute as to the facts, and (3) without attempting to resolve difficult issues of fact or law, the court can come to the conclusion that “the strength of one party’s case is disproportionate to that of the other party”, then (4) the court may take that relative strength into account. It is not necessary that there should be no issues of fact or law to be resolved. What is necessary is that (1) there should be no credible dispute as to the facts, (2) the court should not embark on anything resembling a trial of the action on conflicting affidavits in order to evaluate the strength of each party’s case, and (3) the court should be of the clear view that one party’s case is much stronger than the other’s. It can be argued that the first of these three conditions is unduly restrictive and, indeed, that it is subsumed by the second. That is to say, it could be contended that, even where there is a credible dispute as to the facts, the court may, without holding anything resembling a trial, be able to come to a clear view that one party’s case is much stronger than the other’s and should be able to take that factor into account. Support for this approach is found in the first instance case of *Series 5 Software v Clarke*, op. cit..

The desire to give greater prominence to the relative strength of each party’s case has led to the argument that in certain circumstances the question whether an injunction should be granted should be decided “without” the *American Cyanamid* guidelines, thereby circumventing the restrictive terms of guideline (6) completely. On the whole, that argument has been resisted. However, it has been deployed to some effect in cases where the grant or refusal of an interlocutory injunction would have the effect of disposing of the action finally (see para.15-17 et seq. below).

(c) - "other special factors"

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(c) - "other special factors"

- 15-16** It was suggested that guideline (7) indicated that the guidelines as a whole were not to be regarded as of general application and, therefore, the strength of either party's case could be taken into account whenever a case exhibited "other special factors" (see Lord Denning MR in *Fellowes & Son v Fisher [1976] Q.B. 122, CA*, and *Hubbard v Pitt [1976] Q.B. 142, CA*, but this view has not prevailed. It seems clear that guideline (7) refers only to special factors affecting the balance of convenience (see *Hubbard v Pitt*, above, at p.185 per Stamp LJ).

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5. - Interlocutory Ruling in Effect Disposing of Action Finally

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5. - Interlocutory Ruling in Effect Disposing of Action Finally

- 15-17 In a given case, an application for an interlocutory injunction may be successful; on the other hand, it may not. The disposition of the application one way or the other is likely to have a bearing on the subsequent progress of the proceedings.

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(a) - Likelihood of claimant succeeding at trial

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5. - Interlocutory Ruling in Effect Disposing of Action Finally

(a) - Likelihood of claimant succeeding at trial

15-18 Cases can arise in which, as a practical matter, the grant or refusal of an injunction at the interlocutory stage will, in effect, dispose of the action finally in favour of whichever party was successful in the application, because there would be nothing left on which it was in the unsuccessful party's interest to proceed to trial. Clearly, the *American Cyanamid* case was not such a case. However, in *N.W.L. Ltd v Woods [1979] 1 W.L.R. 1294, HL*, which was such a case, Lord Diplock said (at p.1306) that in these circumstances "the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial" is a factor which should be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other. In Lord Diplock's view this is not inconsistent with the *American Cyanamid* case because there was nothing in the decision in that case to suggest that the judge ought not to give "full weight to all the practical realities of the situation to which the injunction will apply".

So, the position is that where the grant or refusal of an interlocutory injunction will effectively end the action, it is appropriate for the court in assessing the balance of convenience to investigate "the degree of likelihood" of the claimant succeeding at trial. However, such investigation need not, and perhaps should not, amount to a trial of the action. It is for the judge to control the extent of the inquiry undertaken (*Lansing Linde Ltd v Kerr [1991] 1 W.L.R. 251; [1991] 1 All E.R. 418, CA*, at p.258 and p.424, CA, per Staughton LJ, see also p.270 and p.435, per Butler-Sloss LJ; *Schillings International LLP v Scott [2018] EWHC 1210 (Ch)* at [37] (Norris J)).

In some instances, the hearing of the application for interlocutory relief may well, in practice, be determinative of the dispute between the parties, not because the interim decision leaves nothing left on which it is in the unsuccessful party's interest to proceed to trial (as in *N.W.L. Ltd v Woods*, *supra*), but because, taking a commercial view, the court's decision at the hearing renders it not worthwhile for the unsuccessful party to continue to prosecute or defend (as the case may be) the action. Where the court, in determining whether to grant the interlocutory injunction, has faithfully applied the *American Cyanamid* principles and confined its attention to the question whether there is "a serious question to be tried", the unsuccessful party's decision in this respect will be based purely on the commercial realities (*R.H.M. Foods Ltd v Bovril Ltd [1982] 1 W.L.R. 661; [1982] 1 All E.R. 673, CA*, at p.666 and p.678, per Oliver LJ). However, if (contrary to the *American Cyanamid* principles) the court considered the degree of likelihood that the claimant would have succeeded in establishing their right to an action were the action to go to trial the court's view on the merits, in addition to the commercial realities, is likely to influence the unsuccessful party's decision.

Where it is clear that, whatever decision the court reaches as to the granting of an injunction, the commercial realities are likely to weigh very heavily on either or both parties, with the result that almost inevitably the proceedings will be at an end, it may be asking too much to expect the court to reach a decision purely on the basis of whether there is a serious question to be tried. It is perhaps for this reason that (contrary to the *American Cyanamid* principles) a consideration of the claimant's prospects of success has been regarded as of particular importance in passing-off actions (see, for contrasting examples, *Alfred Dunhill Ltd v Sunoptic SA [1979] F.S.R. 337, CA*, and *Newsweek Inc v British Broadcasting Corp. [1979] R.P.C. 441, CA*, where the strength or weakness of the parties' cases turned the day). However, it must be remembered that passing-off actions are not exempt from the rule that if the applicant fails to demonstrate that there is a serious question to be tried (see principle (10)) consideration of the balance of convenience does not arise and interlocutory relief must be refused (*Advance Magazine Publishing v Redwood Publishing [1993] F.S.R. 449*).

A difference of approach is apparent in the authorities coming after *N.W.L. Ltd v Woods*. On the one hand it is said (following Lord Diplock) that the cases in which the court's decision will, as a practical matter, dispose of the claim can be handled within

the *American Cyanamid* guidelines without any modification of the principles established in that case as properly understood (see *Cambridge Nutrition Ltd v British Broadcasting Corporation [1990] 3 All E.R. 523, CA*, at p.539, CA, per Ralph Gibson LJ, and *Lawrence David Ltd v Ashton [1989] I.C.R. 123, CA*, sub nom. *David (Lawrence) v Ashton [1991] 1 All E.R. 385, CA*, at p.135 and p.396, per Balcombe LJ), if only for the reason that the likely disposal of the whole action by the grant or refusal of the interlocutory injunction should be treated as a special factor to be taken into consideration in the particular circumstances of the case (guideline (7)).

On the other hand it has been said that a prerequisite to the application of the guidelines is that a trial is in fact likely to take place, in the sense that the claimant's case shows that they are genuinely concerned to pursue their claim to trial, and that they are seeking the injunction as a means of a holding operation pending the trial. Where this is not the case, so it is said, the court is not bound to apply the guidelines (see *Cayne v Global Natural Resources Plc [1984] 1 All E.R. 225, CA*, at p.234 and p.238 per Kerr and May LJ, and *Cambridge Nutrition Ltd v British Broadcasting Corporation [1990] 3 All E.R. 523, CA*, at p.534 per Kerr LJ; note also *Byanston Finance v De Vries (No.2) [1976] 2 W.L.R. 41, CA*, at p.51, CA, Buckley LJ and at p.55, per Sir Pennycuick) and, indeed, may be entitled to approach the matter on a broad principle by asking "what can the court do to in its best endeavour to avoid injustice" (sometimes known as the "broad brush" approach) (see *Cayne v Global Natural Resources Plc*, above, at p.232 per Eveleigh LJ). Note also *1st Choice Recruitment v Hancock [2003] EWHC 2232 (QB)*, where, in a claim for an employee's breach of an employment contract covenant an injunction was bound to be dispositive of the proceedings, the judge held that the *American Cyanamid Co* principles could not realistically be applied.

In some cases, the courts have dealt with the problem by an admixture of the guidelines and the judgments given in *N.W.L. Ltd v Woods* and *Cayne v Global Natural Resources Plc*, and have found it unnecessary to decide whether the solution was to be found "within" or "without" the guidelines (the judgment of Dillon LJ in *Entec (Pollution Control) Ltd v Abacus Mouldings [1992] F.S.R. 332, CA*, provides a good illustration). Quite commonly, *N.W.L. Ltd v Woods* is regarded as creating ""an exception" to American Cyanamid in the sense that it creates an exception to the rule that the relative strength of each party's case (or the claimant's prospects of success) generally should not be taken into account (see *Lawrence David Ltd v Ashton [1989] I.C.R. 1234, CA*, sub nom. *David (Lawrence) v Ashton [1991] 1 All E.R. 385, CA*, at p.135 and pp 395-396 per Balcombe LJ). In *Global Gaming Ventures (Group) Ltd v Global Gaming Ventures (Holdings) Ltd [2018] EWCA Civ 68*, where the claimants (C) applied for immediate injunctive relief in the form of a mandatory order for disclosure and inspection of documents concerning the recent financial performance of a subsidiary company, being an order that was likely to dispose of the proceedings, C succeeded in their appeal against the judge's refusal of the order sought. The Court held (1) that the judge was clearly right to take into account the harm which disclosure might do, (2) but, in the circumstances of the case, C were entitled to have the potential consequences of the relief they were seeking weighed against the relative strength of their case for disclosure, and not simply by reference to what course would do the least harm, (3) if they were able to demonstrate to the judge that their claim had a significant prospect of success, that should have been taken into account when determining where the balance of convenience lay.

(b) - Likelihood of defendant establishing defence in employment dispute

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(b) - Likelihood of defendant establishing defence in employment dispute

- 15-19 In an employment dispute, where an employer claimant applies for an interim injunction to enforce restrictive covenants, and the covenants are likely to have run most or all of their course before a trial could take place, in considering the balance of convenience, the court should take account as best it can of the likelihood that the claimant would succeed or fail if there were a trial: *Forse v Secarma* [2019] EWCA Civ 215; [2019] I.R.L.R. 587 at [28]–[31]. In such a case, the starting point is that the covenant should be enforced and the burden is on the employee to show why they should not be held to their contractual bargain: *Dyson Technology v Pellerey* [2016] EWCA Civ 87 at [74]–[75]. A case does not have to qualify as “exceptional” before an injunction might be refused: above.

Because of the perceived risk of undermining the statutory immunities granted to trade unions, the [Trade Union and Labour Relations \(Consolidation\) Act 1992 s.221](#) provides that where, on an application for an interim injunction, the defendant claims, or would be likely to claim, that they acted in contemplation or furtherance of a trade dispute, the court shall have regard to the likelihood of the defendant succeeding at trial in establishing any defence to the claim under [s.219](#) (protection from certain tort liabilities) or [s.220](#) (peaceful picketing) of the [1992 Act](#). This provision was discussed in *NWL Ltd v Woods* [1979] 1 W.L.R. 1294, HL, and *Associated British Ports v Transport and General Workers' Union* [1989] 3 All E.R. 796, CA.

(c) - Effect of delay to trial

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5. - Interlocutory Ruling in Effect Disposing of Action Finally

(c) - Effect of delay to trial

15-20 In a given case, the question whether or not the grant or refusal of an interlocutory injunction will in effect dispose of the action finally may be affected by the length of delay to trial (*Lansing Linde Ltd v Kerr [1991] 1 W.L.R. 251; [1991] 1 All E.R. 418, CA*, at p.257 and p.423, CA, per Staughton LJ). Although it may be true to say that, since the coming into effect of the CPR, generally speaking cases proceed more expeditiously to trial than before, cases can still arise in which delay to trial is an important factor. See, e.g., *CEF Holdings Ltd v Mundey [2012] EWHC 1524 (QB); [2012] I.R.L.R. 912; [2012] F.S.R. 35* (Silber J) (where claim to restrain breaches of post-termination covenants in an employment contract not to be tried until the very end of the period of the contractual restriction).

The restraint of trade cases provide a good example. In such cases where the claimant, the former employer, seeks an interlocutory injunction preventing the defendant, the former employee, from taking up other employment for the remainder of the contractual period (whatever it is), the question whether damages would be an adequate remedy for one party or the other can be particularly difficult. Unless the defendant is a person of substance, the court may conclude that damages would not be an adequate remedy for the claimant if an injunction were not granted. If the claimant is financially sound the court may well conclude that the defendant would undoubtedly be compensated under the cross-undertakings if they were wrongly injunctioned and kept out of work for a period. However, there may be a significant risk that the defendant, by being kept out of the employment market for the period of any injunction, will have difficulty in finding work subsequently and will therefore suffer long term damage beyond that period. This may not be easy to establish or, if established, to assess in monetary terms. Much will depend on the period for which the interlocutory injunction operates. For a modern example, where it was said that the proper approach was not to apply the American Cyanamid test, but instead to consider in respect of claims for an injunction whether it was more likely that the claimants would succeed at trial, see *CEF Holdings Ltd v Mundey [2012] EWHC 1524 (QB); [2012] I.R.L.R. 912; [2012] F.S.R. 35* (Silber J). The more modern approach is to apply the *American Cyanamid Co v Ethicon Ltd [1975] A.C. 396* test but in considering the balance of convenience, the court should take account as best it can of the likelihood that the claimant would succeed or fail if there were a trial: *Forse v Secarma Ltd [2019] EWCA Civ 215; [2019] I.R.L.R. 587* at [28]–[31] and further, see para.15-20.

It has been said that it is only if the action cannot be tried before the period of the restraint has expired, or has run a large part of its course, that the grant of an interlocutory injunction should be regarded as effectively disposing of the action (*Lawrence David Ltd v Ashton [1989] I.C.R. 123*, sub nom. *David (Lawrence) v Ashton [1991] 1 All E.R. 385, CA*, at p.135 and p.395 per Balcombe LJ).

Where the anticipated length of the delay before trial makes it likely that the grant or refusal of an interlocutory injunction would in effect dispose of the action finally, instead of taking up the time of the courts with contested applications for interlocutory injunctions, the parties might be better advised to use their best endeavours to cooperate in getting the case ready for trial quickly and applying for speedy trial (*Lawrence David Ltd v Ashton [1989] I.C.R. 123*, sub nom. *David (Lawrence) v Ashton [1991] 1 All E.R. 385, CA*, at p.134 and p.395 per Balcombe LJ; see also *Dairy Crest Ltd v Pigott [1989] I.C.R. 92, CA*). Further, in a restraint of trade case the defendant should seriously consider, when the matter first comes before the court, offering an appropriate undertaking until the hearing of the action, provided that a speedy hearing of the action can then be fixed and the claimant is likely to be able to pay any damages on their cross-undertaking. It is only if a speedy trial should not be possible that it would be necessary to have a contest on the interlocutory application (*Lawrence David Ltd v Ashton [1989] I.C.R. 123*, sub nom. *David (Lawrence) v Ashton [1991] 1 All E.R. 385, CA*, at p.135 and pp.395–396 per Balcombe LJ).

In *Create Financial Management LLP v Lee* [2020] EWHC 1933 (QB); [2021] 1 W.L.R. 78, Morris J held that in determining whether interim springboard relief was likely to be final (such that some assessment of the merits was required in accordance with the approach in *Lansing Linde v Kerr* [1991] 1 W.L.R. 251 and *NWL Ltd v Woods* [1979] I.C.R. 867) the court should consider the length of the injunction sought by the claimant. He thereby disagreed with Edward Pepperall QC in *MPT Group Ltd v Peel* [2017] EWHC 1222 (Ch); [2017] I.R.L.R. 1092 who considered that such question first required the court to form a view as to the likely length of the springboard relief that might be granted at trial.

(d) - Risk of terminological confusion

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5. - Interlocutory Ruling in Effect Disposing of Action Finally

(d) - Risk of terminological confusion

15-21

There is a risk of terminological confusion. In the *American Cyanamid* case, the House of Lords held that, as a threshold requirement to a consideration of the balance of convenience, the court must be satisfied on the material available to it that the claim is “not frivolous or vexatious”; in other words, that there is “a serious question to be tried” (principle (10)) or, put conversely, that such material “fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial” (principle (11)).

In the limited circumstances permitted by guideline (6) only, in assessing the balance of convenience the court may take into account in tipping the balance a qualitatively different factor, that is “the relative strength of each party’s case” as revealed by the written evidence. As noted above, in *N.W.L. Ltd v Woods* Lord Diplock said that in the circumstances under discussion here (interlocutory injunction disposing of action finally) “the degree of likelihood that the plaintiff would have succeeded in establishing their right to an injunction if the action had gone to trial” is a factor which should be brought into the balance. It would seem that this is but another way of saying that “the relative strength of each party’s case” is a factor to be brought into the balance (see *Lawrence David Ltd v Ashton [1989] I.C.R.123, CA*, sub nom. *David (Lawrence) v Ashton [1991] 1 All E.R. 385, CA*, at pp.134–135 and pp.395–396 per Balcombe LJ). However, in some later cases, the factor identified in *N.W.L. Ltd v Woods* has been described as the plaintiff’s “prospects of success at trial” (see *Lansing Linde Ltd v Kerr [1991] 1 All E.R. 418; [1991] 1 W.L.R. 251, CA*, at p.422 and p.256 per Stoughton LJ). This may be an apt description in this context but it is submitted that there is a risk that it will be confused with the threshold requirement referred to in principle (11).

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6. - Cases Excepted from Guidelines

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6. - Cases Excepted from Guidelines

15-22

The principles and guidelines derived from the *American Cyanamid Co* case are intended to be of general application. However, in certain circumstances they are subject to variations, and in some others the variations are so significant that it can reasonably be claimed that they do not apply. Further, cases can arise in which the circumstances are so highly unusual as to make the normal tests (or at least some of them) for the granting of interlocutory injunctions inappropriate (e.g. *R. v Secretary of State for Health, Ex p. Generics (UK) Ltd [1998] Eu.L.R. 146; [1997] C.O.D. 294* (both parties applying for interlocutory injunctions in judicial review proceedings challenging related decisions of authority as to drug-licensing)).

In *Tetronics (International) Limited v HSBC Bank Plc [2018] EWHC 201 (TCC); [2018] B.L.R. 450; 177 Con. L.R. 159* (Fraser J), the judge explained (citing *Bolivinter Oil S.A. v Chase Manhattan Bank N.A. (Practice Note) [1984] 1 W.L.R. 392, CA; Alternative Power Solution Ltd v Central Electricity Board [2014] UKPC 31; [2015] 1 W.L.R. 697, PC*) that, in the case of on-demand bank guarantees, letters of credit and performance bonds, the principle that the obligation of the bank is autonomous from the parties' contractual relations between one another (the "autonomy principle") leads to the strict general rule that the court would not intervene to prevent a bank from making payment under a letter of credit (or other such financing document) following a compliant presentation of documents, so that no injunction will lie unless the claimant can rely on the "fraud exception," that is to say, where the circumstances are (1) that it is seriously arguable (a significantly more stringent test than good arguable case, let alone serious issue to be tried) that, on the material available, the only realistic inference was that the beneficiary could not honestly have believed in the validity of its demands under the letter of credit; (2) that the bank was aware of such fraud; and (3) that the balance of convenience must favour granting the claimant an injunction, which requires "extraordinary facts" and a claimant will face very considerable difficulty in having that balance found in its favour (paras 23 to 32).

The aspect of the law derived from the *American Cyanamid* case that lawyers and judges appear to have had most difficulty in consistently applying in all circumstances is the principle that the threshold question is, not "whether the applicant has a *prima facie case?*", but the less onerous one of "is there a serious question to be tried?" The way in which this principle has come under strain in cases where, as a practical matter, the disposal of the application will result in the disposal of the claim, and the consequences of the lack of congruence between the "great object" which underpins the principle and modern case management principles, have been noted elsewhere in this commentary. It has also been noted elsewhere that the matter is complicated by the fact that it is clear that, once the threshold test has been applied and passed, and the court moves on to applying the appropriate guidelines, in certain circumstances the strengths of the parties' cases become relevant. (See further, the discussion of interim mandatory injunctions, para.15-24 below.)

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7. - Strength of Applicant's Case in Freezing Injunction Cases

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7. - Strength of Applicant's Case in Freezing Injunction Cases

15-23

In *Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft m.b.H und Co K.G. (The Niedersachsen)* [1983] 2 Lloyd's Rep. 600, Mustill J, having referred to *Rasu Maritima SA v Perusahaan Pertambangan Minyakdangas Bumi Negara (Pertamina)* [1978] Q.B. 644; [1977] 3 W.L.R. 518, CA, and later authorities (in particular *Z. Ltd v A.* [1982] Q.B. 558; [1982] 1 All E.R. 556, CA), said that, although they were not easy to reconcile, they establish that the claimant must have "a case of a certain strength" before the question of any freezing injunction relief can arise, and added that the claimant must show a case "which is more than barely capable of serious argument and yet not necessarily one which the judge believes to have a better than 50 per cent chance of success" (above at p.605). This test (which has been widely adopted since) is to be applied in all cases before the question of any freezing injunction relief can arise.

The conclusion reached by Mustill J in The *Niedersachsen* case was not disturbed on appeal and in subsequent freezing injunction cases the "good arguable case" test derived from it (together with other relevant considerations) has been habitually applied. Whilst in the case of challenges to the grant of permission to serve proceedings out of the jurisdiction, a *good arguable case* means that the claimants must show they have "much the better of the argument", the concept is reduced in scope when considered in relation to freezing order applications. No findings of the facts are required and the Court is astute to avoid resolving issues of fact which will fall to be determined at a full hearing later in the litigation.

It cannot be said that, just because a defendant has not applied in the proceedings to strike out the claim against them or for reverse summary judgment, they are to be taken as accepting that there is a good arguable case against them in this context, as it is one thing to take the point positively by making such an application but quite another to be forced to take it in the face of an application by the claimant for a freezing order (*Metropolitan Housing Trust v Taylor* [2015] EWHC 2897 (Ch) at [18] (Warren J)).

For an explanation of the provenance of the "good arguable case" test, and a comparison with the "much better of the argument" test traditionally applied by the English courts when considering whether to order service out of the jurisdiction, with references to relevant authorities, see *Kazakhstan Kagazy Plc v Arip* [2014] EWCA Civ 381; [2014] 1 C.L.C. 451, CA, at [62] et seq per Elias LJ. For a review of the authorities on the point, see *Metropolitan Housing Trust v Taylor* [2015] EWHC 2897 (Ch) at [17]–[26] (Warren J).

The Court of Appeal ought to respect the instincts of experienced commercial judges on the question whether there is a good arguable case, and should only interfere if it is plain that the judge was wrong (*Lakatamia Shipping Company Limited v Nobu Su Limited* [2012] EWCA Civ 1195).

In *AH Baldwin and Sons Ltd v Al Thani* [2012] EWHC 3156 (QB), where a final worldwide asset freezing injunction was granted under the Civil Jurisdiction and Judgments Act 1982 s.25 in support of proceedings in the United States to enforce a contract entered into between an auction house and a successful bidder at auction, Haddon-Cave J, in considering the risk of dissipation, referred to the relevant authorities and summarised the matters to be taken into account by the court. His lordship said: (1) on the return date, the claimant must demonstrate that it is entitled to the relief sought, (2) evidence of actual dishonesty is not essential, and there is no need to show an actual intention to dissipate assets, (3) if there is a good arguable case supporting an allegation that the defendant has acted fraudulently or dishonestly, or with unacceptably low standards of morality giving rise to a feeling of uneasiness about the defendant, then the court may take the view that there is sufficient to justify granting a freezing order without further specific evidence of risk of dissipation, (4) although it is not necessary to establish that the defendant is likely to seek to put their assets beyond reach, it is necessary to show, for example, the defendant dealing with assets in a manner other than in the usual or ordinary course of business or life, so as to render enforcement more difficult or

impossible, (5) the court may infer the necessary risk of the judgment going unsatisfied from the behaviour of the defendant if, for example, he keeps promising to pay but persistently defaults with implausible excuses, (6) the fact that a claimant has a claim which is unanswerable, or virtually incapable of being defended, may be a powerful factor in favour of granting a freezing order, though it cannot of itself be decisive.

See further Vol.1 para.[25.1.25.6](#).

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8. - Mandatory Injunctions

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8. - Mandatory Injunctions

15-24

A mandatory injunction directs that a positive act should be done to repair some omission or to restore the prior position by undoing some wrongful act. In certain circumstances, a mandatory injunction may be granted in a quia timet action; that is to say, to prevent an apprehended legal wrong where none has occurred at present and the applicant is without any remedy at law (*Morris v Redland Bricks Ltd [1970] A.C. 652, HL*). Whilst traditionally, power of the court to grant a positive injunction has been regarded as a more serious power than the power to grant a negative injunction, it was pointed out by the Privy Council in *National Commercial Bank Jamaica Ltd v Olint Corp Ltd (Practice Note) [2009] UKPC 16; [2009] 1 W.L.R. 1405; [2009] Bus. L.R. 1110, PC* that the question is not a semantic one (positive or negative, mandatory or prohibitory) but one of seeking to predict whether granting or withholding an injunction is more or less likely to cause irretrievable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld (as the case may be). The basic principle is that the court “should take whatever course seems likely to cause the least irretrievable prejudice to one party or the other” (above.).

The jurisdiction of the court to grant an injunction enshrined in s.37(1) of the Senior Courts Act 1981 is stated widely and in general terms. The court may by order “whether interlocutory or final” grant an injunction “in all cases in which it appears to the court to be just and convenient to do so”. This has been regarded as quite sufficient to give the court jurisdiction to grant, not only prohibitory injunctions, but also mandatory injunctions. Further, it has been regarded as sufficient to give the court jurisdiction to grant a remedy in the form of a mandatory injunction, not only at a trial (as a final remedy), but also upon an interlocutory application (as an interim remedy).

Obviously, the question whether a mandatory injunction may be granted at all is quite distinct from the question whether it should be granted on an interlocutory application. The considerations relevant to the former question may largely overlap with those relevant to the latter, but they are distinct considerations nonetheless and are not exact.

Whilst the proposition that formerly held good, namely that where an interim mandatory injunction is sought the balance of convenience test requires that it should not be granted unless there is “high degree of assurance” that at the trial it will appear that the injunction was rightly granted, has been rejected, it continues to be a relevant factor in the limited sense described below.

In *Nottingham Building Society v Eurodynamics Systems [1993] F.S.R. 468*, the claimants brought a contractual claim against their suppliers of computer services. The remedies sought by the claimants included an order requiring the defendants to deliver up certain computer software to which they claimed to be entitled upon termination of the agreements. The claimants applied for an interim mandatory injunction to compel the defendants to deliver up such of the software as remained in their possession power or control. Chadwick J applied the *American Cyanamid* principles and guidelines. Having determined that damages would not be an adequate remedy for either party, he went on to consider the balance of convenience. After considering the authorities referred to above (and, in addition, *Films Rover International Ltd v Cannon Film Sales Ltd [1987] 1 W.L.R. 670*), the judge said that the balance of convenience was to be determined in accordance with the following principles:

- (1)The overriding consideration is which course is likely to involve the least risk of injustice if it turns out to be “wrong” in the sense of granting an interlocutory injunction to a party who fails to establish their right at trial (or would fail if there was a trial) or, alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial.
- (2)In considering whether to grant a mandatory injunction, the court must keep in mind that an order which requires a party to take some positive step at an interlocutory stage, may well carry a greater risk of injustice if it turns out to have been wrongly made than an order which merely prohibits action, thereby preserving the status quo.

(3) It is legitimate, where a mandatory injunction is sought, to consider whether the court does feel a high degree of assurance that the claimant will be able to establish this right at a trial. That is because the greater the degree of assurance the claimant will ultimately establish their right, the less will be the risk of injustice if the injunction is granted.

(4) But, even where the court is unable to feel any high degree of assurance that the claimant will establish their right, there may still be circumstances in which it is appropriate to grant a mandatory injunction at an interlocutory stage. Those circumstances will exist where the risk of injustice if this injunction is refused sufficiently outweigh the risk of injustice if it is granted.

That there may be circumstances where the balance of convenience lies in granting the mandatory injunction, even though the court is unable to feel any high degree of assurance that the claimant will establish their right at trial, reflects the judgment of Hoffmann J in *Films Rover International Ltd v Cannon Film Sales Ltd* in which his lordship said that, if it appears to the court that the case is one in which withholding a mandatory interlocutory injunction would in fact carry a greater risk of injustice than granting it even though the court does not feel a “high degree of assurance” about the claimant’s chances of establishing their right, there cannot be any rational basis for withholding the injunction. See further, and to same effect, *R. v Secretary of State for Transport, Ex p. Factortame Ltd (No.2)* [1991] 1 A.C. 603, HL, at 683, per Lord Jauncey; *National Commercial Bank Jamaica Ltd v Olint Corp Ltd (Practice Note)* [2009] UKPC 16, [2009] 1 W.L.R. 1405, [2009] Bus. L.R. 1110, PC, at [19] and [20]; *Jet2.Com Ltd v Blackpool Airport Ltd* [2010] EWHC 3166 (Comm) (Beatson J).

In *Zockoll Group Ltd v Mercury Communications Ltd* [1998] F.S.R. 354, CA, a two-judge court of the Court of Appeal refused the claimant’s application for an interim mandatory injunction made on the claimant’s appeal from a judge’s refusal to grant a prohibitory injunction. In this case Phillips LJ (with whom Simon Brown LJ agreed in the result) endorsed the principles enunciated by Chadwick J in the *Nottingham Building Society* case (including the fourth and last of them) and commended his Lordship’s “concise summary” as being “all the citation that should in future be necessary” to guide the court on the question of the balance of convenience in cases where an interim mandatory injunction is sought.

In *Astro Exito Navegacion SA v Southland Enterprise Co Ltd (No.2)* [1982] Q.B. 1248; [1982] 3 W.L.R. 296; [1982] 3 All E.R. 335, CA, on the defendants’ application the judge stayed the claimants’ action for specific performance pending arbitration on terms which included a mandatory injunction requiring the defendants to authorise the release by a bank of moneys secured by letter of credit, the money so released to be lodged in the joint names of the solicitors for the parties pending further order. In dismissing the defendants’ appeal the Court of Appeal held (following *Smith v Peters* (1875) L.R. 20 Eq. 511) that the court has power, in an appropriate case, to grant an interlocutory mandatory order compelling the execution of a contractual obligation (this issue was not further pursued in the House of Lords, see [1983] A.C. 787; [1983] 2 All E.R. 725, HL).

In *Leisure Data v Bell* [1988] F.S.R. 367, CA, it was said that circumstances can arise (e.g. where there is “a salvage element” involved) where it is necessary that some form of mandatory order should be made to deal with a situation which cannot on the practical realities be left to wait until the trial. (In this case, various cases were cited illustrations.)

9. - Cross-Undertaking as to Damages

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9. - Cross-Undertaking as to Damages

- 15-25 The court is normally only prepared to grant an interim injunction if the applicant is prepared to offer a cross-undertaking in damages (so-called to identify that the undertakings are given by, and are binding on, the applicant). The court has no power to order a party to give a cross-undertaking: it is something that an applicant must be prepared to give in return for the grant of an injunction. As a matter of practice, however, a cross-undertaking is required for the protection not only of the respondent, but of any other person who may suffer loss in consequence of the order: see PD 25A paras 5.1 and 5.2 (see Vol.1 para.[25APD.5](#)).

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(a) - Introduction

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9. - Cross-Undertaking as to Damages

(a) - Introduction

- 15-26 The Senior Courts Act 1981 s.37(2) states that an order granting an interlocutory injunction may be made either unconditionally or on such terms and conditions as the court thinks just. In *American Cyanamid Co v Ethicon Ltd [1975] A.C. 396, HL*, Lord Diplock explained (at p.406) that, where a claimant is granted relief by way of interlocutory injunction, the practice is (and has been since at least the middle of the nineteenth century) to make this subject to a condition in the form of the claimant's undertaking to pay damages to the defendant for any loss sustained by reason of the injunction if it subsequently transpires that it ought not to have been granted; for example, if the proceedings are discontinued, or if the injunction is discharged before trial, or "if it should be held at the trial that the claimant had not been entitled to restrain the defendant from doing what he was threatening to do".

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(b) - Undertakings in interim injunctions generally

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9. - Cross-Undertaking as to Damages

(b) - Undertakings in interim injunctions generally

15-27 Originally the undertaking was inserted only in without notice orders for injunctions. The object was to protect the court as well as the defendant from improper applications for injunctions. By degrees the practice was extended to all cases of interlocutory injunction (*Smith v Day* (1882) 21 Ch.D. 421, CA, at p.424 per Jessel MR). At an early stage it was held that an undertaking ought to be a condition of every interlocutory injunction (*Graham v Campbell* (1878) 7 Ch.D. 490, CA at p.484, CA, per James LJ), though not where the order is in the nature of a final order (*Fenner v Wilson* [1893] 2 Ch. 656).

A cross-undertaking is not given by the applicant to the respondent; it is given by the applicant to the court (*F. Hoffmann-La Roche & Co A.G. v Secretary of State for Trade and Industry* [1975] A.C. 295, HL, at p.361 per Lord Diplock; *Fletcher Sutcliffe Wild Ltd v Burch* [1982] F.S.R. 64). The terms of the cross-undertaking are for the court. Three things follow from this. First, where it is a matter for doubt, the proper interpretation of the cross-undertaking is not a matter of divining the mutual understanding of the parties to the proceedings. Secondly, it may be enforced by one who is not a party to the proceedings in those circumstances where it is given, not merely for the benefit of the respondent, but for their benefit as well (as to which, see further below) (*SmithKline Beecham Plc v Apotex Europe Ltd* [2005] EWHC 1655 (Ch); [2006] 1 W.L.R. 872; [2006] 2 All E.R. 53, at [43] per Lewison J. (in this case the development and extent of undertakings generally is explained)). Thirdly, when an undertaking given to the court (for example to issue a claim form) is not complied with, there must be an enquiry by the court as to why that happened and what, if any, sanction or consequential order should be imposed (*Gray v UVW* [2010] EWHC 2367 (QB) (Tugendhat J)). In the case of injunctions to prevent significant environmental damage under the Aarhus Convention (see CPR r.45.41(2)), the court will, in considering whether to require a cross-undertaking in damages, have regard to the need not to make continuing with the claim prohibitively expensive for the applicant: see PD 25A para.5.3 (see Vol.1 para.25APD.5).

Such undertaking has been described as the “price” of an injunction (*Tucker v New Brunswick Trading Company of London*, (1890) 44 Ch.D. 249, CA, at p.253, per Lindley LJ). Upon the respondent being required to undertake to conduct themselves in accordance with the terms of the injunction, the applicant undertakes (cross-undertakes) to pay damages if, in the event, required to do so. If the applicant is unwilling to undertake to pay the price, they do not get the injunction. The cross-undertaking is the quid pro quo for the court making an interim order without having determined the facts or the claimant’s entitlement to it. It is given, not to identified respondents, but to the court to enable the court, if it thinks fit, to compensate any innocent sufferer from an interim injunction which ought not to have been granted (*Harley Street Capital Ltd v Tchigirinski* [2005] EWHC 2471 (Ch)).

As with other undertakings given to the court, an undertaking as to damages given by a claimant cannot be varied, but a claimant who wishes to be ceased to be bound may apply to the court for “release” from it (or “discharge” of it), accompanying that application with an offer of a further undertaking in different terms (*Birch v Birch* [2017] UKSC 53; [2017] 1 W.L.R. 2959, SC, at [5]).

In *Financial Services Authority v Sinaloa Gold Plc* [2013] UKSC 11; [2013] 2 W.L.R. 678, SC, the Court stated that a distinction is to be drawn between (1) a law enforcement action, where a public authority is seeking to enforce the law in the interests of the public generally, often in pursuance of a public duty to do so, and enjoys only the resources which have been assigned to it for its functions, and (2) private litigation. The Court held that there is no general rule that an authority such as the FSA, acting pursuant to a public duty, should be required, when granted a freezing injunction, to give to the court a cross-undertaking in respect of losses suffered either by defendants or by third parties affected by the injunction. If a defendant or third party is or fears being adversely affected by an injunction, they should come forward and explain the loss feared, and apply for any continuation of the injunction to be made conditional upon such cross-undertaking as the court considers fair (above at para.43).

In dismissing the appeal made by the respondent's bank in this case, an innocent third party, the Court held that there were no particular circumstances why the claimant should be required to give an undertaking to the bank.

In *United States Securities & Exchange Commission v Manterfield* [2009] EWCA Civ 27; [2009] 1 Lloyd's Rep. 399; [2009] 2 All E.R. 1009, CA, where the applicant for a world-wide freezing order was a foreign public agency (C) and the application was made in support of proceedings abroad, the respondent's submission that, because C could offer no cross-undertaking, no freezing order ought to be made, was rejected by the Court of Appeal and it was held that the judge was right to start from the position that a cross-undertaking would not be given and to consider whether this was a case in which it should or should not be dispensed with.

The court cannot compel an applicant to give a cross-undertaking, but it can refuse to grant an injunction unless they do. Where the court is minded to impose such a condition it is a matter for the applicant to decide whether they are prepared to give it and, if it is insisted upon, to provide security. If they are not, the injunction does not go (*F. Hoffmann-La Roche & Co A.G. v Secretary of State for Trade and Industry*, op. cit., at p.361 per Lord Diplock).

The willingness of the applicant to give the cross-undertaking is a very material consideration for the court in determining whether or not the interim injunction should be ordered. The fact that an ultimately unsuccessful claimant will have to compensate the defendant for losses suffered by them through their complying with the interim remedy for the duration of the period during which it took effect is a major factor in assessing the balance of convenience.

Since a cross-undertaking cannot be imposed, it follows that a fortiori it cannot be imposed retrospectively (*SmithKline Beecham Plc v Apotex Europe Ltd*, op. cit., at para.41).

Usually, the cross-undertaking will be expressly given by the applicant and will be expressly incorporated in the court's order. Where it is not expressly given, the court may enforce an implied undertaking even if it had not been included in the order, unless the contrary had been agreed and expressed at the time (see *SmithKline Beecham Plc v Apotex Europe Ltd*, op. cit., at paras 26 to 37 and cases cited there).

Where a limited cross-undertaking is offered and accepted by the court, there is in general no room for implying some further offer of an undertaking beyond that which was expressly offered and accepted (above).

As an extra condition, the claimant may be required to fortify the undertaking by giving security (see further para.15-32 below).

The point of a cross-undertaking in damages is to provide a means of compensation for loss if it occurs in relation to the injunction or undertaking. To that extent the court has, if necessary, to form a view as to the kind and degree of loss that may result in deciding whether an undertaking has sufficient value (with or without fortification) (*Re DPR Futures Ltd* [1989] 1 W.L.R. 778 (Millett J); *Bhimji v Chatwani (No.2)* [1992] 1 W.L.R. 1158 (Knox J); *Sinclair Investment Holdings S.A. v Cushnie* [2004] EWHC 218 (Ch)).

An interlocutory injunction may be granted on terms that the claim form should be amended by adding a claimant in order that an undertaking as to damages might be given on their behalf (see, e.g. *Spanish General Agency Corp. v Spanish Corp.* (1891) 63 L.T. 161). In a case where it is determined subsequently that the injunction should not have been granted the undertaking is likely to be enforced, though the court retains a discretion not to do so (see further, "Application to enforce undertaking", para.15-34, below).

(c) - Undertakings in freezing injunctions and search orders

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(c) - Undertakings in freezing injunctions and search orders

- 15-28** As is the case with interim injunctions generally, freezing injunctions granted as interim remedies are granted on terms that the applicant gives an undertaking in damages to compensate the respondent should the court, in the event, find that the injunction caused the respondent loss for which they should be compensated. For explanation, see *Banco Nacional de Comercio Exterior SNC v Empresa de Telecomunicaciones de Cuba SA* [2007] EWCA Civ 662; [2007] 2 Lloyd's Rep. 484, CA.

In para.(1) of Sch.B of the example of a interim injunction in the form of a freezing injunction given in the Annex to Practice Direction 25A (Interim Injunctions) (one of the practice directions supplementing CPR Pt 25) the undertaking to compensate the respondent is given as follows: "If the court later finds that this order has caused loss to the Respondent, and decides that the Respondent should be compensated for that loss, the Applicant will comply with any order the court may make." In an appropriate case the undertaking should be extended to include any other person who may suffer loss as a consequence of the order (see further para.15-29 below).

The applicant should put in a statement indicating their wealth or that they have sufficient adequately to cover the undertaking (*Staines v Walsh* ; [2003] EWHC 1486; *Sinclair Investment Holdings S.A. v Cushnie* [2004] EWHC 218 (Ch)). A successful party to an action who seeks a freezing order may be required to give a cross-undertaking in damages where the trial judge gives the unsuccessful party permission to appeal. In *Gwembe Valley Development Co Ltd v Koshy, The Times*, 28 February 2002 (Rimer J) an undertaking was required in circumstances where the substantive issue on which the injunction had been granted, and upon which permission to appeal was given, was a point of some difficulty upon which the Court of Appeal might take a different view. In that case the judge, though requiring an undertaking, expressed the opinion that it was not "the usual practice" to do so for freezing orders given after judgment. This opinion was doubted in *Nomihold Securities Inc v Mobile Telesystems Finance SA* [2011] EWHC 337 (Comm) where, in continuing a freezing order granted without notice to an applicant given leave under the Arbitration Act 1996 s.66 to enforce an arbitral award, the judge ruled that, in the circumstances, the applicant should be required to give an undertaking (albeit unfortified). In *Kazakhstan v Zhunus* [2018] EWHC 369 (Comm) (Picken J), the judge held that the claimants should be released from their fortification of the cross-undertaking in damages, but was persuaded, "adopting an essentially pragmatic approach", that the cross-undertaking should continue until such time as the defendants' application for permission to appeal had been determined by the Court of Appeal (at [98] and [100]). It is important that undertakings given are complied with and, if they are not, that there is a good explanation as to why. The fact that there was a failure is a potentially serious matter that might justify the injunction being discharged (*Flightwise Travel Service Ltd v Gill* ; [2003] EWHC 3082 (Ch)).

It is inherent in the freezing order jurisdiction that a claimant must disclose to the defendant any change in their financial position affecting their ability to honour their cross-undertaking (*Staines v Walsh* ; [2003] EWHC 1486 (Ch); (2003) 100(30) L.S.G. 30 (Laddie J)). Other undertakings by the applicant may also be attached to a freezing injunction (whether made before or after judgment). For example, an undertaking not to use information obtained as a result of the order for the purpose of other legal proceedings or not to bring other proceedings. The purpose of such undertakings is to prevent the injunction from causing injustice or being used as a weapon of oppression (*Bates v Microstar Ltd* [2003] EWHC 661 (Ch); (2003) 100(22) L.S.G. 30 (Mr Bernard Livesey Q.C.) (claimant in breach of contract claim released from undertaking to permit their bringing of derivative claim in foreign jurisdiction)). Similar undertakings may be imposed on an order for the cross-examination of a defendant on their disclosure statement made in complying with a freezing injunction (as in *Motorola Credit Corp v Uzan (No.2)* [2002] EWHC 2187 (David Steel J)).

Undertakings given by a claimant as a condition of the grant of a freezing injunction must be carried out to the letter; breach of such an undertaking may not necessarily be regarded as similar to a misrepresentation or non-disclosure of material facts, but, in an appropriate case, breach of an undertaking may result in discharge of the injunction (*Sabani v Economakis, The Times, 17 June 1988*).

In para.(1) of Sch.C of the example of a search order, also given in the Annex to Practice Direction 25A (Interim Injunctions), the undertaking is given as follows:

“If the court later finds that this order or carrying it out has caused loss to the Respondent, and decides that the Respondent should be compensated for that loss, the Applicant will comply with any order the court may make. Further if the carrying out of this order has been in breach of the terms of this order or otherwise in a manner inconsistent with the Applicant’s solicitors’ duties as officers of the court, the Applicant will comply with any order for damages the court may make.”

As to undertakings by Crown, see para.[15-53](#) below. As to the giving of security for undertakings in freezing injunctions and search orders, see para.[15-32](#) below.

(d) - Extent of undertaking as to damages

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(d) - Extent of undertaking as to damages

15-29 In a simple case, the cross-undertaking given by the claimant, as applicant for an interim injunction, extends to compensating losses suffered by the defendant restrained by the order. In a more complicated case there may be several defendants, and the question may arise whether the benefit of the undertaking extends to all of them. And in any case there may be the further question whether third parties, being persons affected in some way by the impact of the injunction, may also benefit. The question of the position of third parties has come to the fore since the development of the freezing injunction (Mareva injunction), a form of interim remedy that is unusual in a number of respects.

In *Berkeley Administration Inc v McClelland [1996] I.L.P r.772, CA*, the Court of Appeal concluded that, subject to any direction to the contrary a court may give in a particular case: (1) advantage can be taken of a cross-undertaking in damages by every defendant who was a party to the action when the undertaking was granted; (2) advantage cannot be taken of the cross-undertaking by persons who are not parties to the action, or, at least, do not become parties until after the order as been discharged. His lordship added that, in his opinion, the benefit of the injunction should extend to defendants who become parties while the undertaking is in force. Presumably, the benefit to such defendants runs from the time when they were joined, and is not retrospective (*SmithKline Beecham Plc v Apotex Europe Ltd [2005] EWHC 1655 (Ch); [2006] 1 W.L.R. 872; [2006] 2 All E.R. 53*, at [49] per Lewison J).

It is pointless, at the time of the grant of the injunction, to go into the question of which defendants will be affected if the injunction turns out to have been granted improperly, since damages will be payable only where damage is actually suffered (*Dubai Bank Ltd v Galadari (No.2) 3 October 1989 unrep.* (Morritt J)). Within a few years of its being established that the court has jurisdiction to grant freezing injunctions, it became standard practice for the court to require cross-undertakings to be given by applicants in favour of banks and others who would be put to expense by execution of the order. It was held that an applicant for a freezing injunction should normally be required in addition to undertake, as a term of the order, to indemnify any third party (e.g. a bank) against any costs, expenses or fees reasonably incurred by the third party in seeking to comply with the order (*Searose v Seatrain (UK) Ltd [1981] 1 W.L.R. 894; [1981] 1 All E.R. 806; Clipper Maritime Co Ltd of Monravia v Mineral Import-Export [1981] 1 W.L.R. 1262; [1981] 3 All E.R. 664* and *Banco Nacional de Comercio Exterior SNC v Empresa de Telecommunications de Cuba SA [2007] EWCA Civ 662; [2007] 2 Lloyd's Rep. 484, CA*). The applicant may be obliged to make a broader undertaking in this respect and agree to indemnify the third party as well against all liabilities which may flow from such compliance (*Z Ltd v A-Z and AA-LL [1982] 1 Q.B. 558*; sub nom. *Z. Ltd v A. [1982] 1 All E.R. 556, CA*). Whether a particular undertaking is of the narrower or broader type is a matter of construction (*Guinness Peat Aviation (Belgium) N.V. v Hispania Lineas Aereas SA [1992] 1 Lloyd's Rep. 190*). A form of the broader undertaking is included in the standard forms and should normally be used.

The recognition that, in that context, the cross-undertaking should be given in terms that would benefit third parties raised awareness of the fact that the court did not lack jurisdiction to require such terms in other forms of interim relief, if not routinely, then at least where this was just and convenient (e.g. *Allied Irish Bank v Ashford Hotels Ltd [1997] 3 All E.R. 309, CA* (application for cross-undertaking in favour of third parties as a condition for appointing a receiver refused)).

As was noted above, para.5.1A of Practice Direction 25A (Interim Injunctions), para.5.1(1) (see para.25APD.5 below) states that, when the court makes an order for an injunction it should consider whether to require an undertaking by the applicant to pay any damages sustained by a person other than the respondent, including not only another party to the proceedings, but also “any other person who may suffer loss as a consequence of the order”. The addition of “any other person who may suffer

loss" was made by TSO CPR Update 42 (October 2006), and was made for the purpose of dealing with problems that had been identified (see *SmithKline Beecham Plc v Apotex Europe Ltd* [2006] EWCA Civ 658; [2007] Ch. 71, CA; [2006] 4 All E.R. 1078, C4 at [29] per Jacob LJ). The origins of the practice of requiring undertakings to the court in favour of third parties as part of the price of an interim injunction can be traced to the development of freezing orders, but is not confined to such orders (*SmithKline Beecham Plc v Apotex Europe Ltd*, op. cit.). Where a claimant seeks an interim injunction other than a freezing order, the court will not, as a matter of course, make the grant of an order conditional on the claimant undertaking to pay the reasonable costs of any third party incurred as a result of the order, but in appropriate circumstances the court may consider imposing a wider undertaking in damages than that normally extracted from an applicant for an interlocutory injunction (*Miller Brewing Co v Ruhi Enterprises Ltd*; [2003] EWHC 1606 (such undertaking to pay costs of one co-defendant, where freezing order made against another defendant, not imposed in trade mark claim)). The default position is that an applicant for an interim injunction is required to give an unlimited crossundertaking in damages (though this price is not exacted where the applicant is a law enforcement agency simply enforcing the law in the public interest). The mere fact that litigation is being brought by a liquidator does not compel the conclusion that the cross-undertaking should be capped, but such is within the scope of the Judge's discretion, which should not be fettered by rigid judge-made rules (*JSC Mezhdunarodnyi Promyshlenniy Bank v Pugachev* [2015] EWCA Civ 139; [2016] 1 W.L.R. 160, CA, at [68]–[73]). It is fairness rather than likelihood of loss that leads to the requirement of a cross-undertaking (also at [77]).

(e) - Applicant unable to offer credible undertaking

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(e) - Applicant unable to offer credible undertaking

15-30 Where a claimant brings an action for a permanent injunction, normally, and for obvious reasons, they will apply for an interlocutory injunction. Where an applicant for an interim injunction is impecunious, or of limited means, they may be unable to give a credible undertaking, or unwilling to give an undertaking to the limit of their means. In *Allen v Jambo Holdings Ltd [1980] 1 W.L.R. 1252; [1980] 2 All E.R. 502, CA*, it was said that the court will not deny a legally aided claimant an interlocutory injunction (in this case, a freezing injunction), to which they would otherwise be entitled simply on the ground that their undertaking in damages would be of limited value, since questions of financial stability ought not to affect the position in regard to what is the essential justice of the case. The position was clarified in *R. (Ellson) v Greenwich LBC, [2006] EWHC 2379 (Admin)*, when it was said that, where an impecunious claimant was applying for an injunction, the court would know that, although the claimant was putting on the line all the assets that they had, thus showing how strongly they felt about the claim that they were making, they would not in practice be able to meet the damages. That would be a factor to be taken into account by the court in deciding whether or not to make the order. In *Oxy Electric Ltd v Zainuddin [1991] 1 W.L.R. 115; [1990] 2 All E.R. 902*, the court rejected the argument that the action of a claimant of apparently limited means should be struck out unless they were willing to apply for an interlocutory injunction and to support an undertaking with adequate security (distinguishing *Blue Town Investments Ltd v Higgs & Hill Plc [1990] 1 W.L.R. 696; [1990] 2 All E.R. 897*, on the grounds that in that case the claimant's chances of obtaining a final injunction at trial were minimal).

If an applicant for an injunction says that they do not wish to, or are not in a position to give an unlimited cross-undertaking in damages, the burden is on them to show that external funds are not available, and why they should be able to provide a cross-undertaking in a lesser amount (*JSC Mezdunarodniy Promyshlenniy Bank v Pugachev [2015] EWCA Civ 139; [2016] 1 W.L.R. 160*, CA, at [85]). Although not specifically directed to the cross-undertaking in damages on an injunction application, it may be that, in considering whether an applicant is too impecunious to provide a meaningful undertaking, assistance may be derived from the Supreme Court's criterion for stifling further participation in proceedings as stated in *Goldtrail Travel Ltd v Onur Air Tasimacilik AS [2017] UKSC 57; [2017] 1 W.L.R. 3014*, SC, at [23], which (widened for this purpose) can be stated thus: Has the applicant established on the balance of probabilities that no funds would be made available to it, whether by its owner (if a company) or by some other closely associated person, as would enable it to satisfy the requirement of providing a meaningful cross-undertaking in damages?

(f) - Liquidated company applicant

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(f) - Liquidated company applicant

- 15-31 In *Rosling v Law Guarantee and Trust Co* (1903) 47 S.J. 255, the court rejected the argument that an insolvent company can only obtain an injunction on the condition that its liquidator gives a personal undertaking (not following *Westminster Association v Upward* (1880) 24 S.J. 690, where counsel for the claimant volunteered an undertaking on behalf of liquidator).

In a case where proceedings are brought by the liquidators of a company against former directors to recover sums derived from the company's assets, the liquidators may be permitted to give a limited undertaking commensurate with the size of the company's assets; there is no requirement in such a case for the liquidators to provide an unlimited guarantee that the defendants will suffer no loss (*Re DPR Futures Ltd [1989] 1 W.L.R. 778*).

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(g) - Fortifying undertaking

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(g) - Fortifying undertaking

15-32 In a proper case, the court may impose, as a condition for granting or continuing the injunction, a requirement that the applicant's undertaking should be fortified by giving security in a certain sum by the bond of an insurance company or by payment into court or by some other means, for example, by payment to the applicant's solicitor or to the solicitors for each party jointly to be held pending further order (*Baxter v Claydon [1952] W.N. 376*). The difficulties in using an insurance policy as a means of providing fortification of a cross-undertaking in damages were considered in *Holyoake v Candy [2017] EWCA Civ 92; [2017] 3 W.L.R. 1131, CA*.

A defendant should normally apply for the security at the time when the injunction is granted (or, if granted without notice) on the return date. The court has no power subsequently to impose such an additional term on the grant of an injunction (*Commodity Ocean Transport Corp. v Basford Unicorn Industries Ltd (The Mito) [1987] 2 Lloyd's Rep. 197*).

An application for fortification of a cross-undertaking needs to be made whilst the injunction in respect of which it is given is continuing. Requiring fortification is adjunct to the undertaking offered by a claimant, and is only "required" in the sense of being the price which the claimant will have to pay if they want their order to operate in the future. There is no jurisdiction to grant an application for fortification once the injunction has been discharged: *Napp v Dr Reddy's Laboratories (UK) Ltd [2019] EWHC 1009 (Pat)* (Carr J).

For relevant practice, see Admiralty and Commercial Courts Guide para.F14.3 (para.2A-98 above).

Where an injunction has been granted, the respondent may apply to the court for the security to be fortified by further or additional security. Before an application to fortify an undertaking can succeed a likelihood of a significant loss arising as a result of the injunction and a sound basis for belief that the undertaking will be insufficient must be shown (*Bhimji v Chatwani; Chatwani v Bhimji (No.2) [1992] 1 W.L.R. 1158; [1992] B.C.L.C. 387*). See also *Sinclair Investment Holdings SA v Cushnie [2004] EWHC 218 (Ch)*. For an explanation of the matters that the court should take into account where the defendant applies for an uplift by way of fortification of the security, see *Harley Street Capital Ltd v Tchigirinski [2005] EWHC 2471 (Ch); In the matter of Bloomsbury International Ltd [2010] EWHC 1150 (Ch)* (Floyd J). In *Energy Venture Partners Ltd v Malabu Oil and Gas Ltd [2015] 1 W.L.R. 2309, CA*, the Court of Appeal reviewed and generally approved the relevant existing first instance authorities. The Court stated that (1) in determining whether fortification should be ordered in respect of an undertaking in damages a court is required to make an "intelligent estimate" of the likely amount of the loss for which a court would find the respondent should be compensated in the event of the undertaking being enforced, (2) loss will not qualify for compensation under an undertaking unless it has been caused by the grant of the injunction, (3) in making an intelligent estimate of the likely amount of loss the court must examine that causation issue, (4) it is for the respondent to show a sufficient level of risk of loss to require fortification, (5) it is not necessary for the respondent to establish the linked issues of likely loss and causation on a balance of probabilities, and it is in general unnecessary and inappropriate for a court to go into a detailed and prolonged assessment of those issues.

Where a defendant who might wish to seek fortification of a cross-undertaking is unable to show a consistent pattern of deal-making or engagement in business ventures which may be stultified by the injunction, they may, if a real opportunity is identified, take steps to secure permission from the claimant or the court to take advantage of it, and may make application for fortification at that time (*JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev [2015] EWCA Civ 139; [2016] 1 W.L.R. 160, CA*, at [99]). It may be appropriate expressly to preserve the right to make such application in the order made on the return date.

Specimen clauses for giving security for the cross-undertaking in damages are at paras (2) of Sch.B (freezing order) and (5) of Sch.C (search order) in the Annex to Practice Direction 25A. See further Vol.1 para.[25APD.10](#).

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(h) - Enforcement and assessment

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(h) - Enforcement and assessment

- 15-33** The undertaking “in damages” (or to provide “compensation for loss”) is given to the court and not to the party enjoined. However, if it should be held at the trial that the claimant had not been entitled by interlocutory injunction to restrain the defendant from doing what they were threatening to do, or if it is established before trial that the injunction ought not to have been granted in the first instance, the party enjoined may apply to the court for the undertaking to be enforced.

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(i) - Application to enforce undertaking

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(h) - Enforcement and assessment

(i) - Application to enforce undertaking

15-34

Sometimes, the status of the interim injunction in these circumstances mentioned immediately above is described as “wrongful”, but this is not apt because it suggests that the court’s decision to grant the injunction (now with hindsight seen to be unnecessary) was wrong or unjust when it was made. Old authorities on the subject established that an application to enforce an undertaking should be made promptly, and where the undertaking is dissolved at or before the trial should be then made; but this is not essential, and in a proper case damages may be awarded in a later application (*Re Hailstone, Hopkinson v Carter (1910) 102 L.T. 877*); but a long delay is fatal except in special circumstances (see *Ex p.Hall, Re Wood (1883) 23 Ch.D. 644*, and *Schlesinger v Bedford [1893] W.N. 57*). As a practical matter, in many cases injunctions will remain in being until the trial and in such cases the propriety of its original grant and the question of the enforcement of the undertaking will not be considered before the conclusion of the trial. Even then the court may occasionally wish to postpone the question of enforcement to a later date (see *FinancieraAvenida v Shibliq, The Times, 14 January 1991, CA*, per Lloyd LJ).

When an application to enforce an undertaking as to damages is made there are two separate points to consider: first, as a matter of discretion, should the court order that the undertaking be enforced?; secondly, if so, what loss had the defendant suffered in terms of money, was it caused by the order and was it too remote? (*Balkanbank v Taher (No.2) [1995] 1 W.L.R. 1056, CA*). The court may leave both questions to be determined at the same time, or it may decide the first question; if, having determined that the undertaking should be enforced, it usually orders an enquiry into causation, remoteness and quantum, which is heard later. At the stage of exercising its discretion whether or not to order an inquiry, the court does not ordinarily hear protracted argument on whether the suggested loss will be recoverable. In seeking to persuade the court to order an inquiry, the applicant must adduce credible evidence that they had suffered loss, which was *prima facie* or arguably caused by the making of the order; assuming there is such credible evidence, the burden of any contention that the relevant loss would have been suffered anyway passes to the claimant, and an inquiry will be ordered (*Malhotra v Malhotra [2014] EWHC 113 (Comm); [2015] 1 B.C.L.C. 428* (Blair J)).

An order made on an application for an inquiry into damages should spell out clearly what, if any, residual discretion is left to be exercised later and it should, for example, be possible to tell on the face of the order whether the claimant is to pay the amount ascertained on the inquiry (*Balkanbank v Taher [1994] 4 All E.R. 239*, at p.260, per Clarke J). Security for costs will not be ordered in respect of the costs of an inquiry upon a cross undertaking in damages: *C.T. Bowring & Co (Insurance) Ltd v Corsi & Partners Ltd [1994] 2 Lloyd's Rep. 567*, CA. Such decision remains good law under the CPR: *JSC Karat-1 v Tugushev [2021] EWHC 743 (Comm)*, Cockerill J. For procedure where injunction is discharged before trial, see para.15-37 below.

(ii) - Decision to enforce

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The question whether the undertaking should be enforced is a separate question from the question whether the injunction should be discharged or continued (*Cheltenham and Gloucester Building Society v Ricketts [1993] 1 W.L.R. 1545, CA; [1993] 4 All E.R. 276, CA*, at p.1551 and p.281 per Neill LJ). The latter question comes before the former. In relation to the question whether an injunction should be discharged or continued there is a distinction to be drawn between (1) an order which, on the material before the judge at the time of the making of the order, ought not to have been made, and (2) an order which was properly made on such material but which was later shown on trial or on an application to set aside to have been made wrongly made on the true facts (*Southwark LBC v Storrie [1997] C.L.Y. 632*). In the first situation, evidence at trial cannot be relied upon to justify ex post facto the making of a without-notice order (*Columbia Picture Industries Inc v Robinson [1986] 3 All E.R. 338; [1987] Ch. 38* at p.378 and p.85 per Scott J). However, where an interlocutory injunction is set aside, either in the first or the second situation, in determining whether the undertaking in damages should be enforced, the court must consider all the circumstances of the case and in particular the threat or risk, if any, which faced the claimant when the injunction was made and the proved conduct of the defendant (*Cheltenham and Gloucester Building Society v Ricketts [1993] 1 W.L.R. 1545, CA; [1993] 4 All E.R. 276, CA*, at p.1554 and p.284, CA, per Neill LJ; *Southwark LBC v Storrie [1997] C.L.Y. 632*.

In a case where it is determined that the injunction should not have been granted, the undertaking is likely to be enforced, though the court retains a discretion not to do so (*Cheltenham and Gloucester Building Society v Ricketts [1993] 1 W.L.R. 1545; [1993] 4 All E.R. 276, CA*, at p.1551 and p.281 per Neill LJ, and *Ushers Brewery Ltd v P.S. King & Co (Finance) Ltd [1972] 1 Ch. 148*, and authorities cited in those cases; see also *Graham v Campbell (1878) 7 Ch.D. 490, CA*, at p.494 per James LJ, and Mem. by Jessel MR in *[1879] W.N. 74*). Further, an inquiry should be directed where the claimant discontinues his action (*Newcomer v Coulson (1878) 7 Ch.D. 764*). The law as to the discharge of freezing orders and the enforcement of undertakings where there has been material non-disclosure (whether innocent or not) was explained in *Dadourian Group International Inc v Simms [2009] EWCA Civ 169; [2009] 1 Lloyd's Rep. 601, CA*; see further Vol.1 para.25.3.5.

As the power to enforce the undertaking is incidental to the power to grant an injunction (see *Re Hailstone (1910) 102 L.T. 877* at p.880), the discretion will be exercised in accordance with ordinary equitable principles (*Cheltenham & Gloucester Building Society v Ricketts [1993] 1 W.L.R. 1545; [1993] 4 All E.R. 276* at 284, CA, per Peter Gibson LJ).

Where a claimant has obtained an interlocutory injunction restraining the defendant from doing something until trial, and the court decides at trial that a permanent injunction should not be granted, the defendant can normally expect, virtually as of right, to have an enquiry as to the damages to which they are entitled pursuant to the cross-undertaking which the claimant will have been required to give as a condition of obtaining the interlocutory injunction. However, there are plainly exceptions to this general rule. But it is clear that "special circumstances" are required before an enquiry can properly be refused (see *Lunn Poly Ltd v Liverpool & Lancashire Properties Ltd [2006] EWCA Civ 430; [2007] L. & T.R. 6; [2006] 2 E.G.L.R. 29, CA*, at [42] per Neuberger LJ and authorities cited there). The court retains a discretion not to enforce the undertaking:

"if it considers that the conduct of the defendant in relation to the obtaining or continuing of the injunction or the enforcement of the undertaking makes it inequitable to do so" (*F. Hoffmann-La Roche & Co A.G. v Secretary of State for Trade and Industry [1975] A.C. 295, HL, at p.361; [1974] 2 All E.R. 1128, HL*, at p.1150 per Lord Diplock).

An inquiry as to damages should not be ordered unless there is at least some reasonably arguable case that the injunction has caused the complaining party some loss or damage for which compensation ought to be paid (*Detect Sea Enterprises Ltd v O'Connor, 14 October 1997, unrep.* (Sir Richard Scott, V.C.). Where an injunction is maintained in force for far longer than it ought to have been, *prima facie* the party subject to it is entitled to be compensated for any loss they may have been caused by the injunction being maintained in force for that excessive period (above.).

In *North Principal Investments Fund Ltd v Greenoak Renewable Energy Ltd [2009] EWHC 985 (Ch)* the judge reviewed the relevant authorities (in particular *Yukong Line Ltd v Rendsburg Investments Corporation [2001] 2 Lloyd's Rep. 113, CA*) and stated (1) that if it is established that the injunction was wrongly granted, albeit without fault on the claimant's part, the court will ordinarily order an inquiry as to damages in any case where it appears that loss may have been caused as a result, (2) that the applicant must adduce some credible evidence that they have suffered loss as the result of the making of the order, and (3) that if the defendant shows that they have suffered loss which was *prima facie* or arguably caused by the order, then the evidential burden of any contention that the relevant loss would have been suffered regardless of the making of the order in practice passes to the defendants and an inquiry will be ordered.

Enforcement has been refused where a local authority defendant acted high-handedly and unreasonably in dealing with a private claimant who brought an unsuccessful action in nuisance (*Great House at Sonning v Berkshire CC 18 December 1996, unrep.*).

Where the judge makes a consent order directing that there should be an inquiry, that order is not a decision, in the exercise of discretion, that the undertaking should be enforced (*Balkanbank v Taher [1995] 1 W.L.R. 1056, CA*).

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(iii) - Assessment or inquiry as to damages

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Where the court determines that an undertaking should be enforced the next step is an assessment of the damages payable. (As to the measure of damages, see para. 15-38 below.) Damages can only be obtained by an immediate assessment or by an order for an inquiry; an independent action will not lie (*Fletcher Sutcliffe Wild Ltd v Burch [1982] F.S.R. 64*).

Normally, the court will order an inquiry as to damages but, where appropriate, the court may instead proceed to an immediate assessment upon discharging the order (see, e.g. *Columbia Picture Industries Inc v Robinson [1986] Ch. 38, CA; [1987] 3 All E.R. 338, CA*, where the injunction was discharged at trial) and the court should always consider doing so where a search order or a freezing injunction is discharged on the return date (see below). Where an injunction was obtained without notice, but should neither have been sought nor granted, and the respondent's case for damages on the cross-undertaking was unanswerable, the circumstances may be such as to enable the trial judge to assess damages without sending the matter off to an inquiry with pleadings, disclosure, evidence, expert evidence and a stay of proceedings (*Econet Wireless Ltd v Vee Networks Ltd [2006] EWHC 1829 (Comm)*).

The court may refuse an inquiry if the damage sustained is trivial or remote (*Smith v Day (1882) 21 Ch.D. 421, CA*). An inquiry may be directed though the claimant was not guilty of misrepresentation, suppression, or other default in obtaining the injunction (*Griffith v Blake, (1884) 27 Ch.D. 474, CA*). Where the claimant succeeds at trial, but only in part, it may be the case that the defendant was subjected to restraints under the injunction in excess of what the claimant was legitimately entitled to on the basis of his rights as determined at trial; in that event an inquiry as to the defendant's damages resulting from the excess restraints may be ordered (*Richardson (John) Computers Ltd v Flanders (No.2) [1994] F.S.R. 144*).

Although there is no specific provision to the effect, under the CPR and the inherent jurisdiction, the court has ample powers in appropriate circumstances to dismiss summarily an inquiry as to damages (*F.S.L. Services Ltd v Macdonald [2001] EWCA Civ 1008*).

In both the Ch.D. and QBD the inquiry is usually held before a Master.

(iv) - Enforcement of undertaking where injunction discharged before trial

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15-37 Where an interlocutory injunction is discharged before the trial the court at the time of discharge is faced with a number of possibilities (the following is based on the judgments of Neill and Peter Gibson LJJ in *Cheltenham and Gloucester Building Society v Ricketts* [1993] 1 W.L.R. 1545; [1993] 4 All E.R. 276, CA).

(a)The court can determine forthwith that the undertaking as to damages should be enforced and can proceed at once to make an assessment of the damages. Save in the most straightforward of cases where all the relevant facts are known the court is unlikely to exercise its discretion in this way. It will only be in rare cases that the court can take this course because the relevant evidence of damages is unlikely to be available.

(b)The court can determine forthwith that the undertaking is not to be enforced and refuse the application; but, again, this will only be done in very straightforward cases, such as, for example, when it is clear that the applicant has suffered no loss by reason of the injunction.

(c)The court may determine that the undertaking should be enforced but then direct an inquiry as to damages in which issues of causation and quantum will have to be considered. It is likely that the order will include directions as to pleadings and discovery in the inquiry. The court should not order an inquiry as to damages and at the same time leave open for the tribunal at the inquiry to determine whether or not the undertaking should be enforced (*Norwest Holst Civil Engineering Ltd v Polysius Ltd*, *The Times*, 23 July 1987, CA; [1987] CA Transcript 644, cf., *Zygal Dynamics Plc v John McNulty*, 20 June 1989, unrep., CA Transcript 571, and *Barclays Bank Ltd v Rosenberg* (1985) 135 New L.J. 633, at p.634, per Evans J). A decision that the undertaking should be enforced is a precondition for the making of an order of an inquiry as to damages.

(d)The court can adjourn the application for the enforcement of the undertaking to the trial or further order. Usually the application will be adjourned to the trial, especially in a case in which the question whether the interlocutory injunction was rightly granted in the first instance has not been determined (see *Ushers Brewery Ltd v P.S. King & Co (Finance) Ltd* [1971] 2 All E.R. 468; [1972] Ch. 148, and *Cheltenham and Gloucester Building Society v Ricketts* [1993] 1 W.L.R. 1545; [1993] 4 All E.R. 276, CA).

(v) - Measure of damages

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- 15-38** On an inquiry as to damages, the measure of damages is not at large such that the court can punish a claimant who wrongfully obtained the injunction. The issue is whether the party subject to the injunction can show that they have suffered loss as a result of the injunction and, if so, what that loss is. In *F. Hoffmann-La Roche & Co A.G. v Secretary of State for Trade and Industry [1975] A.C. 295, HL*, on the basis of *Smith v Day (1882) 21 Ch D 421, CA*, Lord Diplock expressed the view (at p.361) that quantification of compensation under a cross-undertaking should be on the basis of a breach of a notional contract between the parties to the effect that the injunctee would not prevent the injunctee from doing the enjoined acts (see also *Cheltenham and Gloucester Building Society v Ricketts [1993] 1 W.L.R. 1545; [1993] 4 All E.R. 276* at 285, CA, per Neill LJ).

After a series of first instance decisions had expressed doubts about the so-called contractual basis of assessment, the question was addressed by the Court of Appeal in *Abbey Forwarding Ltd v Hone [2014] EWCA Civ 711; [2015] Ch. 309; [2014] 3 W.L.R. 167, CA*. The Court held (1) (applying *Schlesinger v Bedford (1893) 9 T.L.R. 370*, per Lindley LJ) that the remote consequences of obtaining an injunction are not to be taken into account in assessing damages: only damages which naturally flow from the injunction are recoverable; (2) Lord Diplock's dictum in *F. Hoffmann-La Roche & Co A.G. v Secretary of State for Trade and Industry [1975] A.C. 295, HL*, at p.361 reflects the law as to such recoverability; but (3) that the analogy with contract must allow for "logical and sensible adjustments" in appropriate cases, such as, for example, that a claimant might have to accept a greater risk of losses incurred by a defendant in the period between the making of an order on a without-notice application and the return date, before the defendant has had the chance to alert the claimant or the court to serious and imminent losses, and before there is any sensible chance to apply to the court for a discharge or variation of the order; (4) the remoteness rules are applied so that the claimant giving the cross-undertaking should have reasonably foreseen loss of the type that was actually suffered, and not the particular loss within that type; (5) in appropriate cases, and where such losses are satisfactorily proved, realistic compensation can be awarded for loss of business opportunities, for business and other disruption (including the adverse effects of the inappropriate policing of the injunction on the injunctees) as well as for upset, stress, and loss of reputation (although the awards for the latter three heads are generally modest).

In *Les Laboratoires Servier v Apotex Inc [2008] EWHC 2347 (Ch); [2009] F.S.R. 3*, a case in which the claimant's pharmaceutical patent was found to be invalid by the trial judge, Norris J summarised (at para.7 et seq) the principles of law, sufficient to enable him to quantify compensation in the inquiry as to damages. In *AstraZeneca AB v KRKA dd Novo Mesto [2015] EWCA Civ 484*; (2015) 145 B.M.L.R. 188, CA, where a judge awarded the defendants a sum in excess of £27 million on an inquiry in another pharmaceutical patent case, both at first instance and on the appeal (which was dismissed), the parties were agreed that the principles as summarised by Norris J in the *Les Laboratoires* case applied, and the Court of Appeal were prepared to endorse that summary (above paras 13 and 16), whilst elaborating on the approach to be adopted to assessing the value of loss of chance.

In *SCF Tankers Ltd v Privalov [2017] EWCA Civ 1877*, CA, the Court of Appeal dismissed the appeal by the claimant companies from the decision of the judge in *Fiona Trust & Holding Corp v Privalov [2016] EWHC 2163 (Comm); [2017] 2 All E.R. 570; [2017] 2 All E.R. (Comm) 57* (Males J), where the judge held that they should pay damages on cross-undertakings they had given in respect of an interlocutory injunction against the defendants. In conducting the enquiry the judge said (at [47]–[51]) (i) the defendants are entitled to recover damages for their losses suffered as a result of the freezing orders (not as a result of the litigation); (ii) the freezing order need not be the sole or exclusive cause of the loss, but must be an effective cause; (iii)

the burden is on the party who obtained the freezing order to demonstrate a failure to mitigate; (iv) the type of loss must be within the reasonable contemplation of the parties; (v) a liberal assessment of the defendants' damages should be adopted: this does not mean that a defendant should be awarded damages which it has not suffered, but that the court must recognise that the assessment of damages suffered may be inherently imprecise, and over-eager scrutiny of a defendant's evidence and minute criticism of its methodology is not appropriate. The judge went on to say (at [55]–[57]) that in principle damages can be awarded for loss of profits even if the defendant might have made a loss. The approach is to ask whether the defendant has proved to a sufficient standard (which may be the balance of probabilities, or sometimes a real and substantial chance in a loss of chance case) that its trading would have been profitable. To label the prospect of profits as "speculative" takes matters nowhere unless that prospect is so speculative that it must be disregarded: in principle, trading which is speculative (i.e. it may turn out to be loss-making) is capable of founding an award of damages if on the evidence the court is able to find to a sufficient standard that it would in fact have been profitable.

In *Al-Rawas v Pegasus Energy Ltd* [2008] EWHC 617 (QB); [2009] 1 All E.R. 346; [2009] 1 All E.R. (Comm) 393 (Jack J) it was explained that, subject to an exception, the undertakings in the prescribed forms for search and seizure orders and for freezing orders require claimants to accept liability for compensatory damages only. The exception is where the claimant in carrying out a search order acted in breach of its terms or otherwise in a manner inconsistent with his solicitor's duties as an officer of the court. The comments in the judgment about damages for emotional distress not being recoverable must be considered to be overruled by the decision in *Abbey Forwarding Ltd v Hone* [2014] EWCA Civ 711; [2015] Ch. 309; [2014] 3 W.L.R. 1676, CA.

At an inquiry as to damages, the question may arise whether the injunction party failed reasonably to mitigate his loss. It arose in *Al-Rawas v Pegasus Energy Ltd* [2007] EWHC 2427 (QB) (Eady J) where, for the purpose of avoiding the restrictions imposed by a freezing injunction, the defendants paid US \$33m into court, taking out a loan in order to do so. Upon the injunction being discharged, an inquiry as to damages was ordered, and the money in court released. The defendants applied for summary judgment to recover the difference between the interest paid to service the loan and the interest earned whilst the money was in court (US \$392,972.79 plus interest). In granting the application the judge rejected the claimant's submission that there were sufficient grounds to suppose that, at trial, the claimants would be able to show on a balance of probabilities that the defendants failed to discharge their obligation to mitigate their loss (it being suggested that there were alternative courses that they could and should have taken).

One of the undertakings in the example forms of freezing and search order is that if the order ceases to have effect (for example, if the respondent provides security, or if the order is discharged) the applicant will immediately take all reasonable steps to inform in writing anyone to whom they have given notice of this order, or who they have reasonable grounds for supposing may act upon this order, that it has ceased to have effect. The burden is thus normally on the person who obtained the injunction. In *Triodos Bank N.V. v Dobbs*, [2005] EWHC 108 (Ch), the injunction party was dilatory in taking the steps required of them to perfect the order discharging the injunction, and had the delay aggravated their losses, their failure in that respect could have amounted to a failure to mitigate his loss.

10. - Interim Injunctions in Particular Proceedings

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- 15-39 The circumstances in which an interim injunction may be applied for are many and various. Special considerations arise in certain proceedings.

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(a) - Restricting freedom of expression, assembly or association

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(a) - Restricting freedom of expression, assembly or association

- 15-40 The law relating to the granting of injunctions, whether interim or final, affecting freedom of expression was significantly altered by the [Human Rights Act 1998](#). By that Act, the European Convention for the Protection of Human Rights and Fundamental Freedoms was introduced into English law. (The Convention is set out in [Pt of Sch.1 to the Act](#).)

In [PJS v News Group Newspapers Ltd \[2016\] UKSC 26; \[2016\] 2 W.L.R. 1253](#), SC, the Supreme Court examined the distinctions between the torts of invasion of privacy (sometimes referred to as “intrusion”) and breach of confidence on an interim injunction application, explaining that a threatened breach of privacy rights may attract greater protection than confidentiality rights where there has already been some disclosure (para.25). The two core components of the rights of privacy are that there should be no unwanted access to private information (“confidentiality”) or unwanted access to one’s personal space (“intrusion”) (para.58).

In [Practice Guidance: Interim Non-Disclosure Orders \[2012\] 1 W.L.R. 1003](#) the Master of the Rolls set out the recommended practice for any application for an interim non-disclosure order (see Vol.1 para.[53PG.1](#)). In that Guidance the statutory provisions and reported cases (down to August 2011) dealing with the restrictions that may be imposed on freedom of expression, and derogations from the principle of open justice that may be effected, by court orders are referred to. The judgment of the Court of Appeal in [H v News Group Newspapers Ltd \(Practice Note\) \[2011\] EWCA Civ 42; \[2011\] 1 W.L.R. 1645, CA](#), is a leading authority (see para.[15-41](#) below). The principles stated in that case apply, not only where an interim injunction protecting the identity of a party or non-party is sought, but also where a claim is settled on terms that anonymity and confidentiality are maintained, and a consent order to that effect is sought from the court ([JIH v News Group Newspapers Ltd \[2012\] EWHC 2179 \(QB\)](#)).

The principles set out in [JIH v News Group Newspapers Ltd \[2011\] EWCA Civ 42; \[2011\] 1 W.L.R. 1645, CA](#), and in [McKennit v Ash \[2006\] EWCA Civ 1714; \[2008\] Q.B. 73 CA](#), were approved by the Supreme Court in [PJS v News Group Newspapers Ltd \[2016\] UKSC 26; \[2016\] 2 W.L.R. 1253](#), SC, at [60] per Lord Neuberger.

As well as the potential conflict between parties claiming art.10 rights (freedom of expression) and art.8 rights (privacy) (see para.[15-41](#)), issues arise when information has been obtained by an intending publisher through a breach of a duty of confidence or other breach of contract. These issues were considered in [HRH Prince of Wales v Associated Newspapers Ltd \[2006\] EWCA Civ 1776; \[2008\] Ch. 57](#) (whether, overall, it is in the public interest that the duty of confidence should be breached) and in [ABC v Telegraph Media Group Ltd \[2018\] EWCA Civ 2329](#) (the weight to be attached to an obligation of confidence may be enhanced if the obligation is an express contractual agreement). In the latter case, a non-disclosure clause was, after tender of expert legal advice to each side, inserted in an agreement to settle litigation, and, applying [Mionis v Democratic Press SA \[2017\] EWCA Civ 1194](#), it was held that such a settlement serves not only the private interests of the litigants, but also the administration of justice and the public interest, by freeing resources for other cases, and so such settlement agreements freely entered into are likely to be enforced.

For commentary on freedom of expression in intellectual property cases, see para.[15-47.4](#) below.

(i) - The rights to freedom of expression, assembly and association

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(a) - Restricting freedom of expression, assembly or association

(i) - The rights to freedom of expression, assembly and association

15-41 Article 10 of the Convention establishes for everyone the right to freedom of expression. Article 8 establishes for everyone the right to respect for his private and family life, his home and his correspondence. Claimants asserting art.8 rights frequently seek injunctions preventing publication of information against defendants who oppose on the basis that they have art.10 rights.

The right to freedom of expression guaranteed by art.10 is a qualified right. Article 10(1) protects the right, but art.10(2) recognises the need to protect the rights and freedoms of others (including their rights and freedoms under art.8). The right to respect for private and family life etc is also a qualified right. Article 8(1) protects the right, but recognition is given in art.8(2) to the protection of the rights and freedoms of others (including their rights and freedoms under art.10).

Article 11 establishes the right to freedom of peaceful assembly and of association. It may be engaged, together with art.10, where an injunction seeks to prevent lawful protest. In such cases: (1) it is important to recognise that any demonstration in a public place may cause some disruption to ordinary life, including to traffic, and that public authorities must show a degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by art.11 is not to be deprived of its substance; (2) factors that may be relevant to proportionality include the extent to which continuation of the protest would breach domestic law, the importance of the precise location of the protestors, the duration of the protest, the degree to which the protestors occupy land, and the extent of the actual interference to the rights, including property rights, of others; (3) the organisers must have autonomy to determine the manner in which they protest. (See *DPP v Ziegler [2021] UKSC 23; [2021] 3 W.L.R. 179; [2021] 4 All E.R. 985*.) Damages are highly unlikely to be an adequate remedy where the respondent is at risk of suffering breaches of arts 10 and 11, and the injunction is likely to turn on whether the claimant establishes that the interference with the defendant's rights is proportionate. At the interim stage, the strength of the case that the defendant has behaved unlawfully must be relevant. (See *Gitto Estates Ltd v Persons Unknown [2021] EWHC 1997 (QB)*.)

In *Cream Holdings Ltd v Banerjee [2004] UKHL 44; [2005] 1 A.C. 253*, authoritative guidance was given as to the "likely to succeed at trial" threshold required for an interim restraint on publication. In *Re S (A Child) (Identification: Restriction on Publication) [2004] UKHL 47; [2005] 1 A.C. 593; [2004] 4 All E.R. 683*, Lord Steyn explained how the court should deal with the conflict between ECHR arts 8 and 10 as follows: (1) neither article has precedence over the other; (2) 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; (3) the justifications for interfering with or restricting each right must be taken into account; and (4) the proportionality test must be applied to each.

In *JPH v XYZ [2015] EWHC 2871 (QB)* (Popplewell J) the claimant (C) applied for an interim non-disclosure order restraining the disclosure or publication of images and information in a so-called "revenge porn" case. The judge (sitting in public) found (1) that there was cogent, credible and, at that point, uncontradicted evidence (a) that photographs and videos were taken in circumstances where C had a strong case for asserting that they had a reasonable expectation of privacy and in circumstances attracting confidentiality, and (b) that the effect of disclosure would be highly damaging to JPH both emotionally and financially, (2) that damages would not be an adequate remedy, and (3) that there was no discernible public interest in publication of the images or information, and in granting C's application, and held that the balance came down firmly in favour of protection of their art.8 rights.

In *Terry v Person or Persons Unknown [2010] EWHC 119 (QB)* (Tugendhat J) a professional footballer sought unsuccessfully to restrain unnamed parties from publishing information about a private relationship, and also sought wide derogations from open justice, including anonymity, the sealing of the court file, a prohibition on publication of the existence of the proceedings, and that notwithstanding the Practice Direction to Pt 25 para.9.2, the claimant was not required to provide anyone served with the order with the evidence, or a note of the hearing. The judgment merits study. When seeking a “persons unknown” injunction against media organisations to prevent communication of private or confidential information, it is only necessary to give prior notification of the application to organisations which the claimant reasonably believes might have an interest in the story: *TUV v Persons Unknown [2010] EWHC 853 (QB); [2010] E.M.L.R. 19* (Eady J) (where the claimant’s laptop computer containing images of a confidential nature had been stolen).

In *H v News Group Newspapers Ltd (Practice Note) [2011] EWCA Civ 42 [2011] 1 W.L.R 1645, CA*, the Master of the Rolls examined the relevant authorities, and summarised the principles that applied, in a case where the protection sought by a claimant was an anonymity order or other restraint on publication of details of proceedings which are normally in the public domain (in this particular case, details of a personal relationship), as follows (as above, para.21):

- (1)the general rule is that the names of the parties to an action are included in orders and judgments of the court;
- (2)there is no general exception for cases where private matters are in issue;
- (3)an order for anonymity or any other order restraining the publication of the normally reportable details of a case is a derogation from the principle of open justice and an interference with the art.10 rights of the public at large;
- (4)accordingly, where the court is asked to make any such order, it should only do so after closely scrutinising the application, and considering whether a degree of restraint on publication is necessary, and, if it is, whether there is any less restrictive or more acceptable alternative than that which is sought;
- (5)where the court is asked to restrain the publication of the names of the parties and/or the subject matter of the claim, on the ground that such restraint is necessary under art.8, the question is whether there is sufficient general, public interest in publishing a report of the proceedings which identifies a party and/or the normally reportable details to justify any resulting curtailment of his right and his family’s right to respect for their private and family life;
- (6)on any such application, no special treatment should be accorded to public figures or celebrities: in principle, they are entitled to the same protection as others, no more and no less;
- (7)an order for anonymity or for reporting restrictions should not be made simply because the parties consent: parties cannot waive the rights of the public;
- (8)an anonymity order or any other order restraining publication made by a judge at an interlocutory stage of an injunction application does not last for the duration of the proceedings but must be reviewed at the return date;
- (9)whether or not an anonymity order or an order restraining publication of normally reportable details is made, then, at least where a judgment is or would normally be given, a publicly available judgment should normally be given, and a copy of the consequential court order should also be publicly available, although some editing of the judgment or order may be necessary;
- (10)notice of any hearing should be given to the defendant unless there is a good reason not to do so, in which case the court should be told of the absence of notice and the reason for it, and should be satisfied that the reason is a good one.

The usual case will involve a balancing exercise between art.8 and art.10. Where the case engages rights under art.2 or art.3, there is conflicting first-instance authority as to whether such rights fall to be balanced against art.10. See the discussion in *HM Attorney General for England and Wales v BBC [2022] EWHC 826 (QB); [2022] 4 W.L.R. 74; [2022] E.M.L.R. 16*, Chamberlain J of *RXG v Ministry of Justice [2019] EWHC 2026 (QB); [2020] Q.B. 703* (Sharp P & Nicklin J), *A v Persons Unknown [2016] EWHC 3295 (Ch); [2017] E.M.L.R. 11* (Vos C), and *Re Al Makhtoum (Reporting Restrictions) [2020] EWHC 702 (Fam); [2020] E.M.L.R. 17* (McFarlane P).

(ii) - Restricting the right to freedom of expression: Human Rights Act 1998 s.12

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(a) - Restricting freedom of expression, assembly or association

(ii) - Restricting the right to freedom of expression: Human Rights Act 1998 s.12

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Section 12 of the Human Rights Act 1998 applies if a court is considering whether to grant “any relief” which, if granted, might affect “the exercise of the Convention right to freedom of expression” ([s.12\(1\)](#)) (for full text of [s.12](#), see para.[3D-47](#) above). An obvious instance is where an injunction is sought to restrain the making of allegedly defamatory statements (see further para.[15-48](#) below). In this context, *any relief* includes any remedy or order (other than in criminal proceedings) ([s.12\(5\)](#)). The right to freedom of expression is contained in art.10 of the Convention. **Section 12(4)** stipulates that the court “must have particular regard to the importance of” that right. (Having *particular regard* means having regard to art.10(1) as qualified by art.10(2) (*Douglas v Hello! Ltd [2001] Q.B. 967, CA*, at [133] per Sedley LJ).) In cases where derogations from the principle of open justice (such as anonymisation or restrictions on reporting) are sought, the obligations of counsel and solicitors on a without notice application to see that there has been full disclosure and that the correct legal procedures are used apply as much as if the case involved merely private rights, and, as the court’s obligation to ensure open justice is a continuing one, such derogations, if granted, must be reviewed on the return date (*Gray v UVW [2010] EWHC 2367 (QB)* (Tugendhat J)). Further, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), the court must have particular regard to (a) the extent to which (i) the material has, or is about to, become available to the public, or (ii) it is, or would be, in the public interest for the material to be published, (b) any relevant privacy code ([s.12\(4\)](#)).

Section 12 may be engaged, not only where a court is trying a claim in which an injunction affecting the exercise of art.10 rights is sought as a final remedy, but also where it is dealing with a pre-trial application for an interim injunction having that effect. For an account of the relevant law, and guidance on practice and procedure, see *Practice Guidance: Interim Non-Disclosure Orders* given by Lord Neuberger MR in August 2011 (Vol.1, para.[53PG.1](#)).

As a practical matter [s.12](#) is likely to be engaged in proceedings where a claimant, having commenced proceedings for an injunction having the effect of affecting the defendant’s art.10 rights, applies for similar interim relief pending trial. However, the section (apart from subs.(3)) is not confined to such proceedings.

An application to restrain publication of private information involves competing ECHR rights of privacy and freedom of expression. The governing principles are: (1) to ascertain whether the applicant has a reasonable expectation of privacy, which protection may be lost if it is shown as a matter of fact and degree in each case that the information is already genuinely in the public domain; and (2) the court must conduct the “ultimate balancing test”, namely (i) neither art.8 nor 10 has preference over the other; (ii) where their values 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; and (iv) the proportionality test must be applied; see *In re S (A Child) (Identification: Restrictions on Publication) [2004] UKHL 47*, HL, at [17], per Lord Steyn; *K v News Group Newspapers Ltd [2011] EWCA Civ 439; [2011] 1 W.L.R. 1827*, CA, at [10] per Ward LJ.

Section 12(3) is directed specifically to the situation where the court is dealing with an application for interim relief. It states that no such relief (as is described in [s.12\(1\)](#)) is to be granted “so as to restrain publication” before trial “unless the court is

satisfied that the applicant is likely to establish that publication should not be allowed". It has been held that there is no conflict between s.12(3) and the Convention (*Douglas v Hello! Ltd*, op. cit., at [150] per Keene LJ).

Section 12(2), though not confined in its application to the situation where the court is dealing with an application for interim relief, is particularly relevant to it. It states that, if the person against whom the application for relief is made ("the respondent") is neither present nor represented, no such relief is to be granted unless the court is satisfied (a) that the applicant has taken all practicable steps to notify the respondent, or (b) that there are compelling reasons why the respondent should not be notified.

Section 12(3) was included in the 1998 Act for the purpose of meeting the concern that, whenever claimants alleged that a threatened publication would infringe their rights under art.8 (Right to respect for private and family life) and applied for interim orders imposing prior restraint on newspapers and other media to preserve the status quo until trial, the courts, in applying the conventional *American Cyanamid* approach, might readily grant such applications. By providing that that no such relief is to be granted "unless the court is satisfied that the applicant is likely to establish that publication should not be allowed" the subsection sets a higher threshold for the grant of interlocutory injunctions against the media than the *American Cyanamid* guideline of a "serious question to be tried" or a "real prospect" of success at trial. The higher statutory threshold indicates a legislative intent to strengthen freedom of speech. The effect of s.12(3) is to make interlocutory injunctions restraining publication available in a narrower range of circumstances than would otherwise be the case. But the "likely to establish" threshold is still lower than the threshold that a claimant must pass at trial (*Giggs v News Group Newspapers Ltd* [2012] EWHC 431 (QB); [2013] E.M.L.R. 5 (Tugendhat J)).

It is established that the term "likely" in s.12(3) does not bear the meaning of "more likely than not" or "probably". In *Cream Holdings Ltd v Banerjee* [2004] UKHL 44; [2005] 1 A.C. 253, HL, the House of Lords held that, in determining whether an applicant seeking an injunction restraining publication "is likely to establish that publication should not be allowed", the court must be satisfied that his prospects of success at trial are sufficiently favourable to justify the order being made in the circumstances. In determining what degree of likelihood makes the prospects of success sufficiently favourable, generally the applicant must satisfy the court, not merely (as the judge and the Court of Appeal held) that they have a real prospect of success, but that they would probably succeed at trial. Thus s.12 sets a higher threshold for the grant of interlocutory injunctions than a serious question to be tried or a real prospect of success at trial, albeit that that standard could be dispensed with where appropriate (see further below). The general approach is that the court should be "exceedingly slow" to grant an interim injunction to restrain publication where the applicant has not satisfied the court that they will "more likely than not" succeed at trial (above at para.22). In *Merlin Entertainments PLC v Cave* [2014] EWHC 3036 (QB); [2015] E.M.L.R. 3 (Laing J), it was held that the same threshold test applied to claims against individuals mounting an internet and e-mail campaign against a company and its employees, such materials being potentially defamatory but which the maker of the statements intended to justify at trial.

However, cases may arise where a lesser degree of likelihood will suffice. In *Cream Holdings Ltd v Banerjee*, Lord Nicholls explained (op. cit. at para.19):

"Cases may arise where the adverse consequences of disclosure of information would be extremely serious, such as a grave risk of personal injury to a particular person. Threats may have been made against a person accused or convicted of a crime or a person who gave evidence at a trial. Disclosure of his current whereabouts might have extremely serious consequences. Despite the potential seriousness of the adverse consequences of disclosure, the applicant's claim to confidentiality may be weak. The applicant's case may depend, for instance, on a disputed question of fact on which the applicant has an arguable but distinctly poor case. It would be extraordinary if in such a case the court were compelled to apply a 'probability of success' test and therefore, regardless of the seriousness of the possible adverse consequences, refuse to restrain publication until the disputed issue of fact can be resolved at the trial."

Where a claim is brought by an individual for the statutory cause of action created by s.1 of the Protection from Harassment Act 1997, and it is alleged that the defendant's unlawful conduct includes speech (s.7(4)), an application for an interim injunction restraining that aspect of the defendant's conduct may raise an issue as to the defendant's right to freedom of expression under art.10 and in that event s.12 will apply. It has been held at first instance that in such circumstances the higher threshold test referred to in the Cream Holdings Ltd case (see above) applies (*Merlin Entertainments PLC v Cave*, op cit, at para.43). In *Emerson Developments v Avery* [2004] EWHC 194 (QB), a judge at first instance in a harassment case found that the claimants' claim had a real prospect of success and granted a prohibitory interim injunction.

Where the court is satisfied that the applicant is likely to establish at trial that publication should not be allowed, there remains a discretion in the court (*Douglas v Hello! Ltd*, op. cit., at para.153 per Keene LJ).

The flexible approach to the term “likely” in s.12(3), as derived from the *Cream Holdings Ltd* case, was applied by the Court of Appeal in *Böehringer Ingelheim Ltd v Vetplus Ltd [2007] EWCA Civ 583; [2007] Bus. L.R. 1456; [2007] E.T.M.R. 67, CA*, to a trade mark infringement claim of the “comparative advertising” variety. In *Oven Clean Ltd v Gilbert [2007] EWHC 3483 (Ch)* it was doubted whether the *Cream Holdings Ltd* test applies to trade mark or passing off cases beyond that variety. But in *Unilever Plc v Griffin [2010] EWHC 899(Ch); [2010] F.S.R. 33* (Arnold J), the maker of Marmite succeeded in obtaining an injunction under the Cream Holdings principle restraining copyright infringement and passing off against a controversial right-wing political party which sought to associate itself with the product by using images in a pre-election broadcast.

The common law rules and the Convention provisions relevant to the exercise by the court of its powers (1) to grant an interim injunction (a) restraining the publication, use or disclosure of categories of confidential information, (b) restraining the publication or disclosure of the existence of the proceedings, and (c) providing for the anonymisation of the parties, and (2) to give directions of the sort commonly used in order to underwrite the security of such injunctions (e.g. restricting access to court records), were examined by the Court of Appeal in *Donald v Ntuli [2010] EWCA Civ 1276; [2011] 1 W.L.R. 294, CA*. In this case the Court held (1) that under art.6 (right to a fair trial) and the common law, the principle of open justice applies because it furthers the interests of justice unless a countervailing consideration overrides it in the interests of justice, (2) that the “strict necessity test” referred to in the earlier authorities was not diluted by the coming into effect of the *1998 Act*, and (3) that in applying the test, a court will have regard to the respective and sometimes competing Convention rights of the parties as part of its consideration of all the circumstances of a case.

Where confidential documents supplied to a newspaper by an M.P. were displayed on the newspaper’s website for a short period, the court considered that the claimant had a sufficiently realistic chance of persuading the trial court that the dissemination so far had not destroyed the confidentiality of the material contained in the documents. The court could see no reason why the newspaper should not be able to use the contents of documents to inform opinions and to stimulate public debate (even by quoting from the documents themselves). Freedom of speech is a precious value in a democratic society that the courts must strive to protect and promote. But this did not mean that that journalists should have complete freedom to publish in full confidential documents leaked in breach of a fiduciary duty, in the exercise of the right to freedom of expression: responsible journalists must themselves consider whether publication of personal details, even about the affairs of corporations not alleged to have violated any laws, is appropriate (*Barclays Bank Plc v Guardian News and Media Ltd [2009] EWHC 591 (QB); (2009) 153(13) S.J.L.B. 30* (Blake J)).

In *R. (Governing Body of X) v OFSTED [2020] EWCA Civ 594; [2020] E.M.L.R. 22; [2020] E.L.R. 526*, the Court of Appeal confirmed the rationale for imposing a high hurdle when interim relief is sought to restrain publication of a report by a public authority and endorsed the analysis of Chamberlain J in *R. (Barking and Dagenham College) v Office for Students [2019] EWHC 2667 (Admin); [2020] E.L.R. 152* at [35]–[37]. Orders restraining publication will only be made where there are “compelling” factors in favour of such order: per Lindblom LJ in *Governing Body of X* at [79]. A rare example of such relief being granted is *R. (Interim Executive Board of X) v OFSTED [2016] EWHC 2004 (Admin); [2017] E.M.L.R. 5* (Stuart-Smith J).

(iii) - Claims for misuse of private information

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As a practical matter, applications of the type to which s.12(3) is directed are made routinely in proceedings in which claims are made based upon alleged breaches of privacy or of obligations of confidence which may arise in contract or in tort. The values enshrined in art.8 (Right to respect for private and family life) and art.10 (Freedom of expression) are now part of the distinct causes of action for breach of privacy rights and breach of obligations of confidence.

For an account of the relevant law, and guidance on practice and procedure for applications for interim relief, see *Practice Guidance: Interim Non-Disclosure Orders* given by Lord Neuberger MR in August 2011 (Vol.1, para.53PG.1).

In *McKennitt v Ash* [2006] EWCA Civ 1714; [2008] Q.B. 73, CA, Buxton LJ referred to the modern authorities and explained (at para.11) that, where the complaint is of the wrongful publication of private information, the court has to determine two questions. First, is the information private in the sense that it is in principle protected by art.8? (This question embraces the sub-question: in the particular circumstances of the case, does the applicant have “a reasonable expectation of privacy” in relation to the information?) If the answer to the first question is, “no”, that is the end of the matter. If “yes”, the second question (the “balancing exercise” or “parallel analysis”) arises: in all the circumstances, must the interest of the owner of the private information yield to the right of freedom of expression conferred on the publisher by art.10? In terms, both rights are qualified and neither right takes precedence over the other. The art.8 right may be interfered with, and the art.10 right restricted, provided various conditions are fulfilled. Among them is the condition that the interference or restriction must be no greater than is proportionate to the legitimate aim pursued. In this respect the proportionality of interfering with one right has to be balanced against the proportionality of restricting the other (the “ultimate balancing test”).

Where an application of the type to which s.12(3) is directed is made in a claim for misuse of private information, the task confronting the court is that of (1) determining the two questions framed by Buxton LJ in *McKennitt v Ash*, and (2) determining, in the light of the guidance given in *Cream Holdings Ltd v Banerjee* (see above), the question whether or not the claimant’s prospects of success in establishing at trial that publication should not be allowed are sufficiently favourable to justify the order being made in the circumstances. In *Browne v Associated Newspapers Ltd* [2007] EWCA Civ 295; [2007] 3 W.L.R. 289, CA, the Court of Appeal said (at para.23) that the court should consider (i) whether art.8 is engaged, then (ii) whether art.10 is engaged, then (iii) whether the applicant has shown that they are “likely to establish at a trial that publication should not be allowed” (s.12(3)).

It should be stressed that the question for the court is not whether the applicant has established at the hearing of the application for interim relief that publication should not be allowed, but whether they are likely to do so at trial. In *Browne v Associated Newspapers Ltd*, op. cit., the Court of Appeal considered the submission that, where the claimant shows that there is a real expectation of privacy, but the question whether publication would satisfy the public interest (see s.12(4)) cannot be resolved until trial, then the interests of justice would require (other things being equal) that the claimant’s expectation of privacy should be protected until trial. The court rejected the submission on the ground that it was contrary to s.12(3), which proceeds on the footing that, where there is uncertainty publication should be permitted unless the claimant can show that they are likely to succeed at trial, using the word “likely” in the flexible manner described by Lord Nicholls in the *Cream Holdings Ltd* case (above at para.43).

The general principle is that, before an injunction is granted restraining publication, there must be evidence that the defendant intends to publish the information and the claimant must establish with particularity what is alleged to be confidential. Such evidence is required so that the court can make a judgment as to the balance between art.8 and art.10 rights in the light of s.12(3), and so that the injunction can be framed in such a way that the party affected knows with certainty what they are or are not allowed to do (*Browne v Associated Newspapers Ltd*, op. cit., at paras 63 and 64).

In *PJS v News Group Newspapers Ltd [2016] UKSC 26; [2016] 2 W.L.R. 1253*, the law as to the granting of interim injunctions in claims for misuse of private information was examined, and the Supreme Court held that, where information was private, and where there was no public interest in its disclosure, the trial court was not likely to find that the claimant's right to privacy was defeated by the fact that the information was already to some extent publicly known (its confidentiality having been compromised by publicity).

In *Barclay v Barclay [2020] EWHC 1154 (QB)*, Warby J granted an interim injunction preventing public access to and reporting of passages in a skeleton argument on the grounds of confidentiality. Although unusual, such application engaged s.12(3) of the Human Rights Act 1998 as interpreted in *Cream Holdings v Banerjee [2005] 1 A.C. 253* and *ASG v GSA [2009] EWCA Civ 1574*.

(iv) - Dealing with applications “in a more proportionate manner”

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(iv) - Dealing with applications “in a more proportionate manner”

- 15-44 Actions for misuse of private information are usually brought at short notice and are followed by an immediate application for an interim injunction restraining publication before trial which has to be heard urgently and dealt with quickly. As was explained above, the judge dealing with the application has to embark on the difficult task of giving effect to arts 8 and 10 and to the requirements of [s.12 of the 1998 Act](#). All this creates considerable practical problems.

In March 2002, in the case of *A v B Plc [2002] EWCA Civ 337; [2003] Q.B. 195, CA*, the Court of Appeal laid down guidelines intended to assist judges and parties “to deal with the majority of these applications in a more proportionate manner”. The guidelines are extensive. (There are fifteen individual guidelines, explained in over 3,500 words.) It has to be said (with respect) that the extent to which the guidelines offered real assistance to the judge dealing with an interlocutory application for an injunction pending trial, as distinct from the judge trying a claim for a final injunction prohibiting publication, was limited. Their value has been diminished by significant developments in the law since March 2002, in particular the decision of the House of Lords in *Cream Holdings Ltd v Banerjee*, op. cit. (clarifying s.12(3)), and the decision of the European Court of Human Rights in *Von Hannover v Germany (2004) 40 E.H.R.R. 1* (restating the rights and expectations of public figures with regard to their private lives). In *McKennitt v Ash*, op. cit., the Court of Appeal said (at para.64) that it seems clear that these guidelines cannot be read as any sort of binding authority on the content of art.8 and art.10.

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(v) - Sitting in private—public and private judgments

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(v) - Sitting in private—public and private judgments

15-45 When dealing with an application to which [s.12\(3\)](#) applies, the court (whether sitting at first instance or on appeal) is likely to exercise its power (given by [CPR r.39.2\(1\)](#)) to sit in private. (See further Vol.1, para.[39.2.1](#) and [40.2.13](#).)

A judge, having heard an interlocutory application in private, may give judgment in open court (public judgment), but is not obliged to do so and may restrict the availability of the judgment to the parties (private judgment). However, in recognition of the imperative of public justice, the court (especially an appellate court) may give, in effect, two complementary judgments, one public and the other private. Whether this is done, and how it is done, will be affected by the rulings made on the application (see *Browne v Associated Newspaper Ltd [2007] 1 W.L.R. 289, CA*, at paras 4 and 5).

Obviously, where an application for an injunction restraining publication before trial succeeds the whole point of the application and the court's ruling would be undermined were the court to give a public judgment revealing the details of the information and, in effect, creating the mischief that the injunction was designed to prevent. The less obvious and more difficult question of practice arises where the court decides that the application should fail in whole or in part with the result that the respondent should not be restrained by the court from publishing in advance of trial (should they wish to do so) the material which the claimant unsuccessfully sought to protect. If the court gives a public judgment containing the details of the material in question it risks in effect itself publishing information that the claimant may subsequently succeed in restraining the defendant from publishing, either on an appeal against the interlocutory ruling, or at the trial of the claim. (See further Vol.1, para.[39.2.1](#).)

(vi) - Defamation claims—prior restraint

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(vi) - Defamation claims—prior restraint

- 15-46** In certain circumstances, the law of prior restraint operates to protect the defendant's freedom of speech rights, and can provide a basis for rejecting a claimant's application to prevent by interlocutory injunction the further publication of the alleged defamatory material.

For further explanation, see para.[15-48](#) below.

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(vii) - Confidentiality of litigation settlement agreements

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(vii) - Confidentiality of litigation settlement agreements

- 15-46. 1 It is commonplace for litigation settlement agreements to contain confidentiality clauses (often referred to as “non-disclosure agreements”) by which the parties promise to keep the terms confidential. In *ABC v Telegraph Media Group Ltd [2018] EWCA Civ 2329*, the defendant wished to publish allegations of discreditable conduct that had been settled and were the subject of non-disclosure obligations. The Court of Appeal discussed the public interest in the disclosure of wrongdoing, and in informed debate as to standards of conduct in public or commercial life as against the public interest in enforcing private agreements and in settling litigation by enforceable settlement agreements. It was held that the weight to be attached to an obligation of confidence may be enhanced if it is an express contractual agreement freely entered into, without improper pressure, by legally advised parties, with due allowance for disclosure of wrongdoing to the police or other public bodies.

The Court applied *Mionis v Democratic Press SA [2017] EWCA Civ 1194*, where it was held that such a settlement serves not only the private interests of the litigants, but also the administration of justice and the public interest, by freeing resources for other cases, and so such settlement agreements freely entered into are likely to be enforced.

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(b) - Patents and other intellectual property claims

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(b) - Patents and other intellectual property claims

- 15-47 Before the decision of the House of Lords in American *Cyanamid Co v Ethicon Ltd [1975] A.C. 396, HL*, resolved it, the question whether interim relief should be accorded only to very strong causes of action or refused only to the very weak in patents and other intellectual property claims (see [CPR Pt 63](#)) was controversial. It is interesting to note that *American Cyanamid Co* was a case in which the claimants sought an interlocutory injunction against the defendants restraining them from infringing their registered patent.

The principles and guidelines governing the grant of interlocutory injunctions derived from that case (and not merely the main point just mentioned) apply to proceedings in which patents and other intellectual property claims are made. However, the view that such claims demand consideration of peculiar problems that make the application of the principles and guidelines less than straightforward, even to the extent of requiring that they may have to be ignored in part in particular cases, has persisted.

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(i) - Consideration of the merits on interim injunctions

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(b) - Patents and other intellectual property claims

(i) - Consideration of the merits on interim injunctions

- 15-47. 1 A long-term controversy in respect of the grant of interim relief for alleged infringement of intellectual property rights, and particularly trade mark and passing off cases, has been the extent to which the merits of the action ought to be taken into account. There are two reasons that this issue is of particular importance in relation to trade mark and passing off cases: the fact that the damage caused is often inextricably linked with the strength of the case; and the fact that the grant of an interim injunction will often dispose of the case (for example, once a name has to be changed there may be little point in later incurring the cost and disruption of changing it back following a trial).

American Cyanamid Co v Ethicon Ltd [1975] A.C. 396; [1975] 1 All E.R. 504; [1975] R.P.C. 513 (and see generally the notes to CPR Part 25) has decided that interim relief should be *prima facie* refused only to very weak causes of action, and that if there is to be no refusal on grounds of strength of cause of action, the matter should be decided on the balance of convenience, which depends principally on likelihood and extent of damage.

In passing-off cases, damage is an essential element of the cause of action for the tort, so that it may not be logically possible to differentiate between the cause of action and the likelihood of damage. See for example, *The Financial Times Ltd v Evening Standard Co Ltd [1991] F.S.R. 7*. A case in which the likelihood of damage is small is one in which the balance of convenience is likely to favour the defendant, and yet it may undermine the cause of action itself. To what extent therefore should the court consider the merits both when considering whether or not there is a serious issue to be tried and when considering the balance of convenience?

Even in trade mark infringement actions, the unconditional monopoly given by registration is not invaded unless the alleged infringement too closely resembles the registered mark. But if it does the plaintiff may suffer damage which will never be known to him (*Alltransport International Group v Alltrans Express Ltd [1976] F.S.R. 13*). So even in trade mark cases cause of action and likelihood of damage are likely to march together in many instances. Where European regulations treat as critical the risk of confusion (here with reference to the word "Champagne") the absence of likelihood of substantial damage does not justify refusal of an injunction. However, erosion of distinctiveness of a trade name by its use on different goods may constitute substantial damage (*Tattinger S.V. v Albbev Ltd [1993] F.S.R. 641, CA*).

Further, interim injunctions granted in these cases are very apt to dispose of the whole action, for a defendant forced at an interim stage to change his mark is in practical reality unlikely to change back again even if successful at trial.

The question then arises whether for one or other of these reasons, in cases of infringement of trade mark or passing-off, the *American Cyanamid* principles should be modified by according greater weight to the relative strength of the rival cases.

The limbs of the American Cyanamid test have tended to be considered in order, each distinctly from the last. But the question remains unresolved whether the proper approach truly involves considering each question in isolation, or whether consideration of each of the four factors may properly bleed into the others for a consideration in the round.

In *Neurim Pharmaceuticals (1991) Ltd v Generics UK Ltd (t/a Mylan) [2020] EWCA Civ 793* (Floyd, Males, Arnold L.JJ), the Court of Appeal upheld the Patent's Court's refusal of an interim injunction sought on the basis of a second medical use patent (see *[2020] EWHC 1362 (Pat)*). The Appellants sought further leave to appeal from the Supreme Court. A three-judge panel

of the Supreme Court (Lords Kerr, Lloyd-Jones, Kitchin JJ SC) gave a reasoned refusal of permission (though N.B. that as a formal matter the disposal of a permission application has no formal value as a precedent and does not comprise any definitive statement as to the correctness or otherwise of the Court of Appeal's decision from which the further appeal is sought: Supreme Court Practice Direction 3, para.3.3.3). The Supreme Court appeared to acknowledge the open nature of this question:

“The panel considered that there is a point of law of public general importance touching on the question whether the four-stage test outlined by Lord Diplock in *American Cyanamid v Ethicon [1975] A.C. 396* should be applied in a rigid and strictly sequential manner or whether a more overarching and flexible approach to the issues adumbrated by Lord Diplock would be appropriate – cf the observations of Lord Goff in *R. v Secretary of State for Transport Ex p. Factortame Ltd (No.2) [1991] 1 A.C. 603*.

The panel decided, however, that permission should not be given in this case. Prominent among the reasons for this decision was the imminence of the trial in the action. (It is scheduled to begin in October 2020).”

(ii) - Passing off—a special case?

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- 15-47.2 The Court of Appeal in *County Sound Plc v Ocean Sound Ltd [1991] F.S.R. 367, CA* at 372) purports to give an emphatic negative to this question and asserts that “it has long been recognised at first instance and in this court that the American Cyanamid principles apply as much to passing-off cases as to any other” and that indeed “a passing-off action is especially suited to the application of the American Cyanamid principles”. The analysis that followed failed properly to address the issue however. In reviewing the cases (and specifically disapproving one CA decision, *Newsweek Inc. v BBC [1979] R.P.C. 441*) the CA in *County Sound* gave examples only of cases where the plaintiffs had either unarguably strong or weak *prima facie* cases, leaving the only type of case where the old and the new principles reach different results, namely the cases where the plaintiff has an arguable but not strong *prima facie* case, unexemplified.

Furthermore, in *County Sound* the CA did not specifically address itself to the question whether in trade mark and passing-off cases, cause of action and balance of convenience marched together, though (above, at 372) it did in passing re-affirm the principle that in passing-off cases if there is no damage there is no tort.

In allowing an interim injunction pending appeal of a patents action, Floyd LJ in *Novartis AG v Hospira UK [2013] EWCA Civ 583; [2013] C.P. Rep. 37* noted obiter that when “assessing the balance of justice in [passing off] cases it is frequently necessary to form a view as to the strength of the plaintiff’s claim in order to understand the scale of any likely damage”: see *Novartis* at [37], referring to the judgment of Robert Walker LJ in *Guardian Media Group* (discussed below). In *Series 5 Software Ltd v Clarke [1996] F.S.R. 273*, Laddie J carefully analysed the House of Lords decision in American Cyanamid and concluded that it did not preclude a consideration of the merits, but merely any attempt to resolve difficult issues of fact or law at the interim application stage. By that analysis Laddie J concluded as follows:

1. The grant of an interlocutory injunction is a matter of discretion and depends on all the facts of the case.
2. There are no fixed rules as to when an injunction should or should not be granted. The relief must be kept flexible.
3. Because of the practice adopted on the hearing of applications for interlocutory relief, the court should rarely attempt to resolve complex issues of disputed fact or law.
4. Major factors the court can bear in mind are (a) the extent to which damages are likely to be an adequate remedy for each party and the ability of the other party to pay. (b) the balance of convenience. (c) the maintenance of the status quo. (d) any clear view the court may reach as to the relative strength of the parties’ cases.

Series 5 Software is often cited by practitioners as putting a “gloss” on *American Cyanamid*, or modifying the appropriate test. In fact it does not go so far—it merely explains in practice how the test laid down in *American Cyanamid* ought to be applied, which would, where the occasion demands it involve a consideration of the merits. The case is also often cited for the principle that the merits should be more closely considered in IP cases (and particularly passing off and trade mark cases) than in other cases. Again this goes too far. Whilst it may be appropriate to consider the impact of the merits in passing off and trade mark cases for the reasons explained above), *Series 5* is not so limited. Indeed *Series 5* was not really an intellectual property case at all (although it involved confidential information).

It may be noted that in *County Sound*, the CA disapproved the principle expounded by Denning MR in *Newsweek v BBC* that passing off cases were special cases which should ordinarily be disposed of at the interim stage. At first instance in *Newsweek* the judge had merely pointed out that the facts were uncontroversial, and therefore the case was one in which it was appropriate to consider the merits based on those facts, which is what *Series 5* suggests should be done.

Series 5 was followed by *Antec International Ltd v South Western Chicks (Warren) Ltd (Interlocutory Injunction)*, [1997] F.S.R. 278 (*Ch D*), in which injunctive relief was granted, and considered with approval by Walker J in *Barnsley Brewery Co Ltd v RBNB*, [1997] F.S.R. 462 (*Ch D*) in which injunctive relief was refused. We note that in the latter case, Walker J stated (in accordance with the conclusions above) as follows:

“That decision is sometimes, it seems, regarded as surprising or even heretical. I do not see it that way. I see it as a valuable reminder of the background and context of *American Cyanamid* and indeed of its basic message. The basic message is that applications for interlocutory injunctions cannot be mini trials of disputed issues of fact and that the court has to do the best it can on a provisional basis, with the relatively modest aim of reducing so far as possible the risk of the provisional decision ultimately proving to have produced an unjust result.”

In relation to passing off cases in particular it is necessary to sound a word of caution. The above may tend to suggest that passing off cases may be more amenable than others to reaching a preliminary view as to the merits of the case. In fact of course the opposite may be true. In the case of *Neutrogena Corporation v Golden Ltd* [1996] R.P.C. 473 Jacob J noted as follows:

“It was certainly my experience in practice that my own view as to the likelihood of deception was not always reliable. As I grew more experienced I said more and more “it depends on the evidence.”

It is certainly not the case (as suggested by *County Sound* for example) that there will always be an obvious answer as to the strength of the case, and even if such an answer seems to present itself, it may be shown to be wrong on the evidence.

This does not mean however that there will be no cases in which the relative merits of the parties' cases show a stark disparity. Plainly this must be factored in to the assessment at the interim stage. The question is the extent to which they ought to be factored in before the balance of convenience stage. The strict approach to *American Cyanamid* would suggest they should not (assuming the case is seriously arguable), but *Series 5* would suggest a more flexible approach is more appropriate. It is arguable to what extent this is likely to have any significant effect on decisions in practice.

And of course as a matter of practice, rather than strict legal principle, it is usually the case at the hearing of interim applications that the court will take the merits into account, at least in situations where it is possible to reach any conclusion as to the relative strength of those merits at that stage.

Nevertheless, there is still support for the proposition that passing off cases are a special case. In the unreported case of *Guardian Media Group Plc v Associated Newspapers Ltd* [2000] 1 WLuk 442, a passing off case the Judge at first instance, having dealt with the *American Cyanamid* principles, said as follows:

“But in passing off the questions of damage and likelihood of damage are intimately bound up with the strength of the cause of action itself. The more that deception and confusion is likely the stronger the case but also the more the unquantifiable damage that the claimant is likely to suffer. So, as it seems to me, in the ordinary run of passing off cases—and to some extent this is the ordinary run of passing off case—an interlocutory injunction would only be granted where the claimant can show significant likelihood of damage to his goodwill, i.e. significant likelihood of deception or confusion. I approach this case on that basis.”

Walker LJ, in the unreported judgment of the Court of Appeal dated 20 January 2000 held as follows:

“The *American Cyanamid* principles have a degree of flexibility and they do not prevent the court from giving proper weight to any clear view which the court can form at the time of the application for interim relief (and without the need for a mini-trial on copious affidavit evidence) as to the likely outcome at trial. That is particularly so when the grant or withholding of interim relief may influence the ultimate commercial outcome. It is not necessary to consider today whether the court's entitlement to give effect to its provisional view of the merits goes

quite so far as Laddie J sought in *Series 5 Software v Clarke [1996] 1 All ER 853*. In the end, there was not any significant difference between counsel on that point.”

It is not entirely clear how much further *Series 5 Software* sought to go than this statement of Walker LJ that “proper weight” could be given by the court to any clear view of the merits. However it is difficult to see what practical effect any such distinction would have.

In considering the impact of freedom of expression in relation to passing off cases in *Boehringer Ingelheim v Vetplus Ltd [2007] EWCA Civ 583*, Jacob LJ said at [38]:

“No one has ever suggested or reasonably could suggest that the rule in Bonnard could operate to prevent the granting of an interim injunction to restrain an ordinary passing off. It is no good the defendant saying ‘The representation which I made is true and I intend to justify it at trial’. The Court normally considers who is actually likely to win and grants or refuses an interim injunction on that basis. For if the plaintiff is likely to win, damage will be irreparable, if not, not.”

It is not clear whether this is support for the proposition that passing off cases are “special cases” in which the merits should be considered separately from the balance of convenience, or merely support for the proposition that the merits form part of the balance of convenience question. Briggs J in *Oven Clean Ltd v Gilbert [2007] EWHC 3483 (Ch)* has suggested the latter. This accorded with his judgment in *Riemann & Co v Linco Care Ltd [2007] E.C.C. 23*, in which he held that the concession on the part of the defendants that there was an arguable (albeit weak) case meant that only the balance of convenience fell to be considered.

In many cases of course, there is no precise analysis of the way in which the merits fall to be considered.

(iii) - Consideration of the merits: interim injunctions pending appeal

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In *Novartis AG v Hospira UK [2013] EWCA Civ 583 [2013] C.P. Rep. 37*, the Court of Appeal considered an application for an interim injunction pending appeal of a patents action, where the patent had been held invalid at first instance but the judge (Arnold J) had granted permission to appeal on the basis that there was a real prospect of success. Birss J refused the injunction, noting that the facts would probably have justified an interim injunction if there had not already been a trial, but that “rather different considerations” applied in a case where the trial had taken place. The Court of Appeal upheld Novartis’s appeal, and granted the injunction. At [41] in *Novartis*, Floyd LJ distilled the law applicable to an application for an interim injunction pending the claimant’s appeal in its main claim. These were as follows.

(i)The court must be satisfied that the appeal has a real prospect of success.

(ii)If the court is satisfied that there is a real prospect of success on appeal, it will not usually be useful to attempt to form a view as to how much stronger the prospects of appeal are, or to attempt to give weight to that view in assessing the balance of convenience.

(iii)It does not follow automatically from the fact that an interim injunction has or would have been granted pre-trial that an injunction pending appeal should be granted. The court must assess all the relevant circumstances following judgment, including the period of time before any appeal is likely to be heard and the balance of hardship to each party if an injunction is refused or granted.

(iv)The grant of an injunction is not limited to the case where its refusal would render an appeal nugatory. Such a case merely represents the extreme end of a spectrum of possible factual situations in which the injustice to one side is balanced against the injustice to the other.

(v)As in the case of the stay of a permanent injunction which would otherwise be granted to a successful claimant, the court should endeavour to arrange matters so that the Court of Appeal is best able to do justice between the parties once the appeal has been heard.

The *Novartis AG v Hospira* decision was considered by the Patents Court (Arnold J) in *Napp Pharmaceutical Holdings v Dr Reddy's Laboratories (UK) Ltd [2016] EWHC 1581 (Pat)*. The Court noted the apparent inconsistency between, on the one hand, the Court of Appeal’s view in *Novartis* that beyond seeking a real prospect of success, it was unhelpful on an application for an interim injunction to form a more detailed view on the merits; and Lord Hoffmann’s apparently contrary view as expressed in *National Commercial Bank Jamaica Ltd v Olint Corp Ltd [2009] UKPC 16; [2009] 1 W.L.R. 1405* (Privy Council).

See also *Warner-Lambert Co LLC v Sandoz GmbH [2015] EWHC 3153 (Pat)*. At an earlier trial (*[2015] EWHC 2548 (Pat)*), Arnold J had found Warner-Lambert’s patent to be invalid and in any case not infringed; he found in favour of Actavis on its counterclaim for groundless threats under s.70 Patents Act 1977. Prior to that trial, Arnold J had refused interim injunctive relief against the defendants (*[2015] EWHC 72 (Pat)*; upheld on appeal in relation to interim injunction, but not in relation to

application for strike-out: [\[2015\] EWCA Civ 556](#) (Floyd LJ writing for the Court of Appeal)) in respect of a “skinny-label” product carving out the patentee’s indication.

Following the trial, Sandoz launched a corresponding “full label” product. Birss J granted an urgent application for an interim injunction against Sandoz, enjoining them from supplying or offering the full label product, and requiring them to give information about their entitlement (if any) to recall the product. In due course, Sandoz gave undertakings until the full hearing of the interim injunction application. A full, urgent hearing before Birss J led to the grant of the injunction sought: [\[2015\] EWHC 2919 \(Pat\)](#). In so doing, the judge placed particular reliance on the conduct of Sandoz, and Lloyds (the pharmacy chain to which the full label product had been distributed) and his finding that

is a matter which should have been dealt with by Lloyds and Sandoz and AAH giving proper notice to Warner-Lambert and the whole matter could have been resolved in an orderly fashion. To have taken the course they have taken by attempting to shift such a large volume of material in such a short space of time, Sandoz, AAH and Lloyds only have themselves to blame.

A little over two weeks later, Arnold J heard an application to continuation of the injunction, which he granted against both Sandoz (the drug company) and Lloyds (the dispensing pharmacy): [\[2015\] EWHC 3153 \(Pat\)](#).

In November 2017, Henry Carr J heard an application for an interim injunction by a patentee pending appeal to the UK Supreme Court: [Actavis v ICOS & Eli Lilly \[2017\] EWHC 2880 \(Pat\)](#). The Court refused injunctive relief. The applicant was the patentee, ICOS, whose patent had been upheld at trial, but then found invalid for obviousness on appeal to the Court of Appeal. ICOS sought an injunction restraining the generic parties from selling generic versions of the tadalafil product with which the patent was concerned. Applying the principles from [Novartis AG v Hospira](#), the Judge concluded that the appeal had no real prospect of success; that any damage to the patentee that might result would be quantifiable; and that prejudice to the generic parties would in any case outweighed the prospect of such damage to ICOS. Thus the injunction was refused.

(iv) - American Cyanamid and trade mark cases

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- 15-47.3 As noted above, there are also trade mark cases in which the cause of action and balance of convenience “march together”. See for example *Sirdar Ltd v Les Fils de Louis Mulliez* [1975] F.S.R. 309; (1975) 15 C.M.L.R. 378 (degree of deceptive resemblance); and *Mail Newspapers Plc v Insert Median Ltd* [1987] R.P.C. 521 at 527 (similarity of rival marks).

On one view, there is no reason why the same considerations that apply to passing off cases should not apply to such cases. Again whether the merits are considered separately to the balance of convenience or not is a matter of debate. The merits are often considered, usually at the balance of convenience stage. See, e.g. *O2 Holdings Ltd v Hutchison 3G UK Ltd (Application for Interim Injunction)* [2004] EWHC 2571 (Ch); [2005] E.T.M.R. 61 (injunction refused since inter alia claimant's case weak). In practice the stage at which the merits are considered may be of little import.

It has been suggested that although the lack of evidence of actual confusion is not fatal to an application for an interim injunction in a trade mark infringement action, such lack is a factor of very great significance, requiring the claimant to bring forwards other substantial grounds to make up for it (*Baywatch Production Co Inc. v The Home Video Channel* [1997] F.S.R. 22). Of course this approach is not appropriate where there are serious practical difficulties preventing the claimant from obtaining such evidence, e.g. where the defendant's product has not been launched, or has not been launched long enough for confusion to have arisen.

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(v) - Interim injunctions and freedom of expression

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- 15-47. 4 Different principles apply to the grant of interim relief where issues of freedom of expression arise as set out in *Cream Holdings v Banerjee [2005] 1 A.C. 253*. In cases involving freedom of expression the Human Rights Act 1998 demands that claimants show that they are “likely” (and the test is necessarily flexible—“likely” does not mean “more likely than not”) to win at trial, not merely a real prospect of success. The standard is a flexible one, but the court should be “exceedingly slow to make interim orders if the court is not satisfied that the claimant will probably succeed at trial” (*Volkswagen AG v Garcia [2013] EWHC 1832 (Ch)* at [26]). See also *Douglas v Hello! Ltd (No.1) [2001] Q.B. 967; [2001] 2 W.L.R. 992; [2001] 2 All E.R. 289; [2001] E.M.L.R. 9*. See further “Restricting freedom of expression” at para.15-40 et seq. above.

Freedom of expression has been considered in relation to passing off cases—see for example *Red Bull GmbH v Mean Fiddler Music Group Plc (Application: Interim Injunction) [2004] EWHC 991* and *Consorzio del Prosciutto di Parma [1990] F.S.R. 530* in which Morritt J (as he then was) held that the right of free speech was not an absolute bar to a prior restraining order but was to be taken into account in the general balance of convenience test under *American Cyanamid*.

MacMillan Magazines Ltd v RCN Publishing Co Ltd [1998] F.S.R. 9; (1997) 20(9) I.P.D. 20089 (Ch D) —Where an action for malicious falsehood was brought and the parties both had an arguable case, no injunctive relief would be granted unless the statements made were obviously untrue in circumstances where the defendant indicated that it intended to justify the statements.

The effect of *Cream Holdings* and of s.12(3) of the Human Rights Act 1998 was considered in the context of a claim for an interim injunction sought in relation to an alleged breach of confidential information in *Volkswagen AG v Garcia*. Certain academics had investigated, and identified a security weakness in, the technology behind car immobilisers used in many of the applicant’s vehicles. Birss J held that interference with the freedom of expression of those academics was justified when considering the strength of the merits of the applicant’s case, the balance of public interests, and the defendants’ attitude to the probity of the source of the information.

The flexible probability requirement which arises where an interim injunction would affect freedom of expression, as explained in *Cream Holdings* has been applied by the Court of Appeal to a commercial trade mark dispute in *Boehringer Ingelheim v Vetplus Ltd [2007] EWCA Civ 583*. The court held that there is no complete bar (i.e. in accordance with *Bonnard v Perryman*) to injunctive relief when the defendant indicates that they intend to justify a comparative advertisement. See also *Red Dot Technologies Ltd v Apollo Fire Detectors Ltd [2007] EWHC 1166 (Ch)*.

Threats of proceedings for infringement of patent are not to be equated with questions of trade libel, so that interim injunctions to restrain them are proper (*Johnson Electric Industrial Manufactory Ltd v Mabuchi-Motor K.K. [1986] F.S.R. 280*).

(vi) - Mandatory injunctions

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- 15-47. 5 It was thought that a special application of the *American Cyanamid* principles is required in deciding cases where a mandatory injunction was sought (see *Zockoll Group Ltd v Mercury Communications Ltd (No.1)* [1998] F.S.R. 354, CA; *Aegis Defence Services Ltd v Stoner* [2006] EWHC 1515 (Ch); *AAH Pharmaceuticals Ltd v Pfizer Ltd* [2007] EWHC 565 (Ch)). However, in the Privy Council case of *National Commercial Bank Jamaica Ltd v Olint Corp Ltd (Practice Note)* [2009] UKPC 16, [2009] 1 W.L.R. 1405, [2009] Bus. L.R. 1110, PC, it was explained (at [19]) that in the *American Cyanamid* case Lord Diplock was not intending to confine the principles to prohibitory rather than mandatory injunctions, and that the underlying principle is the same, namely, that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other. It is a generalisation to say that the features which ordinarily justify describing an injunction as mandatory are often more likely to cause irremediable prejudice than cases in which a defendant is merely prevented from taking or continuing with some course of action (*Films Rover International Ltd v Cannon Film Sales Ltd* [1987] 1 W.L.R. 670, at 680).

See further para.15-24 above.

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(vii) - Disposal of the entire case

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- 15-47. 6 As to cases dealing with the point that a granted injunction may dispose of the whole action, see *Newsweek Inc v BBC [1979] R.P.C. 441* at 446 at first instance; *Gala of London Ltd v Chandler Ltd [1991] F.S.R. 294*; *Management Publications Ltd v Blenheim Exhibitions Group [1991] F.S.R. 348*; *[1991] F.S.R. 550 CA* (and see also *Morgan-Grampian v Training Personnel Ltd [1992] F.S.R. 267* as to status quo); *Alfred Dunhill Ltd v Sunoptic SA [1979] F.S.R. 337*; *Elan Digital Systems Ltd v Elan Computer Ltd [1984] F.S.R. 373* (circumstance gives rise to no point of law but only a point of fact to be taken into account in balance of convenience); *Post Office v Interlink Express Parcels Ltd [1989] 1 F.S.R. 369*; *Boots Company Ltd v Approved Prescription Services Ltd [1988] F.S.R. 45*.

In a predominantly copyright case also involving names, the Vice Chancellor noted that the interim proceedings would be determinative of the case and looked at the relative strength of the parties' cases because he had found the balance of convenience so even; *Mirage Studios v Counter-Feat [1991] F.S.R. 145* at 154. In another copyright case *Entec (Pollution Control) Ltd v Abacus Mouldings [1992] F.S.R. 332*, the CA refused an interim injunction because it would dispose of the case, although in that case the defendants were impecunious and if injunctioned could fight no more.

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(viii) - Status quo

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(viii) - Status quo

- 15-47. 7** The preservation of the status quo is of course a factor which may be taken into account according to the *American Cyanamid* principles. Often the status quo will favour the grant of an injunction, since the injunction will prevent the defendant from bringing his goods to market. However this is not always the case, and indeed what the appropriate status quo is for the purposes of determining the interim application is not always easy to determine in intellectual property disputes. For example it is not always the case that preventing the use of the defendant's mark will preserve the status quo—see the reasoning of Aldous J in *Blazer Plc v Yardley and Co Ltd [1992] F.S.R. 501*. NB that the grant of an injunction preventing the defendant from using a particular trade mark does not necessarily prevent him from selling his goods—see *Tattinger v Allbev Ltd [1992] F.S.R. 647*, and *Fyffes v Chiquita Brands International Inc [1993] F.S.R. 83*. Furthermore a party may not be able to take advantage of a status quo which has resulted from its own unreasonable conduct—see *Leo-Pharma A/S v Sandoz [2008] EWHC 541 (Pat)*.

In *BASF SE v Sipcam (UK) Limited* the defendant had already started selling the product alleged to infringe the applicant's patent when an interim injunction was sought by the applicant. The respondent sought to argue that the status quo was one in which the respondent was already on the market, and that therefore this factor pointed away from granting an injunction. Birss J granted an injunction, and rejected the respondent's argument on the status quo; in particular, the judge deprecated the defendant's behaviour when informing the applicant when it would start sales, and the nature and timing of their offers of inspection of the respondent's facilities by the applicant's solicitors.

However, in *Glencairn IP Holdings Ltd v Dartington Crystal (Torrington) [2018] EWHC 769 (Pat)* HHJ Hacon (sitting in the High Court) found that consideration of the status quo was only relevant where the other considerations were all entirely balanced. He held at [34] that:

“... the question of assessing the status quo should only be done where other factors appear to be evenly balanced. In other words, where the court reaches the conclusion that the balance of potential irreparable harm and convenience is equal on both sides.”

(ix) - Irreparable damage and claimant's cross-undertaking

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(ix) - Irreparable damage and claimant's cross-undertaking

- 15-47. 8 It has been held to be essential that a plaintiff seeking an interim injunction to restrain infringement should show a likelihood of irreparable damage (*Broad & Co. Ltd v. Graham Building Supplies Ltd (No.2) [1969] R.P.C. 295* where the court refused to go into the question of infringement because no such damage was shown); see also *Broad & Co Ltd v Cast Iron Drainage Co Ltd*, above and *Post Office v Interlink Express Parcels Ltd [1989] 1 F.S.R. 369*. However see *SmithKline Beecham Plc v Apotex Europe Ltd [2003] EWCA Civ 137; [2003] F.S.R. 31*, where it was held that whether damages are recoverable and the extent of any such damage may be very important considerations when deciding whether to grant an interlocutory injunction, but the court's jurisdiction to grant interlocutory injunctions is not so limited. In any case, the CA held, where use of a property right is in issue, damages may not be the main consideration.

See also *Evalve Inc v Edwards Lifesciences Ltd [2019] EWHC 1158 (Pat); [2020] F.S.R. 4* (Henry Carr J). The context was an expedited trial about a medical device for treating a life-threatening heart condition. Edwards, the defendant, indicated that it would offer to implant only ten of its devices before judgment, in two hospitals in the UK. Additionally, the more "traditional" arguments of irreversible price depression by entry of generic competitors did not apply in the usual way. The judge found there was no irreparable harm, and refused an interim injunction.

Another case turning on questions of irreparable harm and the adequacy of damages was *Neurim Pharmaceuticals (1991) Ltd v Generics UK Ltd [2020] EWCA Civ 793*. Lord Justice Floyd explained the patentees' case before the Patents Court, at his [12]:

"The case advanced on the evidence by Neurim and Flynn was that the entry onto the market of Mylan's product would cause them harm in two ways. First, it would cause them to lose sales of Circadin and depress the price at which they could continue to make such sales as they were able to retain. I will refer to this head as "pecuniary loss". Secondly, they said that the loss of revenue from sales of Circadin would cause consequential damage to their businesses in a variety of ways. They said that the lost revenues would create a need to close down research and development (including clinical trials) and educational programmes, cause them to make redundancies, have an impact on the market for Slenyto and other fledgling products and harm their distribution networks. I will refer to this aspect of their damage as 'consequential loss'".

The Patents Court had found damages to be an adequate remedy, and so rejected the injunction. The Court of Appeal agreed, upholding the Judge's refusal to grant an injunction on the basis that damages were an adequate remedy. However, the Court of Appeal rejected the submission that such decision "would have grave consequences for the pharmaceutical industry generally" and emphasised that it had "not decided any principle of general application", but that:

"the extremely unusual facts of [that] case [had not given] rise to such difficult questions of computation of damages as to trigger the exercise of the court's discretion to grant an injunction."

Another case in which damages were found to be an adequate remedy for the patentee such that the injunction was refused was *Novartis AG v Teva UK Ltd [2022] EWHC 959 (Ch)*, which concerned the generic market for the drug fingolimod. The

key fact underpinning this decision of Roth J was the unusual market for the drug, which is only prescribed in secondary care and for which supply is via contracts/tenders, and that whilst generics entering the market would cause a price drop there was unlikely to be a significant price spiral. The Judge also rejected the argument that refusal of the injunction would cause damage to *Novartis*' reputation.

For a consideration of the relevance of damage to related companies: see *Peaudouce SA v Kimberley Clark [1996] F.S.R. 680*, although NB *SmithKline Beecham Plc v Apotex Europe Ltd [2003] EWCA Civ 137; [2003] F.S.R. 31* as to damage not being an essential pre-requisite for interim relief.

Reasonable conduct by the plaintiff over the years regarding settlements may result in the fact that the potential loss between motion and trial is not such as to justify interim relief (*Smith Kline & French Ltd v Higson [1988] F.S.R. 115*).

An interim injunction was refused in a passing-off case where grant would cause the defendant great damage but very little to the plaintiff (*Management Publications Ltd v Blenheim Exhibitions Group [1991] F.S.R. 348*).

An inability on the part of the plaintiff to meet the cross-undertaking is not an end of the matter. The question is what course involves the least risk of injustice: see *Fleming Fabrications Ltd v Albion Cylinders Ltd [1989] R.P.C. 47 CA*, where an injunction was granted because the plaintiffs were at a crucial point in their exploitation of the patent.

NB on the effect of cross undertakings in damages against non-parties—see *SmithKline Beecham Plc v Apotex Europe Ltd [2006] EWCA Civ 658 [2007] Ch. 71; [2006] 3 W.L.R. 1146; [2006] 4 All E.R. 1078; [2006] C.P. Rep. 39; [2007] F.S.R. 6*. See also *SmithKline Beecham Plc v Apotex Europe Ltd [2005] EWHC 1655 (Ch); [2006] 1 W.L.R. 872; [2006] 2 All E.R. 53; [2005] F.S.R. 44* for an unsuccessful attempt to introduce third parties into the cross undertaking in damages by the application of the slip rule.

In *Napp Pharmaceutical Holdings Ltd v Dr Reddy's Laboratories (UK) Ltd [2019] EWHC 1009 (Pat)*, the Patents Court (Henry Carr J) considered whether there was jurisdiction to order fortification for a cross-undertaking in damages given in respect of an interim injunction that was subsequently discharged on appeal. The Judge found that the Court has no power to compel a party to give a cross-undertaking; rather, one is offered as the price that the claimant is willing to pay in return for its injunction. Where the injunction has been discharged, there is no such “price worth paying”, since the claimant is not seeking continuation of the injunction. Therefore fortification cannot be ordered once the injunction has been discharged.

(x) - Delay

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(x) - Delay

15-47.9 Delay by the claimant in seeking interim relief may be a “powerful” factor against the grant of such relief—see, e.g. *AAH Pharmaceuticals Ltd v Pfizer Ltd* [2007] EWHC 565 (Ch); [2007] U.K.C.L.R. 1561.

However delay may be excused where the chances of the plaintiff succeeding in the action is high (*Cavendish House (Cheltenham) v Cavendish Woodhouse, Ltd* [1970] R.P.C. 234, CA). See also, as to delay, *Effluent Disposal Ltd v Midlands Effluent Disposal Ltd* [1970] R.P.C. 238, and *Broad & Co Ltd v Cast Iron Drainage Co Ltd* [1970] F.S.R. 363.

Delay will be of less significance in circumstances where the defendant’s conduct has not changed as a result of any delay—see *Radley Gowns Ltd v Costas Spyrou (t/a Touch of Class and Fiesta Girl)* [1975] F.S.R. 455 Ch D, and *Handi-Craft Co v B Free World Ltd* [2005] EWHC 1307 (Pat). But where the defendant’s business has grown significantly during the period between the claimant’s initial knowledge of the breach of its rights and the making of the application, the delay (in that case, of nearly two years) will be fatal to the grant of interim relief (*Blinkx UK Ltd v Blinkbox Entertainment Ltd* [2010] EWHC 1624 (Ch)).

NB the relationship between delay and the damage and merits in certain cases such as passing off and certain trade mark cases. See, e.g. *Lyle & Scott Ltd v Primark Stores Ltd* [2007] EWHC 1549 (Ch)—where large numbers of the defendant’s products had been put on the market and the claimant had not noticed, this suggested that the chances of serious loss were remote.

Where a claimant in a trade mark case non-used his mark for many years and only told the defendant of a token continued use after delivery of a counterclaim to rectify the Register, interim relief was refused and previous judgments stayed: *Gala of London Ltd v Chandler Ltd* [1991] F.S.R. 294.

(xi) - Nature of relief

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- 15-47. 10 For the purposes of interim relief the injunction should be confined wherever possible to a precise statement of what is not permitted (*Biro Swan Ltd v Tallon Ltd [1961] R.P.C. 326; Berkeley Hotel Co Ltd v Berkley International (Mayfair) Ltd [1972] R.P.C. 237*). An interim injunction to restrain passing off may be refused as unnecessary where an injunction to restrain infringement of registered trade mark is granted (*Bowater-Scott Corp. Ltd v Modo Consumer Products Ltd [1969] F.S.R. 330*).
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(xii) - Stay pending appeal

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(xii) - Stay pending appeal

15-47. 11A stay may be granted pending appeal (see, e.g. *Peck (John) & Co Ltd v Zelker (R.) Ltd [1963] R.P.C. 85*). The CA granted a limited stay of an interim injunction in respect of passing off pending appeal, entirely suspending the injunction relating to goods but as to the injunction relating to the business only adding a proviso franking advertisements which were either already contracted for or to which the plaintiffs consented: *Elan Digital Systems Ltd v Elan Computer Ltd [1984] F.S.R. 373*.

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(xiii) - Interim injunctions in patent actions

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15-47.12 The principles governing the grant of an interim injunction in a patent infringement action are no different from the principles in other cases. The leading case is *American Cyanamid Co v Ethicon Ltd [1975] A.C. 396; [1975] 1 All E.R. 504*, discussed generally at para. 15-7 et seq above, and, in relation to trade mark and passing-off claims particularly, at paras 15-47.1 to 15-47.3 above. The above discussion of *Series 5* is as relevant to patent cases as to others. In that regard however it is most unusual for a patent case to be one in which it is obvious where the merits lie in all but the most extreme cases. This is particularly so in cases where the case will turn (as is often the position) on obviousness.

Cases have arisen in which, when considering where the balance of convenience lies, the court has found that the likely loss to be suffered by the holder of a pharmaceutical patent would be greater than that likely to be suffered by a generic competitor, and has granted an interim injunction to the former party restraining the latter (see cases referred to in *Cephalon Inc v Orchid Europe Ltd, [2010] EWHC 2945 (Pat)* (Floyd J) at [49]). In those cases the fact that the generic competition was likely to produce price cutting, and that restoring those prices to the full monopoly level after success at trial could cause the patentee to lose goodwill, has been regarded as significant. And so too has the fact that the generic competitor, having settled upon the product they intended to sell, took no steps to have issues of infringement and validity clarified well before their date of intended launch (*SmithKline Beecham v Apotex Europe Ltd. [2003] EWCA Civ 137, [2003] F.S.R. 31, C.A.*). But these factors are not principles of law. Whether they apply at all in any given case and whether, if they do, they outweigh other factors is to be decided on the evidence (*Cephalon Inc v Orchid Europe Ltd. [2010] EWHC 2945 (Pat)* (Floyd J) at [49])).

NB also *Abbott Laboratories v Ranbaxy Europe Ltd [2004] EWHC 2723 (Ch); (2005) 28(1) I.P.D. 27111*, in which Pumfrey J held that, notwithstanding the apparent weakness of the claimant's patent, that weakness would not have prevented the court granting interim relief if the position of those affected could have been protected by cross undertakings. Had there been a real prospect that the claimant's main claim was valid, an interlocutory injunction would have been granted.

The grant of injunctive relief in patent cases turns on the unique facts of each case just as in any other type of case. Often similar issues arise however. In *Mayne Pharma (USA) Inc v Teva UK Ltd [2004] EWHC 3248*, Pumfrey J said as follows:

“In a case in which a pharmaceutical previously on the market is challenged by a generic on price grounds, the risk of price erosion irrecoverable if the patentee is ultimately successful at trial, is frequently the dominant factor in considering the grant of an interlocutory injunction. To the extent that one can generalise in cases of this description, it is possible to say that in the ordinary course all the remaining factors tend to be more or less evenly balanced. It is not infrequently the case that, first of all, the risk of irrecoverable damage, coupled with another common feature of these cases which is a failure by the defendants to clear the ground before they start their course of activity, will, in the mind of the judge disposing of the application, take on a heavy significance. Where, however, one is considering a very brief period indeed, these factors have much less weight. I must be satisfied, before I interfere by injunction at this stage on incomplete evidence, that there is a real risk over the period between now and the hearing of the effective application that there will be a significant risk of irrecoverable price erosion or some other head of damage for which the claimants will not adequately be compensated in damages.”

However the question that often arises in pharmaceutical patent interim injunction cases as to whether generic market entry will cause a downward price spiral in the period until trial if no injunction is granted is intensely fact sensitive—see *Neurim Pharmaceuticals (1991) Ltd v Generics UK Ltd (t/a Mylan) [2020] EWCA Civ 793; Novartis AG v Teva UK Ltd [2022] EWHC 959 (Ch)*.

On the other hand, it may be said that in many cases in which an injunction is not granted some sort of estimate of the claimant's damage can be made by reference to the defendant's sales, whereas normally a defendant who is wrongly stopped will find it very difficult to form any reasonable estimate of what sales they would have made but for the injunction.

Of course many factors arise—each case must be considered individually. For discussion of many of the sorts of factors which may arise and fall for consideration in cases however, see the following non-exhaustive list: *Novartis AG v Dexcel-Pharma Ltd [2008] EWHC 1266 (Pat); [2008] F.S.R. 31*—injunction granted—short period until trial, and status quo was that there was no competing product on market; *Leo Pharma A/S v Sandoz Ltd [2008] EWCA Civ 850*—judge was entitled to conclude that entry of a generic into the marketplace might lead to price drops and thus incalculable damage, and therefore grant of injunction was within his discretion (c.f. *Merrell Dow Pharmaceuticals Inc v H.N. Norton and Co Ltd [1994] R.P.C. 1*—where a patentee might have to lower his price permanently as a result of infringement, nevertheless his loss is ascertainable, whilst the possible market share of the infringer is not ascertainable: injunction refused); *Les Laboratoires Servier v KRKA Polska Sp ZoO [2006] EWHC 2453 (Pat); (2007) 30(1) I.P.D. 30006 (Ch D (Patents Ct))*—injunction granted where serious issue on patent infringement and counterclaim for invalidity not made out on summary judgment basis—launch of defendant's products was likely to lead to launches by other generic companies and price erosion which would continue after trial; *Wyeth Holdings Corp v Alpharma Ltd [2003] EWHC 3196*—injunction granted—most just course involved maintaining status quo in light of proximity of trial; *SmithKline Beecham v Generics UK Ltd (2002) 25(1) I.P.D. 25005 (Ch D (Patents Ct))* injunction granted where new entrants to the marketplace would cause irreparable damage; *Improver Corp. v Remington Consumer Products Ltd [1989] R.P.C. 82, CA*—interim injunction granted to preserve the status quo where the defendant was thought to be not yet on the market and had gone ahead with its eyes open; *Monsanto v Stauffer* cases—([1984] F.S.R. 559 N.Z. and [1984] F.S.R. 598, CA)—defendant seeking to enter the plaintiffs' herbicide market was restrained lest they establish a bridgehead for the time when the patent monopoly expired; *T.J. Smith and Nephew Ltd v 3M United Kingdom Plc [1983] R.P.C. 92*—the amount of time, energy and money which the patentees put into the marketing of the patented article may justify the assertion that infringements would cause irreparable damage, and once a patentee is willing to negotiate royalty arrangements it necessarily follows that they are willing to give up their monopoly position in return for money, and if the defendants are good for the money, then damages are an adequate remedy; *Brupat Ltd v Sanford Marine Products Ltd [1983] R.P.C. 61*—where a patent infringement was a reliable article and its sales would not affect the patentee's goodwill it was held that damages were an adequate remedy for the patentee and could be more easily assessed than damages on the cross undertaking—an impecunious defendant can protect the plaintiff by paying a royalty into a joint account; *Vernon & Co (Pulp Products) Ltd v Universal Pulp Containers Ltd [1980] F.S.R. 179*—no injunction against poor defendant who undertook, pending trial, to pay into a safeguard account 5% of his sales price); *E.A.R. Corp. v Protector Safety Products (UK) Ltd [1980] F.S.R. 574*—injunction granted to protect plaintiff at a critical time in his business which was being built up under the patent umbrella; *Corraplast Ltd v George Harrison (Agencies) Ltd [1978] R.P.C. 761, CA*—plaintiff's market just turning in their favour, impossible to assess loss of competitive strength of patents after expiry, patent shortly to expire, defendant an importer, wrong to allow him to establish bridgehead shortly before expiry, injunction granted; *Polaroid Corp. v Eastman Kodak Co Ltd [1977] R.P.C. 379, CA*—worldwide competition, no UK manufacture by plaintiffs, substantial investment by defendants in UK, injunction refused (NB the fact that the defendants had taken reasonable precautions to avoid infringing any valid patent was held irrelevant); *Roussel-Uclaf v G.D. Searle & Co Ltd [1977] F.S.R. 125*—a reasonably accurate assessment of the claimant's loss could be made and the drug the subject of the patent could be life saving and had no precise equivalent, injunction refused); *Catnic Components Ltd v Stressline Ltd [1976] F.S.R. 157, CA*—defendants substantial and had made a substantial investment, drastic and long-lasting damage to plaintiff unlikely, injunction refused; *Hovercraft Development Ltd v Sealand Hovercraft Ltd [1976] R.P.C. 393*—plaintiff exploited patent by licensing but defendant was in financial trouble, injunction granted; *Standex International Ltd v C.B. Blades Ltd [1976] F.S.R. 114*—defendants had insufficient assets to be able to pay damages, injunction granted; *Belfast Ropework Ltd v Pixdane [1976] F.S.R. 337, CA*—defendants, importers, had no sufficient assets to safeguard plaintiffs, injunction granted.

To defend an application for an interim injunction a defendant should show that they genuinely do intend to defend the plaintiff's claim at trial. How they do this will depend on the facts of each case. See *T.J. Smith and Nephew Ltd v 3M United Kingdom Plc [1983] R.P.C. 92*—since the court cannot go into elaborate matters of fact at the interim stage it is not necessary for defendants to reveal the details of their defence to a claim for infringement nor invalidity at the interim stage, though the defendants conceded they would have to give particulars of the grounds on which they contested validity. A genuine intention to defend the action may be present even though the same grounds are relied on as failed in an earlier action; see *Quantel Ltd v Shima Seiki Europe*

Ltd [1990] R.P.C. 436 in which the defendants intended to call additional evidence and on their providing a bank guarantee in the sum of £2 million—the balance of convenience lay in favour of no injunction.

The Court has jurisdiction to grant an interim injunction in respect of a patent that has not yet granted—see *Novartis AG v Teva UK Ltd [2022] EWHC 959 (Ch)*, in particular the finding that s.69 of the Patents Act 1977, which only refers to a right to damages after publication of a patent application, is no bar to that jurisdiction.

It is wrong to grant an interim injunction on a patent which is in limbo as a result of an unconditional offer to amend; on a motion to commit, a court cannot try what final form the claims are going to take. If an interim injunction was granted before an application to amend, it would be discharged (*Molnlycke AB v Procter and Gamble Ltd (No.2) [1990] R.P.C. 487*).

Various factors which were of importance in early pre-*Cyanamid* cases may still be relevant, e.g. *Fomento (Sterling Area) Ltd v Refill Improvements (Ri-Co) Co Ltd [1963] R.P.C. 163* (patent due to expire shortly, injunction refused. But cf. *Corruplast [1978] R.P.C. 761, CA*, above); *Hoffman-la Roche & Co A.G. v Inter-Continental Pharmaceuticals Ltd [1966] R.P.C. 265* (existence of an application for a compulsory licence irrelevant, injunction granted); *Pfizer Corp v Inter-Continental Pharmaceuticals Ltd [1966] R.P.C. 566* (wrong to suspend injunction pending determination of application for compulsory licence); *Zaidener v Barrisdale Engineers Ltd [1968] R.P.C. 489* (non-manufacturing patentee who exploited by licensing, injunction refused).

Interim injunctions to restrain threats of proceedings for infringement of patent are a valuable remedy. In most cases they are the only practical remedy to avoid the mischief. See *H.V.E. (Electric) Ltd v Cufflin Holdings Ltd [1964] R.P.C. 149*. See also *Bowden Controls Ltd v Acco Cable Controls [1990] R.P.C. 427* (as well as *American Cyanamid* itself).

(xiv) - Injunction against non-infringer

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15-47. 13 In certain cases, for the preservation of the patentee's rights, an injunction (generally of a temporary nature) may be awarded against a non-infringer. The principle has been expressed thus:

"If a man has in his possession or control goods, the dissemination of which, whether in the way of trade or, possibly, merely by way of gifts (see *Upmann v Forester L.R. (1885) 24 Ch D 231*) will infringe another's patent or trade mark, he becomes, as soon as he is aware of this fact, subject to a duty (an equitable duty) not to allow those goods to pass out of his possession or control at any rate in circumstances in which the proprietor of the patent or mark might be injured by infringement ensuring. The man having the goods in his possession or control must not aid the infringement by letting the goods get into the hands of those who may use them or deal with them in a way which will invade the proprietor's rights. Even though by doing so he might not himself infringe the patent or trade mark, he would be in dereliction of this duty to the proprietor. This duty is one which will, if necessary, be enforced in equity by way of injunction"

per Buckley LJ in *Norwich Pharmacal Co v Commrs. of Customs and Excise [1974] A.C. 133 at 146; [1972] 3 All E.R. 813; [1972] R.P.C. 743 (reversed on other grounds by the HL at [1974] A.C. 133; [1973] 2 All E.R. 943; [1974] R.P.C. 101)*. See also, e.g. *Washburn & Moen Mfg Co v Cunard Steamship Co (1889) 6 R.P.C. 398*.

Because the defendant who is joined under the protective jurisdiction is innocent, the plaintiff will normally bear the costs as against them, but they are able to recover those from the infringer (*Smith, Kline & French Laboratories Ltd v R.D. Harbottle (Mercantile) Ltd [1980] R.P.C. 363*).

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(xv) - Interim injunctions for infringements of design right

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15-47. 14 On the question of whether or not the grant of an injunction is appropriate in circumstances where a licence of right is available, see *Dyrlund Smith A/S v Turberville Smith Ltd [1998] F.S.R. 774*. There is no working rule that an injunction will not be granted except in special circumstances—the *American Cyanamid* principles apply.

Section 233(2) of the Copyright, Designs and Patents Act 1988 does not operate as a bar to interim relief—see *Badge Sales v PMS International Group Ltd [2004] EWHC 3382 (Ch); [2006] F.S.R. 1*.

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(xvi) - Interim injunctions in IPEC

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14. 1

The IPEC has jurisdiction in the ordinary way to grant interim injunctive relief. An example was *Frank Industries Pty Ltd v Nike Retail BV [2018] 3 WLUK 52*. HHJ Hacon granted an interim injunction against *Nike Retail BV* on the basis of alleged trade mark infringement and passing off. An issue arose in argument about the interaction between the cross-undertaking and the £500k cap on IPEC damages, but HHJ Hacon found that it did not need to be resolved. Frank Industries offered a cross-undertaking of £500k, and whether that arose because of the cap or through Frank's free choice as to the undertaking offered was immaterial. That was the cross-undertaking that the judge was to take account of when carrying out the ordinary assessment. The injunction was upheld in large part on appeal: *[2018] EWCA Civ 497; [2018] F.S.R. 24* (Kitchin and Lewison LJJ).

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(c) - Defamation claims (serious issued to be tried and prior restraint)

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The court's power to grant interlocutory relief in defamation cases seems to be guided by two associated notions, one of high principle and one of practicality. The first is the importance of protecting the individual's right to free speech. The second is an acknowledgement that the court should not, save in the clearest case, usurp the jury's role by restraining at an interlocutory stage publication of a statement that the jury might later find to be no libel or true or otherwise defensible.

The first principle involves the law of "prior restraint". In *Herbage v Pressdram Ltd [1984] 1 W.L.R. 1160, CA; [1994] 2 All E.R. 769, CA*, the Court of Appeal referred to the law of prior restraint in defamation actions and explained (1) that no interim injunction restraining publication of material alleged by the claimant to be defamatory will be granted if the defendant raises the defence of justification (*Bonnard v Perryman [1891] 2 Ch. 269*), and (2) that, unless the evidence of malice is so overwhelming that the judge is driven to the conclusion that no reasonable jury could find otherwise, no such injunction will be granted if the defence raises privilege. In the interests of freedom of speech, the courts will not restrain the publication of a defamatory statement, whether a trade libel or a personal one, where the defendant says they are going to justify it at the trial of the action, except where the statement is obviously untruthful and libellous (*Boehringer Ingelheim Ltd v Vetplus Ltd; [2007] EWCA Civ 584*). Normally, neither the motive of the defendant in making the libel threat, nor the threatened manner of publication, nor the potential damage to the claimant provides an exception to this rule (*Holley v Smyth [1998] Q.B. 726, CA; [1998] 1 All E.R. 853, CA; J. Trevor & Sons v Solomon, (1977) 248 E.G. 779*).

In *Herbage v Pressdram Ltd*, op. cit., the court confirmed that, in the face of this long-established practice, the principles enunciated by the House of Lords in the *American Cyanamid Co* case relating to interim injunctions are not applicable to interlocutory applications to restrain publication made in actions for defamation. Griffiths LJ explained that if the courts were to accept that the *American Cyanamid Co* principles did apply, in very many cases the practical effect would be that the claimant would obtain an injunction, because they would often show a serious issue to be tried, that damages would not be realistic compensation, and that the balance of convenience favoured restraining repetition of the alleged libel until trial of the action. That would be a very considerable incursion into the prior restraint rule, which is based on freedom of speech.

After the *Human Rights Act 1998* came into effect, and after the decision of the House of Lords in *Cream Holdings Ltd v Banerjee [2004] UKHL 4; [2005] 1 A.C. 253, HL*, in the case of *Greene v Associated Newspapers Ltd [2004] EWCA Civ 1462; [2005] 1 All E.R. 30, CA*, the Court of Appeal held that there was nothing in s.12(3) of the Act that could properly be interpreted as weakening the rule that, in an action for defamation, a court would not impose a prior restraint on publication unless it was clear that no defence would succeed at trial. (The law of prior restraint in defamation cases and the effects thereon of the 1998 Act are extensively reviewed and explained in the judgment of the court in this case.)

In *Woodward v Hutchins [1977] 1 W.L.R. 760, CA*, where there were concurrent claims in breach of confidence and defamation, it was held that an interlocutory injunction restraining publication should be refused on the ground that to hold otherwise would undermine the prior restraint rule.

The rule against prior restraint extends to a claim for trade mark infringement where the claim is, in reality, a claim brought to protect the claimant's reputation; but it does not extend to a case where the claim is brought, not to protect reputation, but to protect a property right (*Boehringer Ingelheim Ltd v Vetplus Ltd [2007] EWCA Civ 584*, op. cit.).

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(d) - Injunctions in restraint of trade

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(d) - Injunctions in restraint of trade

15-48.1 Covenants in restraint of trade are *prima facie* unenforceable at common law and are only enforceable in so far as they are no wider than is reasonably necessary to protect a legitimate business interest commensurate with the benefits secured under the contract. Where that is established, it is for the respondent to establish that the restraint is unreasonable as being contrary to the public interest: *Harcus Sinclair LLP v Your Lawyers Ltd* [2021] UKSC 32; [2021] 3 W.L.R. 598; [2021] P.N.L.R. 26. Covenants restraining an employee from working for a competitor during their employment are not subject to the doctrine of restraint of trade, and do not need to pass any reasonableness test to be enforceable (*J M Finn & Co v Holliday* [2013] EWHC 3450 (QB); [2014] I.R.L.R. 102 at [57] per Simler J).

There is a distinction between post-termination restraints (self-evidently operating after the contract has been terminated) and “garden leave” provisions operating during the currency of the employment relationship. In the latter case, when an express negative covenant or the implied duty of good faith apply to prevent an employee working for another employer, the doctrine of restraint of trade will not apply, nor is there a need to justify an express contractual garden leave provision by reference to this doctrine. However in circumstances where an employer has put an employee on garden leave and then seeks an injunction to restrain the unwilling employee from joining a competitor before the expiry of his notice period, an injunction to enforce or aid that period of garden leave must be considered in light of the restraint of trade doctrine: *J M Finn & Co v Holliday* [2013] EWHC 3450 (QB); [2014] I.R.L.R. 102 (Simler J). A useful discussion of the issues in cases of this nature is to be found in *Elsevier Ltd v Munro* [2014] EWHC 2648 (QB); [2014] I.R.L.R. 766 (Warby J).

The Supreme Court in *Tillman v Egon Zehnder Ltd* [2019] UKSC 32; [2020] A.C. 154; [2019] 3 W.L.R. 245 has overturned a century of authority and permitted the severance of offending words from a post-termination restrictive covenant, the basis being that removal of the words would not generate any major change in the overall effect of all the post termination restraints in the contract. The burden of showing this falls on the employer.

A distinction must be drawn between an injunction restraining breaches of a non competition covenant granted without notice pending the return date (typically one week away), in respect of which the Cyanamid serious question to be tried test arises, and an injunction sought to restrain an ex-employee until the trial of the claim, but which may in effect be finally determinative of the issue since the period of restraint may have expired by the trial date: in the latter case, the fact that the issue will not be conclusively determined before trial weighs as a factor in the balance of convenience (*Lansing Linde Ltd v Kerr* [1991] 1 W.L.R. 251, CA, at p.258 per Staughton LJ; *Schillings International LLP v Scott* [2018] EWHC 1210 (Ch)).

In *Coppage v Safety Net Security Ltd* [2013] EWCA Civ 1176, the Court of Appeal summarised the law relating to restrictive covenants in employment contracts thus: (1) Post-termination restraints are enforceable, if reasonable, but covenants in employment contracts are viewed more jealously than in other more commercial contracts, such as those between a seller and a buyer. (2) It is for the employer to show that a restraint is reasonable in the interests of the parties and in particular that it is designed for the protection of some proprietary interest of the employer for which the restraint is reasonably necessary. (3) Customer lists and other such information about customers fall within such proprietary interests. (4) Non-solicitation clauses are more favourably looked upon than non-competition clauses, for an employer is not entitled to protect himself against mere competition on the part of a former employee. (5) The question of reasonableness has to be asked as of the outset of the contract, looking forwards, as a matter of the covenant’s meaning, and not in the light of matters that have subsequently taken place (save to the extent that those throw any general light on what might have been fairly contemplated on a reasonable view of the clause’s meaning). (6) In that context, the validity of a clause is not to be tested by hypothetical matters which could fall within

the clause's meaning as a matter of language, if such matters would be improbable or fall outside the parties' contemplation. (7) Because of the difficulties of testing in the case of each customer, past or current, whether such a customer is likely to do business with the employer in the future, a clause which is reasonable in terms of space or time will be likely to be enforced. Moreover, it has been said that it is the customer whose future custom is uncertain that is "the very class of case against which the covenant is designed to give protection ... the plaintiff does not need protection against customers who are faithful to him" (*John Michael Design Plc v Cooke* [1987] 2 All E.R. 332, 334). (8) On the whole, cases in this area turn so much on their own facts that the citation of precedent is not of assistance.

It is suggested that the pace of change in any given industry may be such that principle (5) above may need to be reconsidered or reformulated, since technological developments during the course of the employment relationship may be unforeseeable.

Where a defendant (typically an ex-employee) has, as a result of unlawful acts, obtained an unfair advantage as against the position they would have been in had they started a new business from scratch (for example by taking trade secrets or other confidential information), the court may grant "springboard relief", being an injunction which restrains the wrongdoer, so as to deprive them of the fruits of their unlawful acts. For principles applicable, see *QBE Management Services (UK) Ltd v Dymoke* [2012] EWHC 80 (QB); [2012] I.R.L.R. 458; (2012) 162 N.L.J. 180 (Haddon-Cave J) at [239] et seq. Once the relevant conditions have been satisfied, the court asks whether it is in the interests of justice and proportionality to impose a springboard injunction (*CEF Holdings Ltd v Mundey* [2012] EWHC 1524 (QB); [2012] I.R.L.R. 912; [2012] F.S.R. 35 (Silber J)).

Guidance was given as to the exercise of the jurisdiction to grant springboard injunctions in *Forse v Secarma Ltd* [2019] EWCA Civ 215; [2019] I.R.L.R. 587, including that such injunctions are not punitive, but are intended to prevent the wrongdoer from benefitting from any commercial advantage wrongly achieved. Such injunctions must be no greater in scope and for no greater period than is reasonable to remove the unfair advantage secured by the defendant, and the court must estimate what that period will be, and limit the relief accordingly. The judge must state the grounds for the conclusions reached, and should avoid being too prescriptive because the evidence will be incomplete and untested at the interim stage. See especially at [33] and [57]–[60] (per Sir Terence Etherton MR).

(e) - Passport orders

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10. - Interim Injunctions in Particular Proceedings

(e) - Passport orders

- 15-48.2 Exceptionally, the court has jurisdiction to make orders requiring the respondent to deliver up their passport. In *Bayer AG v Winter [1986] 1 W.L.R. 497*, CA, such order was made to prevent the respondent from frustrating a disclosure order in respect of counterfeit goods. Fox LJ stressed the interference with the respondent's liberty and that the duration of the order should be very limited and no longer than necessary. Since imprisonment is no longer available for the non-payment of debts, such orders cannot be made as a means of enforcement: *B v B (Injunction: jurisdiction) [1998] 1 W.L.R. 329*, Wilson J.

Such orders require caution and will only be made where the respondent is a flight risk and the order is proportionate. Applications often require the court to assess the proportionality of the objective of the order against the respondent's rights under art.8 of the European Convention on Human Rights, especially if the order is made against a foreign national resident abroad as in *Lakatamia Shipping Co Ltd v Su [2021] EWCA Civ 1187*. Rejecting an argument that the judge should not have continued a passport order where the respondent no longer had leave to remain in the UK since such order required him to commit an offence under [s.24 of the Immigration Act 1971](#), the Court of Appeal observed that the Secretary of State has discretion to grant leave to remain outside the Immigration Rules in exceptional circumstances such as where the respondent was compelled to remain in the UK by reason of a court order: *Lakatamia* at [37].

The applicable principles were summarised by the Court of Appeal in *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev [2015] EWCA Civ 1108*, at [36]–[37].

In *Protasov v Derev [2020] EWHC 2884 (Ch)*, the court refused to continue a passport order against a Russian national where an outstanding disclosure issue was not of such gravity as to justify its continuation, the relief sought seemed targeted more towards compliance with any future orders that might be made, and the applicant had failed to show that there was a real risk that he would leave the jurisdiction.

11. - Proceedings Against the Crown

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- 15-49** Where a claimant brings civil proceedings against the Crown, and applies for an interim remedy in the form of an interlocutory injunction, special considerations arise.

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(a) - Senior Courts Act 1981 s.37 and Crown Proceedings Act 1947 s.21

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(a) - Senior Courts Act 1981 s.37 and Crown Proceedings Act 1947 s.21

15-50

Section 37(1) of the Senior Courts Act 1981 states that the High Court may by order, whether interlocutory or final, grant an injunction “in all cases in which it appears to the Court to be just to do so”. However, subss.(1) and (2) of s.21 of the Crown Proceedings Act 1947 restricts the circumstances in which injunctions may be granted, respectively, “against the Crown” and “against an officer of the Crown” in “civil proceedings” (as defined in s.23(2) of that Act). Sub-section (1) states that no injunction shall be granted in any civil proceedings “against the Crown”, but provides that the court may in lieu thereof make a declaratory order. Sub-section (2) states that no injunction shall be granted in any civil proceedings “against an officer of the Crown” if the effect of doing so would be “to give any relief against the Crown that could not have been obtained in proceedings against the Crown”.

In broad terms, s.21 prevents an injunction being granted (in the exercise of the court’s powers under s.37(1)) in those situations where, prior to the 1947 Act, no injunctive relief could be obtained. The construction and application of s.21(2) has occasioned some difficulty. One particular question which has arisen is whether s.31 of the Senior Courts Act 1981 (Application for judicial review) on its true construction confers a jurisdiction which did not exist before 1981 (and which therefore did not exist before 1947) to grant injunctions against the Crown. Further, problems have arisen because of doubts as to precisely the circumstances in which, before the 1947 Act, injunctions would lie and which, therefore, were not caught by the restriction imposed on s.37(1) by s.21(2).

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(b) - Judicial review proceedings against Crown

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11. - Proceedings Against the Crown

(b) - Judicial review proceedings against Crown

15-51

In *Factortame Ltd v Secretary of State for Transport [1990] 2 A.C. 85, HL*, the applicants brought judicial review proceedings against “the Crown”, that is to say, against a Secretary of State in his capacity as an officer representing the Crown. The court decided that a substantive question should be referred to the European Court of Justice for a preliminary ruling under the EC Treaty (at the time the appropriate article was art.177). The question then arose as to whether the applicants were entitled to interim relief (in the form of a mandatory injunction) pending the outcome of the reference. In the proceedings in a Divisional Court (where interim relief against the Crown was granted) and the Court of Appeal (where the Crown’s appeal was allowed) (for both judgments, see [1989] 2 C.M.L.R. 353), the Solicitor-General accepted that, in the light of *R. v Licensing Authority Ex p. Smith Kline & French Laboratories (No.2) [1990] 1 Q.B. 574*, CA, it was not open to him to argue that, although the court has no jurisdiction to grant an interim injunction against the Crown in proceedings begun by writ (see *Crown Proceedings Act 1947 s.21*), it has such a jurisdiction on an application for judicial review. The point was kept open for argument in the House of Lords where Lord Bridge said that the views expressed in the Licensing Authority case were erroneous. It would seem that this conclusion did not form part of the ratio decidendi of the Factortame case as Lord Bridge appears to have regarded it merely as an additional reason for holding that the order made by the Divisional Court in the instant case could not be supported.

The House of Lords returned to the question in the case of In *re M. [1994] 1 A.C. 377, HL* (on appeal from *M. v Home Office [1992] Q.B. 270, CA*). The House held (1) that, even prior to the 1947 Act an action could be brought against an officer of the Crown personally in respect of a tort committed or authorised by them although they had been acting in their official capacity, and they had not been entitled to plead Crown immunity, (2) that injunctions, including, interlocutory injunctions, could be granted and that s.21 of the 1947 Act did not prevent an injunction being granted in a situation in which it could have been granted prior to that Act, (3) that, historically, orders of prohibition and mandamus had regularly been granted against the Crown or officers of the Crown acting in their official capacity, and (4) that s.31(2) of the 1981 Act, on its natural interpretation, gave jurisdiction to the court on applications for judicial review to grant injunctions, including interim injunctions, against ministers and other officers of the Crown, although that jurisdiction should only be exercised in limited circumstances. In *R. v Ministry of Agriculture Fisheries and Food, Ex p. Monsanto Plc [1999] Q.B. 1161, D.C.*, a company applied in judicial review proceedings for a stay pending a decision of the ECJ of the operation of decisions made by the Ministry having the effect of permitting their competitors from marketing herbicides over which their patents had expired. It was common ground that the court had power to grant such interim relief and that in exercising its discretion the court must have regard to the principles enunciated in the *American Cyanamid Co* case, but it was a matter of contention as to precisely how those principles should be applied in a public law case. A Divisional Court said that the principles had to be applied in the context of the particular public law questions to which the judicial review proceedings gave rise. Generally, speaking, judicial review proceedings are intended to provide swift relief against abuse of executive power. Such proceedings are neither intended for, nor well suited to, inhibiting commercial activity, particularly over an indefinite, substantial period of time. Before 1999, the relevant rules of court provided that, on an application for judicial review, the court could grant “such interim relief as could be granted in an action” (RSC Ord.53, r.3(10)). CPR Pt 54 contains rules for claims for judicial review. Rule 54.6 states that the claim form must state (amongst other things) any remedy including any interim remedy claimed.

For information on procedure for granting a claim for interim relief in judicial review proceedings, see commentary following CPR r.54.3 and r.54.6. An injunction issued in judicial review proceedings is enforceable by contempt, even against a minister, but (1) the appropriate course is first to require the Secretary of State to explain the default; and (2) committal proceedings might

not be necessary where such direction produces an apology, full explanation and belated compliance with the order: *Mohammed v Secretary of State for the Home Department [2021] EWHC 240 (Admin); [2021] A.C.D. 44* (Chamberlain J).

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(c) - Proceedings involving reference to European Court of Justice

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(c) - Proceedings involving reference to European Court of Justice

15-52

References to the ECJ are no longer possible post Brexit: [European Union \(Withdrawal\) Act 2018 s.6](#). Part 68 of the [Civil Procedure Rules 1998](#), which previously provided the procedure for such references, was revoked by [reg.14 of the Civil Procedure Rules 1998 \(Amendment\) \(EU Exit\) Regulations 2019 \(SI 2019/521\)](#) with effect from the end of the transition period (31 December 2020). Proceedings which were already stayed immediately before Exit Day (31 January 2020) in accordance with [r.68.5](#) shall continue to be stayed unless or until the court directs otherwise: [reg.25](#).

In *Factortame Ltd v Secretary of State for Transport*, op. cit., the House of Lords held that, as a matter of English law, the courts have no jurisdiction to grant interim relief in terms which would involve either overturning an English statute in advance of any decision by the European Court of Justice that the statute infringed Community law or (as has been explained above) granting an injunction against the Crown. It then became necessary to seek a preliminary ruling from the ECJ as to whether Community law itself invested the English court with such jurisdiction. The applicants contended that, although they may not have been entitled under domestic law to interim injunctive relief pending the outcome of the reference to the ECJ of the substantive question, it was a requirement of Community law that such relief should be available to them.

On this reference, the ECJ held that the English court had jurisdiction under Community law, in the circumstances postulated, to grant interim relief for the protection of directly enforceable rights under Community law and that no limitation on the court's jurisdiction imposed by any rule of national law could stand as the sole obstacle to preclude the grant of such relief (see *R. v Secretary of State for Transport, Ex p. Factortame Ltd (Case C-213/89) [1990] 2 A.C. 85; [1990] 3 C.M.L.R. 1, ECJ*). In the light of this ruling as to jurisdiction, the House of Lords applied the guidelines derived from *American Cyanamid Co v Ethicon Ltd [1975] A.C. 396, HL*, and decided that interim injunctive relief against the Crown should be granted to the applicants (*R. v Secretary of State for Transport, Ex p. Factortame Ltd (No.2) [1991] 1 A.C. 603, HL*). Lord Goff said that he doubted whether there is any rule that a party challenging the validity of a law under Community law must (to resist an application for an interim injunction against him, or to obtain an interim injunction restraining the enforcement of the law) show a strong *prima facie* case that the law is invalid. In the end, the matter is one for the discretion of the court, taking into account all the circumstances of the case. Even so, the court should not restrain a public authority by interim injunction from enforcing an apparently authentic law unless it is satisfied, having regard to all the circumstances, that the challenge to the validity of the law is, *prima facie*, so firmly based as to justify so exceptional a course being taken.

The House of Lords held that in applying the *American Cyanamid Co* guidelines to these cases the position was as follows:

- (1)the balance of convenience was likely to be the deciding factor as there was unlikely to be an adequate remedy in damages available to either side;
- (2)generally, the court should not restrain a public authority from enforcing apparently authentic national legislation unless the court was satisfied, having regard to all the circumstances, that the challenge to the law is, *prima facie*, so firmly based as to justify so exceptional a course being taken; but it is always a matter of discretion; and
- (3)on the facts of the instant case, the applicants' challenge was, *prima facie*, a strong one and the balance of convenience came down in favour of the grant of the interim injunction sought.

It should be noted that the effect of the ruling on interim relief given by the ECJ in the Factortame case is not confined to proceedings against the Crown arising on judicial review, or, indeed, to proceedings involving the Crown at all, but extends to proceedings to which the restriction on the granting of injunctive relief found in [s.21 of the Crown Proceedings Act 1947](#) (supra) might apply. Consequently, if in proceedings commenced other than by a claim form for judicial review against the Crown a question of whether a statute infringed Community law was referred to the ECJ the English court, though lacking jurisdiction under domestic law, would have jurisdiction under Community law to grant interim relief for the protection of directly enforceable rights under Community law.

In the Factortame case, the claimant challenged domestic legislation on the ground that it contravened European Community law. The relevant European Community law itself was not challenged. Cases may arise in which, in English proceedings, the validity of EU legislation (such as a Directive or Regulation) is challenged and an application is made for an interim injunction, suspending the operation of the legislation pending a ruling by the ECJ on the issue of validity. The ECJ has ruled that the national court should only grant interim relief suspending the operation of the measure pending the preliminary ruling of the ECJ if they are satisfied that there are serious doubts as to its validity and there is an urgent need for interim relief in order to avoid serious and irreparable damage to the party seeking interim relief (*Atlanta Fruchthandelsgesellschaft mbH v Bundesamt für Ernährung und Forstwirtschaft* (C-465/93) [1996] All E.R. (E.C.) 31; [1995] E.C.R. I-3761 and see *R. (ABNA Ltd) v Secretary of State for Health* [2003] EWHC 2420; [2004] Eu. L.R. 88).

Where domestic legislation implementing EU legislation is challenged on the indirect ground that the EU legislation is invalid, and the question of the validity of the latter is referred to the ECJ for a ruling, it is likely that an application will be made for interim relief suspending the effect of the domestic legislation until the ruling is given. It could be argued that, in such circumstances, the application would be determined in accordance with the *American Cyanamid Co* guidelines as applied in the Factortame case. On the other hand, it could be argued that the matter should be determined in accordance with the ruling of the ECJ in the Atlanta case. Different views were expressed on this matter in the judgments given by the Court of Appeal and by the House of Lords in *R. v Secretary of State for Health, Ex p. Imperial Tobacco Ltd* [2001] 1 W.L.R. 127, HL (see commentary following [CPR r.54.3](#)).

(d) - Undertakings by the Crown and public bodies

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11. - Proceedings Against the Crown

(d) - Undertakings by the Crown and public bodies

15-53

Before the [Crown Proceedings Act 1947](#), the Crown could obtain an interlocutory injunction without giving the usual undertakings as to damages (*Secretary of State for War v Cope [1919] 2 Ch. 339*), apparently on the ground that it was not liable in tort. The question whether the courts would alter their practice in this respect in the light of the changes to Crown immunity brought about by the [1947 Act](#) was not authoritatively answered until the decision of the House of Lords in *F. Hoffmann-La Roche & Co A.G. v Secretary of State for Trade and Industry [1975] A.C. 295, HL; [1974] 2 All E.R. 1128, HL*. In this case it was decided that a distinction should be drawn between actions brought by the Crown (1) to enforce or protect its proprietary or contractual rights, and (2) to restrain a subject from breaking a law where the breach would be harmful to the public or a section of it. In an action of the first type the Crown should be in no different a position from the ordinary citizen and so should be required to give an undertaking in the usual way. However, in an action of the second type, a law enforcement action, different principles apply.

Law enforcement proceedings are of two types, so a further distinction has to be drawn. First, there is the relator action in which, once the Attorney-General's consent has been obtained, the relator stands in the shoes of the claimant in an ordinary suit between subject and subject (in practice, often the relator will be a public authority of some kind). In these circumstances, an undertaking in damages is required from the relator but not from the Attorney-General. The second is a law enforcement action brought by the Crown, for example (as was the position in the *Hoffmann-La Roche* case itself), an action brought under a statute which provides expressly for enforcement of a provision of the statute by civil proceedings by the Crown in the discharge of the Crown's duty to the public at large to secure that the law is not flouted. The House of Lords held that, in these circumstances (i.e. where the Crown sues without a relator), there was no rigid rule that the Crown should never be required to give the usual undertaking. However, the practice of exacting an undertaking from the Crown ought not to be applied as a matter of course (as it should be in action between subject and subject, in relator actions, and in actions by the Crown to enforce or to protect its proprietary or contractual rights). On the contrary the propriety of requiring such an undertaking from the Crown as a condition for the granting of an interlocutory injunction should be considered in the light of the particular circumstances of the case. Indeed, an undertaking should not be a condition unless the party injuncted can show very good reason why it should be. In cases where the defence is that the law sought to be enforced by the Crown is invalid (and not merely that the defendant's actions are not prohibited by law) it is for the defence to show a strong *prima facie* case and even then it may still be inappropriate for the court to impose an undertaking as a condition (see above, at p.367, per Lord Diplock).

These constraints have made it possible to assert that when the Crown is seeking an interlocutory injunction in an action in which it is attempting to enforce the law "the usual practice is that no undertaking is required" (*Director General of Fair Trading v Tobyward Ltd [1989] 1 W.L.R. 517; [1989] 2 All E.R. 266*, at p.525 and p.272, per Hoffmann J). The underlying principle seems to be that where the Crown, in the discharge of its duty to the public at large to secure that the law is not flouted, attempts to enforce the law by bringing civil proceedings it should not have to incur legal liability to the person alleged to be in breach of the law should those proceedings fail, particularly where the Crown had no alternative legal avenues open to it to secure compliance with the law. However, there is no rule of law that an emanation of the Crown is exempt from giving a cross-undertaking in damages in law enforcement proceedings. The court has a discretion, and the presence or absence of undertakings is a matter to be taken into account by the court when considering the balance of convenience (*Customs and Excise Commissioners v Anchor Foods Ltd [1999] 1 W.L.R. 1139; [1999] 3 All E.R. 268* (Neuberger J)). The relevant law was summarised in *Securities and Investments Board v Lloyd-Wright [1993] 4 All E.R. 210* (Morritt J), where a freezing injunction was granted to the claimants in proceedings brought under the [Financial Services Act 1986](#) and the defendant's application for a cross-undertaking in damages was refused. The remedies sought in the proceedings were provided by the [1986 Act](#) for the benefit of the public at large, or those

who suffered from infringements of the legislation, and was a matter of law enforcement. In *Customs and Excise Commissioners v Anchor Foods Ltd*, op. cit., a freezing injunction was granted to the claimants in proceedings to recover unpaid customs duty provided a cross-undertaking in damages was given. Neuberger J said that, on the spectrum of types of cases where the Crown seeks relief, this was neither at the law enforcement extreme nor was it at the other proprietary right enforcement extreme, though it was significantly nearer the former than the latter.

The exercise by the Attorney-General of the Crown's power to act as protector of charity has much in common with law enforcement proceedings. Because the Crown in not asserting any proprietary or contractual claim of its own, an undertaking as to damages should not be demanded as of course but may be required in an appropriate case (see e.g. *Attorney-General v Wright [1988] 1 W.L.R. 164; [1987] 3 All E.R. 579*, where an undertaking limited to the funds of a charity were imposed on the Crown in a case where it sought to recover property and asserted proprietary rights on behalf of the charity).

In the *Hoffmann-La Roche* case, the House of Lords was concerned only with the position of the Crown in law enforcement actions. It was not concerned with the position of local authorities which have the function of enforcing the law in their districts in the public interest or other public authorities. Whether the same principle should be held to apply in the case of public authorities other than the Crown charged with the enforcement of the law fell to be considered by the House in *Kirklees Metropolitan BC v Wickes Building Supplies Ltd [1993] A.C. 227, HL; [1992] 3 All E.R. 717, HL*, where a local authority brought an action for an injunction to restrain a trader from persistently breaching the Sunday trading laws. The House held (reversing the Court of Appeal and following the reasoning in the *Hoffmann-La Roche* case) that the court had a discretion to grant the local authority an interlocutory injunction without requiring it to give an undertaking in damages and that it should be exercised in favour of the authority. It should be noted that, in this case (unlike the *Hoffmann-La Roche* case), proceedings by way of injunction were not the only form of proceedings open to the local authority but, in the circumstances, no other proceedings would have been effective to enforce the law (cf., the earlier case of *Rochdale Borough Council v Anders [1988] 3 All E.R. 490*, where the judge held that an undertaking by the local authority should be a condition). Where a local authority takes civil proceedings for law enforcement purposes there is no requirement for an undertaking in damages unless it can be shown that special circumstances justify it, and even then it remains a matter for the court's discretion (*Coventry City Council v Finnie, (1997) 29 H.L.R. 658, D.C.*).

It is conceivable that in law enforcement proceedings, brought by the Crown (without a relator) or by a public authority of some kind, the defendant may argue by way of defence that the national law sought to be enforced is contrary to Community law. The resolution of this issue may involve a reference to the European Court of Justice and considerable delay in the ultimate disposal of the case. In *Kirklees Metropolitan Borough Council v Wickes Building Supplies Ltd [1993] A.C. 227, HL; [1992] 3 All E.R. 717, HL*, the House of Lords rejected the argument that where in such proceedings the claimants are granted an interlocutory injunction they should under Community law be required to give an undertaking to protect any Community law right of direct effect which might possibly be affected. However, the House held that the question of undertakings in these circumstances is not simply a question of procedure to be left to the national law. (For the reasons given by the House for not requiring undertakings from the claimant local authority in this case, see above, at p.282 and pp.734–735, per Lord Goff.)

12. - Injunctions Against Persons Unknown

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A. - Interim Injunctions

12. - Injunctions Against Persons Unknown

- 15-53. 1** Injunctive relief may be sought even though a defendant is not named, but merely described, in the claim form. The description used must be sufficiently certain as to identify both those who are included and those who are not (see *Bloomsbury Publishing Group Ltd v News Group Newspapers Ltd* [2003] EWHC 1205 (Ch); [2003] 1 W.L.R. 1633, Sir Andrew Morritt VC). The categories of unnamed defendant so far identified are: (1) where there is a specific defendant whose name is not known but who can be described by reference to an alias, a photograph or some other descriptor that enables all concerned to know who is the intended party; (2) where there is a specific group or class of defendants, some or all of whom (because of the fluctuating nature of the group or class or for some other reason) are unknown, they can be defined by reference to their association with that group or class; (3) where the identity of the defendant is defined by reference to that defendant's future act of infringement, the defendant cannot be immediately identified, and their status as a defendant is established by the future act or infringement (*Vastint Leeds BV v Persons Unknown* [2018] EWHC 2456 (Ch)) (Marcus Smith J). (As to the position of injunctions binding so-called newcomers, see the commentary below.)

In these cases, the description of the defendant should not involve a legal conclusion, such as is implicit in the use of the word "trespass" and (b) it is undesirable to use a description that depends on the subjective intention of the individual (such as "intending to trespass"), since such a description may not be known to the outside world (and in particular the claimant), and is susceptible of change: *Hampshire Waste Services v Persons Unknown* [2003] EWHC 1738 (Ch); [2004] Env. L.R. 9, Sir Andrew Morritt VC; *South Cambridgeshire DC v Persons Unknown* [2004] EWCA Civ 1280; [2004] 4 P.L.R. 88, CA.

A freezing injunction can be granted against persons unknown: *CMOC v Persons Unknown* [2017] EWHC 3599 (Comm), Judge Waksman QC. As to applications for injunctions against persons whose identity is unknown under the *Town and Country Planning Act 1990*, see Practice Direction 8A para.20 (para.8APD.20).

The Supreme Court has clarified that, except in evasion of service cases (including concealment of identity in order to evade service) and those cases where alternative method service may be permissible (CPR r.6.15), or service dispensed with (CPR r.6.16), proceedings and the grant of injunctive relief may only be brought against a person unknown if that person is "anonymous but identifiable": this means that it is possible to communicate with that person and identify them as the person described in the claim form and injunction. Where an interim injunction can be enforced against some property, or by notice to third parties who would necessarily be involved in any contempt, the process of enforcement may be sufficient to bring the proceedings to the defendant's notice: *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] UKSC 6; [2019] 1 W.L.R. 1471 at [15] and [25].

In *Canada Goose UK Retail Ltd v Persons Unknown* [2019] EWHC 2459 (QB); [2020] 1 W.L.R. 417 at [59] (upheld on appeal), Nicklin J summarised the principles to be derived from Cameron. Nicklin J emphasised the need to identify persons unknown with sufficient precision, finding that the term "protestor" was not sufficiently precise as it could apply to individuals who had allegedly broken the law and those who were innocent of any arguable wrongdoing. Where defendants can be identified by name or description they ought to be so identified (at [146]–[162]).

Proper consideration must be given to compliance with s.12(3) of the Human Rights Act 1998. See *Canada Goose UK Retail Ltd v Persons Unknown* [2020] EWCA Civ 303; [2020] 1 W.L.R. 2802 at [82].

The court has the power to make "self-identification orders" requiring an anonymous defendant to disclose their name. See para.15-78.1.

Newcomers

15-53. 1.

1 In *Barking and Dagenham LBC v Persons Unknown* [2022] EWCA Civ 13; [2022] 2 W.L.R. 846; [2022] 4 All E.R. 51, Sir Geoffrey Vos MR clarified that injunctions against persons unknown, whether interim or final, can bind newcomers who become aware of the order made and “make themselves” a party by violating such order. Statements to the contrary in *Canada Goose UK Retail Ltd v Persons Unknown* [2020] EWCA Civ 303; [2020] 1 W.L.R. 2802, at [89]–[92], were inconsistent with earlier decisions of the Court of Appeal and were not to be regarded as good law. Such an order is effectively made against the world (contra mundum). The classic example was the order in *Venables v News Group Newspapers Ltd* [2001] Fam 430, preventing the disclosure of a notorious criminal’s new identity. In *South Cambridgeshire DC v Gammell* [2005] EWCA Civ 1429; [2006] 1 W.L.R. 658; *The Times*, 3 November 2005, Sir Anthony Clarke MR explained that a newcomer automatically makes themselves a party to the proceedings by their knowing violation of such an injunction.

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13. - Costs of Injunction Proceedings

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Interim Remedies

A. - Interim Injunctions

13. - Costs of Injunction Proceedings

15-53. 2 Costs will be reserved at any hearing without notice to the respondent. Equally costs will usually be reserved where an injunction is granted on the basis of the balance of convenience. In *Picnic at Ascot v Kalus Derigs [2001] F.S.R. 2*, Neuberger J set out the following principles:

1. In a case without any other special factors, where an applicant obtains an interim injunction on the basis of the balance of convenience, the court should normally reserve costs since there has been no successful party: *Richardson v Desquenne et Giral UK Ltd [1999] 11 WLUK 700*, 23 November 1999, unrep., CA.
2. It is undesirable that there should be inconsistency of approach.
3. A respondent who accedes to the grant of interim relief should not for that reason alone be subject to a more disadvantageous order than if they had fought and lost.
4. There may, however, be cases where the balance of convenience is so clear and the outcome of the hearing so plain that an order for costs should be made against the respondent for wasting time and money in fighting the application (whether or not they eventually concede).
5. The court should, however, bear in mind that the case may never go to trial.
6. The court should adopt a realistic attitude where it is fair and possible to do so as to the likelihood of trial. At one end of the spectrum costs were reserved in *Richardson* (above) where an expedited trial was ordered within five weeks. At the other, costs might be ordered against a respondent where the substantive merits were plainly in the applicant's favour and the case was unlikely to go to trial.
7. Caution is, however, needed in taking the substantive merits into account at the interim stage save where the view on merits is based on incontrovertible facts or an agreed construction of a document.
8. It may be easier for a respondent to recover costs of successfully resisting interim relief. Either way the court should ask: (a) Would it be unfair for the party successful at the interim hearing to have their costs of the application even if they lost at trial? and (b) Where relief is granted, was the opposition to the application justified? Or where relief is refused, was the launch of the application justified?

The Court of Appeal reaffirmed the authority of Richardson (above) and Picnic at Ascot (above), and rejected a submission that the law had moved in favour of a “pay now” approach, in *Melford Capital Partners (Holdings) LLP v Wingfield Digby [2020] EWCA Civ 1647; [2021] W.L.R. 1553; [2020] Costs L.R. 1759*.

It is more likely that an immediate costs order will be made where relief is not granted on the basis of holding the ring until trial: *Koza Ltd v Koza Altin Islemeleri AS [2020] EWCA Civ 1263; [2020] Costs L.R. 1479*, Popplewell LJ. (See, generally, para. 15-17 and following.) Further, once an injunction has been granted, the costs of unsuccessfully rerunning the same arguments on appeal are likely to be ordered against the appellant: *Koza*.

Equally, a freezing or a search order granted on the basis of an enhanced view as to the merits might justify an immediate costs order: *Bravo v Amerisur Resources Plc [2020] EWHC 2279 (QB); [2020] Costs L.R. 1329* (Martin Spencer J).

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1. - Introduction

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Section 15 - Interim Remedies

Interim Remedies

B. - Freezing Injunctions

1. - Introduction

- 15-54** A “freezing injunction” is defined by r.25.1(1)(f) as an order restraining a party from (i) removing assets from the jurisdiction, or (ii) dealing with any assets whether located within the jurisdiction or not. The rule draws no distinction between cases in which (a) the applicant does not assert a proprietary claim over the assets frozen by the injunction, and (b) the applicant does assert such a claim.

No proprietary claim

Traditionally an unsecured creditor having no proprietary claim could not obtain an injunction restraining a debtor from removing their property from the jurisdiction or otherwise disposing of or dealing with their property. However, in *Mareva Compagnia Naviera SA v International Bulk Carriers SA (“The Mareva”)* [1980] 1 All E.R. 213; [1975] 2 Lloyd’s Rep. 509, CA, the Court of Appeal held that, in appropriate circumstances, an injunction could be granted freezing assets up to a value sufficient to satisfy the claimant’s claim. Before the CPR, injunctions freezing assets over which the applicant asserted no proprietary claim were known as “Mareva injunctions” following the landmark case. This extended form of relief enables the court to grant an interim injunction restraining the respondent from disposing of, or even merely dealing with, their assets, being assets over which the applicant asserts no proprietary claim in order to prevent such assets being dissipated and any judgment rendered academic.

One of the hazards of litigation is that even if a judgment is obtained, there may be no assets against which the claimant can seek to enforce the judgment. By a freezing injunction, a defendant may be prevented from artificially creating such a situation by dissipating his assets and thwarting in advance any orders which the court may make at trial: *Derby & Co Ltd v Weldon (Nos 3 and 4)* [1990] Ch. 65 at 76, CA, per Lord Donaldson MR; *Atlas Maritime Co SA v Avalon Maritime Ltd (No.3) (“The Coral Rose”)* [1991] 1 W.L.R. 917 at 929, per Nicholls LJ.

Proprietary claims

In an action in which the claimant seeks to recover their own property, the court can grant an interim injunction restraining the disposal of any property over which the claimant asserts a proprietary claim. There is a clear distinction between relief where a claimant asserts that the assets in question belong to them and that dealings with them should be restrained in order to protect their proprietary rights and freezing injunctions granted where the claimant does not claim any interest in the assets and “... seeks an inhibition of dealings with them simply in order to keep them available for a possible future execution to satisfy an unconnected claim” (*Mercedes-Benz AG v Leiduck* [1996] 1 A.C. 284; [1995] 3 W.L.R. 718; [1995] 3 All E.R. 929 at 939, PC, per Lord Mustill) and the distinction is brought out in the cases when it is necessary to do so (e.g. *A v C (Note)* [1981] Q.B. 956; [1980] 2 All E.R. 347, *Bankers Trust Co v Shapira* [1980] 1 W.L.R. 1274; [1980] 3 All E.R. 353, CA and *AJ Bekhor & Co Ltd v Bilton* [1981] Q.B. 923; [1981] 2 All E.R. 565 at 573, CA, per Ackner LJ).

Jurisdiction

The jurisdiction to make a freezing injunction was recognised, but not codified, by [s.37\(3\) of the Senior Courts Act 1981](#) which clarified that the power of the High Court to grant:

“... an interlocutory injunction restraining a party ... from removing from the jurisdiction of the High Court, or otherwise dealing with, assets located within that jurisdiction shall be exercisable in cases where that party is, as well as in cases where he is not domiciled, resident or present within that jurisdiction.”

In fact, freezing injunctions are not limited to assets within the jurisdiction and the court can in appropriate cases make a worldwide freezing injunction: see para.[15-81](#) and following.

Practice

If a freezing injunction is to be efficacious, it must usually be granted swiftly and without notice to the respondent; often before substantive proceedings have been issued. If granted unjustly, a freezing injunction may do incalculable damage to the defendant: *Third Chandris Shipping Corp v Unimarine SA* [1979] Q.B. 645; [1979] 2 All E.R. 972, at 653 and 978, CA, per Mustill J. In many respects the development of the law (both substantive and procedural) has reflected the need to adjust the competing claims of efficacy and justice.

The challenges in these cases include: (i) how to form the necessary judgment at a time when every fact is likely to be hotly disputed; (ii) how to frame an order which, on the one hand protects the applicant against the manipulations of a respondent who may prove to be unscrupulous, without strangling the respondent's working capital at the instance of an applicant who might themselves prove to be unscrupulous; (iii) how to choose ancillary orders which are effective without being oppressive; (iv) how to protect the position of third parties (in particular, wholly innocent third parties) with some interest in the frozen assets; and (v) whether to extract a cross-undertaking in damages.

For commentary on the relevant practice and procedure, see Vol.1 para.[25.1.25](#).

Example order

An example of a freezing injunction is annexed to Practice Direction 25A (Interim Injunctions), supplementing [CPR Pt 25](#) (see [F.I. Draft Freezing Injunction under Miscellaneous Forms](#) in the online Civil Procedure Forms Volume). A perusal of the detailed terms of that example, including those imposing restraints and duties on the respondent, on third parties and on the applicant (and the exceptions thereto), gives a good indication of particular practical problems which the courts have had to settle. Indeed, many of the provisions in the example can be traced to particular authoritative decisions of the Court of Appeal and House of Lords; see further Vol.1, para.[25.1.25.7](#). The example order will need to be tailored to fit the circumstances of the individual case, but the applicant must draw any departures from it to the attention of the judge at the without notice hearing.

In the example freezing injunction annexed to Practice Direction 25A, the respondent is restrained from removing, disposing of, dealing with, or diminishing the value of their “assets”, whether or not they are in their own name, and whether they are solely or jointly owned. In a given case, whether the form of words used to define “assets” is as given in the example or is in some other more elaborate form, determining what is and what is not an “asset” caught by the injunction is a matter of legal analysis and construction of the order as actually made. See further Vol.1 para.[25.1.25.7](#) and authorities referred to there.

2. - Nature and Scope of Power—Generally

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B. - Freezing Injunctions

2. - Nature and Scope of Power—Generally

15-55

The nature of this legal power, the purposes of an order made under it, and the assets that may be covered by an order, have been explained in numerous cases; see e.g. *Fourie v Le Roux [2007] UKHL 1; [2007] 1 W.L.R. 320, HL*, per Lord Scott at para.25 et seq, and the detailed account by Aikens J in *C. Inc Plc v L. [2001] 2 Lloyd's Rep. 459*.

In giving the lead judgment of the Court of Appeal in *JSC BTA Bank v Ablyazov [2013] EWCA Civ 928; [2014] 1 Lloyd's Rep. 195, CA*, Beatson LJ explained (para.34) that there are three legal principles “in play” as to the approach of the court to the exercise of the jurisdiction to make freezing orders; they are (1) that the purpose of such an order is to stop the injuncted defendant dissipating or disposing of property which could be the subject of enforcement if the claimant goes on to win the case it has brought, and not to give the claimant security for his claim (enforcement principle), (2) that the jurisdiction should be exercised in a flexible and adaptable manner so as to be able to deal with new situations and new ways used by “sophisticated and wily operators” to make themselves immune to the courts’ orders or deliberately to thwart the effective enforcement of those orders (principle of flexibility), and (3) that, because of the penal consequences of breaching a freezing order and the need of the defendant to know where he, she or it stands, such orders should be clear and unequivocal, and should be strictly construed (principle of strict construction). The first is the primary principle. There is a certain tension between the principles. However, on the claimant bank’s appeal to the Supreme Court in this case, it was stated that the “flexibility principle” has no role in the construction of a freezing order, as the court’s task is to make new orders to meet new avoidance measures as they emerge, rather than to interpret existing orders in an expansive way (*JSC BTA Bank v Ablyazov (No 10) [2015] 1 W.L.R. 4754; [2015] UKSC 64*, at [18]).

The freezing injunction is a remedy which exists for the purpose of restraining a judgment debtor, or potential judgment debtor, from committing the abuse of dissipating or hiding assets that the judgment creditor might lawfully attach for the purpose of satisfying a judgment given, or likely to be given, in his favour (*A. v C. (Note) [1981] Q.B. 956*). It is an interim remedy granted to protect the efficacy of court proceedings (domestic or foreign), in particular, to prevent a defendant dissipating their assets with the intention or effect of frustrating enforcement of a prospective judgment. It is not granted to give a claimant advance security for their claim, though it may have that effect. The claimant applying for such a remedy cannot of course guarantee that they will recover judgment, but they must at least point to proceedings already brought or about to be brought so as to show where and on what basis they expect to recover judgment (*Fourie v Le Roux*, op. cit., at [3] per Lord Bingham). It is difficult to visualise a case where the grant of a freezing order, made without notice, could be said to be properly made in the absence of any formulation of the case for substantive relief that the applicant for the order intended to institute (above at [35] per Lord Scott). Assets up to a value sufficient to satisfy the claimant’s claim in the action, should they be successful in obtaining judgment, may be “frozen” by such an injunction.

A freezing injunction (though made before substantive proceedings have been instituted) is of immediate effect. It takes effect against the defendant in personam and is not an attachment of the assets. It has its legal operation, not on the property itself, but on the defendant who is subject to the jurisdiction of the court. It restrains the respondent from dealing with his assets, but it does not prevent him from borrowing money, thereby increasing his overall indebtedness (*Cantor Index Ltd v Lister [2002] C.P. Rep. 25* (Neuberger J); *Anglo Eastern Trust Ltd v Kermanshahchi [2002] EWHC 1702 (Ch)*). It gives the applicant no proprietary rights in the assets seized and no advantage over other creditors of the defendant (*Cretanor Maritime Co Ltd v Irish Marine Management Ltd [1978] 1 W.L.R. 966; [1978] 3 All E.R. 164, CA, Iraqi Ministry of Defence v Arcepex Shipping Co [1981] Q.B. 65; [1980] 1 All E.R. 480, Derby & Co Ltd v Weldon (No.2) [1990] Ch. 65; sub nom. Derby & Co Ltd Weldon (No.2) [1989] 1 All E.R. 1002, CA, and A.J. Bekhor & Co Ltd v Bilton [1981] Q.B. 923; [1981] 2 All E.R. 565, CA*). The purpose of this particular form of injunction is not to provide a claimant with security for its claim but to restrain a defendant from evading justice by disposing of assets otherwise than in the ordinary course of business so as to make itself judgment proof; a claimant has no

interest in the assets the subject of a freezing injunction (*Gangway Ltd v Caledonian Park Investments (Jersey) Ltd [2001] 2 Lloyd's Rep. 715* (Colman J); *Flightline Ltd v Edwards [2003] EWCA Civ; [2003] 1 W.L.R. 1200, CA* (agreement to discharge order on terms as to deposit of cash giving applicant no security rights)). Further, it is not granted to punish the defendant for his alleged misdeeds, or to enable the claimant to exert pressure on him to settle the action (*P.C.W. (Underwriting Agencies) Ltd v Dixon [1983] 2 All E.R. 158, CA*), but rather to protect the applicant (*Flightwise Travel Service Ltd v Gill [2003] EWHC 3082 (Ch)*). If the claimant obtains judgment, a freezing injunction merely ensures that once the mechanisms of enforcement are set in motion, there is something physically available upon which they can work (*Mercedes-Benz A.G. v Leiduck [1996] 1 A.C. 284; [1995] 3 All E.R. 929* at 941, PC, per Lord Mustill).

As to the protection afforded defendants by the claimant's undertakings in orders for interim injunctions in the form of freezing orders, see para.15-28 above.

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3. - Jurisdiction

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3. - Jurisdiction

- 15-56 The creation of this form of injunction was a judicial innovation based on the equitable jurisdiction of the High Court.

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(a) - Generally

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3. - Jurisdiction

(a) - Generally

15-57

The remedy has been found to be particularly useful in shipping and commercial cases but is not confined to such proceedings. It may be ordered by the court in aid of a statutory adjudication of a building dispute (*Pynes Three Ltd v Transco Ltd [2005] EWHC 2445 (TCC)*), in respect of a pending or anticipated arbitration reference (Arbitration Act 1996 s.44(2)(e), *The Rena K [1979] Q.B. 377*), or in aid of the enforcement of an arbitration award where it has been converted into a judgment (*Gidrxislme Shipping Co v Tantomar-Transportes Lda [1995] 1 W.L.R. 299; [1994] 4 All E.R. 507*). As to whether such injunctions should contain an “ordinary course of business” exception, see *Mobile Telesystems Finance SA v Nomihold Securities Inc [2011] EWCA Civ 1040; [2012] 1 All E.R. (Comm) 223; [2012] Bus. L.R. 1166, CA*, which described the touchstone as whether the judgment was immediately enforceable or where enforcement is not presently available (for example, where there is a stay of execution, or where an arbitration award is not yet enforceable because the period under r.62.18(9) has not expired).

Generally, the injunction will be an aid to the enforcement of a judgment obtained, or expected to be obtained, in proceedings for substantive relief in a court in England and Wales. However, in certain circumstances, a party who has obtained, or who expects to obtain, a judgment in a foreign court may be granted a freezing injunction by the court. (On the question whether an injunction obtained for the last-mentioned purpose may freeze assets which are outside the jurisdiction as well as those within, see para.15-80 below.)

In cases issued before the end of the transition period following Brexit (i.e. before 11pm on 31 December 2020), art.24(5) of the recast Judgments Regulation (art.22(5) of the former Regulation) (see generally para.15-5 above) states that in proceedings concerned with the enforcement of judgments, the courts of the Member State in which judgment has been or is to be enforced shall have exclusive jurisdiction. A freezing order is not within art.24(5), as that provision is concerned with actual enforcement, and not with steps that might lead to enforcement (*Masri v Consolidated Contractors International Company SAL [2008] EWCA Civ 303; [2008] 2 Lloyd's Rep. 128, CA*). Post-judgment worldwide freezing injunctions should be of limited duration and the judgment creditor should be encouraged to proceed with proper methods of execution (*Republic of Haiti v Duvalier [1990] 1 Q.B. 202; [1989] 1 All E.R. 454* at 465, CA, per Staughton LJ). It is not the function of a freezing order to confer on the judgment debtor a right to preferential treatment over other creditors (*Camdex International Ltd v Bank of Zambia (No.2) [1997] 1 W.L.R. 632, CA*, per Aldous LJ at p.638).

The existence of the jurisdiction to grant freezing injunctions is acknowledged by the *Senior Courts Act 1981* s.37(3) (a provision first enacted in 1981 and not derived from earlier legislation). The explanation for the significance of this is as follows.

The initial doubt whether a freezing injunction could be granted against a defendant resident or domiciled outside the jurisdiction was resolved by the *Senior Courts Act 1981* s.37(3) which states that the power to grant the injunction shall be exercisable in cases where the party to be restrained is, as well as in cases where he is not, domiciled, resident or present within the jurisdiction.

The court has jurisdiction to grant a freezing injunction restraining a party from dealing with his assets located abroad (*Babanaft International Co SA v Bassatne [1990] 1 Ch. 13; [1989] 1 All E.R. 433; [1988] 2 Lloyd's Rep. 435, CA; Republic of Haiti v Duvalier [1990] 1 Q.B. 202; [1989] 2 W.L.R. 261; [1989] 1 All E.R. 456, CA*). Thus a distinction is drawn between “domestic” and “worldwide” freezing injunctions, having effect, respectively, within the jurisdiction and extra-territorially (as to the latter, see further para.15-81 below).

Section 37(3) of the 1981 Act did not, as is sometimes said, turn the common law freezing injunction into a statutory remedy; rather it assumed that the remedy existed, and tacitly indorsed its validity (*Mercedes-Benz AG v Leiduck* [1996] A.C. 284, PC). Where the court has in personam jurisdiction over the person against whom a freezing order is sought the court has jurisdiction to grant it, and the question for the court then becomes (as it does where any injunctive relief is sought) whether, in the light of the restrictions and limitation which have been placed by a combination of judicial precedent and rules of court on the circumstances in which the power should be exercised, relief can properly be granted.

As is the case with ordinary interlocutory injunctions, a freezing injunction may be granted where it appears to the court “to be just and convenient to so do” and it may be granted at any time (Senior Courts Act 1981 s.37(1)); consequently, it may be granted after judgment in aid of execution as well as before judgment.

Where a claimant recovers judgment on a claim and the defendant’s counterclaim is dismissed, and the defendant satisfies the judgment by paying money to the claimant, in the event of the defendant appealing a freezing injunction may be granted by the court or by the Court of Appeal, restraining the claimant from dealing with that money pending the outcome of the appeal on the counterclaim (*Ketchum International Plc v Group Public Relations Holdings Ltd* [1996] 4 All E.R. 374, CA).

If costs are awarded against a party seeking an interlocutory injunction and made payable forthwith, a freezing injunction may be granted against the party in aid of execution of that order, *Jet West Ltd v Haddican* [1992] 1 T.L.R. 487; [1992] 2 All E.R. 545, CA. Where a claimant brings minority shareholders’ proceedings by petition under the Companies Act 1985 s.459, the court has no jurisdiction to grant a freezing injunction unless the petition contains allegations which could be said to constitute a cause of action against the directors (*In re Premier Electronics (GB) Ltd* [2002] B.C.C. 911 (Pumfrey J)).

Where a shareholder (A) who was also a contracting party together with the company in which he held shares (B) and the counter-parties (C) sought a freezing injunction in support of a claim for specific performance by C of obligations owed to B, there was a good arguable case that the principle against reflective loss was not infringed since the principle of company autonomy was recognised and there was no potential prejudice to creditors (*Latin American Investments Ltd v Maroil Trading Inc* [2017] EWHC 1254 (Comm); [2017] 2 C.L.C. 4 (Teare J)).

The court has an inherent jurisdiction to issue a bench warrant for the arrest of a person who failed to comply with a condition of a freezing injunction requiring him to surrender his passport (*Zakharov v White The Times*, 13 November 2003 (Ch); 153 New L.J. 1669 (2003) (Evans J)).

As to the respective powers of judges, Masters, and district judges in relation to the granting of freezing injunctions, see Vol.1, para.25.1.25.1.

(b) - Equitable quia timet freezing order where indemnity claimed

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(b) - Equitable quia timet freezing order where indemnity claimed

15-58

A number of authorities following *Siskina v Distos Cia Naviera SA (The Siskina)* [1979] A.C. 210; [1977] 3 All E.R. 803, HL, established that a freezing injunction cannot be granted as ancillary relief in respect of a merely contingent cause of action, no matter how close to fruition that cause of action may be or how just or convenient it may otherwise be to grant an injunction (see para.15-67 below, and note also para.15-4 above). These authorities were reviewed (obiter) by Rix J in *Rowland v Gulfpac Ltd* [1999] 1 Lloyd's Rep. Bank. 86 (Rix J), a case in which directors sought a declaration to the effect that they were entitled to be indemnified against (at least) the cost of defending claims against them in foreign proceedings. His lordship concluded that there is no right to a freezing order unless there is a pre-existing cause of action. However, equity will give relief where the common law will not, and will even give relief in a situation of quia timet before a loss has actually occurred. But equity will do so only where there is reasonably good, perhaps clear, evidence that a liability will fall on the party entitled to be indemnified and that the person obliged to indemnify clearly proposes to ignore his obligations. This decision was based on *In re Anderson-Berry* [1928] 1 Ch. 290, CA.

In *Papamichael v National Westminster Bank Plc* [2002] 1 Lloyd's Rep. 332 (Judge Chambers Q.C.), a bank defending a claim by a depositor for return of monies, brought a claim for indemnity against a third party and applied for a freezing order and obtained a freezing order against that party. At the hearing of an application to set that order aside, on the basis of the Gulfpac case the bank applied for the grant of a quia timet injunction over the third party's assets, in the event of the judge holding that the freezing order could not stand because no cause of action had yet arisen against him. The judge held that the bank was entitled to the freezing order and to the relief of a quia timet injunction. In doing so the judge said that the temptation to think of the quia timet injunction as a form of "parallel" freezing order should be resisted. It is founded upon the need to protect a party where his right to indemnity or similar relief is contingent upon an event that has not yet occurred. The person responsible for the event may or may not be the person against whom the relief is sought.

See also, *Director of the Assets Recovery Agency v Gerrard* [2007] EWHC 908 (QB); [2008] S.T.C. 1097; [2007] S.T.I. 1275 (Pitchers J); *Director of Assets Recovery Agency v McCormack* [2007] EWHC 908 (QB); [2008] S.T.C. 1097; [2007] S.T.I. 1275 (Pitchers J).

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(c) - County courts

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3. - Jurisdiction

(c) - County courts

- 15-59** With effect from 22 April 2014, the County Court Remedies Regulations 1991 (as amended) were revoked and replaced by the [County Court Remedies Regulations 2014 \(SI 2014/982\)](#). The [2014 Regulations](#) make no provision for freezing injunctions; consequently, that remedy is no longer proscribed and the County Court has unrestricted jurisdiction to make orders for that form of injunctive relief. An application in the County Court for a freezing order must be made to a Circuit Judge.

[Article 3 of the High Court and County Courts Jurisdiction Order 1991](#) provides that the High Court shall have jurisdiction to hear an application for an injunction made in the course of or in anticipation of proceedings in a county court where a county court may not, by virtue of regulations under [s.38\(3\)\(b\)](#) or otherwise, grant an injunction (see Vol.2, para.[9B-933](#)). Thus, the High Court has jurisdiction to grant freezing injunctions incidental to and in support of county court proceedings. In [Schmidt v Wong \(Practice Note\) \[2005\] EWCA Civ 1506; \[2005\] 1 W.L.R. 561, CA](#), the Court of Appeal explained that in order to invoke the High Court's assistance in this respect the claimant in the county court proceedings should make an application to the High Court in accordance with [Pt 23](#) (issuing the application at the RCJ or the appropriate District Registry and paying the higher court fee). The application should be made returnable before a judge. In the body of the application there should appear an explanation along the following lines:

"This application is being made in the course of [in anticipation of] proceedings in the ... County Court pursuant to [article 3 of the High Court and County Courts Jurisdiction Order 1991](#). The County Court has no jurisdiction to grant the relief sought by reason of [regulation 3\(1\) of the County Court Remedies Regulations 1991](#)."

The court explained that the High Court's assistance is not to be invoked by issuing a claim form in the High Court. This is because a freezing injunction cannot be extracted from the claim to which it relates and treated as a free-standing remedy.

[CPR r.27.2\(1\)\(a\)](#) states that [Pt 25](#) does not apply to small claims "except as it relates to interim injunctions".

4. - Third Parties

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4. - Third Parties

- 15-60 As was noted above, in the development of the law and practice of freezing injunctions, difficulties have arisen as to the position of third parties (in particular, wholly innocent third parties) with an interest of some kind in the frozen assets. Where the third party is holder of an asset of the defendant (e.g. his bankers), in many instances, the effectiveness of the injunction will depend as much on the restraining of the actions of the third party as those of the defendant, if not more so. (In an appropriate case, of course, and in accordance with the relevant rules, a third party may be joined as a party to the action.) The applicant is required to give third parties notice of the injunction and to notify them of their right to seek to vary an order (*Guinness Peat Aviation (Belgium) N.V. v Hispania Lineas Aereas SA* [1992] 1 *Lloyd's Rep.* 190) (see further para.15-62 below).

The innocent third party should be told with as much certainty as possible what he is to do or not to do. For example, in the case of a third party bank the claimant should identify the bank account by specifying the branch and heading of the account or any other asset with as much precision as possible or by undertaking to pay the cost involved to request the bank or other party to conduct a search to ascertain whether he holds assets of the defendant.

The claimant should inform the judge of the names of the third parties to whom notice is to be given, but of course he may give information to others on further inquiry.

A claimant cannot possibly be entitled to obtain the advantage of a freezing injunction at the expense of the business rights of an innocent third party merely by proffering him an indemnity. The court must take into account, not merely the balance of convenience and justice as between the claimant and the defendant, but also that balance as between the claimant and the third party. The court will decline to grant the claimant a freezing injunction which will have the effect of substantially interfering with the business rights of a third party in order to secure the ultimate recovery of debts or damages from the defendant with which the third party is in no way concerned. In such circumstances the offer of an indemnity by the claimant is not sufficient (*Galaxia Maritime SA v Mineral Import-Export* [1982] 1 *W.L.R.* 539; [1982] 1 *All E.R.* 796 at 799, CA, per Kerr LJ).

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(a) - Duties of third party

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(a) - Duties of third party

- 15-61** A third party is bound by the terms of the injunction as soon as he has notice of it, even though the defendant himself has not yet been served and does not know that the order has been made. He must do what he reasonably can to preserve the assets otherwise he will be guilty of contempt of court as an act of interference with the course of justice if he assists in their disposal. In particular, a third party who holds assets to the order of the defendant must not do anything which would assist him in the removal or disposal of such assets (*Z Ltd v A-Z and AA-LL [1982] 1 Q.B. 558*; sub nom. *Z. Ltd v A. [1982] 1 All E.R. 556, CA*). These propositions are reflected in the example of an order granting a freezing injunction annexed to Practice Direction 25A (Interim Injunctions), supplementing CPR Pt 25 (see [F.I. Draft Freezing Injunction](#) under [Miscellaneous Forms](#) in the online *Civil Procedure Forms Volume*).

The receipt by a bank of notice of a freezing injunction affecting a customer's account may override the customer's instructions regarding that account and make it unlawful for the bank to honour the customer's cheques. The bank is obliged to comply so far as it possibly can with the court's order; but where the bank has a security interest in the frozen assets it is entitled to exercise its rights in accordance with its own commercial judgment, provided that it is not colluding with or aiding and abetting a breach by the defendant of the freezing order (*Gangway Ltd v Caledonian Park Investments (Jersey) Ltd [2001] 2 Lloyd's Rep. 715*, (Colman J), as explained in *Taylor v Van Dutch Marine Holding Ltd [2017] EWHC 636 (Ch); [2017] 1 W.L.R. 2571; [2017] 4 All E.R. 62* (Mann J), at paras 10, 12 and 17). A bank has no choice but to comply with the court's order but does not assume any responsibility towards the applicant; see also *Customs and Excise Commissioners v Barclays Bank Plc [2006] UKHL 26; [2006] 2 Lloyd's Rep. 327, HL* (bank no liable in negligence for failing to prevent defendant from making unauthorised withdrawals of frozen funds)). See further, "Protection of third party" para.15-62 below.

Where the defendant is owed an asset by a third party (e.g. a pension payable by an employer) *prima facie* the transfer of that asset to the defendant does not amount to assisting in removal or dissipation, but different considerations would arise where it is known that the sole purpose of the transfer is to facilitate dissipation (*The Law Society v Shanks [1988] 1 F.L.R. 504, CA*). Mere notice of the existence of the injunction cannot render it a contempt of court for a third party to make over an asset to the defendant direct. Otherwise it might be impossible, for example, for a debtor with notice to pay over to the defendant even the most trivial sum without seeking the directions of the court. A distinction must be drawn between notice of the injunction on the one hand and notice of a probability that the asset will be disposed of or dealt with in breach of it on the other. Where the evidence demonstrates that a defendant will, if he can, dispose of money owed to him by a third party in breach of a freezing injunction, the court may, with the approval of the third party, order that the money should be paid into court, or into a frozen bank account of the defendant at a bank which has notice of the injunction (*Bank Mellat v Kazmi [1989] 1 Q.B. 541; [1989] 1 All E.R. 925, CA*).

(b) - Protection of third party

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4. - Third Parties

(b) - Protection of third party

- 15-62 Care must be taken to ensure that freezing injunctions do not bear harshly upon innocent third parties. Otherwise, a procedure which was forged to prevent abuse may become an instrument of oppression (*Searose Ltd v Seatrain UK Ltd [1981] 1 W.L.R. 894*, at 897).

As to the effects of freezing injunctions on third parties, especially where the assets are held out of the jurisdiction, note Commercial Court Guide para.F14.9 (see Vol.2, para.2A-98), and *Bank of China v NBM LLC [2002] EWCA Civ 1933; [2002] 1 W.L.R. 844, CA*.

Provisions designed to protect third parties are included in the example of an order for a freezing injunction annexed to the Practice Direction. Lack of proper consideration of such provisions was criticised by the Court of Appeal in *Ghoth v Ghoth [1992] 2 All E.R. 920, CA*.

In *Z Ltd v A-Z and AA-LL [1982] 1 Q.B. 558*; sub nom. *Z. Ltd v A. [1982] 1 All E.R. 556, CA*, the Court of Appeal laid down guidelines for the protection of third parties (in particular, of banks). Routine banking transactions should not be interfered with by a freezing injunction unless an exceptionally strong case that the principles of banking law were inapplicable (*Lewis & Peat (Produce) Ltd v Almatu Properties Ltd, The Times, 14 May 1992, CA*). A bank holding funds which become the subject of a freezing injunction is entitled to a variation of the injunction so as to enable it to exercise any right of set-off it has in connection with facilities granted to the customer's account before it receives notice of the injunction and such right of set-off can be exercised in respect of interest accruing in the future as well as interest already accrued, and indeed a freezing injunction served on a bank should ordinarily contain such a proviso to avoid the need for an application to vary it (*Oceanica Castelana Armadora SA v Mineralimportexport, The Theotokos [1983] 1 W.L.R. 1294; [1983] 2 All E.R. 65*). Accordingly, in the example of an order granting a freezing injunction annexed to Practice Direction 25A (Interim Injunctions), supplementing CPR Pt 25 it is expressly stated that the injunction does not prevent any bank from exercising any right to set off it may have in respect of any facility which it gave to the respondent before it was notified on the order.

Obviously, a third party may suffer loss as a consequence of the order. As a term of a freezing injunction, the claimant may be obliged to undertake to indemnify any third party affected by the order against all expenses reasonably incurred in complying with the order; see further paras 15-28 and 15-29 above.

(c) - Restraint on third parties: the Chabra jurisdiction

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(c) - Restraint on third parties: the Chabra jurisdiction

15-63

In *TSB Private Bank International SA v Chabra* [1992] 1 W.L.R. 231 (Mummery J), it was held that, where the defendant is restrained from disposing of the assets of a company, the court has jurisdiction of its own motion to join the company (in effect, a third party) as a second defendant and to grant a freezing injunction against it to support the claimant's claim against the defendant, even though there is no cause of action against the company. The principles for the exercise of the Chabra jurisdiction (as it is called) were summarised by Popplewell J in *PJSC Vseukrainskyi Aktionernyi Bank v Maksimov* [2013] EWHC 422 (Comm); (2013) 163 N.L.J. 324. Those principles were approved by the Court of Appeal in *Lakatamia Shipping Co Ltd v Su* [2014] EWCA Civ 636; [2015] 1 W.L.R. 291, CA, and stated to be as follows (at [32]): (1) the jurisdiction is exercisable where there is good reason to suppose that assets held in the name of a defendant against whom the claimant asserts no cause of action (the NCAD) would be amenable to some process, ultimately enforceable by the courts, by which the assets would be available to satisfy a judgment against a defendant against whom the claimant asserts a cause of action (the CAD); (2) the test of "reason to suppose" is equated with a "good arguable case" i.e. more than barely arguable but not necessarily one the judge believes has better than a 50% chance of success; (3) it is just and convenient to exercise the jurisdiction, which is exceptional and to be exercised with caution; (4) a common example of assets falling within the Chabra jurisdiction is where there is good reason to suppose that assets in the name of the NCAD are in truth assets of the CAD; (5) establishing substantial control by the CAD over NCAD assets may be relevant, but will not necessarily justify freezing NCAD assets; the ultimate test is that there is good reason to suppose that the assets would be amenable to execution of a judgment obtained against the CAD. If there is a real risk that the Chabra defendant may deal with assets to prevent enforcement of a judgment against the defendant, a Chabra order should be made without notice. Once the assets held by the Chabra defendant are frozen, any disputed questions of ownership or control can be dealt with on notice (*JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2015] EWCA Civ 906; [2015] W.T.L.R. 1759, CA, at [29]). Where the court exercises the Chabra jurisdiction and restrains a third party, in effect the court is granting ancillary relief in aid of, and as part of, the freezing relief granted against the defendant.

Whilst there is no pre-condition that the third party's assets must be controlled by or directly connected to the defendant, the court considers as part of the exercise of its discretion the extent of that connection or interest. Thus in *Yukos Capital S.a.r.l v OJSC Rosneft Oil Co* [2010] EWHC 784 (Comm); [2011] 1 All E.R. (Comm) 172 (Steel J) the assets were held by special purpose companies which, whilst not subsidiaries of Rosneft, had no business or assets of their own, and which existed solely to provide a portal for transfer of purchase monies whilst preserving a bank's security. The assets were made the subject of a freezing order. But where there were pre-existing and apparently bona fide corporate entities, and no evidence that the defendant's assets had been transferred or its asset base diminished in order to avoid the enforcement of a judgment, an injunction against such third parties will be refused (*Linsen International Ltd v Humpuss Sea Transport Pte Ltd* [2011] EWHC 2339 (Comm); [2011] 2 Lloyd's Rep. 663 (Flaux J)). A petitioner in a creditors' petition for the winding up of a company may obtain freezing orders against persons whose only alleged liabilities are to the company (or to the liquidator under statutory claims arising only in the event of liquidation). But, in the absence of cogent reasons, if freezing orders are to be obtained against potential judgment debtors of a company pending the making of a winding up order, they should be made on the application of a provisional liquidator rather than of a petitioning creditor (*H.M. Revenue and Customs v Egerton* [2006] EWHC 2313 (Ch); [2007] 1 All E.R. 606; [2007] Bus. L.R. 44 (Briggs J)). Even in a case where it would otherwise be appropriate to exercise the Chabra jurisdiction against a foreign third party alleged to be holding assets on behalf of the defendant, the court has no power to exercise that jurisdiction unless it can establish territorial jurisdiction (i.e. some ground to serve the foreign third party out of the jurisdiction) (*Belletti v Morici* [2009] EWHC 2316 (Comm); [2009] I.L.Pr. 57 (Flaux J)).

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5. - “Domestic” Freezing Injunctions

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5. - “Domestic” Freezing Injunctions

- 15-64** The assets “frozen” by freezing injunctions may be assets within the jurisdiction or without. For purposes of exposition “domestic” freezing injunctions may be dealt with first before considering the additional and different matters relevant to “worldwide” injunctions, such as they are (though that may involve a degree of repetition).

For commentary on practice and procedure relating to applications for orders for freezing injunctions, see Vol.1 para.[25.1.25](#).

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(a) - Relevant factors

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(a) - Relevant factors

15-65 The granting of a freezing injunction is a matter for the discretion of the judge hearing the application. In the exercise of this discretion, the court may grant an application for an injunction freezing the respondent's assets within the jurisdiction where the following matters are established:

- (1)the claimant has a good arguable case on a substantive claim over which the court has jurisdiction;
- (2)the defendant has assets within the jurisdiction;
- (3)there is a real risk of dissipation or secretion of assets which would render the claimant's relief nugatory.

The court must be satisfied that it is just and convenient in all the circumstances of the case to grant the relief.

The court may also grant an application for an injunction freezing the respondent's assets outside the jurisdiction (a "worldwide" freezing injunction), but on such an application additional factors become relevant. See further, "Worldwide freezing injunctions", para. 15-81 below.

By contrast, a proprietary injunction (i.e. an injunction restraining dealings with the claimant's own assets) may be granted on normal *American Cyanamid* principles: *Sukhoruchkin v Van Bekestein [2013] EWHC 1993 (Ch)*, at [7].

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(i) - Good arguable case

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(a) - Relevant factors

(i) - Good arguable case

15-66 *American Cyanamid Co v Ethicon Ltd [1975] A.C. 396, HL*, holds that an applicant for an interlocutory injunction need show only "a serious question to be tried". In applications for freezing injunctions, the formula "a good arguable case" has been preferred. For discussion on this point, see para.15-23 above.

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(ii) - Court's jurisdiction over substantive claim

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(a) - Relevant factors

(ii) - Court's jurisdiction over substantive claim

- 15-67** In the normal case, an application for a freezing injunction will be made by a claimant in proceedings, either commenced or about to be commenced, in which it is clear that the court has jurisdiction over the substantive claims made against the defendant by the claimant.

In *Siskina v Distos Cia Naviera SA (The Siskina)* [1979] A.C. 210; [1977] 3 All E.R. 803, HL, Lord Diplock said (at 256) the power to grant an interlocutory injunction can only be exercised “in protection or assertion of some legal or equitable right which it has jurisdiction to enforce by final judgment”. On the basis of this proposition it has been concluded that an interlocutory injunction in the form of a freezing injunction will not be granted to an applicant who has no cause of action against the defendant at the time of the application (*Siporex Trade SA v Comdel Commodities Ltd* [1986] 2 Lloyd's Rep. 428 at 436, per Bingham J, *Veracruz Transportation Inc v V.C. Shipping Co Inc* [1992] 1 Lloyd's Rep. 353 at 358, CA, per Beldam LJ, *Mercedes-Benz A.G. v Leiduck* [1996] 1 A.C. 284; [1995] 3 All E.R. 929, PC (where Lord Mustill said “the order cannot simply be made in the air”)). It can only be granted when there is an actual or threatened invasion of a legal right; it cannot be made in respect of a contract that has not been breached and is not threatened with breach (*Zucker v Tyndall Holdings Plc* [1992] 1 W.L.R. 1127; [1993] 1 All E.R. 124, CA, see also *A. v B.* [1989] 2 Lloyd's Rep. 423).

However, it has been argued that Lord Diplock's statement must be regarded as unduly restrictive and that the absence of some existing legal or equitable right is not a matter going to the existence of the court's equitable jurisdiction but to the exercise of discretion (*Mercedes-Benz A.G. v Leiduck*, op. cit., per Lord Nicholls). It may be noted that in *Kazakhstan Kagazy Plc v Zhunus* [2016] EWHC 1048 (Comm); [2016] 4 W.L.R. 86 (Leggatt J) the Veracruz line of cases were described as “ripe for reconsideration”. In that case, a defendant D2 wished to seek a freezing order against a co-defendant D1 when Pt 20 proceedings had not yet commenced and it was held (at [74]) that so long as D2 had the right to commence a Pt 20 claim (which was not amenable to be struck out) seeking substantive relief against D1, in principle a freezing order could be granted. (In *Morris v Murjani* [1996] 1 W.L.R. 848, CA, where an interlocutory injunction restraining a bankrupt from leaving the jurisdiction was granted, it was stated that the requirement of a pre-existing cause of action was limited to cases involving an ordinary dispute relating to the alleged violation of private rights and did not apply to a claim brought by a trustee against a bankrupt.)

This issue has now been clarified. Following *Broad Idea International Ltd v Convoy Collateral Ltd* [2021] UKPC 24; [2022] 2 W.L.R. 703; [2022] 1 All E.R. 289 and *Fourie v Le Roux* [2007] UKHL 1; [2007] 1 W.L.R. 320, it is clear that the court's jurisdiction to grant an injunction, where it has personal jurisdiction over the respondent and the grant of relief is just and equitable, is unlimited. Earlier cases in which the court has held that it did not have jurisdiction are better explained by recognising that the court had the power to grant injunctive relief but declined to do so in accordance with its settled practice in such circumstances.

It has been held that the authorities: (1) show (a) that the right to an interlocutory freezing injunction cannot exist in isolation but is always incidental to and dependent on the enforcement of a substantive right, and (b) that the substantive right usually, although not invariably, takes the shape of a cause of action; and (2) leave open the possibility that something short of an immediately enforceable cause of action is sufficient, in particular the possibility that a present debt payable in the future pursuant to a statutory scheme is just such a case (*HM Revenue & Customs Commissioners v Ali* [2011] EWHC 880 (Ch); [2012] S.T.C. 42 (Warren J) (where held that the initiation of the assessment procedure under the Taxes Management Act 1970

s.29 by the issue and service of assessments constitutes a *sui generis* instance in which the court may, provided it is just and convenient to do so, grant and continue a freezing injunction to support the Revenue's discharge of their statutory duties to collect tax after the tax comes into existence but before it is payable)).

It is clear that, in certain circumstances, where an application is made to the English court for a foreign injunction in aid of proceedings which have been or are to be commenced in a foreign court, or in courts in Scotland or Northern Ireland, the English court may have jurisdiction to grant the injunction even though it does not have jurisdiction over the substantive claim (see further para.15-3 above). Note also para.15-56 above (Equitable quia timet freezing order where indemnity claimed).

Where a claimant (C) has obtained a judgment against a defendant (D1), for the purposes of enforcement another defendant (D2) may be joined and C may obtain a freezing injunction against him, even though (1) there was no substantive claim against D2, and (2) his assets were not even arguably beneficially owned by D1, provided C had a right against D1, being a right that gave rise to a right that D1 could enforce against D2 and his assets (*C. Inc v L. [2001] 2 Lloyd's Rep. 459*, (Aikens J) (granting freezing injunctions against spouse of judgment debtor where latter wholly dependant on former)).

In certain circumstances, a party armed with a foreign judgment or arbitration award may seek to enforce it through the English court. In order to do so, the judgment creditor may require permission under r.6.20 to serve proceedings on the judgment debtor out of the jurisdiction. (In *Tasarruf Mevduati Sigorta Fonu v Demirel [2007] EWCA Civ 79; [2007] 1 W.L.R. 2508, CA*, the Court of Appeal rejected the submission that jurisdiction to serve out in these circumstances only exists where, at the time when the application is made, there are assets in the jurisdiction against which the judgment can be enforced, or at least where the judgment is otherwise enforceable in England and Wales.) The court has jurisdiction to grant the judgment creditor a domestic freezing injunction in aid of the proceedings. The court will, as a matter of discretion, grant a worldwide freezing order to assist in enforcing an overseas arbitration award only in special or exceptional circumstances where the justice of the case so requires, thus departing from the normal guideline that the Court should confine itself to its own territorial area: *Rosseel NV v Oriental Shipping Ltd [1990] 1 W.L.R. 1387*.

(iii) - Assets within jurisdiction

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5. - "Domestic" Freezing Injunctions

(a) - Relevant factors

(iii) - Assets within jurisdiction

15-68 In declaring the existence of the jurisdiction, the [Senior Courts Act 1981 s.37\(3\)](#) states that a party may be restrained by a freezing injunction from “removing … or otherwise dealing with” assets located within the jurisdiction of the court.

The term “assets” has no limitation put upon it and it includes ships and aircraft, chattels such as motor vehicles, jewellery, objets d’art, crypto-currencies and other valuables as well as choses in action: [C.B.S. \(UK\) Ltd v Lambert \[1983\] Ch. 37; \[1982\] 3 All E.R. 237, CA; Vorotyntseva v Money-4 Ltd \(T/A Nebus.com\) \[2018\] EWHC 2596 \(Ch\).](#)

In the first instance, unless the case is exceptional, the court should freeze the defendant’s assets up to a sum level with the claimant’s *prima facie* justifiable claim (a “maximum sum” order), and not generally ([Z Ltd v A-Z and AA-LL \[1982\] Q.B. 558; \[1982\] 2 W.L.R. 288; \[1982\] 1 All E.R. 556](#), at 574–575 and 589, CA, per Kerr LJ). It may be necessary to make different provisions in relation to the defendant’s assets generally and in relation to such of his assets as are known or believed to be in the hands of third parties (above). In some instances, the claimant will be capable of identifying with particularity (nature, location, etc.) the defendant’s assets to be “frozen” by the injunction. To the extent to which the assets are known or suspected to exist, these should be identified even if their value is unknown; and if it is known or suspected that they are in the hands of third parties, everything should be done to define their location to the greatest possible extent (above).

In the example of a freezing order annexed to Practice Direction 25A (Interim Injunctions) terms reflecting [s.37\(3\)](#) and relevant case law (in particular [Z Ltd v A-Z and AA-LL](#)) are found in paras 5 to 8. Paragraph 5 states that the respondent must not “remove” from England and Wales or in any way “dispose of, deal with or diminish the value of” any of his assets which are in the jurisdiction up to the value stipulated by the order.

The words “deal with” should be given a wide meaning. They should not be construed *eiusdem generis* with “removing from the jurisdiction”; they include disposing of, selling or charging the asset (see [C.B.S. UK Ltd v Lambert \[1983\] Ch. 37; \[1982\] 3 All E.R. 237, CA](#)).

Paragraph 6 of the example of a freezing order annexed to Practice Direction states that the assets which a respondent may be restrained from removing or disposing of etc includes any asset jointly owned. Further, they include any asset which he has the power, directly or indirectly, to dispose of or deal with as if it were his own; for these purposes the respondent has such “power” if a third party holds or controls the asset in accordance with the respondent’s direct or indirect instructions. (Parts of this paragraph may be seen as a response to the decision of the Court of Appeal in [Federal Bank of the Middle East Ltd v Hadkinson \[2000\] 1 W.L.R. 1695, CA](#).) In the version of the freezing order example annexed to Practice Direction 25A, para.6 states that the respondent’s assets liable to freezing include his assets “whether or not they are in his own name and whether they are solely or jointly owned”. In the version as contained in App.5 to the Admiralty and Commercial Courts Guide (see Vol.2, para.[2A-164](#) above) this formulation is broader and states that the assets include his assets “whether or not they are in his own name and whether they are solely or jointly owned and whether the respondent is interested in them legally, beneficially or otherwise”. This difference was noted by the Court of Appeal and regarded as significant in [JSC BTA v Solodchenko \[2010\] EWCA Civ 1436; \[2011\] 1 W.L.R. 888, CA](#) (where held that the broader formulation includes assets held by the defendant as a trustee or nominee for a third party). As a consequence, that version was amended for the purpose of making it clear that,

whether the wider wording should be included in an order, will be considered by the Commercial Court on a case by case basis (see further Vol.1 para.[25.1](#)[25.7](#)).

Where there is a dispute as to the ownership of assets that may be subject to the injunction, the following principles apply (*S.C.F. Finance Co Ltd v Masri [1985] 1 W.L.R. 876; [1985] 2 All E.R. 747, CA*): (1) if the assets appear to belong to a third party they should not be included in the scope of the injunction without evidence that they are the defendant's, (2) the mere assertion of the defendant that a third party owns the assets need not be accepted without inquiry (and the same principle applies to claims by a third party to intervene to vary the injunction to exclude the assets), (3) the court must do its best to do what is just and convenient between all concerned, (4) in a proper case the court may direct an issue to be tried either before or after the main action as to the ownership of the assets.

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(iv) - Risk of judgment being unsatisfied

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5. - "Domestic" Freezing Injunctions

(a) - Relevant factors

(iv) - Risk of judgment being unsatisfied

15-69

The purpose of the injunction is to ensure that the court's judgment is not rendered valueless "by an unjustifiable disposal of assets" (*Ketchum International Plc v Group Public Relations Holdings Ltd [1997] 1 W.L.R. 4, CA*). What has to be shown is that there is, without an injunction, "a real risk that a judgment or award in favour of the claimants would go unsatisfied" (*Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft m.b.h und Co K.G. [1983] 1 W.L.R. 1412, CA*). That formulation cannot, however, be regarded as a complete statement of the law. A defendant may be likely to make perfectly normal dispositions, such as the payment of ordinary trading debts, the effect of which may be that, when any award is made, it is, in whole or in part, unsatisfied when, absent those payments, it might have been satisfied or satisfied to a greater extent (*TTMI Ltd of England v ASM Shipping Ltd of India [2005] EWHC 2666 (Comm); [2006] 1 Lloyd's Rep. 560* (Clarke J)). There is no requirement to prove that unjustified dissipation is likely; only that there is a real risk. In *Les Ambassadeurs Ltd v Yu [2021] EWCA Civ 1310*, Andrews LJ observed that while a real risk was more than a theoretical, fanciful or insignificant risk, it was not desirable to put any gloss on the test or to suggest that judges must specifically address whether the risk is real rather than fanciful. The claimant should depose to objective facts from which it may be inferred that the defendant is likely to move assets or dissipate them; unsupported statements or expressions of fear have little weight (*O'Regan v Iambic Productions (1989) 139 N.L.J. 1378* (Sir Peter Pain).) It is a fundamental principle that a freezing order is not granted for the purpose of providing security for the claim. By procuring an order an applicant is not put in a better position than any other creditor. The mere fact that the defendant's creditworthiness is in doubt or that the actual or feared conduct would risk impairing the claimant's ability to enforce a judgment or award does not in every case mean that a freezing order should be granted. The conduct in question must be unjustifiable (*Mobil Cerro Negro Ltd v Petroleos de Venezuela SA [2008] 1 Lloyd's Rep. 684* (Walker J) at [36] and [41]). There is an important distinction between a defendant who can pay but choose not to until they are forced to do so, and a defendant who is so determined not to pay that they would take active steps to frustrate any judgment by transferring or concealing assets or by some other unjustified dissipation: *Les Ambassadeurs*.

In summary, to demonstrate a sufficient "risk of dissipation" a claimant must establish (1) that there is a real risk that a judgment or award will go unsatisfied as a result of unjustified dealing with the defendant's assets; (2) that that risk can be demonstrated with solid evidence; mere inference or generalised assertion is not sufficient; (3) that the evidence upon scrutiny shows that the dishonesty in question justifies the conclusion that assets are likely to be dissipated: mere allegations that a defendant has been dishonest are insufficient; (4) the relevant inquiry is whether there is a current risk of dissipation: past events may be evidentially relevant, but only if they demonstrate a current risk of dissipation of assets now held; (5) the following are important considerations: (a) the nature, location and liquidity of the defendant's assets; (b) whether or to what extent the assets are already secured or incapable of being dealt with; (c) the defendant's behaviour in response to the claim or anticipated claim (*Gulf Air BSC (C) v One Inflight Ltd [2018] EWHC 1019 (Comm)*), at [17]–[20], citing and expanding *National Trust Bank v Yurov [2016] EWHC 1913 (Comm)*, at [70]). In addition, included within the summary of relevant principles by Popplewell J in *Fundo Soberano de Angola v Jose Filomeno dos Santos [2018] EWHC 2199 (Comm)* at [86] is that the risk of dissipation must be established separately against each defendant.

Great care should be taken in the presentation of the evidence to the court so that the court can see whether there is a real risk of dissipation of assets. Where the respondent is alleged to have been dishonest, the court should scrutinise with care whether what is alleged in this respect in itself really justifies the inference that he is likely to dissipate assets unless restrained (*Thane Investments Ltd v Tomlinson [2003] EWCA Civ 1272*).

In *Metropolitan Housing Trust v Taylor [2015] EWHC 2897 (Ch)*, Warren J explained that, where dishonesty is alleged, it is sometimes possible to infer a risk of dissipation from the fact of the dishonesty (para.18), and noted that an exposition of the principles and provision of guidance on the point is to be found in the judgment of the Court of Appeal in *VTB Capital Plc v Nutritek International Corp [2012] EWCA Civ 808; [2012] 2 Lloyd's Rep. 313, CA*, at [172]–[179]; see also *AH Baldwin and Sons Ltd v Al Thani [2012] EWHC 3156 (QB)* (Haddon-Cave J).

If the defendant's assets are held in a complex, opaque and offshore structure, that is not of itself sufficient to infer a risk of dissipation, but it is capable of being regarded as contributing to the risk if there is other material on which to infer such a risk (*Holyoake v Candy [2016] EWHC 970 (Ch); [2016] 3 W.L.R. 357* (Nugee J) at [27]).

(b) - Assets excepted

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B. - Freezing Injunctions

5. - "Domestic" Freezing Injunctions

(b) - Assets excepted

- 15-70** In a given case, a freezing injunction preventing the defendant from dealing with assets up to a certain amount could have very serious consequences for him unless he had access to other funds. For example, it could have the effect of preventing him from running his business (and perhaps even force its collapse), from paying his living and other routine expenses, from meeting unexpected bills (e.g. medical costs), and from paying legal expenses incurred by the action. The purpose of a freezing injunction is to prevent the defendant evading the due process of execution by hiding assets or otherwise making himself judgment proof. Where the court is satisfied that the defendant requires money for a purpose which does not conflict with that underlying purpose, the court should qualify the injunction (by insertion of an appropriate order in the original order or on the defendant's subsequent application) to allow the defendant to deal with assets subject to restraint but which are not subject to a proprietary claim for such purpose. Clearly, where, in a given case, the respondent uses his assets for these purposes as permitted by the terms of the order, the effect may be to reduce the value of the assets remaining to a level below that required to meet the claimant's claim.

The circumstances in which such qualification may be appropriate are briefly outlined below. In the example of a freezing order annexed to Practice Direction 25A (Interim Injunctions) terms reflecting these circumstances are found in para.11.

Where a claimant (C), having obtained a freezing injunction against the defendant (D), succeeds at trial in obtaining judgment against D, then C (as the judgment creditor) becomes entitled to enforce the judgment against all of the available assets of D. If the freezing injunction is continued after judgment the court has a power, on the application of C, to vary it by altering or removing provisions excepting assets from the scope of the injunction. For an explanation of the relevant considerations and authorities, see *Kazakhstan v Zhunus [2018] EWHC 369 (Comm)* (Picken J), at paras 105 to 119. See also para.15-71 below, and Vol.1 para.25.1.25.12.

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(i) - Payments in the ordinary course of business—Angel Bell orders

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(i) - Payments in the ordinary course of business—Angel Bell orders

15-71 The authorities on this matter start with *Iraqi Ministry of Defence v Arcepex Shipping Co SA (The “Angel Bell”) [1981] Q.B. 65; [1980] 1 All E.R. 480*, where Goff J held, in determining an issue as between an intervener and a claimant, that a Mareva injunction granted against a defendant should be varied so as to permit the defendant to make a payment in good faith and in the ordinary course of business to the intervener. Subsequently, *Angel Bell* orders became common place; see *Atlas Maritime Co SA v Avalon Maritime Ltd (The “Coral Rose”) [1991] 4 All E.R. 769; [1991] 1 Lloyd’s Rep. 563, CA*, and the authorities referred to therein, and *Halifax Plc v Chandler [2001] EWCA Civ 1750*, at [16] et seq., per Clarke LJ. On the one hand the injunction must not be used so as to amount to an instrument of oppression which would bring about the cessation of trading. On the other hand, the court must have regard to the interests of the claimant and consider whether the variation would involve a real risk that a judgment in his favour would remain unsatisfied (*The Coral Rose*, op. cit., at 776 and 568, per Neill LJ). In the standard form for freezing order it is provided that the order does not prohibit the respondent from dealing with or disposing of any of his assets in the ordinary and proper course of business. This enables routine business transactions to be conducted without reference to the court. Dealings or disposals which are not part of the ordinary business of the defendant are not necessarily prohibited; they merely require the approval of the court or the claimant before they are carried out and so enable the court to scrutinise what, on its face, may not appear to be a routine or regular transaction (*JSC BTA Bank v Ablyazov [2010] EWCA Civ 1141; [2011] Bus. L.R. D119, CA*, at [74]).

In *Emmott v Michael Wilson & Partners [2015] EWCA Civ 1028*, Lewison LJ explained (paras 19–28) that “in the ordinary course of business” and “in the proper course of business” are separate and cumulative requirements, which are highly fact-sensitive questions. The purpose of the payment is likely to be relevant to whether a payment is in the proper course of business. “In the ordinary course of business” does not mean that the payment must be ordinary, or routine, or recurring, and any attempts to restrict the meaning of the phrase are unhelpful. In *Koza Ltd v Akcil [2019] EWCA Civ 891*, three further propositions were added: a) The test is objective, so the question is to be considered against accepted commercial standards and practices for the running of a business; b) The question is not whether the transaction is ordinary or proper, but whether it is carried out in the ordinary and proper course of the company’s business; c) These questions are to be answered in the specific factual context in which they arise.

The draft freezing injunction annexed to Practice Direction 25 excepts the disposing of assets “in the ordinary and proper course of business”. In *PJSC Commercial Bank Privatbank v Kolomoisky [2018] EWHC 1910 (Ch)*, the court examined the effect of a version of the exception in a case where the claimant bank applied for a declaration that certain payments made by the defendant in transactions by non-trading companies owned or controlled by him were not permitted (paras 26 to 28). The judge explained that a “business” was clearly not to be equated only with a trade or commercial undertaking.

Where it is disputed, or is a matter for doubt, whether a proposed dealing with or disposal of assets is in the ordinary and proper course of business, a variation of the freezing order may be required (e.g. *Abbey Forwarding Limited v Hone [2010] EWHC 1532 (Ch)*) (see further, Vol.1 para.25.1.25.10).

Different considerations may apply in the case of post-judgment freezing orders. Where there is an immediately enforceable post-judgment asset freezing order “it will sometimes and perhaps usually be inappropriate to include an ordinary course of

business exception” (*Mobile Telesystems Finance SA v Nomihold Securities Inc* [2011] EWCA Civ 1040; [2012] 1 All E.R. (Comm) 223; [2012] Bus. L.R. 1166, CA). But a freezing order granted in aid of enforcement of a judgment where enforcement is not presently available (for example, where there is a stay of execution, or where an arbitration award is not yet enforceable because the period under r.62.18(9) has not expired) should ordinarily contain the usual exception to permit payments in the ordinary course of business (above at [37] per Tomlinson LJ). The impact on the defendant’s continuing business is a material consideration (above at [35]). See also Vol.1 para.25.1.25.13. In *Michael Wilson & Partners Ltd v Emmott* [2019] EWCA Civ 219; [2019] 4 W.L.R. 53; [2019] 4 All E.R. 1054, the Court of Appeal at [57]–[59] confirmed Tomlinson LJ’s approach in *Nomihold* at [33] as the correct starting point providing “helpful and appropriately nuanced general guidance” and said that a decision applying it is a discretionary matter reached on a fact specific basis, with which the Appeal Court would be slow to interfere.

In *Organic Grape Spirit Ltd v Nueva IQT SL* [2020] EWCA Civ 999; [2020] 2 C.L.C. 176, Newey LJ stressed that while it is not necessary to prove “nefarious intent” or that the defendant is likely to act with the object of putting his assets beyond reach, absent a proprietary claim the defendant’s assets belong to him and a freezing order is not intended to give a claimant security for his claim. The court’s concern is to restrain unjustified disposals. Accordingly, even where a proposed transaction falls outside the ordinary course of business and involves a substantial degree of risk or speculation, it should not be prohibited save where the defendant is not acting in good faith, is acting with the apparent purpose of ensuring that funds are not available to satisfy any judgment, or is not acting in accordance with acceptance standards of commercial behaviour.

(ii) - Living expenses and ordinary debts

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(ii) - Living expenses and ordinary debts

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Freezing injunctions addressed to natural persons should always make provision for the defendant's living expenses and for the payment of ordinary debts as they become due unless there is reason to believe that the defendant has other assets to which the injunction does not attach which would be available for that purpose (*The Law Society v Shanks [1988] 1 F.L.R. 504, CA; Babanaft International Co SA v Bassatne [1990] 1 Ch. 13; [1989] 1 All E.R. 433; [1988] 2 Lloyd's Rep. 435, CA; Investment and Pensions Advisory Service v Gray [1990] B.C.L.C. 38; P.C.W. (Undertaking Agencies) Ltd v Dixon [1983] 2 All E.R. 158 (Lloyd J), and [1983] 2 All E.R. 697, CA*). In *Vneshprombank LLC v Bedzhamov [2019] EWCA Civ 1992; [2020] 1 All E.R. (Comm) 911; [2019] 2 C.L.C. 792*, the Court of Appeal reviewed the authorities and concluded that a defendant ought to be permitted to spend, as ordinary living expenses, as per their "actual past standard of living". It summarised the applicable principles at [67]–[71]. Where the claimant asserts a proprietary interest in assets held by the defendant, the latter must use its own resources to finance his defence and living expenses; the onus is on a defendant who claims its only assets are those which are the subject of the proprietary claim to prove not only that it has no assets itself, but also that there are no other assets available to it which could be used for this purpose (*Marino v FM Capital Partners Ltd [2016] EWCA Civ 1301*, at [15] and [18]–[20] per Sales LJ). It is not enough for the Defendant merely to assert that any other funds are or might be enjoined without identifying such other funds and their nature, form and location. This is so the court can determine, if it decides funds should be released for this purpose, which funds should be used: *Fundo Soberano de Angola v Dos Santos [2018] EWHC 3624 (Comm)* (Popplewell J at [13]).

Paragraph 11(1) of the example of a freezing order annexed to Practice Direction 25A states that the respondent shall not be prohibited from spending each week a sum fixed by the court, or a reasonable sum, on "ordinary living expenses" and indicates that it may be further ordered that, before spending any such money, the respondent must tell the applicant's legal representatives where the money is to come from.

In setting a figure for living expenses at the without notice stage, the applicant must propose a figure which reflects what is known or can reasonably be ascertained about the defendant's actual lifestyle. The court may be asked to reconsider the permitted figure on the return date or on a variation application: the principle is that the defendant should be allowed to maintain their pre-freezing order standard of living, ascertained by reference to evidence as to actual expenditure. Where a defendant's credibility is in doubt, extravagant asserted expenditure may be treated by the court with scepticism, and specific items of expenditure may be ring-fenced: *Vneshprombank LLC v Bedzhamov [2019] EWCA Civ 1992; [2020] 1 All E.R. (Comm) 911; [2019] 2 C.L.C. 792* in which the established principles are summarised (para.68).

Where an unqualified freezing order made in Luxembourg risked hampering D's defence of English proceedings and undermining the exception in an earlier English order for living expenses and legal costs, the court ordered C to consent to a variation of the Luxembourg order to allow such expenditure: *Circumference Investments (Europe) Ltd v Martin [2021] EWHC 2691 (Ch)*.

(iii) - Legal expenses

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(iii) - Legal expenses

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If the court is satisfied that the defendant does not have other available funds, the injunction may be qualified by the insertion of an order permitting him to make drawings from the assets to cover his expenses on legal advice and representation in the proceedings (*A. v C. (No.2) [1981] Q.B. 961*). Prima facie, the payment of legal fees is not dissipation (*Cala Cristal SA v Al-Borno (Emran), Times, 6 May 1994*).

Paragraph 11(1) of the example of a freezing order annexed to PD 25A makes provision for this exemption in a manner similar to that made for the exemption as to living expenses. In *Linsen International Ltd v Humpuss Sea Transport Pte Ltd [2010] EWHC 303 (Comm)*, it was pointed out that the wording of the standard form exception to a freezing order, which allowed limited expenditure on legal advice, would permit a series of payments each below the stated maximum, and a provision was added that if the money spent by the defendants on legal advice exceeded a particular sum, or thereafter, any whole number multiple of that sum, the defendants were required to tell the claimants where the money had come from, and the amount expended. It is for the party seeking to pay legal expenses out of frozen funds to persuade the court that it would be just to permit it in all the circumstances; if it is clear that the defendant has assets which are not restrained assets, the court will normally not vary the order to permit payment from frozen funds as it would not be consistent with the underlying purpose of the order (*Fortress Value Recovery Fund I LLC v Blue Skye Special Opportunities Fund LP [2014] EWHC 551 (Comm)*).

The standard freezing order provides that a defendant is entitled to spend a reasonable sum on legal advice and representation without obtaining the claimant's permission, but the requirement to tell the claimant's legal representatives where the money is to come from gives the claimant an opportunity, if it objects, to bring the matter before the court. The legal principles applicable where an application by defendants for permission to make use of a particular source of funds to meet their legal expenses is opposed by the claimants were summarised by Males J in *Tidewater Marine International Inc v Phoenixtide Offshore Nigeria Ltd [2015] EWHC 2748 (Comm)*. His lordship explained that the right to spend money on legal fees in non-proprietary cases which freeze all the defendant's assets is subject to the defendant demonstrating (a) that he has no other assets with which to finance his defence, (b) that there are no other persons who may be willing to assist the defendant in obtaining legal advice and representation, and (c) that it would be in accordance with the overall justice of the case to permit him to use funds caught by the order; credible evidence is needed to discharge this burden (paras 40 to 42 and 51), a burden perhaps more properly described as a "burden of persuasion" rather than as a burden of proof (see *Serious Fraud Office v X [2005] EWCA Civ 1564*). It is incumbent on the defendant, like any applicant, to put the facts fully and fairly before the court. This burden is on the defendant because (a) it is the defendant who knows the facts about the available assets, and (b) the court has already concluded that justice requires that the defendant's freedom to dispose of its own assets as it sees fit should be restrained (or it would not have granted the injunction in the first place). Judges are entitled to have a "very healthy scepticism" about unsupported assertions made by a defendant about the absence of assets, particularly where he, or those to whom his evidence or contentions relate, have been less than frank in dealing with the court or the claimant (*Mussells v Thompson*, 1 January 1984, CA, unrep., per Sir John Donaldson MR; *Compagnie Noga D'Importation et D'Exportation SA v Australian and New Zealand Banking Group [2006] EWHC 602 (Comm)*).

In *Fathollahipour v Aliabadibensi [2014] EWHC 2120 (QB)* (Phillips J), a case in which no proprietary claim was advanced by the claimants (C), for the purpose of raising money to pay legal expenses the defendants (D) sought a variation to permit them to make use of a disclosed asset within the jurisdiction, being an asset which was charged to C in respect of existing costs

orders in their favour. In objecting to that variation C submitted that foreign assets disclosed by D and not frozen by the order were available to D to pay their legal expenses. In dismissing D's application the judge explained (1) that assets frozen within the jurisdiction should only be permitted to be used if there is clear and credible evidence that there is no alternative source of assets which were not frozen and which could be used in preference, (2) that the authorities demonstrate that it is for the defendant to show the court that these assets are not available for use, in respect of which he must produce credible evidence, (3) in the circumstances, D had not come "anywhere close" to satisfying the burden of showing that those assets are unavailable to them. The judge stressed that this was not a case where the opposition of the claimants was to the effect that there were reasons to believe that the defendant's disclosure of assets was incomplete, raising the suspicion that there were undisclosed assets available to the defendant to fund legal (or living) expenses. Thus this was not a case in which, substantial disclosure having been given, it was incumbent on the claimants to show that the defendants' evidence of disclosure was incredible or obviously incomplete; see e.g. *Bank St Petersburg v Arkhangelsky [2014] EWHC 574 (Ch)* (Hildyard J), where, in declining to tighten a freezing order so as to prevent the defendants from using frozen funds for their legal (and living) expenses, the judge was not persuaded that the evidence of the defendants was incredible, nor that there were sufficient grounds for supposing that in breach of the worldwide order the defendants had not disclosed other assets from which they could meet their legal (and living) expenses.

The court has jurisdiction to impose on a party who makes an application in the course of proceedings, and who is subject to a freezing order, the requirement to identify the source of funding for legal expenses as a condition to the making of the application. In *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev [2017] EWHC 1847 (Ch)*, during the trial of a claim brought as part of enforcement proceedings (but making no proprietary claim) a defendant (D), who was subject to a standard freezing order and who had played no part in the proceedings, made an application challenging the court's jurisdiction and sought an adjournment of the trial. The claimants (C) submitted that the judge should impose conditions which must be complied with before D's application should be heard, including a condition that D should reveal the source from which funds for his application were coming, and applied for an unless order striking out D's application in the event of non-compliance with the conditions. The judge was satisfied that a court had jurisdiction to make the orders sought in general and in the form of conditions, albeit they were all of a kind which a court would only make require at all, let alone make as conditions, in exceptional circumstances, especially as a condition of a challenge to jurisdiction (some only in very exceptional circumstances) (para.40). As to the condition requiring D to reveal the source of legal expenses funding in particular the judge said that the court should only make such an order if it is satisfied to an appropriate standard, that is, a properly arguable case, that the funding is or may be from frozen funds (para.71).

In *JSC BTA Bank v Ablyazov [2018] EWHC 1368 (Comm)*, the claimant (C) asserted that the defendant's (D) legal expenses were not (as D claimed) being met by his mother, but from funds frozen by a non-proprietary freezing order and sought an order requiring D to supply further detail and supporting documentation as to the source of the funding of his legal expenses, to the best of his ability and having made reasonable inquiries (including of his mother). The judge, in making the order (a "source of costs disclosure order"), stated that the burden was on C to establish that there was a properly arguable case that the funding was or may be from frozen funds: there must be adequate grounds for making the order (paras 9 to 16).

Where the freezing injunction restrains the defendant from dealing with assets to which the claimant asserts title, the defendant must establish on proper evidence that there are no funds or assets available to him which can be used by him to pay his legal expenses other than the assets in respect of which the claimant brings his proprietary claim. Once that hurdle is cleared, the court can make an order allowing the defendant to use part of the funds (the equitable ownership of which is claimed by the claimant) for the defendant's legal expenses. That power in the court is a discretionary power. The court, in deciding whether to exercise it, must weigh the potential injustice to the claimant of permitting the funds which may turn out to be the claimant's property to be diminished so that the defendant can be legally represented, against the possible injustice to the defendant of depriving him of the opportunity of having the assistance of professional lawyers in advancing what may, at the end of the day, turn out to be a successful defence (see *Ostrich Farming Corp Ltd v Ketchell, 10 December 1997, unrep.*, CA, and earlier Court of Appeal decisions referred to there; see also *Independent Trustee Services Ltd v G P Noble Trustees Ltd [2009] EWHC 161 (Ch)* and *Director of Assets Recovery Agency v Creaven [2005] EWHC 2726 (Admin); [2006] 1 W.L.R. 662* (Burnton J)). In *Marino v FM Capital Partners Ltd [2016] EWCA Civ 1301*, Sales LJ said at [15] that a defendant which claims that its only assets are those which are the subject of a proprietary claim must prove not only that it has no assets itself, but also that there are no other assets available to it which could be used for this purpose. His lordship (at [23], adopted the 4-stage process set out by the judge in Independent Trustee Services case (above): (1) does the claimant have an arguable proprietary claim to the funds in issue; (2) does the defendant have arguable grounds for denying that claim; (3) if yes, has the defendant shown that without recourse to the funds in issue, he could not effectively defend the proceedings or meet living expenses; (4) if yes, where does the balance of justice lie? In *Courtwood Holdings SA v Woodley Properties Ltd [2017] EWHC 3514 (Ch)*, where recourse was sought to the injuncted funds to pay professional fees incurred in preserving and enhancing the property which was the

subject of the proprietary claim, the judge held at that the fees were to be treated, not as an ordinary commercial debt, but as a deductible trust property expense honestly and reasonably incurred.

Neither the claimant nor the court is entitled to control the defendant's choice of solicitors and counsel, and the payment of their proper costs or the way in which they conduct the case; such conduct will be subject to the court's power to give case management directions, but they are directions which apply to all parties and do not directly qualify the exception in a freezing order for reasonable legal costs; their effect is indirect as being relevant to whether particular costs are reasonable (*HM Revenue & Customs v Begum* [2010] EWHC 2186 (Ch); [2010] S.T.I. 1547 (Richards J)). Further, the court will not give the claimant the right to require a solicitor and own client assessment of the defendant's costs or a right to attend such assessment (as this would be an unjustified interference in the relationship between solicitor and client); furthermore, the court will not itself perform the function of a provisional assessor of costs and will not act as a pre-emptive costs judge, from time to time deciding what the defendant's solicitors should be allowed to spend (as above, rejecting submission that the introduction of powers for the summary assessment of costs and for payments on account of costs before their detailed assessment had significantly changed the role of the court in this last mentioned respect). See also *Anglo-Eastern Trust Ltd v Kermanshahchi* [2002] EWHC 2938 (Ch).

In *United Mizrahi Bank Ltd v Doherty* [1998] 1 W.L.R. 435, a bank (C) brought a proprietary claim against its former employee (D) for breach of duty and obtained an order freezing D's assets at home and abroad. The order included certain specific proprietary injunctions relating to particular funds alleged to have been wrongfully obtained by D. The judge refused D's application for an order that, notwithstanding C's alleged proprietary claim to a particular residential property, he be permitted to sell it and to apply the proceeds to the discharge of past and future legal costs. D's concern was that, although such sale would not be a breach of the freezing order, without such an order it might be suggested that he was expending funds which might turn out to be C's property and could amount to a further breach of trust. The judge held that the legal expenses exemption in the freezing order provided no guarantee for the recipients of the proceeds of the sale (including D's solicitors) that they would be protected from a possible claim in constructive trust should C establish their claim.

Where proceedings are brought under the *Proceeds of Crime Act 2002* for a civil recovery order (CRO) an interim statutory property freezing order (PFO) may be made by the court in accordance with the provisions of that Act and Practice Direction —Civil Recovery Proceedings (see para.3K-1 et seq above). The provisions therein relevant to legal expenses exclusion where a PFO is made, in particular Section 7 of the Practice Direction, were considered by the Court of Appeal in *R. (Azam) v Serious Organised Crime Agency* [2013] EWCA Civ 970; [2013] 1 W.L.R. 3800; [2014] 1 All E.R. 206. The court explained the proper approach to be adopted by the court in determining, where a respondent applies for permission to apply some of the assets frozen by a PFO to future legal expenses, whether there are other available assets, and drew attention to material differences between that situation and cases of freezing orders in ordinary civil proceedings protecting an asserted proprietary claim. See further para.3K-6.2. Thus, in *AA v BB* [2021] EWHC 1833 (Ch), Miles J refused to restrain C (who had the benefit of a freezing order in a proprietary case) from asserting any claim against D's solicitors in respect of legal fees paid under the legal expenses exception.

Where an unqualified freezing order made in Luxembourg risked hampering D's defence of English proceedings and undermining the exception in an earlier English order for living expenses and legal costs, the court ordered C to consent to a variation of the Luxembourg order to allow such expenditure: *Circumference Investments (Europe) Ltd v Martin* [2021] EWHC 2691 (Ch).

(c) - Ancillary orders—asset disclosure

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(c) - Ancillary orders—asset disclosure

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For the purpose of rendering a freezing injunction effective (before judgment as well as after judgment), the court may make orders requiring the defendant (1) to make a statement disclosing his assets, (2) to give disclosure of documents, and (3) to provide information. Such orders can assist (1) in determining the existence, nature and location of assets, (2) in clarifying questions of title concerning assets, and (3) in identifying third parties to whom notice of the injunction should be given for the purpose of ensuring that they do not inadvertently or inadvertently assist the defendant in the removal or disposal of assets. Quite commonly the making of such ancillary orders or the defendant's responses to them can result in further applications to the court by one party or the other (or by a third party) for modification of the terms of the injunction, of the terms of the ancillary order itself, or for other orders. Indeed, the defendant's responses may lead to the joinder of further parties against whom, in turn, further orders requiring disclosures by them may be made (see e.g. *Arab Monetary Fund v Hashim (No.5) [1992] 2 All E.R. 911*). See further Vol.1 para.[25.1.26](#).

Where a respondent applies to set a freezing order aside, or appeals against the court's refusal to set aside the order, the question may arise whether the ancillary disclosure order should be stayed pending the outcome of the application or the appeal. The problem is that, where the disclosure order has been made at the same time as a freezing order made without notice, and the freezing order is subsequently set aside there will be no proper basis for the disclosure order. By that time the defendant may have been irretrievably prejudiced by the disclosure of assets which he should not have been required to disclose. On the other hand, if it is held after full argument that the freezing order should stand, then the claimant may be irretrievably prejudiced if the order has not been capable of being policed in the meantime. There is no general rule that the defendant is entitled to a stay; a balance has to be struck; in a normal case, a stay is likely to be refused (see *Motorola Credit Corporation v Uzan [2002] EWCA Civ 989; [2002] 2 All E.R.(Comm) 945, CA; Raja v Van Hoogstraten [2004] EWCA Civ 968; [2004] 4 All E.R. 793, CA*). See also, *JSC BTA Bank v Ablyazov [2009] EWCA Civ 1125; [2010] 1 All E.R. (Comm) 1029, CA*.

See further Vol.1 para.[25.1.26](#), and note commentary there on Bankers Trust orders and Norwich Pharmacal orders.

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(i) - Asset disclosure pre-judgment

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B. - Freezing Injunctions

5. - "Domestic" Freezing Injunctions

(c) - Ancillary orders—asset disclosure

(i) - Asset disclosure pre-judgment

15-75

Where the claimant has established the existence of assets within the jurisdiction (being assets over which the claimant makes no proprietary claim), or at least established that it is highly probable that such assets exist, the court normally adds to a pre-judgment freezing order a disclosure order requiring the defendant to disclose to the claimant the precise form and whereabouts of his assets for the purpose of making it more difficult for the defendant surreptitiously to disobey the restraining order and to enable notice to be given to third parties who might have custody of the assets so as to bind them to the injunction; without such power it would be difficult, if not impossible, to operate the freezing injunction jurisdiction properly (*A.J. Bekhor & Co Ltd v Bilton* [1981] Q.B. 923; [1981] 2 All E.R. 565, CA, *A v C (Note)* [1981] Q.B. 956; [1980] 2 All E.R. 347; see also *Z Ltd v A-Z and AA-LL* [1982] 1 Q.B. 558; sub nom. *Z Ltd v A* [1982] 1 All E.R. 556, CA, and *Campbell Mussels v Thompson* (1984) 8 L.S.Gaz. 2140, CA). The jurisdiction to attach such an order is inherent in the Senior Courts Act 1981 s.37(1) and the example form of order annexed to PD 25A (Interim Injunctions) contains such a provision.

In an action in which the claimant makes a proprietary claim, the court has jurisdiction, not only to grant an ordinary interlocutory injunction restraining the disposal of that property, but may also make orders designed to ascertain the whereabouts of that property. In these circumstances, the power of the court to make the ancillary orders is not based on the court's jurisdiction to grant freezing injunctions (as developed since Mareva injunctions were created), but has a different provenance. For example, the court may make orders requiring the defendant to provide information. Further, it may order a bank (whether or not party to the proceedings) to give discovery of documents in relation to the bank account of a defendant who is alleged to have defrauded the claimant of his assets (*Bankers Trust Co v Shapira* [1980] 1 W.L.R. 1274; [1980] 3 All E.R. 353, CA, approving *A. v C. (Note)* [1981] Q.B. 956; [1980] 2 All E.R. 347).

Paragraph 9 of the example of a freezing order annexed to Practice Direction 25A (Interim Injunctions) contains terms for an ancillary order (based on authority) requiring the defendant to inform the claimant in writing at once of all his assets in England and Wales, whether in his own name or not and whether solely or jointly owned, and giving the value, location and details of all such assets. However, it is not incumbent on a company ordered to give information as to its assets for the purposes of a freezing order to give details of the assets of its subsidiaries since they are not assets beneficially owned by it: *Linsen International Ltd v Humpuss Sea Transport Pte Ltd* [2010] EWHC 303 (Commercial Court) (Christopher Clarke J).

The principle of *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] A.C. 133, HL, has been extended to include contractual as well as tortious wrongdoing, to enable the claimant to learn crucial information, and so that the person against whom the relief is sought may be a wrongdoer himself (*Mitsui & Co Ltd v Nexen Petroleum UK Ltd* [2005] EWHC 625 (Ch); [2005] 3 All E.R. 511 (Lightman J)). The relief may be sought against a defendant in the proceedings at the same time as an application for a freezing order (*JSC BTA Bank v Ablyazov* [2010] EWHC 2219 (QB); [2011] 1 All E.R. (Comm) 1093; [2010] 2 C.L.C. 329 (Clarke J)). The applicable principles are: (i) a wrong must have been carried out or arguably carried out by an ultimate wrongdoer; (ii) there must be the need for the order to enable action to be brought against the wrongdoer; and (iii) the person must be mixed up in, so as to have facilitated the wrongdoing and be able or likely to be able to provide the information necessary to enable the ultimate wrong-doer to be sued (*Mitsui & Co Ltd v Nexen Petroleum UK Ltd* [2005] EWHC 625 (Ch); [2005] 3 All E.R. 511). The conditions for relief were extensively examined and explained at first instance in *Ramilos Trading Ltd v Buyanovsky* [2016] EWHC 3175 (Comm); [2016] 2 C.L.C. 896 (Flaux LJ) at [11]–[26]. Initially, the *Norwich Pharmacal* remedy was restricted to circumstances where the primary litigation was entirely domestic and between private parties, but its

subsequent development has seen its extension to cases where the primary litigation is taking place in a foreign jurisdiction and/or where it is of a public law nature. In *R. (Omar) v Foreign Secretary of State for Foreign and Commonwealth Affairs [2013] EWCA Civ 118; [2013] 3 W.L.R. 438, CA*, it was held that the regime set out in the *Crime (International Co-operation) Act 2003* for the obtaining of evidence for use in foreign criminal proceedings created an exclusive procedure, and not a parallel one, and where it was in play the *Norwich Pharmacal* remedy did not run. The 2003 Act is, in respect of foreign criminal proceedings, the equivalent statute to the *Evidence (Proceedings in Other Jurisdictions) Act 1975*, which applies in respect of foreign civil proceedings (see *Section II of CPR Pt 34*). In *Ramilos Trading Ltd v Buyanovsky*, op cit, where a party sought to invoke the court's Norwich Pharmacal jurisdiction to obtain information and evidence to support possible civil claims in foreign proceedings, it was held that in the circumstances that jurisdiction was excluded by the statutory regime under the *1975 Act*.

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(ii) - Asset disclosure post-judgment

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B. - Freezing Injunctions

5. - "Domestic" Freezing Injunctions

(c) - Ancillary orders—asset disclosure

(ii) - Asset disclosure post-judgment

15-76

Under English law, after judgment, but not before judgment, a claimant is able to attach assets of the defendant against whom he has obtained judgment. The judgment debtor may be required to give disclosure of his assets and the claimant may obtain an order for his examination as to his assets under [CPR Pt 71](#). The judgment debtor may be required to give disclosure of his assets wherever situate (whether within and without the jurisdiction) (*Interpool Ltd v Galani* [1988] Q.B. 738; [1987] 2 All E.R. 981, CA). In a case outside Pt 71, such disclosure may be ordered under the Senior Courts Act 1981 s.37 (*Maclaine Watson & Co Ltd v International Tin Council (No.2)* [1989] Ch. 286; [1988] 3 All E.R. 257, CA).

Obviously, in a given case, the object of ordering the disclosure of assets could be defeated by an unscrupulous judgment debtor if he was not restrained from removing or dealing with assets which he should disclose in response to the disclosure order. Accordingly, after judgment an application may be made for a freezing injunction (or for the continuation of such an injunction made before judgment), with an ancillary order attached (with a scope as deemed appropriate by the court), for the purpose of providing such restraint. The ancillary order may require the defendant to disclose assets without as well as within the jurisdiction (*Gidrxislme Shipping Co v Tantomar-Transportes Lda.* [1995] 1 W.L.R. 299; [1994] 4 All E.R. 507).

Post-judgment worldwide freezing injunctions should be of limited duration and the judgment creditor should be encouraged to proceed with proper methods of execution (*Republic of Haiti v Duvalier* [1990] 1 Q.B. 202; [1989] 1 All E.R. 454 at [465], CA, per Staughton LJ). It is open to the defendant to apply to discharge on provision of credible evidence that the injunction is being maintained for an improper purpose (*Touton Far East Ltd v Shivnath Raj Harnarain (India) Ltd* [2016] EWHC 1765 (Comm)). It is not the function of a freezing order to confer on the judgment debtor a right to preferential treatment over other creditors (*Camdex International Ltd v Bank of Zambia (No.2)* [1997] 1 W.L.R. 632, CA, per Aldous LJ at p.638).

In *Vitol SA v Capri Marine Ltd* [2010] EWHC 458 (Comm); [2011] 1 All E.R. (Comm) 366 (Tomlinson J) the judge explained (at para.37) that disclosure orders made after judgment may have the dual purposes of (1) assisting in the identification or ascertainment of the location of assets which were subject or potentially subject to a freezing order, and (2) assisting the judgment creditor to locate assets against which enforcement could be sought. The judge held that the disclosure given post judgment by a judgment debtor could be used for the purposes of enforcement, not only against the judgment debtor, but also (on the basis of the alter ego theory of liability) in proceedings abroad against a third party. The enforcement of the judgment was not a purpose collateral to that for which disclosure was made.

(iii) - Respondent resisting disclosure, etc. on ground of privilege

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(c) - Ancillary orders—asset disclosure

(iii) - Respondent resisting disclosure, etc. on ground of privilege

15-77

Paragraph 9 of the example of a freezing order annexed to Practice Direction 25A (Interim Injunctions) states that, if the respondent's providing of information as to his assets in compliance with the ancillary order "is likely to incriminate" him, he "may be entitled to refuse to provide it". Further, among the undertakings that the applicant may be required to give the court is one to the effect that he will not, without the permission of the court, "use any information obtained as a result of this order for the purpose of any civil or criminal proceedings, either in England and Wales or in any other jurisdiction, other than this claim" (above, Sch.B para.(9)). It is not necessary here to explain the scope of this privilege (see further para.15-93 below, and Vol.1 para.31.3.31). It is sufficient to note that cases have arisen in which the courts have had to consider the manner in which account should be taken of the privilege when making ancillary orders in support of freezing injunctions (e.g. *Arab Monetary Fund v Hashim* [1989] 1 W.L.R. 565; [1989] 3 All E.R. 466; *Sociedade Nacional de Combustíveis de Angola U.E.E v Lundqvist* [1991] 2 Q.B. 310; [1990] 3 All E.R. 283, CA; *Sociedade Nacional de Combustíveis de Angola U.E.E v Lundqvist* [1991] 2 Q.B. 310; [1990] 3 All E.R. 283, CA; *JSC BTA Bank v Ablyazov* [2009] EWCA Civ 1125; [2010] 1 All E.R. (Comm) 1029, CA). In *Dadourian Group International Inc v Simms (No.2)* [2006] EWCA Civ 1745; [2007] 1 W.L.R. 2967, CA, the defendant (D) gave disclosure by affidavit and was cross-examined on it. At trial, on the claimant's (C) application, the judge released C from their undertaking permitting them to use D's affidavit and the transcript of D's cross-examination, not only at trial, but also in other proceedings, including committal proceedings against D. On appeal, the Court of Appeal rejected D's submission that the court should permit release from the undertaking only in exceptional circumstances and held that the principle is that permission may be given to use information so obtained in committal proceedings where it is just and convenient for the purpose of policing and enforcing the freezing order. The court outlined the procedure to be followed where a claimant applies for release from his undertaking in these circumstances and the matters particularly to be taken into account by the court in dealing with such application.

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(iv) - Cross-examination on disclosure affidavit

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(c) - Ancillary orders—asset disclosure

(iv) - Cross-examination on disclosure affidavit

15-78

The court may order cross-examination of the defendant upon any affidavits filed by him in purported compliance with order made ancillary to an order for a freezing injunction, and may do so even though no further order is required from the court consequent upon the cross-examination (*House of Spring Gardens Ltd v Waite [1985] F.S.R. 173, CA*). See further Vol.1 para.32.7.1, and authorities referred to there. The fact that such cross-examination will relate to matters which are relevant to the substantive issues in the action is a matter to which the court should have regard when considering whether to permit cross-examination because the court must be astute to guard against abuse of the freezing injunction process by claimants who are using it in an attempt to discover facts that will assist them in the action (*Yukong Line Ltd of Korea v Rendsburg Investments Corp of Liberia, The Times, 22 October 1996, CA*). The cross-examination must not be undertaken for an ulterior purpose (*Jenington International Inc v Assaubayev [2010] EWHC 2351 (Ch)*). Its conduct should be confined to the purpose for which the affidavit was required, which is to establish the relevant assets of the defendant (*British Sky Broadcasting Group Plc v Digital Satellite Warranty Cover Ltd [2011] EWHC 3062 (Ch); [2012] 1 W.L.R. 219* (Robin Knowles QC)). In the example of a freezing order annexed to PD 25A the undertakings given by the applicant include an undertaking not to use (without the permission of the court) "any information obtained" as a result of the order for the purpose of any civil or criminal proceedings (including any proceedings for contempt) other than the claim in which the order is made. When, in furtherance of a freezing order an applicant obtains an order for cross-examination before the court on an affidavit of assets required to be sworn by the defendant as part of the freezing order then the fruits of the cross-examination are to be treated as "information obtained" within the applicant's undertaking (above). See further commentary following CPR r.32.7 (Order for cross-examination); Vol.1 para.32.7.1. In *Bank of St Petersburg OJSC v Arkhangelsky [2012] EWHC 2842 (Ch)* (Hildyard J) an application was made by a judgment creditor, in proceedings to obtain information from a judgment debtor under CPR Pt 71, for permission to make use of evidence, obtained pursuant to a freezing order (granted in separate but related proceedings), in the cross-examination of the judgment debtor. The judge held that if, in the proceedings in which the freezing order was granted, a pre-judgment order for cross-examination would not have been made (for example because other ways of achieving asset disclosure had not been explored), such permission should not be granted post-judgment in the Pt 71 proceedings.

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(v) - Orders to ensure the effectiveness of earlier orders

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(c) - Ancillary orders—asset disclosure

(v) - Orders to ensure the effectiveness of earlier orders

- 15-78.1 The court has the power by making further orders to ensure the effectiveness of any other order it has made, including where appropriate by ordering disclosure of information (*MacLaine Watson & Co Ltd v International Tin Council (No 2) [1989] Ch. 286, CA*, at p.303). This principle was applied to order solicitors to disclose the contact details of their client (a contemnor who had not complied with a freezing and assets disclosure order) to aid enforcement of a freezing and assets disclosure injunction and the committal order which had previously been made for breach of it (*JSC BTA Bank v Solodchenko (No. 3) [2011] EWHC 2163 (Ch); [2012] 3 W.L.R. 559* (Henderson J)). In declining to order disclosure of information about the contemnor's assets communicated to the solicitors, the court confirmed the very strong public interest in free and unfettered access to legal advice coupled with the absolute and unqualified status accorded by English law to legal professional privilege.

In *JSC BTA Bank v Ablyazov [2011] EWHC 2664 (Comm)*, (Clarke J), the same principle was applied to order disclosure, on restricted information regime conditions, of the ultimate beneficial owner of a company which was providing funding to the defendants in 9 claims brought by the claimant, covering 75 lawyers in 8 different law firms as well as 10 leading and more than 20 junior counsel.

Where a "person unknown" defendant hides behind anonymity, the court has the power to include within the injunction an order that such person must identify him/herself and provide an address for service ("a self-identification order"). Such orders appear so far to have been made only in threatened unlawful publication cases; see, e.g., *PML v Person(s) Unknown [2018] EWHC 838 (QB)*.

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(d) - Freezing injunction in aid of proceedings in other jurisdictions

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(d) - Freezing injunction in aid of proceedings in other jurisdictions

15-79 Lord Diplock’s dictum in *Siskina v Distos Compania Naviera SA (The Siskina)* [1979] A.C. 210, HL, that the court’s power to grant an injunction, or its exercise, was dependent on the existence of a claim for substantive relief which the court had jurisdiction to grant such that a freezing order could not be granted in aid of foreign proceedings, should no longer be regarded as good law: *Broad Idea International Ltd v Convoy Collateral Ltd* [2021] UKPC 24; [2022] 2 W.L.R. 703; [2022] 1 All E.R. 289; *Fourie v Le Roux* [2007] UKHL 1; [2007] 1 W.L.R. 320. Such constraint is not only undesirable in light of subsequent developments including the advent of electronic banking allowing money to be easily and instantaneously transferred between jurisdictions, the globalisation of commerce and the growth in the use of offshore companies, but was legally unsound. Many such statements as to the limits of the court’s jurisdiction would be better explained by recognising that the court had the power to grant injunctive relief but has from time to time declined to do so in accordance with its then settled practice. Such practice is not immutable, as the development of the freezing injunction from its roots in the 1970s demonstrates.

In any event, as explained at para.15-5, s.25 of the Civil Jurisdiction and Judgments Act 1982 now provides that the High Court has power to grant interim relief in aid of substantive proceedings elsewhere of whatever kind and wherever taking place. Such power includes the power to grant a freezing injunction in aid of foreign proceedings.

In *United States Securities & Exchange Commission v Manterfield* [2009] EWCA Civ 27; [2009] 1 Lloyd’s Rep. 399; [2009] 2 All E.R. 1009, CA, where the claimants (C) in foreign proceedings (a public agency) in which fraud was alleged applied for a worldwide freezing injunction, the respondent’s submission that, on the grounds that C were seeking to enforce a foreign penal law, the English court should decline jurisdiction was rejected. It was held (1) that the substance of what C would seek to enforce (if they prevailed in the action), and in relation to which they sought to preserve assets, was the disgorgement of what they alleged to be the proceeds of fraud, and (2) that in the circumstances, the fact that a civil penalty might be imposed was not of such significance as to form a basis for characterising the proceedings as for the enforcement of a penal law.

In *United States of America v Abacha* [2014] EWCA Civ 1291, the Court of Appeal held that it would be inexpedient for a party to obtain a freezing order where (1) any order later made in the substantive proceedings would be unenforceable in this jurisdiction, and (2) there was an alternative and comprehensive regime which would have enabled the assets in question to have been secured. In particular the Court held that s.25 could not be used to circumvent the procedures for enforcing orders made in foreign proceedings for the recovery of proceeds of crime laid down by the *Proceeds of Crime Act 2002* and the *Proceeds of Crime Act 2002 (External requests and Orders) Order 2005* (SI 2005/3181) for prohibition and recovery orders in respect of assets located in England which had been the subject of orders in foreign proceedings to recover proceeds of crime. In *Ras Al Khaimah Investment Authority v Bestfort Development LLP* [2017] EWCA Civ 1014; [2018] 1 W.L.R. 1099, CA, there was real doubt as to the extent of relief granted in the primary proceedings (in Georgia) and the Court of Appeal held (para.59) that the possible inconsistencies in such relief rendered it inexpedient to grant any relief in respect of assets in Georgia.

Where an unqualified freezing order made in Luxembourg risked hampering D’s defence of English proceedings and undermining the exception in an earlier English order for living expenses and legal costs, the court ordered C to consent to a variation of the Luxembourg order to allow such expenditure: *Circumference Investments (Europe) Ltd v Martin* [2021] EWHC 2691 (Ch).

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(e) - Freezing injunction in aid of foreign judgment registered for enforcement

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(e) - Freezing injunction in aid of foreign judgment registered for enforcement

15-80

Where a judgment or decision is given in the foreign proceedings or a court settlement concluded before the end of the transition period following the UK’s exit from the European Union (11pm on 31 December 2020), questions of recognition and enforcement of such judgment, decision or settlement shall continue to be governed by the Brussels Convention and Lugano Conventions ([reg.92 of the Civil Jurisdiction and Judgments \(Amendment\) \(EU Exit\) Regulations 2019 \(SI 2019/479\)](#)) and by the recast Judgments Regulation (reg.93A, and arts 67(2)(a) and 69(2) of the Withdrawal Agreement between the UK and the EU under art.50(2) of the Treaty on European Union dated 17 October 2019).

Otherwise, the recognition and enforcement of foreign judgments is now governed by the [Administration of Justice Act 1920](#), the [Foreign Judgments \(Reciprocal Enforcement\) Act 1933](#) and the common law.

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(f) - Freezing orders in aid of arbitration award

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B. - Freezing Injunctions

5. - "Domestic" Freezing Injunctions

(f) - Freezing orders in aid of arbitration award

- 15-80.1** There is a distinction between an immediately enforceable post judgment freezing order and freezing order granted in aid of enforcement of a judgment where enforcement is not presently available (for example, where there is a stay of execution, or where an arbitration award is not yet enforceable because the period under r.62.18(9) has not expired). See para.15-71 above.

The court can grant permission to serve out of the jurisdiction a claim to enforce the award in the same manner as a judgment, irrespective of the place where the award was made. Where permission to enforce the award is sought and obtained, the court can in principle grant a worldwide freezing order, and a claim for such relief does not need to be included within the arbitration claim form: *Eastern European Engineering Ltd v Vijay Construction (Pty) Ltd [2018] EWHC 1539 (Comm)* (Butcher J). For commentary on post-judgment WFOs, see para.15-85 below

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(g) - Freezing order and order appointing a receiver

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(g) - Freezing order and order appointing a receiver

- 15-80.2 The Senior Courts Act 1981 s.37(1) states that the court may by order grant an injunction or appoint a receiver (see para.9A-128 above). The remedies are separate, but in some cases it may be appropriate to grant both (*Derby v Weldon (No. 3) [1990] Ch. 65, CA*). For example, the court may order the appointment of a receiver in support of a freezing order. But an appointment for that purpose will only be appropriate in cases where the injunction is insufficient on its own and generally will be completely inappropriate in the ordinary case where the assets are constituted by money in bank accounts (in respect of which the relevant bank can be given notice) or by immovable property (*JSC BTA Bank v Ablyazov [2010] EWCA Civ 1141; [2011] Bus. L.R. D119, CA*). Such cases are only likely to arise where there is a measurable risk that, if it is not granted, a defendant will act in breach of the freezing order or otherwise seek to ensure that his assets will not be available to satisfy any judgment which may in due course be given against him. If, therefore, the method by which a defendant beneficially holds his assets is transparent, a receivership order may well not be necessary. But if it is opaque and there is a reasonable suspicion that such opacity will be used by a defendant to act in breach of a freezing order, it may well be the case that a receivership order is appropriate (above).

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6. - “Worldwide” Freezing Injunctions

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6. - “Worldwide” Freezing Injunctions

- 15-81 It was noted above (para.[15-64](#)) that the assets “frozen” by freezing injunctions may be assets within the jurisdiction or without and that additional and different matters arise in relation to “worldwide” injunctions.

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(a) - Introduction

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B. - Freezing Injunctions

6. - "Worldwide" Freezing Injunctions

(a) - Introduction

- 15-82 The early authorities relating to freezing injunctions of the type recognised by the Court of Appeal in *Mareva Compania Naviera SA v International Bulk Carriers SA ("The Mareva")* [1980] 1 All E.R. 213; [1975] 2 Lloyd's Rep. 509, CA, imposed three territorial limitations upon the scope of this form of interim remedy. The remedy was granted only for the purpose (a) of restraining the removal of property from within the jurisdiction, (b) by persons resident outside the jurisdiction, (c) who had property within the jurisdiction. All three limitations were subsequently abandoned. The later cases stressed that s.37(1) of the Senior Courts Act 1981 is expressed in wide terms and contains no territorial limitation. Further, s.37(3) does not restrict the territorial ambit of freezing injunctions; its purpose is to ensure that there should be no discrimination against parties not domiciled, resident or present within the jurisdiction (*Babanaft International Co SA v Bassatne* [1990] 1 Ch. 13; [1989] 1 All E.R. 433 at 440, CA, per Kerr LJ). Furthermore, the existence of assets of the defendant within the jurisdiction is not a pre-condition to the granting of an injunction having extraterritorial effect (*Derby & Co Ltd v Weldon (Nos 3 and 4)* [1990] 1 Ch. 65, CA, sub nom. *Derby & Co Ltd v Weldon (No.2)* [1989] 1 All E.R. 1002, CA). Since these limitations were removed, freezing injunctions having extra-territorial effect have become common place. However, it has been recognised since *Ashtiani v Kashi* [1987] Q.B. 888, CA, that to grant an injunction freezing assets abroad is not an automatic step; special grounds have to be shown.

The example of an order for a freezing injunction annexed to Practice Direction 25A (Interim Injunctions) (supplementing CPR Pt 25) contains clauses that are appropriate for an order freezing injunction not limited to the respondent's assets in England and Wales, but restraining the respondent from dealing with or disposing of his assets located outside England and Wales. In *JSC BTA Bank v Ablyazov* [2009] EWHC 3267; [2010] 1 All E.R. (Comm) 1040 (Teare J), the court found good reason for permitting a variation of those clauses, with the effect that the respondent was restrained from disposing of or dealing with such assets so long as the value of all his assets "in England and Wales" (rather than "whether in or outside England and Wales") remained above the maximum sum. The case law on orders for so-called "worldwide" freezing injunctions (WFOs) is extensive. Much of it is reflected in the terms of the example of an order annexed to the Practice Direction. The example form of a freezing order contains an undertaking by the applicant not without the permission of the court to seek to enforce the order outside England and Wales. In *Dadourian Group International Inc v Simms (Practice Note)* [2006] EWCA Civ 399; [2006] 1 W.L.R. 2499, CA, the Court of Appeal laid down guidelines as to the exercise of the discretion whether to grant permission to enforce a worldwide freezing order abroad. For the guidelines and further commentary, see para.15-87 below.

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(b) - Relevant factors

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6. - “Worldwide” Freezing Injunctions

(b) - Relevant factors

15-83 The granting of a freezing injunction is a matter for the discretion of the judge hearing the application. In the exercise of this discretion, in the context of English proceedings the court may grant an application for a WFO where the following matters are established:

- (1)the claimant has a good arguable case;
- (2)the claimant has satisfied the court—
 - (a)that there are no assets or insufficient assets within the jurisdiction to satisfy his claim; and
 - (b)that there are assets without the jurisdiction; and
- (3)there is a real risk of dissipation or secretion of those assets so as to render any judgment which the claimant may obtain nugatory.

In addition, in exercising its discretion the court should consider whether undertakings or provisos, or a combination of both, should be requested or imposed for the purpose of protecting the defendant from oppression and for protecting the position of foreign third parties.

The English court’s jurisdiction to grant applications for interim injunctions in support of foreign proceedings includes power to grant a WFO. Generally, the court will only be prepared to exercise its discretion to grant this relief in such circumstances if the respondent or the dispute has a sufficiently strong link with England and Wales; for detailed explanation of this point, see *Mobil Cerro Negro Ltd v Petroleos de Venezuela SA [2008] 1 Lloyd's Rep. 684* (Walker J) at [86]–[119] (refusing application for WFO in support of intended arbitration in New York). There will always need to be a careful examination of any proposed part of the order which would tend to run counter to principles of comity with courts in other jurisdictions (above).

(c) - Persons outside jurisdiction not affected by WFO

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(c) - Persons outside jurisdiction not affected by WFO

- 15-84 In the commentary above on domestic freezing injunctions it was explained that third parties may be affected directly by an order for such an injunction. The position of third parties in orders for worldwide freezing injunctions is somewhat different.

In *Babanaft International Co SA v Bassatne [1990] Ch. 13; [1989] 1 All E.R. 433, CA*, it was stated that it would be improper for the court to grant an unqualified injunction freezing foreign assets because such an injunction would amount to an exorbitant assertion of extra-territorial jurisdiction over third parties resident abroad who were in no sense subject to the English court's jurisdiction (e.g. banks holding the judgment debtor's assets). The appropriate terms for a "Babanaft proviso" were considered in subsequent cases and are now found in para.19 of the example of an order for a freezing injunction annexed to Practice Direction 25A (Interim Injunctions) is directed specifically at WFOs.

Paragraph 19(1) states that, except as provided in para.19(2), the terms of the WFO "do not affect or concern anyone outside the jurisdiction of this court". The exceptions provided for in para.19(2) include any person who (a) is subject to the jurisdiction of the English court, (b) has been given written notice of the WFO at his residence or place of business within the jurisdiction of the court, and (c) is able to prevent acts or omissions outside the jurisdiction of the court which constitute or assist in a breach of the terms of the WFO. Any other person is affected or concerned only to the extent that the WFO is declared enforceable by, or is enforced by, a court in a country or state outside the jurisdiction of the English court.

In *YS GM Marfin II LLC v Lakhani [2020] EWHC 2629 (Comm)*, Jacobs J held that while it is not improper to give notice to third parties outside the jurisdiction who would not be bound by the order, the effect of the order must not be misrepresented and a stark and unexplained reference to contempt and the penal notice would be inappropriate.

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(d) - Post-judgment WFO

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(d) - Post-judgment WFO

- 15-85 After a judgment has been given by an English court, the judgment debtor may be required to give disclosure of his assets wherever situated. The object of ordering such disclosure is to render the judgment effective, by enabling the judgment creditor to discover whether there are sufficient assets within the jurisdiction which may be attached to satisfy the judgment and, if not, whether there are assets elsewhere that might be pursued by enforcement processes in foreign courts.

Obviously, in a given case, the object of ordering the disclosure of assets could be defeated by an unscrupulous judgment debtor if he was not restrained from dealing with assets which he should disclose in response to the disclosure order. Where the judgment debtor has assets located abroad an application may be made for a freezing injunction for the purpose of restraining him from dealing with those assets.

The arguments against granting an injunction extending to assets outside the jurisdiction are much weaker in a case where judgment has been obtained than in a case where an interlocutory order is sought before trial (*Babanaft International Co SA v Bassatne*, op. cit., per Kerr LJ, and Neill LJ, and *Republic of Haiti v Duvalier* [1990] 1 Q.B. 202; [1989] 1 All E.R. 456 at 465, CA, per Staughton LJ). In the former situation the court is no longer so concerned to protect the defendant.

In *FM Capital Partners v Marino* [2018] EWHC 2889 (Comm) (Peter MacDonald Eggers QC) the Court considered that, where the "extended definition" of assets (as discussed in *JSC BTA Bank v Ablyazov* (No.10) [2015] UKSC 64; [2015] 1 W.L.R. 4754) in a standard form freezing order applies and the respondent controls a company as principal or only shareholder, disposals of the company's assets if not in the ordinary course of business may have the effect of diminishing the value of the respondent's shareholding, and therefore be injuncted. The companies in question were trading businesses, and the court imposed a notification requirement in respect of transactions over a specified limit.

Enforcement of arbitration awards is governed by CPR r.62.17 et seq., see Vol.2 para.2E-37. The court can grant a worldwide or domestic freezing order, even if such a claim is not included in the arbitration claim form: *Eastern European Engineering Ltd v Vijay Construction (Pty) Ltd* [2018] EWHC 1539 (Comm) (Butcher J). Granting such a WFO is a matter for the court's discretion, to be exercised only in special or exceptional circumstances where the justice of the case so requires, to depart from the normal guideline that the Court should confine itself to its own territorial area: *Rosseel NV v Oriental Shipping Ltd* [1990] 1 W.L.R. 1387.

For discussion of whether the payments in the ordinary course of business exception should be in place in post judgment freezing order cases, see para.15-71.

(e) - Pre-judgment WFO

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(e) - Pre-judgment WFO

15-86 In *Babanaft International Co SA v Bassatne* [1990] Ch. 13; [1989] 1 All E.R. 433, CA, Kerr LJ said (at 33 and 444) that:

“... some situations ... cry out—as a matter of justice to plaintiffs—for disclosure orders and Mareva injunction type injunctions covering foreign assets of defendants even before judgment.”

This dictum has been much quoted. Each case must depend on its own facts (*Derby & Co Ltd v Weldon* [1990] 1 Ch. 48; [1989] 1 All E.R. 469 at 473, CA, per May LJ, and at 62 and 478, per Nicholls LJ; in this case it was said that there is every justification for an injunction where “the defendants are clearly sophisticated operators who have amply demonstrated their ability to render assets untraceable and a determination not to reveal them” at 57, per Parker LJ).

A pre-judgment WFO would clearly be unjustified if, for example, there were sufficient English assets to meet any judgment to which the claimant might ultimately be entitled (in the case of a non-proprietary claim) (*Derby & Co Ltd v Weldon (Nos 3 and 4)* [1990] 1 Ch. 65 at 79, CA, per Lord Donaldson MR), or if the court were not satisfied that there were foreign assets or that there was a real risk of disposal of the same, or if it would in all the circumstances be oppressive to make the order (*Derby & Co Ltd v Weldon* [1990] 1 Ch. 48; [1989] 1 All E.R. 469 at 474, CA, per May LJ, per Parker LJ). The risk of prejudice to the claimant must be appropriately grave before it will be just and convenient to make such a draconian order and special factors, such as the defendant’s capacity and propensity to hide assets to defeat creditors are important to the assessment of that risk (*Derby & Co Ltd v Weldon* [1990] 1 Ch. 48; [1989] 1 All E.R. 469 at 478, CA, per Nicholls LJ).

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(f) - Permission to enforce abroad

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The making of an order in respect of foreign assets is a serious step and the risks of refusing this relief must justify it. There is an obvious risk of oppression to the defendant and third parties. Accordingly, a WFO will usually contain an undertaking by the party who obtained the order not to seek to enforce it in another jurisdiction without the English court's permission. In the example of a freezing injunction annexed to the Practice Direction 25A (Interim Injunctions) this undertaking is found in para.(10) of Sch.B. This reflects the long-standing concern that care should be taken to ensure that a WFO is not enforced oppressively by a multiplicity of applications in different countries throughout the world (*In re Bank of Credit and Commerce International S.A. [1994] 1 W.L.R. 708, CA*). On an application to enforce abroad it is to be expected to have before him (what the court granting the original order would not) evidence of the law and practice in the country or countries in which the order is sought to be enforced (*Derby v Weldon (No.1) [1990] Ch. 48, CA*, at p.59 per Nicholls LJ).

In *Dadourian Group International Inc v Simms (Practice Note) [2006] EWCA Civ 399; [2006] 1 W.L.R. 2499, CA*, the Court of Appeal stated that the court has a discretion to grant an applicant permission to enforce a WFO abroad whenever it considers it just so to do. (In this case, the court expressly rejected the submission that the court should not give permission to enforce a WFO abroad if the party alleged to hold the assets can be brought before the English court.) The court said there is a range of factors which the court is likely to need to consider. For this purpose the court set out and explained guidelines to be applied by the court (enumerated 1 to 8) where a party applies to the court for such permission (the “Dadourian guidelines”). As summarised by the court the guidelines are as follows (as to guideline 8, see further Vol.1, para.23.10.2).

(1)The principle applying to the grant of permission to enforce a WFO abroad is that the grant of that permission should be just and convenient for the purpose of ensuring the effectiveness of the WFO, and in addition that it is not oppressive to the parties to the English proceedings or to third parties who may be joined to the foreign proceedings.

(2)All the relevant circumstances and options need to be considered. In particular consideration should be given to granting relief on terms, for example terms as to the extension to third parties of the undertaking to compensate for costs incurred as a result of the WFO and as to the type of proceedings that may be commenced abroad. Consideration should also be given to the proportionality of the steps proposed to be taken abroad, and in addition to the form of any order.

(3)The interests of the applicant should be balanced against the interests of the other parties to the proceedings and any new party likely to be joined to the foreign proceedings.

(4)Permission should not normally be given in terms that would enable the applicant to obtain relief in the foreign proceedings which is superior to the relief given by the WFO.

(5)The evidence in support of the application for permission should contain all the information (so far as it can reasonably be obtained in the time available) necessary to make the judge to reach an informed decision, including evidence as to the applicable law and practice in the foreign court, evidence as to the nature of the proposed proceedings to be commenced and evidence as to the assets believed to be located in the jurisdiction of the foreign court and the names of the parties by whom such assets are held.

(6) The standard of proof as to the existence of assets that are both within the WFO and within the jurisdiction of the foreign court are a real prospect; that is the applicant must show that there is a real prospect that such assets are located within the jurisdiction of the foreign court in question.

(7) There must be evidence of a risk of dissipation of the assets in question.

(8) Normally the application should be made on notice to the respondent, but in cases of urgency, where it is just to do so, the permission may be given without notice to the party against whom relief will be sought in the foreign proceedings but that party should have the earliest practicable opportunity of having the matter reconsidered by the court at a hearing of which he is given notice.

Guidance as to the application of these guidelines from the courts has been sparse. In *Arcadia Petroleum Ltd v Bosworth [2015] EWHC 3700 (Comm)*, (Males J), the claimants applied for permission to enforce the order which had been continued on the return date, and some protections for the defendants were justified under Dadourian Guideline 2 as follows: (i) The order granting permission should be explicit as to what the steps the claimants were being given permission to take in each relevant overseas jurisdiction; (ii) The claimants were required to give an undertaking that the benefit of the undertakings in the inter partes WFO should ensure for the benefit of any third party notified in the overseas jurisdictions; (iii) The claimants had to undertake to undo any enforcement steps in the overseas jurisdictions if the WFO was set aside, including paying any costs reasonably incurred by the defendants in connection with such undoing; (iv) The claimants were required to undertake to be co-operative in relation to the exceptions and protections in the WFO (e.g. in relation to living expenses and legal costs). In *Ikon International (HK) Holdings Public Co Ltd v Ikon Finance Ltd [2016] EWHC 318 (Comm)*, the judge accepted the general proposition advanced by the claimants that a party who has been granted a freezing injunction is entitled to police that injunction and to seek further assistance from the court in so doing, regardless of the fact that there are outstanding applications to discharge, or, indeed, that a without notice WFO has not yet been considered at an on-notice hearing, but held that in the circumstances it was wrong to grant the claimants permission to enforce a freezing order out of the jurisdiction or make an order for cross examination before the return date of the freezing order which had been made on a without notice application.

Where, as a quid pro quo for the grant of a WFO, one party undertakes not to begin proceedings against another on the same subject matter in another jurisdiction, that undertaking takes effect as if it were an injunction against the party giving the undertaking (*Grupo Torras S.A. v Sheikh Fahad Mohamed al Sabah [2001] EWCA Civ 1370*).

1. - Introduction

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C. - Search Orders

1. - Introduction

15-89 Paragraph (h) of CPR r.25.1(1) recites that the court may grant an interim remedy in the form of an order requiring a party to admit another party to premises “for the purpose of preserving evidence, etc.” Such an order, formerly known as an Anton Piller order (see further below), is now referred to in that provision as a “search order”. Detailed provisions concerning search orders and their execution are found in para.7 of Practice Direction 25A (Interim Injunctions), supplementing [CPR Pt 25](#), and an example of search order is annexed to that practice direction. In [*TBD \(Owen Holland\) Ltd v Simons \[2020\] EWCA Civ 1182; \[2021\] 1 W.L.R. 992; \[2021\] 4 All E.R. 889*](#), Arnold LJ observed, at [174], that the description of the order as an “example” is unfortunate and that the standard form of search order which has been developed over more than 25 years should be used unless there is good reason to depart from it.

Three major types of case are likely to attract applications for search orders. They are (1) cases involving infringement of rights in intellectual property (such as trade marks, copyright and trade secrets, and passing-off), (2) anti-competition cases brought by ex-employers against ex-employees), and (3) matrimonial proceedings where it is thought that a spouse has failed to make truthful disclosure of his or her assets.

For principal commentary on the jurisdiction of the court to grant search orders, and relevant practice and procedure, see commentary to [r.25.1\(1\)\(h\)](#) in Vol.1.

As to the protection afforded respondents by the claimant’s undertakings in search orders, see para.[15-28](#) above.

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2. - Jurisdiction

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C. - Search Orders

2. - Jurisdiction

- 15-90** A search order requires the defendant or respondent to permit certain persons to enter his premises, to search for documents or other articles of moveable property, and to take them away and retain them for the time being. It is necessarily made without notice, because if it is thought that the defendant or respondent knew that the order was about to be made he would conceal, remove or destroy the documents or articles in question. The granting of a search order is a matter for the discretion of the judge hearing the application. The court's jurisdiction in this respect developed as an adjunct to the powers of the court to make pre-trial orders for the detention, custody or preservation of property which is the subject-matter of proceedings ([CPR r.25.1\(1\)\(c\)](#), formerly RSC Ord.29, r.2).

In [TBD \(Owen Holland\) Ltd v Simons \[2020\] EWCA Civ 1182; \[2021\] 1 W.L.R. 992; \[2021\] 4 All E.R. 889](#), Arnold LJ gave a useful analysis of the birth of the jurisdiction in the early 1970s and its development over the following 46 years. He identified the problems that have arisen in practice, the exceptional nature of the jurisdiction and the critical importance of safeguards to protect the position of the respondent. Arnold LJ also observed that search orders originated in an analogue age when most business records only existed in paper form. Accordingly, the relief sought these days is often for an imaging order rather than a true search order. (As to imaging orders, see para.15-90.1 below.) Arnold LJ cautioned that an imaging order may make a traditional search order unnecessary or significantly reduce its scope to articles other than documents.

The jurisdiction may be traced to a series of first instance decisions in intellectual property cases given in 1974 (before the decision of the House of Lords in [American Cyanamid Co v Ethicon Ltd \[1975\] A.C. 396, HL](#)). The first of these cases to be fully reported was [E.M.I. Ltd v Pandit \[1975\] 1 W.L.R. 302; \[1975\] 1 All E.R. 418](#) (decided on 4 December 1974). That was an infringement of copyright case in which the claimants were granted an interlocutory injunction restraining the defendant from selling or parting with the infringing material and requiring him to swear an affidavit disclosing those persons from whom he had received or to whom he had supplied the material. On a subsequent without notice application, the claimants produced evidence tending to show that the defendant's affidavit was a fabrication and sought an order for the inspection and removal of certain material with an authorisation attached to permit them to enter upon the defendant's premises for these purposes. The question for the judge was, not whether such an order could be granted, but whether it could be granted on a without notice application. Templeman J concluded that from the terms of (what is now) [CPR r.25.1\(1\)\(c\)](#), and from the authorities, in exceptional circumstances and on terms designed to safeguard the defendant, the court had jurisdiction to make (what was then called) "permit" orders as sought by the claimants. Shortly afterwards, in [Anton Piller K.G. v Manufacturing Processes Ltd \[1976\] 1 Ch. 55; \[1976\] 1 All E.R. 779, CA](#), another copyright case, such orders received the imprimatur of the Court of Appeal and thereafter came to be known as "Anton Piller orders" (see also [Universal City Studios Inc v Mukhtar & Sons \[1976\] 1 W.L.R. 568; \[1976\] 2 All E.R. 330](#)). Subsequently, a difference of opinion emerged as to the source of the court's jurisdiction to grant such orders. The matter was clarified by the [Civil Procedure Act 1997 s.7](#) (see further below). In the years following these cases, a vast body of case law emerged as the implications of the judicial innovation of without notice permit orders became apparent. The jurisdiction of the High Court to grant a search order was put on a statutory basis by the [Civil Procedure Act 1997 s.7](#) (Power of courts to make orders for preserving evidence) (see Vol.2, para.[9A-756](#)). That provision was enacted following recommendations concerning search orders made by a committee of judges appointed by the Judges' Council (see "Anton Piller Orders: A Consultation Paper" (LCD 1992), hereinafter "1992 Consultation Paper"). The jurisdiction of county courts to grant search orders is restricted; see commentary to [r.25.1\(1\)\(h\)](#) in Vol.1. In various respects, [s.7](#) put into statutory form authoritative decisions of the courts handed down in the years following the [Anton Piller](#) case. For example, by expressly stating that a search order may secure the preservation, not only of property that is the subject-matter of proceedings, but also of evidence (which is or may be relevant), [s.7\(1\)](#) carries on the effect of [Yousif v Salama \[1980\] 1 W.L.R. 1540; \[1980\] 3 All E.R. 405, CA](#).

Section 7(1) states that the High 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:

- (a)the preservation of evidence which is or may be relevant, or
- (b)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.

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 (s.7(2)).

The court has jurisdiction to make a search order after judgment against the judgment debtor for the purpose of eliciting documents which are essential to execution and which would otherwise be unjustly denied to the judgment creditor (*Distributori Automatici Italia SpA v Holford General Trading Co Ltd [1985] 1 W.L.R. 1066* (Leggatt J)). Further, the court has jurisdiction to make a search order against a third party for that purpose, and may do so whether or not a non-party disclosure order had been made against the third party under r.31.17, or, if it had, whether or not its terms were more limited than the search order sought (*Abdela v Baadarani (No.2) [2017] EWHC 269 (Ch); [2018] 1 W.L.R. 89* (Nugee J)).

The heart of a search order consists of the directions which may be included in the order by the court in the exercise of the powers referred to in subss.(4), (5) and (6) of s.7. The order may direct any person to permit any person described in the order, or secure that any person so described is permitted:

- (a)to enter premises (or any vehicle, see s.7(8)) in England and Wales, and
- (b)while on the premises, to take in accordance with the terms of the order any of the following steps.

Those steps are:

- (a)to carry out a search for or inspection of anything described in the order, and
- (b)to make or obtain a copy, photograph, sample or other record of anything so described.

The order may also direct the person concerned:

- (a)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
- (b)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.

The order may describe anything generally, whether by reference to a class or otherwise (s.7(8)). The order is to have effect subject to such conditions as are specified in the order (s.7(6)).

It is specifically provided that s.7 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 (s.7(7)) (see further para.15-93 below).

Under the terms of a such order, the respondent is required to permit “the search party” (viz., the supervising solicitor and others) to enter his premises and to search for, inspect and copy such evidence or property as may be listed in the order and to deliver it into safekeeping.

Imaging order

15-90.1 In *TBD (Owen Holland) Ltd v Simons [2020] EWCA Civ 1182; [2021] 1 W.L.R. 992; [2021] 4 All E.R. 889*, Arnold LJ observed that search orders originated in an analogue age when most business records only existed in paper form. Accordingly, the relief sought these days is often for an imaging order rather than a true search order. Such technology has the advantage that it is relatively unintrusive in that no documents are physically removed, and it preserves digital evidence. Further, an imaging order may make a traditional search order unnecessary or significantly reduce its scope to articles other than documents. Imaging

is, however, incapable of itself of discriminating between relevant information and that which is irrelevant, personal, highly confidential or privileged. Arnold LJ observed, at [178], that imaging can only be a preservation step and must be followed by proper consideration of the issues of disclosure and inspection.

In *TBD*, Arnold LJ called for the Civil Procedure Rule Committee to give urgent consideration to promulgating a standard form of imaging order. Meanwhile, he observed at [193] that, save in exceptional cases, imaged data should be kept in the safekeeping of the forensic computer expert and not searched or inspected by anyone before the return date. Departure from this course would require a “very high degree of justification”. See also *CBS Butler Ltd v Brown [2013] EWHC 3944 (QB)* (Tugendhat J), and *A v B [2019] EWHC 2089 (Ch); [2019] 1 W.L.R. 5832* (Mann J).

3. - Grounds for Making Order

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C. - Search Orders

3. - Grounds for Making Order

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In the early cases, it was stressed that the jurisdiction to grant search orders was exceptional and should be exercised only when there is a paramount need to prevent a denial of justice to the claimant which cannot be met by an order for delivery up or preservation of the documents; it should be exercised in rare instances, and then with extreme caution (*Anton Piller K.G. v Manufacturing Processes Ltd*, op. cit., *Lock International Plc v Beswick [1989] 1 W.L.R. 1268; [1989] 3 All E.R. 373*). In fact, the granting of these orders quickly became common place in courts of first instance and in later cases the Court of Appeal took pains to bring the practice under control. Much of this law is now reflected in the provisions in para.7 of Practice Direction 25A (Interim Injunctions), supplementing *CPR Pt 25*, and in the terms of the example of a search order annexed to that practice direction (which are elaborate).

Although in the *Anton Piller* case Lord Denning spoke of “an extreme case”, in practice orders are granted far too routinely for them to be regarded as exceptional. However, the court still insists on a clear showing of fraud, dishonesty, contumacy, or imminent removal or destruction of property or evidence. The overriding principle is that of necessity. No order ought to be made unless it is necessary in the interests of justice. The so-called “balance of convenience” test, which plays a leading role in most decisions to grant interlocutory injunctions, has little, if any role to play in an application to grant a search order. Consistent with the principle of necessity, the cases have established the following conditions for the making of an order (see 1992 Consultation Paper, paras 2.4, et seq., and the summary in *Indicci Salus Ltd v Chandrasekaran [2006] EWHC 521 (Ch)* at [85]).

(1) There must be a strong *prima facie* case of a civil cause of action. Suspicion that there may be a cause of action should not be enough. A scrutiny of the merits of the claimant’s case is an essential preliminary to the grant of a search order. It is not sufficient for the applicant to show merely a “serious question to be tried” (as is sufficient in applications for orthodox interlocutory injunctions).

(2) The damage to the claimant to be avoided by the grant of an order must be serious. If an order is sought in order to forestall the destruction of evidence, the evidence in question must be of major, if not critical, importance.

(3) There must be clear evidence that the defendants had in their possession incriminating documents or things.

(4) The risk of destruction or removal of evidence must be a good deal more than merely possible. (In *Booker McConnell v Plascow Plc [1985] R.P.C. 425* at 441, CA, Dillon LJ referred to “a real possibility”, which he contrasted with “extravagant fears which seem to afflict all claimants who have complaints of breach of confidence, breach of copyright or passing-off.”) 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.

(5) The harm likely to be caused by the execution of the order to the respondent and his business affairs must not be excessive or out of proportion to the legitimate object of the order. This precondition is particularly relevant where the seizure of trading stock or the perusal by the claimant of confidential commercial documents will be the effect of execution of the order and is strongly analogous to the principle of proportionality as applied by the European Court of Human Rights.

This summary was expressly approved by Vos C in *MXI v Farazhad [2018] 3 WLK 744*, unrep., at [40]–[41], subject to assuming, which is correct, that what was then a reference to ‘danger’ in the second criterion ought to read as ‘damage’. On the accuracy of that point, see Ormerod LJ’s judgment in *Anton Piller* at [62]; *Lock International Plc v Beswick [1989] 1 W.L.R. 1268* at 1280; and, *Indicci Salus Ltd v Chandrasekaran [2006] EWHC 521 (Ch)* at [85].

If any of these pre-conditions is absent, the weight of judicial authority suggests that an application for the grant of a search order should be refused. If each of these preconditions appears to be present, an order will not necessarily be justified. The court will still have to weigh in the balance the claimant's need for the order against the injustice to the respondent in making the order without notice, and therefore without any opportunity for the respondent to be heard. The judge who hears the application for the order should keep in mind that, in as much as *audi alteram partem* is a requirement of natural justice, the making of a without notice mandatory order always risks injustice to the absent and unheard respondent. The order should not be made unless it appears that, without the order, the claimant will be likely to suffer a greater injustice than that which the court, by making the order, will be inflicting on the respondent (see *Columbia Picture Industries v Robinson [1987] Ch. 38*). The court requires proportionality between the perceived threat to the claimant's rights and the remedy granted. The fact that there is overwhelming evidence that the defendant has behaved wrongfully in his commercial relationships does not necessarily justify a search order. People whose commercial morality allows them to take a customer list will not necessarily disobey an order of the court requiring them to deliver it up. Not everyone who is misusing confidential information will destroy documents in the face of a court order requiring him to preserve them (*Lock International Plc v Beswick [1989] 1 W.L.R. 1268*) (Hoffmann J).

The search order has been described by Donaldson LJ in *Bank Mellat v Nikpour (1985) 2 F.S.R. 87* at [92] as one of the law's "nuclear weapons". The making of an intrusive order without notice allowing searches of premises or vehicles 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 claimant: Hoffmann J described the jurisdiction to permit a search of the defendant's dwelling as being "the absolute extremity of the court's powers": *Lock International Plc v Beswick [1989] 1 W.L.R. 1268* at 1281. The court has therefore developed a less intrusive version, known as a doorstep delivery-up order, for when the evidence does not satisfy the high threshold for a search order. In *Hyperama Plc v Poulis [2018] EWHC 3483 (QB)* Pepperall J required the doorstep delivery up of electronic devices, to be retained uninspected until after the on-notice return day.

Although the second condition has traditionally been formulated in terms of the need to avoid serious harm to the applicant, Fordham J held in *Calor Gas Ltd v Chorley Bottle Gas Ltd [2020] EWHC 2426 (QB); [2020] 4 W.L.R. 129* that real danger to public health and safety linked to the applicant's cause of action was sufficient to satisfy such condition.

4. - Legal Effect of Order

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4. - Legal Effect of Order

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A search order is an *in personam* order directed to a named person. In the Anton Piller case, Lord Denning conceded that “this may seem to be a search warrant in disguise”. The court has no power to authorise entry on and search of private premises, let alone power to authorise one party to an action to enter and search the premises of his opponent. (The [Senior Courts Act 1981 s.33](#) enables the court in certain circumstances to authorise entry on to private premises, but the purposes for which such an order can be made do not include the carrying out of a search of the premises.) Lord Denning explained that the court circumvents this lack of power by ordering the respondent to permit the entry and search. His disobedience to the order leaves his premises inviolate but subjects him to the risk of proceedings for committal for contempt of court. The entry, for which consent is demanded, is an entry for persons who have no legal or equitable right of entry. The court’s order grants no such right. The granting of consent in obedience to the order enables the party entering and searching to justify what otherwise would be a clear trespass by reliance on the permission given (see 1992 Consultation Paper, paras 2.11 and 2.12).

The realisation that a search order may be but a search warrant in disguise has affected the development of the law and procedure; in particular, the rule that an order should not be made except where necessary (see below), and then only on conditions designed to safeguard the respondent.

[Section 7 of the 1997 Act](#) states that an order “may direct any person to permit any person described in the order, or secure that any person so described is permitted” to make entry and to take the steps stated in the order. Normally, the “any person” to whom the order is directed will be a person who is, or who is about to become, a defendant in proceedings brought by the applicant for the order. However, the order may have, and usually does have, a broader focus. In para.5 of the example of a search order annexed to Practice Direction 25A it is stated that the order must be complied with by (a) the respondent, (b) any director, officer, partner or responsible employee of the respondent, and (c) if the respondent is an individual, any other person having responsible control of the premises to be searched. These words are intended to cover the situation which arises when the defendant is not personally at the premises at the time when the claimant’s search party arrives. As surprise and lack of advance warning are of the essence of search order tactics, an immediate entry and search is usually thought to be essential.

Where in particular proceedings a search order is made by a claimant (C) for the purpose of preserving material evidence in the form of documents in the possession of the defendant (D), the execution of the order will have the effect of requiring D to deliver up the documents without giving D the opportunity of considering whether he or she would be required, in the progress of the proceedings, to disclose the documents in accordance with the rules as to disclosure in [CPR Pt 31](#) or to permit the inspection of them; see further Vol.1 para.[31.6.7](#) (Disclosure and inspection of documents subject to search order).

Although the grant of a search order is likely to fall within the scope of art.8 of the European Convention on Human Rights it may be justified under art.8(2) as necessary to protect the rights of others ([Chappell v United Kingdom \(1990\) 12 E.H.R.R. 1](#), ECtHR). Article 8 refers to a person’s “home”, but the protection of this provision extends to professional premises ([Niemietz v Germany \(1993\) 16 E.H.R.R. 97](#), ECtHR) and applies to searches by private individuals carried out with court sanction, such as is envisaged by a search order. Where a search order is drafted in broad terms and where no supervising solicitor is present, art.8 may be breached ([Niemietz v Germany](#), opit). The European Commission has held that ECHR art.6(1) does not apply to the interlocutory proceedings in which search orders are granted ([Noviflora Sweden Aktiebolag v Sweden No.14369/88, decision of 12 October 1992, unreported, EComHR](#)). The seizure of property pursuant to a search warrant is likely to be considered justified in the general interest (above).

5. - Self-Incrimination

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C. - Search Orders

5. - Self-Incrimination

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Provisions as to the conduct of the search and the securing of materials are found in para.7 of Practice Direction 25A (Interim Injunction) (supplementing Pt 25). The example of a search order annexed to that practice direction recognises that the respondent may be entitled to withhold production of documents on the ground that they are privileged or incriminating, and casts duties upon the supervising solicitor as to the handling of such material accordingly. It is expressly stated in [s.7 of the 1997 Act](#) that the power given to the court by that section to make a search order does not affect any right to the privilege against self-incrimination which the respondent may have ([s.7\(7\)](#)). In certain civil proceedings (notably, intellectual property proceedings and in proceedings for the recovery or administration of any property, for the execution of a trust or for an account of any property or dealings with property, in relation to specific criminal offences), by statute the privilege of self-incrimination is expressly withdrawn, and therefore may not be claimed by a respondent to a search order in such proceedings. For convenience these statutory provisions are listed in para.7(9) of Practice Direction 25A (see Vol.1 para.[25APD.7](#)).

From time to time it has been recommended (e.g. by the committee of judges referred to above) that the privilege against self-incrimination should be withdrawn in civil proceedings generally (see also [Tate Access Floors Inc v Boswell \[1991\] Ch. 512, CA](#)). The question of the scope of the self-incrimination privilege is itself a matter for doubt and this creates uncertainty as to the circumstances in which it may be claimed by a respondent to a search order (see [C. Plc v P \[2007\] EWCA Civ 493; \[2007\] 3 W.L.R. 437, CA](#), and the authorities referred to there. Note also [Senior Courts Act 1981 s.72](#) (Withdrawal of privilege against incrimination of self or spouse in certain proceedings), Vol.2 para.9A-337 above.

See further, para.[15-77](#) above, and Vol.1 para.[31.3.31](#).

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1. - Introduction

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Section 15 - Interim Remedies

Interim Remedies

D. - Anti-Suit Injunctions

1. - Introduction

15-94

An anti-suit injunction is an injunction granted under [s.37 of the Senior Courts Act 1981](#) (see para.[9A-128](#) above) to restrain the respondent, being a person over whom the court has jurisdiction, from instituting or continuing proceedings in a foreign court or arbitral process, where it is necessary in the interests of justice to do so. In the absence of an agreement to the exclusive jurisdiction of the English court, or some other special factor, a person has no right not to be sued in a particular forum. A prohibitory injunction is usually all that is required, but mandatory relief requiring the respondent to discontinue the foreign proceedings may be necessary; for example where the foreign proceedings would continue without the active participation of the respondent and there was a risk of injustice by the respondent circumventing the prohibitory order: *VTB Bank PJSC v Mejlumyan [2021] EWHC 3053 (Comm)*.

For further related commentary, see Vol.1 para.6.37.23 (Restraint of foreign proceedings) and para.[25.1.12.4](#) (Anti-suit injunctions).

The terminology “anti-suit injunction” may, misleadingly, give the impression that the order is addressed to and intended to bind another court, or that the jurisdiction of the foreign court is in question and that the injunction orders the foreign court not to exercise a jurisdiction under its own domestic law (*Turner v Grovit [2001] UKHL 65; [2002] 1 W.L.R. 107, HL*, at [23] per Lord Hobhouse). When the English court makes an anti-suit injunction, it is making an order which is addressed only to a party which is before it, which is amenable to the court’s jurisdiction. The order is not directed against the foreign court (*Société Nationale Industrielle Aérospatiale v Lee Kui Jak [1987] A.C. 871, HL*, at p.892 per Lord Goff).

There are two broad categories of case where an anti-suit injunction may be granted:

- (1)Where there is a legal or equitable right, normally a contractual jurisdiction clause, which may be (a) exclusive; or (b) non-exclusive, or (c) an arbitration agreement;
- (2)Where there is no contractual choice of jurisdiction, but it is nevertheless vexatious and oppressive to bring or continue the claim in the other jurisdiction.

An example of the latter category is *Sea Premium Shipping Ltd v Sea Consortium Pte Ltd* 11 April 2001, unrep. (Steel J)) where a vessel under charter was purchased by new owners and a dispute arose under the charterparty, which contained a London arbitration clause. The charterers sued in Dubai, and the new owners sought an anti-suit injunction in favour of London arbitration. It was held that the English Court was entitled, using English law concepts, to analyse the nature of the claim, which was a claim under the charter, even if the new owners were not party to it, either by novation or assignment. The new owners obtained an injunction restraining the charterers from bringing a contractual claim on the charterparty, whilst ignoring the dispute resolution clause in it. To similar effect was the decision in *Dell Emerging Markets (EMEA) Ltd v IB Maroc Com SA [2017] EWHC 2397 (Comm)*, where it was held that it would be inequitable or oppressive or vexatious for a party to seek to enforce a contractual claim arising out of a contract without respecting the jurisdiction clause within it. This appears to be an application of the Scots doctrine of “approbate and reprobate” (akin to the equitable doctrine of election) by which a person accepting rights under a contract (or will) must accept the whole of the instrument.

The making of an anti-suit injunction does not depend upon denying, or pre-empting, the jurisdiction of the foreign court. For the foreign court, its jurisdiction and whether to exercise that jurisdiction falls to be decided by the foreign court itself in accordance with its own laws. An English court has no superiority over a foreign court in deciding what justice between the parties requires and in particular, that both comity and common sense suggest that the foreign judge is usually the best person to decide whether in his own court he should accept or decline jurisdiction, stay proceedings or allow them to continue (*Barclays Bank Plc v*

Homan [1992] *B.C.C.* 757, at p.762 per Hoffmann J, and at pp.774 and 775 per Glidewell LJ). That foreign court may have an extraterritorial or exorbitant jurisdiction which is not internationally recognised. International recognition of the jurisdiction assumed by the foreign court only becomes critical at the stage of the enforcement of the judgments and decisions of the foreign court by the courts of another country. Anti-suit injunctions come into the picture at an earlier stage and involve not a decision upon the jurisdiction of the foreign court but an assessment of the conduct of the relevant party in invoking that jurisdiction. It has been recognised that the unconscionability of the foreign claimant is often to be found, mainly or substantially, in the very reason that he has first submitted to English jurisdiction as the forum where the parties' dispute will be resolved (whether under a contract, or by his conduct, for example in starting or resisting proceedings here) and has then sought vexatiously to extricate himself from the consequences of that submission, or oppressively to prolong or multiply the litigation by commencing further proceedings abroad (*Star Reefers Pool Inc v JFC Group Co Ltd* [2012] *EWCA Civ* 14, [2012] *1 Lloyd's Rep.* 376, *CA*, per Rix LJ at [30]). The typical situation in which a restraining order is made is one where the foreign court is willing to assume jurisdiction, for otherwise, no anti-suit injunction would be necessary and none would be granted.

The grant of an anti-suit injunction, as of any other injunction, involves an exercise of discretion by the court. It is particularly important in anti-suit injunction applications that the court must have the fullest possible knowledge and understanding of all the circumstances relevant to the litigation and the parties to it, because the likely effect of an injunction on proceedings in the foreign and the domestic forum and on parties not bound by the injunction may be matters very material to the decision whether an injunction should be granted or not (*Donohue v Armco Inc* [2001] *UKHL* 64; [2002] *1 Lloyd's Rep.* 425, *HL*, at [16] per Lord Bingham).

The Supreme Court has given guidance on the principles relating to anti-suit injunctions where there is an arbitration agreement: *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] *UKSC* 35; [2013] *1 W.L.R.* 1889, SC. At the interlocutory stage, the applicant for an anti-suit injunction must show a high degree of probability that they are entitled to restrain the respondent from continuing the foreign proceedings: see *Malhotra v Malhotra* [2012] *EWHC* 3020; [2013] *1 Lloyd's Rep.* 285 (Walker J) at [68] et seq., and *Ecobank Transnational Inc v Tanoh* [2015] *EWCA Civ* 1309; [2016] *1 W.L.R.* 2231, *CA*, at [89] (in the context of a post judgment anti-enforcement injunction).

It is incumbent upon a party seeking an anti-suit injunction to do so promptly and before the foreign proceedings are too far advanced (see *Rec Wafer Norway AS v Moser Baer Photo Voltaic Ltd* [2010] *EWHC* 2581 (Comm); [2011] *1 Lloyd's Rep.* 410 (Blair J) at [46]). The longer a claim continues without any attempt to restrain it, the less likely a court is to grant an injunction. The task for the court is not to attribute blame for separate periods of delay, but to consider whether the application was made promptly, and how far and with what consequences the foreign proceedings have progressed (*ADM Asia-Pacific Trading PTE Ltd v PT Budi Semesta Satria* [2016] *EWHC* 1427 (Comm)).

As with applications for other forms of injunction, notice should be given to the respondent unless there is evidence that to do so might itself defeat the ends of justice, as for example if the respondent were to obtain a pre-emptive injunction in the other jurisdiction. See further Vol.1 para.25.3.2 (Notice) and para.25.3.5 (Applicant's disclosure duties where application made without notice).

2. - European Union Cases

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2. - European Union Cases

15-95

In *Turner v Grovit (Case C-159/02) [2005] 1 A.C. 101*, ECJ, the European Court of Justice ruled that it is not open to a party to obtain an anti-suit injunction against defendants who are threatening to commence or continue proceedings in another Brussels Convention state even when the defendants are acting in bad faith with intent to frustrate or obstruct proceedings properly proceeding before the English court. Before Brexit, the recast Judgments Regulation (EU) No.1215/2012 reduced the need for such applications since, by art.25(2), a jurisdiction clause evidenced in writing or under normal trade practice was treated as a separate contract which could not be contested on the ground that it or the underlying contract was invalid.

The controversial ruling in *Allianz SpA v West Tankers Inc (C-185/07) [2009] 1 A.C. 1138*, ECJ, to the effect that no anti-suit injunction was available to restrain the commencement or continuation of foreign proceedings in breach of an arbitration agreement was resolved even before Brexit by recital 12 and art.73(2) of the recast Judgments Regulation (EU) No.1215/2012. Further, the New York Convention 1958 states that each contracting state shall recognise written arbitration agreements. In any event, the UK is no longer bound by either the original Judgments Regulation (EC) No.44/2001 or the recast Judgments Regulation (EU) No.1215/2012.

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3. - Exclusive Contractual Jurisdiction and Arbitration Clauses

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3. - Exclusive Contractual Jurisdiction and Arbitration Clauses

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The applicable principles where an injunction is sought to restrain proceedings brought in breach of an exclusive jurisdiction or arbitration agreement are well settled. See, for a recent restatement, Jacobs J's judgment in *AIG Europe SA v John Wood Group Plc [2021] EWHC 2567 (Comm)*, at [58], and Males LJ's own judgment on appeal, *[2022] EWCA Civ 781*, at [10]:

- (i)The court's power to grant an anti-suit injunction to restrain foreign proceedings, when brought or threatened to be brought in breach of a binding agreement to refer disputes to arbitration, is derived from [s.37\(1\) of the Senior Courts Act 1981](#), and it will do so when it is "just and convenient".
- (ii)The touchstone is what the ends of justice require.
- (iii)The jurisdiction requires caution since it involves interference with the process or potential process of a foreign court, but an injunction to enforce an exclusive jurisdiction clause governed by English law or an arbitration clause is not to be regarded as a breach of comity since it merely requires a party to honour its contract: *Deutsche Bank AG v Highland Crusader Offshore Partners LP [2009] EWCA Civ 725; [2010] 1 W.L.R. 1023*, at [50].
- (iv)The applicant must establish with a "high degree of probability" that there is a binding arbitration or jurisdiction agreement which governs the dispute in question: *Michael Wilson and Partners v Emmott [2018] EWCA Civ 51; [2018] 2 All E.R. (Comm) 737* and *Ecobank Transnational Inc v Tanoh [2015] EWCA Civ 1309; [2016] 1 W.L.R. 2231*.
- (v)The court will ordinarily exercise its discretion to restrain the pursuit of proceedings brought in breach of a forum clause unless the defendant can show strong reasons to refuse the relief: *Donohue v Armco Inc [2001] UKHL 64; [2002] 1 Lloyd's Rep. 425, Emmott and Aggeliki Charis Compania Maritima SA v Pagnan SpA (The Angelic Grace) [1995] 1 Lloyd's Rep. 87*, CA.
- (vi)The defendant bears the burden of proving there are strong reasons.

To grant an injunction, the English court must have a sufficient legitimate interest in the foreign proceedings, which means that there is a contractual right not to be sued in the courts of a foreign country (*Turner v Grovit [2001] UKHL 65; [2002] 1 W.L.R. 107, HL*, at [27] per Lord Hobhouse). An anti-suit injunction always requires caution because by definition it involves interference with the process or potential process of a foreign court, but an injunction to enforce an exclusive jurisdiction clause governed by English law or an arbitration clause is not regarded as a breach of comity, because it merely requires a party to honour his contract (*Deutsche Bank AG v Highland Crusader Offshore Partners LLP [2009] EWCA Civ 725; [2010] 1 W.L.R. 1023, CA*, at [50] per Toulson LJ). The applicant does not have to show that the contractual forum is more appropriate than any other: the contract does it for him.

Whether a clause provides for exclusive jurisdiction or not is a question of construction of the relevant agreement, and the word "exclusive" does not need to be used (*Royal Bank of Scotland Plc v Highland Financial Partners LP [2012] EWHC 1278 (Comm); [2012] 2 C.L.C. 109* (Burton J)).

If contracting parties have agreed to give a particular court exclusive jurisdiction to rule on claims between those parties, and a claim falling within the scope of the agreement is made in proceedings in a forum other than that which the parties have agreed, the English court will ordinarily exercise its discretion (whether by granting a stay the English proceedings, or by restraining the prosecution of proceedings in the non-contractual forum abroad, or by other appropriate procedural order) to secure compliance with the contractual bargain, unless the party suing in the non-contractual forum (the burden being on him)

can show strong reasons for suing in that forum (*Donohue v Armco Inc* [2001] UKHL 64; [2002] 1 Lloyd's Rep. 425, *HL*, at [24] per Lord Bingham).

The English court may decline to grant an injunction or a stay, as the case may be, where the interests of parties other than the parties bound by the exclusive jurisdiction clause are involved, or grounds of claim not the subject of the clause are part of the relevant dispute, so that there is a risk of parallel proceedings and inconsistent decisions (*Donohue v Armco* op. cit. at [27]). It is a matter of the construction of the underlying agreements whether the jurisdiction clause attaches to all disputes. Thus in *Oceanconnect UK Ltd v Angara Maritime Ltd* [2010] EWCA Civ 1050; [2011] 1 Lloyd's Rep. 399, *CA*, an escrow agreement, providing security for the claim after a vessel had been arrested, had an exclusive jurisdiction agreement, but this did not impact on the underlying dispute, and it was not vexatious or oppressive for a party to start proceedings in Louisiana.

In order for the court to make an anti-suit injunction on the grounds that there is, or arguably is a binding agreement to have disputes determined by arbitration in England, the applicant has to show on the material adduced at the interlocutory hearing a high degree of probability that there was such an agreement, which on an interlocutory basis can be seen to be highly likely to be established (*Transfield Shipping Inc. v Chiping Xinfa Huayu Alumina Co Ltd* [2009] EWHC 3629 (QB), per Clarke J). See further, Vol. 1 para.6.37.23 (Restraint of foreign proceedings). The English court will be particularly slow to restrain arbitration proceedings where the agreement identifies the seat of the arbitration as a foreign jurisdiction (*Weissfisch v Julius* [2006] EWCA Civ 218; [2006] 1 Lloyd's Rep 716, *CA*, at [33] per Lord Phillips CJ).

Where an arbitration agreement binds the parties, the parties undertake: (1) that if either seeks relief within the scope of the agreement they will do so in arbitration in whatever forum is prescribed; and (2) that neither will seek relief in any other forum. If in breach of the second aspect a party (D) seeks relief in the English court, the remedy for the aggrieved party (C) is to apply for a stay under s.9 of the Arbitration Act 1996. Where the arbitration agreement provides for English arbitration, and, in breach of the second aspect a party (D) seeks relief in a foreign jurisdiction, on C's application an English court has power to declare that the claim can only properly be brought in arbitration and to injunct the continuation or the commencement of the foreign proceedings. The sources and the extent of such powers (derived from the court's inherent jurisdiction and the Senior Courts Act 1981 s.37) were explained by the Supreme Court in *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35; [2013] 1 W.L.R. 1889, SC (dismissing the defendants' appeal from the decision of the Court of Appeal, [2011] EWCA Civ 647; [2012] 1 W.L.R. 920, *CA*). The exercise of such powers is not dependent upon C's commencing arbitration proceedings, and may be exercised even where C has no intention or wish to commence any arbitration proceedings (above). Notwithstanding the doctrine of "kompetenz-kompetenz" (the ability of an arbitral tribunal to determine its own jurisdiction even when challenged) the English Court retains the power to determine whether there was ever an agreement to arbitrate, but must decide whether it is appropriate to do so (*Dallah Real Estate and Tourism v Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46; [2011] 1 A.C. 763, SC, at [26]–[30] per Lord Mance).

In Sulamerica Cia National de Seguros SA v Enesa Engenharia SA [2012] EWHC 42 (Comm); [2012] 1 Lloyd's Rep. 275 (Cooke J) (affirmed in [2012] EWCA Civ 638; [2013] 1 W.L.R. 102; [2012] 2 All E.R. (Comm) 795), insurers (C) instituted arbitration proceedings and, upon the insured (D) obtaining a temporary anti-suit injunction in Brazil, C applied to the English court for an anti-suit injunction. The contract contained Brazilian law and exclusive jurisdiction clauses, but also provided for London arbitration if mediation failed. The arbitration clause incorporated the supervisory jurisdiction of the English courts, and the governing law of the agreement to arbitrate was English law. The judge granted C's application, finding that giving full weight to the Brazilian exclusive jurisdiction clause would have effectively excluded the right to arbitrate, and this was not the parties' intention.

4. - Non-Exclusive Jurisdiction Clauses

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D. - Anti-Suit Injunctions

4. - Non-Exclusive Jurisdiction Clauses

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Where a matter is justiciable in an English and a foreign court, the party seeking an anti-suit injunction must generally show that proceeding before the foreign court is or would be vexatious or oppressive. In order to establish that proceeding in a foreign court is or would be vexatious or oppressive on grounds of forum non conveniens, it is generally necessary to show that (a) England is clearly the more appropriate forum (the natural forum), and (b) justice requires that the claimant in the foreign court should be restrained from proceeding there (*Deutsche Bank AG v Highland Crusader Offshore Partners LLP*, op. cit.).

In *SNI Aerospaciale v Lee Kui Jak*, op. cit., at p.893, Lord Goff drew attention to *Peruvian Guano Co v Bockwoldt (1883) LR 23 Ch D 225, CA*, where Jessel MR (at p.230) gave two examples of vexatious proceedings: “pure vexation” occurs when the proceedings are so utterly absurd that they cannot possibly succeed. Another is when the claimant, not intending to annoy or harass the defendant, but thinking he could get some advantage, sues him in two courts at the same time. The courts have refrained from attempting a comprehensive definition of vexation or oppression.

If the English court considers England to be the natural forum and can see no legitimate personal or juridical advantage in the claimant in the foreign proceedings being allowed to pursue them, it does not automatically follow that an anti-suit injunction should be granted. The court must consider comity, and the prosecution of parallel proceedings in different jurisdictions is undesirable but not necessarily vexatious or oppressive (*Deutsche Bank AG v Highland Crusader Offshore Partners*, op. cit., at [50] per Toulson LJ). Where proceedings are brought in a foreign forum, the question whether or not that forum is an appropriate forum is a factor in assessing the conduct of the party suing there, for the purposes of considering whether to grant a restraining injunction, but if it is the only factor, it is easily overridden by other considerations (*Turner v Grovit*, op. cit., at [25] per Lord Hobhouse).

Where a non-exclusive English jurisdiction clause expressly contemplates parallel proceedings in two different jurisdictions, the English court will not imply a term that it should take precedence, and it is not a breach of contract, or otherwise unconscionable, vexatious or oppressive for a party to start proceedings in another jurisdiction (*Royal Bank of Canada v Cooperative Centrale Raiffeisen-Boerenleenbank [2004] EWCA Civ 7; [2004] 1 Lloyd's Rep. 471, CA*).

In non-exclusive jurisdiction cases, an injunction tends not to be granted if its effect would be to deprive the claimant in the foreign action of an advantage in that forum of which it would be unjust to deprive him (*SNI Aerospaciale v Lee Kui Jak*, op. cit., at p.896).

A non-exclusive jurisdiction agreement precludes either party from later arguing that the forum identified is not an appropriate forum on grounds foreseeable at the time of the agreement, for the parties must be taken to have been aware of such matters at the time of the agreement. For that reason, an application to stay, on forum non conveniens grounds, an action brought in England pursuant to an English non-exclusive jurisdiction clause will ordinarily fail, unless the factors relied upon were unforeseeable at the time of the agreement (*Deutsche Bank AG v Highland Crusader Offshore Partners LLP*, op. cit., at [50] per Toulson LJ).

Consistently with any other injunction application, the decision whether or not to grant an anti-suit injunction involves an exercise of discretion and the principles governing it contain an element of flexibility.

5. - Non-Contractual Cases: Vexatious and Oppressive

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D. - Anti-Suit Injunctions

5. - Non-Contractual Cases: Vexatious and Oppressive

- 15-98** As well as the respondent to the application being amenable to the jurisdiction of the court, the English court, if it is to grant an anti-suit injunction, must have a sufficient legitimate interest in the foreign proceedings, which means that if there is no contractual reason to prevent suit there, there must be proceedings in this country which require protection (*Turner v Grovit*, op. cit., at [27] per Lord Hobhouse, by reference to the House of Lords' decision in *Airbus Industries GIE v Patel* [1999] 1 A.C. 119, *HL*).

The principles applicable to this class of case where there is no contractual restriction have been frequently explained in the authorities (e.g. *Seismic Shipping Inc v Total E&P UK Plc (The Western Regent)* [2005] EWCA Civ 985, [2005] 2 Lloyd's Rep. 359, *CA*, at [44]). They may be stated as follows:

- (1)A person may show a right not to be sued in a particular forum if he can point to clearly unconscionable conduct (or the threat of unconscionable conduct) on the part of the party sought to be restrained.
- (2)There will be such unconscionable conduct if the pursuit of foreign proceedings is vexatious or oppressive or interferes with the due process of this Court.
- (3)The fact that there are such concurrent proceedings does not in itself mean that the conduct of either action is vexatious or oppressive or an abuse of court, nor does that in itself justify the grant of an injunction.
- (4)However, the court recognises the undesirable consequences that may result if concurrent actions in respect of the same subject matter proceed in two different countries: for example, conflicting judgments of the two courts concerned, or that there may be an “ugly rush” to get one action decided first to create a situation of res judicata or issue estoppel.
- (5)The Court may conclude that a party is acting vexatiously or oppressively in pursuing foreign proceedings and that he should be ordered not to pursue them if (a) the English court is the natural forum for the trial of the dispute, and (b) justice does not require that the action should be allowed to proceed in the foreign court, and specifically, that there is no advantage to the party sought to be restrained in pursuing the foreign proceedings of which he would be deprived and of which it would be unjust to deprive him.
- (6)In exercising its jurisdiction to grant an injunction, “regard must be had to comity and so the jurisdiction is one which must be exercised with caution.” The court will generally be reluctant to take upon itself the decision whether a foreign forum is an inappropriate one.

An example of a case within this category is where a deceased person's estate is being administered in England, but with some assets abroad, and an anti-suit injunction may be granted to prevent a person from seeking, by foreign proceedings, to obtain a devolution of assets (not being real property or other lex situs assets) different from the English devolution. See *Al-Bassam v Al-Bassam* [2004] EWCA Civ 857; [2004] W.T.L.R. 757; (2004) 148 S.J.L.B. 826, *CA*, where an interim anti-suit injunction was imposed until after determination of threshold issues of due execution and domicile had been resolved.

In *Excalibur Ventures LLC v Texas Keystone Inc* [2011] EWHC 1624 (Comm); [2011] 2 Lloyd's Rep. 289 (Gloster J), the defendants obtained an anti-suit injunction against the claimant to restrain it from proceeding with a New York arbitration on the grounds that the defendants were not parties to the arbitration agreement relied on. The claimant had started proceedings in the Commercial Court as well as the arbitration proceedings, a classic example of vexatious conduct.

In *Royal Bank of Scotland Plc v Hicks [2010] EWHC 2579 (Ch)*, a bank was seeking to enforce its security for repayment of loans by selling shares in Liverpool Football Club. The chargors of the shares failed to get an injunction in England to prevent the sale, and hours later applied, on inadequate factual disclosure, in Texas for a temporary restraining order for the same relief. Some of the contractual documents did not contain exclusive jurisdiction clauses. An anti-suit injunction was granted, as the steps taken in Texas were properly described as vexatious. Subsequently, following the sale of the shares the chargors sought the variation or discharge of the anti-suit injunction to enable them to bring further proceedings but the court considered that the real threat of further vexatious proceedings justified the retention of the anti-suit injunction (see *[2011] EWHC 287 (Ch)*).

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1. - Jurisdiction

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E. - Interim Payments

1. - Jurisdiction

15-99 The Senior Courts Act 1981 s.32 and the County Courts Act 1984 s.50 state that provision may be made by rules of court enabling the High Court and the county courts “to make an order requiring a party to the proceedings to make an interim payment of such amount as may be specified in the order”.

For these purposes, *interim payment* is defined as “a payment on account of any damages, debt or other sum (excluding costs) which that party may be held liable to pay to or for the benefit of another party to the proceedings if a final judgment or order of the court in the proceedings is given or made in favour of that other party” (s.32(5) and s.50(5)).

It is a general principle that a defendant has a right not to be held liable to pay until liability has been established by a final judgment. The court has no inherent power to order payment on account (*Moore v Assignment Courier Ltd [1977] 1 W.L.R. 638; [1977] 2 All E.R. 842, CA*). The jurisdiction granted by this legislation and carried into effect by rules of court (see CPR r.25.6 to 25.9) to order an interim payment is an exception to that principle. The exception was first established by the Administration of Justice Act 1969 s.20, which implemented a recommendation made in the Report of the Committee on Personal Injuries Litigation (1968) (Cmnd. 3691) (the Winn Committee), and was regarded as a significant innovation at the time. Its purpose was to mitigate the hardship caused to claimants making well-founded personal injuries claims by the long delays then existing between commencement of proceedings and receipt of damages by way of compensation. The Committee envisaged that this exceptional power would be of particular use in personal injury cases where (a) the defendant has admitted full liability; (b) the liability of the defendant has been established by the entry of interlocutory judgment for damages to be assessed; (c) where the claimant sues two or more defendants who blame each other but do not allege contributory negligence against him, provided all the defendants are insured and substantial.

Draft rules of court designed to carry this recommendation into effect in the manner proposed by the Committee were given in Appendix 6 to the Report. The primary legislation was enacted in terms wide enough to enable the jurisdiction to be exercised in cases other than personal injury claims should rules of court so permit. In 1969, the draft rules, which were confined in their effect to claims for damages in respect of wrongful death and personal injuries, were enacted. In 1980, the rules were amended to enable orders to be made for the payment of “any damages, debt or other sum (excluding costs)”, thereby enlarging considerably the scope of the power.

Interim payment orders must be distinguished from orders for provisional damages in personal injuries claims provided for by the Senior Courts Act 1981 s.32A and CPR Pt 41, Section I, and also from orders for periodical payments of awards of damages as provided for by the Damages Act 1996 s.2 and CPR r.41.8.

Before the CPR came into effect, rules of court made in exercise of the particular rule-making power granted by s.32 of the 1981 Act were found in RSC Ord.29 Pt II, and with minor modifications, those provisions were applied in county courts by CCR Ord.13 r.12. In the CPR, the relevant rules are found in Section I of Pt 25, that is to say, in rr.25.6 to 25.9. In those rules, the general procedure for interim payment applications is stated (r.25.6), then provision is made for the conditions to be satisfied and matters to be taken into account by the court (r.25.7), and for the powers of the court subsequent to the making of an order (r.25.8). In the former rules, the principal distinction drawn was between orders in respect of damages (especially in actions for personal injuries) and orders in respect of sums other than damages. That distinction was, and remains to be taken into account by the court (see r.25.7). It is expressly provided that these rules do not apply to cases on the small claims track (r.27.2(1)(a)).

Rule 25.9 states that the fact that a defendant has made an interim payment whether voluntarily or by court order, shall not be disclosed to the trial judge until all questions of liability and the amount of money to be awarded have been decided, unless

the defendant agrees. For further information on the effect and consequences of this rule, see the commentary in [CPR Pt 25](#) (Vol.1 para.[25.9.1](#)).

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2. - Application for an Order (CPR r.25.6)

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2. - Application for an Order (CPR r.25.6)

- 15-100** The general procedure is stated in [r.25.6](#). For commentary on that provision, see Vol.1 para.[25.6.1](#).

Orders for interim payments can be sought in all proceedings, whether commenced under [CPR Pt 7](#) or [Pt 8](#). A judge should not make an order on a summary basis without notice to either party and in the absence of any application (*Quest Advisors Limited v McFeely [2011] EWCA Civ 1517; [2012] 1 E.G. 54 (C.S.), CA*, (direction, inserted in an order declaring that the defendant was obliged to grant leases, requiring claimants to make a payment on account of stage payment due under the contract varied)).

Before the [CPR](#) came into effect, specific provisions as to the making of applications for interim payment were found in RSC Ord.29 r.10. Now they are found (with modifications) partly in [r.25.6](#) and partly in [Pt 23](#). Under the [CPR](#), applications for court orders are made in accordance with the general rules contained in [Pt 23](#). Particular rules relating to specific applications appear elsewhere in the [CPR](#) and amplify or modify the provisions found in [Pt 23](#) according to need. The general rule is that a copy of the application notice must be served on each respondent ([r.23.4\(1\)](#)). The respondent is “the person against whom the order is sought” ([r.23.1\(a\)](#)). (In the case of an application for interim payment it is obvious who the respondent should be.) The copy notice of application must be served as soon as practicable after it is filed ([r.23.7\(1\)\(a\)](#)); however, an application for an order for interim payment cannot be made before the time stated in [r.25.6\(1\)](#). The general rule is that a copy notice of application must in any event be served at least three days before the court is to deal with the application ([r.23.7\(1\)\(b\)](#)); however, where the application is for an order for interim payment it should be served at least 14 days before the hearing ([r.25.6\(3\)\(a\)](#)). [Part 6](#) contains the general rules about service of documents, including applications.

A defendant may make an interim payment on account of damages (or a series of such payments) without putting the claimant to the trouble of making an application to the court. Circumstances may arise where, although a voluntary payment is offered and there is no disagreement between the parties, one or the other of them will think it wise to have an order. [Rule 25.9](#) provides that the fact that a defendant has made an interim payment, whether voluntarily or by court order, shall not be disclosed to the trial judge until all questions of liability and the amount of money to be awarded have been decided, unless the defendant agrees.

It is undesirable that an application for an interim payment should become a “mini-trial” and, generally, the procedure is not suitable in a case where the factual issues are complicated or where difficult points of law arise, but an application may properly be entertained in relation to an “irreducible minimum part” of a claim where that part is capable of being established without venturing far into disputed areas of fact or law and provided that it is substantial enough to justify the trouble and expense of the application (*Schott Kem Ltd v Bentley [1991] 1 Q.B. 61, CA; Chiron Corporation v Murex Diagnostics Ltd (No.13) [1996] F.S.R. 578* (Walker J); *Bovis Lend Lease Ltd v Braehead Glasgow Ltd (2000) 71 Con. L.R. 208* (Dyson J); *Trebor Bassett Holdings Ltd v ADT Fire and Security Plc [2012] EWHC 3365 (TCC); 145 Con. L.R. 147* (Coulson J)).

(a) - Generally

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3. - Conditions to be Satisfied and Matters to be Taken into Account (CPR r.25.7)

(a) - Generally

- 15-101** The court may make an order for an interim payment in the several circumstances listed in r.25.7(1), but not otherwise. The jurisdiction to order an interim payment is an exceptional (see above) and is subject to the strict restrictions stated in *r.25.7 (R. (Teleos Plc) v Commissioners of Customs and Excise [2005] EWCA Civ 200; [2005] 1 W.L.R. 3007, CA* (rejecting submission that claimants entitled to interim payment where Revenue had authority to make discretionary reimbursement pending outcome of proceedings over disputed input VAT credits)). Where the conditions in r.25.7(1) are satisfied, the court should grant an order unless there is a sufficient specific reason not to do so (*Test Claimants in FII Group Litigation v Revenue & Customs Comrs (No.2) [2012] EWCA Civ 57; [2012] 1 W.L.R. 2375, CA*). A claimant may make an application for an order in respect of a part of its total claim, and the fact that there has been a trial of certain issues (but not all those that would lead to a judgment for a sum of damages) is no bar to the exercise of the court's power (above).

An application for an interim payment order must be decided on evidence and, in accordance with principle, the judge should not act upon evidence which only one side has seen. This is illustrated by *Fred Perry (Holdings) Ltd v Brands Plaza Trading Ltd [2012] EWCA Civ 224; [2012] 6 Costs L.R. 1007; [2012] F.S.R. 28, CA*. In that case a confidential schedule, prepared by the claimants and in the course of intellectual property proceedings offered by them to the defendants in return for undertakings (in the event not given), was subsequently annexed to a witness statement filed by the claimants on their application under r.25.7(1)(b) for an interim payment order. The judge in determining that application and making the order proceeded on the false basis that the schedule had been seen by the defendants. The Court of Appeal set aside the order.

In *Smith v Bailey [2014] EWHC 2569 (QB); [2015] R.T.R. 6* (Popplewell J), where a claim was made for personal injuries arising out of a road traffic accident, the defendant intimated a defence of contributory negligence, but produced no evidence in support of that defence for the hearing of the claimant's application for an interim payment. In dismissing D's appeal against a Master's award of an interim payment the judge held that, in the absence of evidence of contributory negligence, the Master was justified in treating the likely award of damages to be on the basis of full liability. In *Sellar-Elliott v Howling [2016] EWHC 443 (QB); [2016] P.I.Q.R. P13*. (Sweeney J), the hearing of the claimant's (C) application for an interim payment, in a clinical negligence claim to which the defendant (D) had pleaded a defence (putting causation in dispute), took place six weeks before the date scheduled for the exchange of the expert evidence. In advance of that hearing, C served her expert evidence. A Master granted C's application. In refusing D permission to appeal a judge (1) explained that (a) D was under no obligation to file evidence opposing C's application, and (b) as was her right, she had chosen in response only to serve limited evidence in response (not including her expert evidence), and (2) held that (a) the Master had to determine the application on the evidence before him, and (b) on that evidence he was entitled to conclude that C had proved, to the requisite standard, that the conditions in r.25.7(1)(c) were met.

An examination of the definition of interim payment in r.25.1(1)(k) demonstrates that there are two key requirements: (1) there has to be a claim which leads to the defendant being liable to pay a sum, and (2) the payment sought has to be a payment on account of that liability. If the claimant's claim is not one that has, or will, lead to the defendant being liable to pay a sum, no order for an interim payment may be granted. For example, a claimant bringing a claim for a winding up and dissolution of a partnership could expect (if successful) to get orders to that effect, and eventually there would be sales of the property and the claimant would be entitled to payment of his share of capital and profits out of those sales. But an order for an interim payment could not be made on the basis of the prospect of those orders because under them the defendant would not be under a liability to make a payment of the kind referred to in r.25.1(1)(k) (*Hathurani v Jassat [2010] EWHC 2077 (Ch)*).

With effect from 1 April 2005, para.(1) of r.25.7 was amended for the purpose of revising the categories of defendant against whom an interim payment order may be made. As a consequence, paras (2) and (3) of the rule, which contained special conditions applicable where the claim was for personal injuries, were omitted (see now r.25.7(1)). One purpose of these amendments was to make it possible for the court to make an interim payment order against a defendant in all cases, including personal injury cases where the defendant is uninsured (see r.25.7(1(c))). (As to the relevance of the ability of an uninsured defendant to pay, see “Defendant’s resources” below.) Another purpose was to apply to all cases conditions that previously only applied in personal injury cases where there are two or more defendants (see r.25.7(1)(e)).

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(i) - Judgment obtained

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(a) - Generally

(i) - Judgment obtained

- 15-102 The most obvious circumstance in which an application for an interim payment may be made and granted is where the claimant has obtained judgment against the defendant, either (1) for damages to be assessed, or (2) “for a sum of money to be assessed (other than costs)” ([r.25.7\(1\)\(b\)](#)). The first of these is based on former RSC Ord.29 r.11(1)(b) and the second on RSC Ord.29 r.12(a), which stated that an order could be made where the claimant had obtained “an order for an account to be taken as between himself and the defendant and for any amount certified due on taking the account to be paid”. Where a party applies for an interim payment in these circumstances, and the court orders an account to be taken, then, if the evidence on the application shows that the account is bound to result in a payment to the applicant, the court will, before making the order, order that the liable party pay to the applicant “the amount shown by the account to be due” (PD 25B para.2A; see Vol.1 para.[25BPD.2A](#)).

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(ii) - Liability admitted

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(a) - Generally

(ii) - Liability admitted

- 15-103 Next there is the situation where the defendant has admitted liability to pay to the claimant either (1) damages (see former RSC Ord.29 r.11(1)(a)), or (2) “some other sum of money” (in neither event need the sum be substantial) ([r.25.7\(1\)\(a\)](#)). The second of these did not figure in the former rules.

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(iii) - Judgment predicted

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(a) - Generally

(iii) - Judgment predicted

15-104 Finally, there is the situation where the court is satisfied that, if the case went to trial, either (1) the claimant would obtain judgment for “a substantial amount of money (other than costs)” ([r.25.7\(1\)\(c\)](#)); or (2) in a claim for possession, the defendant would be held liable “to pay the claimant a sum of money” for occupation and use whilst the claim was pending ([r.25.7\(1\)\(d\)](#)).

Where the court is satisfied that there would be judgment for a substantial sum of money without being satisfied what precisely that sum would be, the court has to decide “the likely amount of the final judgment” ([r.25.7\(4\)](#)) and cannot order an interim payment of more than a reasonable proportion of that likely amount ([Makdessi v Cavendish Square Holding BV \[2017\] EWHC 650 \(Comm\)](#) (Teare J) at [6]).

The claimant must establish that such outcome at trial is more likely than not on the usual balance of probabilities and upon the material then before the court: [Test Claimants in FII Group Litigation v Revenue & Customs Commissioners \[2012\] EWCA Civ 57; \[2012\] 1 W.L.R. 2375; Buttar Construction Ltd v Arshdeep \[2021\] EWCA Civ 1408; \[2022\] 1 W.L.R. 1239; \[2022\] P.I.Q.R. P3](#). There is no requirement that the court must also be satisfied that payment is likely: [Buttar Construction](#). The burden on the claimant is therefore a high one and the court needs to be satisfied that it is more likely than not that the claimant will succeed. As a general principle, the law to be applied at the notional trial date referred to in rr.25.7(1)(c)–(d) is the law as it was the date of the claimant’s application. Accordingly, the claimant was entitled to rely on a favourable judgment in collateral proceedings in [Heidelberg Graphic Equipment Ltd v Revenue & Customs Commissioners \[2009\] EWHC 870 \(Ch\); \[2009\] S.T.C. 2335; \[2009\] B.T.C. 351](#) notwithstanding the fact that an appeal was pending again such judgment.

Where a claimant makes alternative claims against a defendant, the court can order an interim payment without reaching a conclusion at that stage as to which of the alternative claims against the defendant will succeed at trial, provided that the claimant will recover a substantial sum under one head or the other ([Schott Kem v Bentley \[1991\] 1 Q.B. 61, CA; JSC BTA Bank v Ablyazov \[2012\] EWHC 783 \(Comm\)](#)). See further para.15-109 below.

(iv) - Personal injuries claims

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3. - Conditions to be Satisfied and Matters to be Taken into Account (CPR r.25.7)

(a) - Generally

(iv) - Personal injuries claims

- 15-105** In practice, many applications for interim payment orders are made in personal injuries cases. A given personal injuries case may fall within any one of the three categories mentioned above, with the claimant seeking an order on the basis (1) that he has obtained judgment on liability, or (2) that liability has been admitted, or (3) that, if the case went to trial, he would obtain judgment for substantial damages. Obviously, it is the third of these three situations which creates the greatest difficulty (especially where there are several defendants) and which has attracted the bulk of the case law. If progress can be made towards securing earlier admissions of liability, the difficulty will be reduced.

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(b) - Grounds for contesting payment

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3. - Conditions to be Satisfied and Matters to be Taken into Account (CPR r.25.7)

(b) - Grounds for contesting payment

15-106 The defendant against whom an order for interim payment is sought may show cause against the making of the order in the following ways:

- (i)by a technical objection, e.g. that the application does not satisfy the conditions stipulated by [r.25.7](#);
- (ii)on the merits by showing that the claimant has failed to prove on the balance of probabilities that they will recover anything (see para.[15-104](#) above);
- (iii)on quantum, [r.25.7\(5\)](#) expressly provides that the court must take into account any set-off or counterclaim as well as any allegation of contributory negligence. Thus the court must be satisfied, whatever the description of the bar relief on in opposition that the claimant would obtain judgment for a substantial amount at trial (*Smallman Construction v Redpath Dorman Long (1992) 47 B.L.R. 15; 25 Con. L.R. 105, CA*). “Substantial” will mean different amounts in different situations and real need of the claimant may be taken into account in this context; however, to say that its meaning extends to sums that are, in absolute terms, trivial would be straining the flexibility of the Order. Applications for small sums are discouraged but if made should be coupled with an application to transfer to the appropriate county court.

(c) - Two or more defendants (CPR r.25.7(1)(e))

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(c) - Two or more defendants (CPR r.25.7(1)(e))

- 15-107** As originally enacted, r.25.7(1)(c) provided that the court must be satisfied that, if the claim proceeds to trial, the claimant will obtain judgment for a substantial amount of money (whether damages or some other sum of money) “against the defendant from whom he is seeking an order for interim payment”. By the Civil Procedure (Amendment No.4) Rules 2004 (SI 2004/3419), it was made clear that such an order could be made “whether or not that defendant is the only defendant or one of a number of defendants to the claim” (cf. former RSC Ord. 29, r.11(1)(c)). Interim payment orders may be made against two or more defendants in respect of the same liability and in respect of the same sum, if the court is satisfied as to the liability of each of the defendants against whom the order is made (*Schott Kem Ltd v Bentley [1991] 1 Q.B. 61; [1990] 3 All E.R. 850, CA*). There is no objection in principle to the making of orders for interim payments against two or more defendants for different fractions of the total amount thought to be just, provided (a) it is made clear in the order that, if the aggregate of the fractions awarded against the defendants exceeds the “just amount,” the sum actually recoverable by the claimant cannot exceed the “just amount”; (b) in the case of a claim for damages, it is made clear that the sum actually recoverable by the claimant cannot exceed the “reasonable proportion of the damages”; and (c) the order otherwise complies with the rules (above).

Difficulties may arise where the court is satisfied that if a claim against two defendants proceeds to trial the claimant would obtain judgment for a substantial amount of money against one or other of the defendants but not against both. Cases on the former rules held that proof of success to the necessary standard against a particular defendant is required before an order can be made against him (*Brian Breeze v R McKennon & Son Ltd 32 B.L.R. 41; (1985) 135 N.L.J. 1233, CA; Ricci Burns Ltd v Toole [1989] 1 W.L.R. 993; [1989] 3 All E.R. 478, CA*). As a result of the amendments to r.25.7 brought about by the Civil Procedure (Amendment No.4) Rules 2004 (SI 2004/3419), it is expressly provided in r.25.7(1)(e) that, in certain circumstances, the court may make interim payment orders where it is satisfied that, if the claim went to trial, the claimant would obtain judgment against at least one of the defendants, but the court cannot determine which. In terms, that provision is not restricted to personal injury claims.

The need for insurance

On a literal reading of r.25.7(1)(e), it appears that all defendants must be insured, have their potential liability met by an insurer, or be either the Motor Insurers’ Bureau or a public body. In *Berry v Ashtead Plant Hire [2011] EWCA Civ 1304*, Longmore LJ observed at [13], obiter:

“[The former practice under RSC Ord.29 r.11 requiring the defendant to be insured] has now been relaxed so as to require insurance to exist only in the case of alternate liability, but it is difficult to believe that the framers of the rule, while relaxing that requirement, intended to refuse relief if it was the case that a defendant, who was not being asked to make an interim payment at all, happened to be uninsured.”

Where insurers reserved their rights under the policies, by definition such policies remained extant and the defendants remained insured for the purposes of r.25.7(1)(e): *Buttar Construction Ltd v Arshdeep [2021] EWCA Civ 1408; [2022] 1 W.L.R. 1239; [2022] P.I.Q.R. P3*.

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(d) - Judgment “for a substantial amount of money” (CPR r.25.7(1)(c))

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(d) - Judgment “for a substantial amount of money” (CPR r.25.7(1)(c))

- 15-108** The court is empowered to have regard to all the circumstances of the case, including the statements of case, any documents disclosed or exhibited and any other relevant material and any admissions made by the defendant, and to determine on such material whether it is satisfied that the claimant will at the trial obtain judgment for a substantial sum of money. This could arise in a claim for a quantum meruit, where the defence is that the claim is excessive or for work done and materials supplied where the defence is that some of the work was defective or was not done, and situations of a like character.

The application should be considered by the court in two stages (*Schott Kem Ltd v Bentley [1991] 1 Q.B. 61; [1990] 3 All E.R. 850, CA*). The court must first be satisfied that, if the action proceeds to trial, the claimant will obtain judgment for a substantial sum, and, if so, the court should then consider whether, in its discretion, it should order an interim payment. At the first stage the claimant must satisfy the court on the balance of probabilities, but to a high standard, that he will obtain judgment for a substantial sum; the likelihood of a set-off or any other defence succeeding must be considered by the court. At the second stage the rules also require (r.25.7(5)) the court to take into account any set-off claimed by the defendant, and any counterclaim arising out of some other transaction and not available as a defence (*Shanning International Ltd v George Wimpey International Ltd [1988] 1 W.L.R. 981; [1988] 3 All E.R. 475, CA*).

In *Deutsche Bank AG v Unitech Global Ltd [2014] EWHC 3117 (Comm)* (Teare J), it was predictable that the claimants’ (C) claim for repayment of a loan agreement might fail at trial because the defendant’s (D) defence of rescission (though opposed by C) succeeded, but on terms that D pay C a substantial sum. It was held that in those circumstances, by obtaining judgment for counter-restitution, C would not obtain judgment for “a substantial amount of money” within the meaning of r.25.7(1)(c) and an interim payment order was refused accordingly. In *Peak Hotels and Resorts Ltd v Tarek Investments Ltd [2015] EWHC 1997 (Ch)*, the court reached the same conclusion. In that case the circumstances left open the question whether the r.25.7(1)(c) condition could be satisfied by an order for rescission that was merely conditional on counter-restitution and the court held it could not because such an order was not a judgment for a sum money within the scope of r.25.7. Subsequently, on an appeal by C from the judge’s decision in the Deutsche Bank case referred to above, the Court of Appeal allowed C’s appeal; see *Deutsche Bank AG v Unitech Global Ltd [2016] EWCA Civ 119; [2016] 1 W.L.R. 3598; [2017] 1 All E.R. 570*. The Court held that the definition of an interim payment, given in the Senior Courts Act 1981 s.32(5) and in r.25.1(1)(k), is sufficiently wide to cover a situation in which a claimant claims to enforce a contract according to its terms and the defendant responds by saying he is entitled to rescind the contract on grounds of misrepresentation, but would only be held to be able to rescind on condition that he gives restitution of sums received from the claimant; the words “other sum” in s.32(5) and r.25.1(1)(k) were very wide, and would plainly cover a requirement in this case that C should pay a sum by way of restitution (paras 57 and 64).

(e) - Alternative claims in debt and damages (CPR r.25.7(1)(c))

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(e) - Alternative claims in debt and damages (CPR r.25.7(1)(c))

- 15-109 Rule 25.7.1(c) states that the court may order an interim payment if it is satisfied that, if the claim went to trial, the claimant would obtain judgment for a substantial sum of money, whether (1) damages or (2) some other sum of money. Formerly, these two forms of money judgment were dealt with in quite separate provisions in RSC Ord.29, specifically, in r.11(1)(c) (damages) and in r.12(c) (apart from damages). In *Shearson Lehman Brothers Inc v Maclaine Watson & Co Ltd [1987] 1 W.L.R. 480; [1987] 2 All E.R. 181, CA*, it was held that the two provisions should be read together to permit the court to make an order for interim payment where it is satisfied that, if the action proceeded to trial, the claimant would obtain judgment either for substantial damages or for a substantial sum of money apart from damages, even though thought not to be certain which. It would seem, however, that if there is doubt whether the sum claimed will prove to be recoverable as damages or under some other heading the court should apply a discount when ordering an interim payment to take account of the provision as to “a reasonable proportion of the likely amount of the final judgment” in r.35.7(4) (*Schott Kem Ltd v Bentley [1991] 1 Q.B. 61; [1990] 3 All E.R. 850, CA*).

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(f) - Claim for possession of land (CPR r.25.7(1)(d))

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(f) - Claim for possession of land (CPR r.25.7(1)(d))

- 15-110 The object of [r.25.7\(1\)\(d\)](#) (formerly RSC Ord.29 r.12(b)) is to enable the court, during the pendency of the action, to order the defendant to make an interim payment to the claimant in respect of his continued use and occupation of the land, whoever should ultimately succeed on the claim for possession of the land itself. This rule operates to negative the decision in *Moore v Assignment Courier Ltd [1977] 1 W.L.R. 638; [1977] 2 All E.R. 842, CA*. This rule applies to an action for possession of land, on whatever ground it is based. An application for interim payment in these circumstances should be distinguished from an application to determine the amount of the interim rent under the [Landlord and Tenant Act 1954 s.24A](#) (see [CPR r.56.3](#) and Practice Direction 56 (Landlord and Tenant Claims and Miscellaneous Provisions about Land), para.3.7 (Vol.1 paras [56.3.1](#) and [56PD.1](#))).

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4. - Amount of Interim Payment (CPR r.25.7(4))

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4. - Amount of Interim Payment (CPR r.25.7(4))

15-111 Rule 25.7(4) consolidates provisions formerly found in the RSC and, as a result, some subtle changes emerge. In all cases, the court must not order an interim payment of more than “a reasonable proportion of the likely amount of the final judgment”. Former RSC Ord.29 rr.11(1) and 12 stated that, if it thought fit, the court should order a payment “of such amount as it thinks just” and, in cases of damages (but not in cases of sums other than damages) the amount was not to exceed a reasonable proportion, etc. In the reported cases, the requirement that the court should award “such amount as it thinks just” figures prominently and, presumably, despite its omission from these rules will continue to do so. However, in considering whether to order an interim payment the court must specifically address the conditions of r.25.7(4) and must consider what is “the likely amount of the final judgment” and what would be “a reasonable proportion of that amount”, as well as other matters that it thinks material to the exercise of its overall discretion (*Spillman v Bradfield Riding Centre [2007] EWHC 89 (QB)*). The court should take into account contributory negligence and any relevant set-off or counterclaim (r.25.7(5)). Whether a relevant set-off or counterclaim exists is to be determined in the light of the state of the pleadings (*O2 UK Ltd v Dimension Data Network Services Ltd [2007] EWCA Civ 1551* (defence, when properly analysed, precluding counterclaim)). There is no judicial guidance on what is “a reasonable proportion”, nor should there be as the matter is one for the judge’s discretion (*Dolman v Rowe [2005] EWCA Civ 715*). The judge has to do his best to make a rough estimate of the likely award and in doing so is entitled to bring into account his general experience (above). In *TTT v Kingston Hospital NHS Trust [2011] EWHC 3917, QB*, a clinical negligence claim, Owen J stated that authorities supported the award of an interim payment of 90% of a conservative assessment of the likely value of the capital sum.

As to the exercise of the discretion in cases where a trial order to the effect that damages should be paid by periodical payments is to be anticipated, see para.15-117 below.

The amount payable as an interim award should not be such as to expose the defendant to the risk that the eventual damages will be less than the sum or sums paid out as interim awards. If it turns out that the claimant has been over-paid, the circumstances may be such that a final adjustment under r.25.8 made to rectify the matter will be ineffective. Thus the claimant’s ability to repay is a factor that the court may take into account in fixing the sum to be paid, or in considering whether terms might be imposed to protect the money in the event of the claimant being unable to repay it. In *Ultraframe (UK) Ltd v Eurocell Building Plastics Ltd [2005] EWHC 2111 (Ch); (2005) 28(10) I.P.D. 28074* (Pumfrey J), where the claimant’s (having obtained an interim injunction) had succeeded on the liability issue in a patent claim but were in a deteriorating financial position, a condition was added requiring the claimant’s holding company to join in the undertaking to repay. (In this case, in addition, the judge fortified the claimant’s cross-undertaking in the interim injunction by requiring it to be given by the holding company as well.) Particular care has to be taken where the claimant is impecunious and a large interim payment is asked for. It has been said that, although a claimant’s impecuniosity does not disentitle him from an order, the amount specified in the order should reflect the possibility that he may be unable to comply with any adjustment order subsequently made under rule 25.8 (*Harmon CFEM Facades (UK) Ltd v Corporate Officer of the House of Commons (Interim Payment) [2001] C.P. Rep. 20*).

In personal injury cases where the circumstances are that any interim payment will be paid, not to the claimant personally, but to the Court of Protection, which will hold the money and only pay out what is reasonable for the claimant’s needs, the risk that the payment might be dissipated before trial with the result that the defendant would be unable to recoup any excess is avoided. In such circumstances the judge is entitled to exercise his discretion rather more generously than he otherwise might (*Dolman v Rowe*, op. cit., *Goode v West Hertfordshire Hospitals NHS Trust [2007] EWHC 3007 (QB)*, (Walker J)).

If the sum applied for is well within “the likely amount of the final judgment”, it will normally be awarded, but it is a relevant consideration (which may lead the court to decline to make the order) that the payment sought may prejudice the trial or the

position of the defendant in the proceedings, or pre-judge an issue to be determined at trial (the so-called “level playing field” principle) (*Tinsley v Sarkar [2004] EWCA Civ 1098*). For example, in a medical negligence claim in which the amount of damages which should be awarded for the future care for a severely disabled claimant was in issue, the fact that the interim payment sought might deplete the likely amount of the final judgment to a level where it would be extremely difficult for the judge of quantum to exercise powers under s.2 of the Damages Act 1996 to make a periodical payments order for future care, was treated as a relevant consideration (*Osunde v Guy's & St Thomas' Hospital [2007] EWHC 2275 (Fam)*). But the level playing field principle can never be an absolute bar to interim payment (*Campbell v Mylchreest [1999] P.I.Q.R. Q17, CA*).

The question whether an interim payment might pre-judge an issue yet to be determined, and the weight to be given to that prospect in determining an application for an interim payment, has arisen in personal injury cases where severely disabled claimants sought damages for future care. In such a case, a dispute can arise between the parties as to the arrangements to be made (and for which the defendant should pay) to ensure that the claimant has the necessary support that he needs to be maintained in reasonable health. Where an interim payment is sought for the purposes of putting in place the arrangements preferred by the claimant (e.g. care at home), being arrangements that (arguably) may cost more to implement and maintain than those preferred by the defendant (e.g. institutional care), the question arises whether an order would pre-judge the disputed issue and prejudice the defendants accordingly (particularly where the defendant wishes to contend that the claimant's accommodation plans are extravagant). Generally, the courts have given the likelihood of such prejudice in these cases little weight (*Campbell v Mylchreest*, op. cit., *Dolman v Rowe*, op. cit., *Goode v West Hertfordshire Hospitals NHS Trust*, op. cit.). Indeed, it has been said that experience gained in implementing the claimant's preferred arrangements by funding provided by an interim payment may prove useful in resolving the disputed issue, and that that is a consideration which may be borne in mind by the court in exercising its discretion whether to order such payment (*Osunde v Guy's & St Thomas' Hospital*, op. cit.).

Defendant's resources

15-112 Before r.25.7 was amended by the Civil Procedure (Amendment No.4) Rules 2004 (SI 2004/3419), it was expressly provided that, in a claim for personal injuries, generally the court could not make an interim payment order against an uninsured defendant. By indirect means, this rule continued the effect of former RSC Ord. 29, r.11(2)(c), which stated that an interim payment order could not be made against a defendant in a personal injury claim who, assuming he was not insured, was not “a person whose means and resources are such as to enable him to make the interim payment”. But the rule protected from interim payment orders, not only the defendant whose means and resources were not such as to enable him to make an interim payment, but also those whose means and resources were sufficient. By the amendment made to r.25.7 in 2004, the restriction protecting uninsured defendants was removed. In cases decided before the CPR came into effect, it was said that the means and resources of the defendant were a relevant consideration, not only in personal injury claims, but in other claims as well (*Jones v Tower Hamlets LBC (1996) 19(11) I.P.D. 19103, CA*). It has been held that, if the defendant's resources are such that an order for interim payment will cause irreparable harm which cannot be made good by eventual repayment, that is a very relevant factor to be taken into account in fixing the amount of any interim payment (*British & Commonwealth Holdings Plc v Quadrex Holdings Inc [1989] Q.B. 842; [1989] 3 All E.R. 492, CA*).

“financial position of each party”

15-113 Rule 1.1 states that the “overriding objective” of the CPR is to enable the court “to deal with cases justly” and dealing with a case justly includes, so far as is practicable, dealing with it in ways which inter alia are proportionate “to the amount of money involved” and “to the financial position of each party” (r.1.1(2)(c)). The question whether or not an interim remedy in the form of an order for interim payment should be made is not a mere matter of practice or procedure but a matter of substantive remedy. It may be doubted, therefore, whether r.1.1 strictly applies. However, well before the CPR came into effect the courts emphasised that the discretion to order an interim payment is extremely wide (see “Court's discretion” Section G below) and it has always been the case that the courts have taken into account the financial positions of each party. Certainly it is not necessary for the claimant to satisfy the court of his need for an interim payment, or that he will suffer prejudice if he does not obtain one (*Schott Kem Ltd v Bentley [1991] 1 Q.B. 61, CA*).

Delay to trial

- 15-114** The power to grant orders for interim payments was introduced by legislation at a time when delays before trial had become so significant that the injustice that could be inflicted on personal injury claimants was patent. Obviously, the length of time before a claim may be settled or tried is an important consideration. Under a procedural system in which cases are actively managed by the court it might be expected that the incidence of early settlements would be increased and delays to trial very much reduced with the results that the need for interim payment orders might decline and that the amounts awarded might be reduced. However, it remains the position that in personal injury cases where claimants seek damages for long-term care the time needed to assemble all of the expert evidence relevant to quantum issues can still be considerable.

Interest

- 15-115** Where an order for an interim payment is made in respect of expenditure already incurred and paid for, the court has power to award interest in its discretion. If the court should think it desirable to award interest on the amount of the interim payment, e.g. where the amount awarded is substantial or the trial is unlikely to come on for a long time, it should clearly and precisely specify the rate of interest awarded and the period or periods for which it is awarded, so that if the trial judge should award a different rate or rates or for a different period or periods, the necessary adjustments can be made to determine the correct total amount of interest which the trial judge has awarded. The rates at which, and the periods for which, interest may have been awarded in respect of an interim payment ordered before trial are not binding on the trial judge.

Interim payments and periodical payments of quantum judgment

- 15-116** Before 1 April 2005, in cases where the claimant sought damages and made an application for an interim payment order, the court could generally assume that any award for damages made at trial would be in the form of a lump sum payment. Since that date, in cases to which the [Damages Act 1996 s.2](#) (as amended by the Courts Act 2005) applies, that cannot be assumed, as in those cases a court dealing with quantum has to consider whether the award (or part of it) should not be capitalised but should be made in the form of a periodical payments order (see [CPR Pt 41, Sect II](#)). The factors to be taken into account are stated in [CPR r.41.7](#). This innovation made it necessary (in cases to which it applied) for the courts to consider what is meant, in this context, by the stipulation in [r.25.7\(4\)](#) to the effect that the court must not order an interim payment “of more than a reasonable proportion of the likely amount of the final judgment”. It has been recognised that it is conceivable that (in a given case to which [s.2](#) applied) the granting of an interim payment order might affect the judge’s ability in giving final judgment at trial of quantum to get the balance right between the lump sum element of any damages award and the periodical payments orders that may be necessary. And it has been held at first instance that the correct approach on an application for an interim payment order is for the court (in addition to having regard to the principles taken from the authorities applicable to such applications generally) to identify what is likely to be awarded for general damages, past losses and interest, and then to predict the likely capitalisation of the remainder of the claims; in carrying out this task, the court must endeavour to ensure that the amount of the interim payment order does not fetter the trial judge’s exercise of discretion under [r.41.7](#) (see [Brewis v Heatherwood & Wrexham Park Hospitals NHS Trust \[2008\] EWHC 2526 \(QB\)](#), where other authorities are explained). In [Eeles v Cobham Hire Services Ltd \[2009\] EWCA Civ 204, \[2010\] 1 W.L.R. 409, CA](#), the Court of Appeal explained that, in a case where a periodical payments order (PPO) is made, the amount of the final judgment is the actual capital sum awarded and does not include the notional capitalised value of the PPO, and held that, because he did not consider what capital sum was likely to be awarded at trial, a judge dealing with an interim payment order (IPO) application was not in a position to decide upon a reasonable proportion of that sum, and had therefore erred in that respect. The court reviewed some of the first instance authorities and stated that, for the purposes of an IPO application, (1) a judge should not normally begin to speculate about how the trial judge will allocate

the damages, and, as a rule, should stop at the figure which he is satisfied is likely to be awarded as a capital sum, however (2) where the judge is able confidently to predict that the trial judge will capitalise additional elements of the future loss so as to produce a greater lump sum award, for example, where the claimant can clearly demonstrate a need for an immediate capital sum (probably to fund the purchase of accommodation), he may award a reasonable proportion of that greater sum, but (3) before encroaching on the trial judge's freedom to allocate in this way the judge should have a high degree of confidence that the trial judge will endorse the capitalisation undertaken. For recent examples of the effect of the guidance given by the Court of Appeal in the *Eeles* case on applications for IPOs, see *Johnson v Chesterfield & Derbyshire Royal Hospital NHS Trust*, 22 May 2009, unrep. (Judge Bullimore); *FP v Taunton & Somerset NHS Trust* [2009] EWHC 1965 (QB); *Brown v Emery* [2010] EWHC 388 (QB); *Best v Smyth* [2010] EWHC 1541 (QB); *Kirby v Ashford & St Peter's Hospital NHS Trust* [2008] EWHC 1320 (QB); *Kirby v Ashford & St Peter's Hospital NHS Trust* (No. 2) [2011] EWHC 624 (QB).

In *C v Nottingham University Hospitals NHS Trust*, 20 September 2016, unrep. (Dove J), on 11 November 2015, judgment on liability on a clinical negligence claim (for a serious brain injury) was entered in favour of the claimant (C), and on C's application the claim was stayed for a period of five years for injury stabilisation reasons. On 28 July 2016, C applied under CPR r.25.6 for an order for an interim payment of £1m from D for specialised accommodation. The judge refused the application, principally for the reason that, as no directions had been given as to the obtaining of evidence in relation to quantum, the assessment called for by *Eeles v Cobham Hire Services Ltd* [2009] EWCA Civ 204; [2010] 1 W.L.R. 409, CA, could not properly and reliably be made, and D had not had the opportunity or indeed the need to undertake any investigation of the quantum of C's case.

5. - Need for Interim Payment

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5. - Need for Interim Payment

- 15-117 Considerable uncertainty may exist as to the quantum of damages likely to be awarded in the event. The claimant does not have to demonstrate that a certain sum is required to cover any particular need over and above the general need that a claimant has to be paid his damages as soon as reasonably may be done.

Considerable uncertainty may exist as to the quantum of damages likely to be awarded in the event. The claimant does not have to demonstrate that a certain sum is required to cover any particular need over and above the general need that a claimant has to be paid his damages as soon as reasonably may be done (*Stringman v McArdle [1994] 1 W.L.R. 1653, CA*; cf. *Schott Kem Ltd v Bentley [1991] 1 Q.B. 61; [1990] 3 All E.R. 850, CA*). The court is not concerned with what the claimant proposes to do with the money received (*Campbell v Mylchreest [1999] P.I.Q.R. Q17, CA*). In the case of a child or patient, the money will normally be paid into court and then the litigation friend will apply to the Master or district judge for payment out as and when the money is required. Where the Court of Protection is concerned, it is for that court to decide how and when the money is to be spent (*Stringman v McArdle*, op. cit.).

In *Wright v Sullivan [2005] EWCA Civ 656; [2006] 1 W.L.R. 172, CA*, the claimant applied for an interim payment for the purpose of obtaining funds for meeting costs of clinical case manager, to be appointed to provide support for the claimant. The judge rejected the defendant's submission that the interim payment order should be made conditional on the proposed case manager receiving joint instructions from the parties and reporting to them jointly. However, the judge directed that, in preparing any witness statement for the assessment of damages hearing, the manager (though a witness as to fact) should regard himself as owing the same duties to the court as those owed by an expert witness. The Court of Appeal dismissed the defendant's appeal against the judge's refusal to make the order conditional, and allowed the claimant's appeal against the direction (holding that the Pt 35 regime did not apply).

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6. - Interim Payment and Summary Judgment

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6. - Interim Payment and Summary Judgment

- 15-118 The court may give summary judgment against a defendant on the whole of a claim or a particular issue ([r.24.2](#)). Summary judgment is not available in certain possession proceedings ([r.24.3\(2\)](#)) but otherwise may be granted in cases where an interim payment order may be made. Depending on the circumstances, an application for summary judgment and for an interim payment order may conveniently be made and dealt with together (*Associated Bulk Carriers Ltd v Koch Shipping Inc [1978] 2 All E.R. 254, CA*). Where, in a claim for unliquidated damages, no application is made for an interim payment but summary judgment is given on liability and there is a triable issue as to quantum, the court has no power to give judgment for part of the damages unless the court is satisfied that such part of the damages can be clearly identified and quantified and that such ascertained part of the damages is undisputedly due (above, and *Sinclair Investment Holdings SA v Cushine [2006] EWHC 219 (Ch)*).

The court may now give a claimant summary judgment if it considers that the defendant has “no real prospect of successfully defending” the claim or issue ([r.24.2](#)). The court may make an interim payment order if it is satisfied that the claimant “would obtain judgment for a substantial amount of money”, if the claim went to trial. If the court is so satisfied it is likely that it will also consider that the defendant has no real prospect of defending. Under the former law, a defendant could be granted unconditional leave to defend where the court was satisfied that he had an arguable defence. In *Andrews v Schooling [1991] 1 W.L.R. 783; [1991] 3 All E.R. 723, CA*, the Court of Appeal examined the earlier authorities (which were not ad idem) and said that it was inconsistent to order an interim payment at the same time as giving unconditional leave to defend and approved the practice of making such leave conditional on the making of an interim payment. There is authority for the proposition that the mere fact that the defendant lodges a bona fide appeal against an order for summary judgment is not, of itself, a sufficient ground for refusing to award the claimant an interim payment order (*Halvanon Insurance Co Ltd v Central Reinsurance Corp. [1984] 2 Lloyd's Rep. 420*).

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7. - Court's Discretion

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7. - Court's Discretion

- 15-119 Whether or not an order is made is a matter of discretion. In the former RSC rules, it was said that the court could make an interim payment order “if it thinks fit” and the amount of the payment was expressed to be “of such amount as [the court] thinks just”. It was these phrases which encouraged the courts to emphasise that the discretion is extremely wide (*Crimpfil Ltd v Barclays Bank Plc, The Times, 24 February 1995, CA*) and that no limitations on its exercise (over and above those imposed by the rules themselves) should be implied (*Schott Kem Ltd v Bentley [1991] 1 Q.B. 61; [1990] 3 All E.R. 850, CA*). These phrases do not appear in r.25.7 but no restriction on the wide discretion should be implied from their omission. The emphasis on the broadness of the discretion can be seen as simply reflecting the fact that the circumstances in which its exercise may be called into play can vary enormously (and may include, not only the nature of the substantive claim and the heads under which damages or money are claimed, but also the stage in the progress of the proceedings at which an application is made).

Generally, interim payment procedures are not suitable where factual issues are complicated, or where difficult points of law arise (*Schott Kem Ltd v Bentley*, op. cit.), but this does not prevent an award being made in respect of part of a complex claim where (without venturing too far into disputed areas of fact or law) there is evidence establishing with reasonable certainty the minimum sum likely to be recoverable (*Chiron Group v Murex Diagnostics Ltd (No.13) [1996] F.S.R. 578* (Walker J)). Where, in the substantive area involved, the assessment of damages is inherently difficult (e.g. future loss of sales where patent infringed), it may well be appropriate simply to ignore certain heads of claim altogether while concentrating on those parts of the claim which can be assessed on established principles with some confidence (*Ultraframe (UK) Ltd v Eurocell Building Plastics Ltd [2005] EWHC 2111 (Ch)*).

Where the court makes an order, it may make it subject to conditions and may specify the consequence of failure to comply with the order or a condition (r.3.1(3)). Presumably, where the order made is an interim payment order, in certain circumstances it may be appropriate for the court to specify that the defendant should not be entitled to defend if he fails to comply with the order (*Casio Computer Co Ltd v Sayo, 28 January 2000, unrep.* (Rimer J)).

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(a) - Defendant insured

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8. - Further Matters Relevant to CPR r.25.7

(a) - Defendant insured

- 15-120** In many instances, where an interim payment is ordered against a defendant, the defendant will be insured in respect of the claim. Until [r.25.7](#) was amended by the [Civil Procedure \(Amendment No.4\) Rules 2004 \(SI 2004/3419\)](#), sub-rules (2) and (3) of the rule stated that an interim payment order could be made in a personal injury claim only if the defendant (or one of them where there were two or more) was insured and therefore clearly had the ability to pay (this marked a departure from former RSC Ord. 29, r.11(2), which was not so restricting). By that statutory instrument, sub-rules (2) and (3) were revoked (with effect from 1 April 2005) and sub-rule (1) amended. The intention is that, subject to an exception, it should be possible to make an interim payment in all cases, even if the defendant is uninsured or not a public body. The exception is cases (not only personal injury cases) where the court is satisfied that one or more defendants will be liable but has not determined which (see [r.25.7\(1\)\(e\)](#)).

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(b) - Motor Insurers' Bureau

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8. - Further Matters Relevant to CPR r.25.7

(b) - Motor Insurers' Bureau

- 15-121 Rule 25.7(1)(e) states that an order for an interim payment may be made where the defendant's liability will be met by an insurer "acting under" the MIB agreement, as well as by the MIB "where it is acting for itself" (r.25.7(2)(b)). The drafting here is different to that found in former RSC Ord.29, r.11(2)(a) and is designed to implement the decision of the Court of Appeal in *Sharp v Pereira [1999] 1 W.L.R. 195; [1998] 4 All E.R. 145, CA*.

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(c) - Recoverable benefits and interim payments

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(c) - Recoverable benefits and interim payments

- 15-122 The [Social Security \(Recovery of Benefits\) Act 1997](#) replaces (with some modifications) the legislative scheme formerly found in the [Social Security Administration Act 1992, Pt IV](#), providing for the recoupment by the Secretary of State from persons making compensation payments of certain benefits paid to the injured parties. An interim payment, whether made voluntarily or under a court order, appears to fall within the definition of a compensation payment under [s.29 of this Act](#). Consequently, a person making an interim payment is liable to the Secretary of State for an amount equal to the total certified recoverable benefits ([s.6\(1\)](#)). (Certain payments are exempted and “small payments” as fixed by regulations may be disregarded.) In these circumstances, where an application for an interim payment is otherwise than by consent, the practice stated in PD 25B (Interim Payments), paras 4.1 and 4.2 should be followed (see Vol.1 para.[25BPD.1](#)). The order will set out the amount by which the payment to be made has been reduced and the payment made to the claimant will be the net amount (above, paras 4.3 and 4.4). Following upon amendments to other [CPR](#) provisions, notably to [r.36.15](#) (Deduction of benefits and lump sum payments), coming about as a consequence of modifications made to the [1997 Act](#) by the [Social Security \(Recovery of Benefits\) \(Lump Sum Payments\) Regulations 2008](#), paras 4.1 and 4.3 of this Practice Direction were substituted by TSO CPR Update 47 (with effect from 1 October 2008).

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(d) - Costs

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(d) - Costs

- 15-123 An interim payment order is an order for payment on account of any sum which a party may be held liable to pay if final judgment is given against him. However, such an order cannot be made for the purpose of requiring a party to make a payment on account of any costs for which he may be required to indemnify his opponent by an order for costs made upon final judgment (see [Senior Courts Act 1981 s.32\(5\)](#)). (For interim payment rules as to costs, see [CPR r.44.3\(8\)](#).) In certain circumstances, a party may be required, not to make a payment on account of expected orders for costs, but to provide security for his opponent's costs. For example, where an application for summary judgment fails, the court may order that a party with a weak case should pay a sum of money into court as security for costs (see [CPR rr.3.1\(3\)](#) and [24.6](#)).

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(e) - Manner of payment

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8. - Further Matters Relevant to CPR r.25.7

(e) - Manner of payment

- 15-124 Former RSC Ord.29 r.13 contained some express provisions as to the manner in which an interim payment should be paid. These provisions are not repeated in Pt 25 but the practice remains the same. The order should specify to whom the payment is to be made and fix a time for payment. If the claimant is a child or patient the money should be dealt with in accordance with directions given by the court under [CPR r.21.11](#).

Former RSC Ord.29 r.13 stated that the court had power to order payment into court of an interim award. This power (which was seldom used) may now be derived from [CPR r.3.1\(3\)](#). Payment is usually in a lump sum, but the court may order payment by instalments. In the case of payments for the occupation of land, it is usual to order periodical payments as if they were of rent in arrear. In personal injury cases the payment may, in appropriate cases, be expressly ordered to be made in respect of the special damages and loss of wages claimed; this may simplify the calculation of interest at the end of the day.

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(f) - Directions for further conduct of case

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8. - Further Matters Relevant to CPR r.25.7

(f) - Directions for further conduct of case

- 15-125** Former RSC Ord.29 r.14 provided that, on an application for interim payment, whether or not an order was made, the court could give directions as to the further conduct of the case, particularly where the issue of liability still remained to be tried and the hearing of the application revealed that an early trial was desirable. Under the case management system introduced by the [CPR](#), no express provision to that effect is required. The court has ample powers to adjust the management of the case in the light of any order as to interim payment. As to restrictions on disclosure of interim payment, see [CPR r.25.9](#).
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(g) - Enforcement

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(g) - Enforcement

- 15-126** An order for an interim payment is an “order for the payment of money” within [CPR r.70.1](#) and, unless time has been given, may be enforced forthwith by the methods referred to in [r.70.2](#) as provided. Doubtless, failure to satisfy an order may found winding-up proceedings.

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(h) - Part 36 offer and interim payment

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8. - Further Matters Relevant to CPR r.25.7

(h) - Part 36 offer and interim payment

- 15-127 The prohibition on communicating a Part 36 offer to a judge is limited by r.36.16(2) to the trial judge. It has long been understood that generally parties are entitled to tell the judge determining the application for an interim payment of the offers made. Care is, however, required where the judge hearing the application is, or is likely to be, the trial judge.

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(a) - Discharge, variation, repayment

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9. - Powers of Court Where it has Made an Order for Interim Payment (CPR r.25.8)

(a) - Discharge, variation, repayment

- 15-128** The court has wide powers to discharge or vary an interim payment order, including the power to order any money paid repaid. Further, in certain circumstances the court may order a defendant to reimburse, either wholly or partly, another defendant who has made an interim payment ([r.25.8\(3\)](#)). The court may adjust an order that has been made but not yet paid.

The court may make an order under this rule without an application by any party if it makes the order when it disposes of the claim or any part of it ([r.25.8\(4\)](#)) by final judgment or grant of leave to discontinue. Otherwise an application for the relief permitted under this rule may be made by any party at any time.

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(b) - Interest

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9. - Powers of Court Where it has Made an Order for Interim Payment (CPR r.25.8)

(b) - Interest

- 15-129 Former RSC Ord.29 r.17 contained no specific provisions as to interest; the matter was dealt with by case law. It is clear that, where, following final judgment or order, the court orders that part of the interim payment should be repaid to the defendant, the court may award him interest on the overpaid amount from the date when he made the interim payment ([r.25.8\(5\)](#)); that is to say, when his “total liability” is less than the interim payment. Presumably, where a defendant is found not liable at all he would be entitled to interest on the full amount of the interim payment. The court may award interest on an interim payment made voluntarily as well as under an order of the court.

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(i) - Final judgment

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Interim Remedies

E. - Interim Payments

9. - Powers of Court Where it has Made an Order for Interim Payment (CPR r.25.8)

(c) - Adjustment on final judgment or order or on discontinuance

(i) - Final judgment

- 15-130 Where an action proceeds to trial either on the issue of liability or of damages or both after the defendant or one of two or more defendants has made an interim payment whether voluntarily or pursuant an order, the court may, before the final judgment or order is given or made, make such adjustments with respect to the interim payment as may be necessary, for the purpose of giving to its determination of that defendant's liability. Such adjustments may become necessary (a) as between the claimant and that defendant, and (b) as between that defendant and any co-defendant of his (r.25.8(2)(b) and (c)).

As between the claimant and the defendant, the first and obvious adjustment that needs to be made is that the amount of the interim payment should be deducted from the amount of the total award of damages, and subject to any further adjustment with regard to the interest on the damages (see para.25.8.3) judgment should be entered for the claimant only for the difference between these two amounts. The form of the judgment should recite the amount of the final judgment or the assessment of the damages and should further recite the order for interim payment and payment made thereunder or the amount paid voluntarily. The judgment or order should then provide for entry of judgment and payment of the balance (see PD 25B (Interim Payments), paras 5.2 and 5.3 (para.25BPD.5) and, to same effect, PD 40B (Judgments and Orders), paras 6.1 and 6.2 are to same effect (Vol.1 para.40BPD.6)).

Where the claimant has invested interim payments received from the defendant and earned interest, that accrued interest should not be deducted from the sum allowed for interest in the final determination of quantum (*Parry v North West Surrey Health Authority, The Times, 5 January 2000*).

In the unlikely event that the amount of the interim payment should exceed the amount of the final award for damages, debt or other sum, the court will order the claimant to repay the difference to the defendant who made the payment (see r.25.8(2)(c)). In addition, the court may award the defendant interest on the overpaid amount in accordance with r.25.8(5) (putting into legislative form *Mercers of the City of London v New Hampshire Insurance Co [1991] 1 W.L.R. 1173; [1991] 4 All E.R. 542*). For form of judgment in this event, see Practice Direction 25B (Interim Payments), paras 6.3 and 6.4 (para.25BPD.5 below) and, to same effect, Practice Direction 40B (Judgments and Orders), paras 5.4 and 5.5 (see Vol.1 para.40BPD.6).

(ii) - Discontinuance

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(c) - Adjustment on final judgment or order or on discontinuance

(ii) - Discontinuance

- 15-131 The court's power to adjust an interim payment may also be exercised where the court grants leave to the claimant to discontinue his action or to withdraw the claim in respect of which the interim payment was made. [Rule 38.2\(2\)\(b\)](#) states that where the claimant has received an interim payment, whether voluntarily or pursuant to order, in relation to the whole or part of his claim he may discontinue that claim or that part of it only if (1) the defendant who has made the payment consents in writing, or (2) the court gives permission. It should be noted that leave to discontinue is required when the claimant "has received an interim payment", and not where such payment has been ordered but not paid, and leave may be dispensed with where the "defendant who has made the payment" consents, and the consent of all other parties is not required. In these two respects, [r.38.2\(2\)\(b\)](#) differs from former RSC Ord.21 r.2(2A). Presumably, *has received an interim payment* includes having received any instalment where the interim payment was to be paid by instalments.

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(iii) - Adjustment between co-defendants

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(c) - Adjustment on final judgment or order or on discontinuance

(iii) - Adjustment between co-defendants

- 15-132 As between the defendant who makes the interim payment and his co-defendants, the court may order any defendant to pay the whole or part of the interim payment to the defendant who made it.

The effect of [r.25.8](#) in this context is as follows. Where (1) a defendant has been ordered to make an interim payment, or has in fact made an interim payment (either voluntarily or under an order), and (2) he made that payment in relation to a claim or part of a claim in respect of which he has made a claim against the co-defendant for a contribution, indemnity or other relief (former RSC Ord.29 r.17 added here “relating to or connected with the plaintiff’s claim”), then (3) the court may order the co-defendant to reimburse him either wholly or partly. Obviously, such an order is likely to be made on or after final judgment or discontinuance of the claim or the part of the claim to which the interim payment related. However, subject to [r.25.8\(3\)\(b\)](#), such order for reimbursement may be made at an earlier stage in the proceedings.

The Daily Cause List—Royal Courts of Justice

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The Daily Cause List—Royal Courts of Justice

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1.Copies of the Daily Cause List will be available in Room E01, Royal Courts of Justice, at 4 pm on each sitting day during Term. The Daily Cause List is also available from the Courts and Tribunals Service website: <https://www.gov.uk/government/publications/royal-courts-of-justice-cause-list>.

2.If an alteration has to be made in any list after 2.45 pm on any day the solicitors affected by the alteration will be notified by telephone by the appropriate official at the Royal Courts of Justice. Except in rare instances such alterations will be by way of deletion of cases appearing in the printed List published at 4 pm, as opposed to the insertion of cases not so appearing.

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Areas and Regions

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Areas and Regions

- AP-2+** His Majesty's Courts and Tribunals Service ("HMCTS") is an executive agency of the Ministry of Justice. For the purposes of administration England is divided into six regions namely Midland, North West, North East, South West, South East, London. Wales is administered separately by HMCTS Wales. The regions should not be confused with the Circuits (Midland, Northern, North Eastern, Western, South East and Wales).

Each region is under the administrative control of a Delivery Director who, subject to the overriding judicial control of the Presiding Judges assigned to each region, is responsible to the Lord Chancellor and the Secretary of State for Justice for the efficient conduct of court business in his Region.

Each region is further divided into a number of clusters for which a Cluster Manager is responsible for the efficient conduct of business in all courts in their area. The manager will in practice act as a point of contact for all concerned, including judges, the legal profession and others to ensure the flexible arrangements for the disposal of court business, including the planning of court sittings, the allocation of judge-power and court accommodation.

The following is a list of the Clusters and relevant telephone numbers. This is followed by a list of Trial Centres.

AP-3+	REGION	REGIONAL DIRECTOR	AREA DIRECTOR
	Midlands Region	Midlands Regional Support Unit Temple Court 35 Bull Street Birmingham West Midlands NG2 1EE Tel: 0115 955 8301	West Midlands and Warwickshire Area Director's Office 6th Floor Temple Court 35 Bull Street Birmingham B4 6LG Tel: 0121 681 3200
	North West Region	North West Regional Director's Office Manchester Civil Justice Centre	

	<p>1 Bridge Street West Manchester M60 1TE Tel: 0161 240 5000 Fax: 0161 832 8596 DX: 724780 Manchester 44</p>	
South East Region	<p>South East Regional Director's Office 5th Floor Fox Court 14 Grays Inn Road London WC1X 8HN Tel: 020 7332 1831 DX: 157632 Cheapside 10</p>	<p>Thames Valley Area Director's Office Milton Keynes Magistrates' Court 301 Silbury Boulevard Witan Gate East Milton Keynes Buckinghamshire MK9 2AJ Tel: 01908 451 128</p>
HMCTS Wales	<p>Wales Regional Support Unit Churchill House Churchill Way Cardiff CF10 2HH Tel: 029 2067 8311</p>	<p>Director of Operations for Wales 3rd Floor, Churchill House Churchill Way Cardiff CF10 4HH Tel: 029 2067 8311</p>
South West Region	<p>South West Regional Support Unit Lynx House Pynes Hill Campus Rydon Lane Exeter EX2 5JL</p>	
London Region	<p>London Regional Support Unit Rose Court 2 Southwark Bridge London SE1 9HS Tel: 020 7921 2190 DX: 154261 Southwark 12</p>	

List of Trial Centres

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List of Trial Centres

Burnley Combined Court Centre

The Law Courts

Hammerton Street

Burnley

Lancashire BB11 1XD

Tel: 01282 855 300

Fax: 01282 414 911

DX: 724940 Burnley 4

Cardiff Civil Justice Centre

2 Park Street

Cardiff

South Wales CF10 1ET

Tel: 029 2037 6400

Fax: 029 2037 6475

DX: 99500 Cardiff 6

Croydon County Court

The Law Courts

Altyre Road

Croydon

Surrey CR9 5AB

Tel: 0300 123 5577

Fax: 020 8760 0432

DX: 97470 Croydon 6

Leicester County Court

90 Wellington Street

Leicester

Leicestershire LE1 6HG

Tel: 0116 222 5700

DX: 17401 Leicester 3

Manchester Civil Justice Centre

1 Bridge Street West

Manchester

Greater Manchester M60 9DJ

Tel: 0161 240 5000

DX: 724783 Manchester 44

Mansfield County Court
Rosemary Street
Mansfield
Nottinghamshire NG19 6EE
Tel: 01623 451 500
Fax: 0870 739 4008
DX: 179562 Mansfield 9

Mayor's and City of London Court
Guildhall Buildings
Basinghall Street
London EC2V 5AR
Tel: 0300 123 5577
Fax: 01264 347953
DX: 97520 Moorgate EC2

Norwich Combined Court
The Law Courts
Bishopsgate
Norwich
Norfolk NR3 1UR
Tel: 0344 892 4000
Fax: 01264 785023
DX: 97385 Norwich 5

Southend County Court
The Court House
80 Victoria Avenue
Southend-on-Sea
Essex SS2 6EU
Tel: 0344 892 4000
Fax: 01264 347956
DX: 97780 Southend on Sea 2

South Tyneside County Court
Millbank
Secretan Way
South Shields
Tyne & Wear NE33 1RG
Tel: 0191 456 3343
Fax: 0191 427 4499
DX: 65143 South Shields 3

Stoke on Trent Combined Court
Bethesda Street
Hanley
Stoke on Trent
Staffordshire ST1 3BP
Tel: 01782 854 000
Fax: 01782 854 046

DX: 703360 Hanley 3

Swansea Civil Justice Centre
Caravella House
Quay West
Quay Parade
Swansea
South Wales SA1 1SP
Tel: 01792 485 800
Fax: 01792 485 810
DX: 99740 Swansea 5

Taunton County Court
The Shire Hall
Taunton
Somerset TA1 4EU
Tel: 01823 281 110
DX: 98410 Taunton 2

Wakefield Civil Justice Centre
1 Mulberry Way
Wakefield
WF1 2QN
Tel: 01924 207900
Fax: 01924 207 959
DX: 703022 Wakefield 24

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List of District Registries

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List of District Registries

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[Civil Courts Order 2014 (SI 2014/819), as amended]

NAME OF PLACE	DISTRICTS DEFINED BY REFERENCE TO AREAS SERVED BY HEARING CENTRES OF THE COUNTY COURT
Aberystwyth	Aberystwyth
Barnsley	Barnsley
Barnstaple	Barnstaple
Barrow in Furness	Barrow in Furness
Basingstoke	Basingstoke
Bedford	Bedford
Birkenhead	Birkenhead
Birmingham (Chancery)	Birmingham
Blackpool	Blackpool
Blackwood	Blackwood
Boston	Boston
Bournemouth	Bournemouth and Poole
Bradford	Bradford
Brighton	Brighton
	Lewes
Bristol (Chancery)	Bath Bristol Weston-super-Mare
Burnley	Burnley
Bury St Edmunds	Bury St Edmunds
Caernarfon (Chancery)	Caernarfon
	Porthmadog
Cambridge	Cambridge

Canterbury	Canterbury
Cardiff (Chancery)	Cardiff
Carlisle	Carlisle
	West Cumbria
Carmarthen	Carmarthen
	Llanelli
Chatham	Medway
	Dartford
Chelmsford	Chelmsford
	Hertford
Chester	Chester
	Wrexham
Chesterfield	Chesterfield
Coventry	Coventry
	Nuneaton
	Warwick
Crewe	Crewe
Croydon	Bromley
	Croydon
Darlington	Darlington
Derby	Derby
Doncaster	Doncaster
	Rotherham
Dudley	Dudley
Durham	Durham
Exeter	Exeter
	Torquay and Newton Abbot
Gloucester	Gloucester and Cheltenham
Great Grimsby	Great Grimsby
Guildford	Aldershot and Farnham
	Guildford
Harrogate	Harrogate
Hastings	Eastbourne
	Hastings
Haverfordwest	Haverfordwest
Hereford	Hereford

Huddersfield	Huddersfield
Ipswich	Ipswich
Kingston upon Hull	Kingston upon Hull
Lancaster	Lancaster
Leeds (Chancery)	Leeds
Leicester	Leicester
Lincoln	Lincoln
Liverpool (Chancery)	Liverpool
Luton	Luton
Maidstone	Maidstone
Manchester (Chancery)	Manchester
Mansfield	Mansfield
Margate	Thanet
Merthyr Tydfil	Merthyr Tydfil
Middlesbrough	Middlesbrough
Milton Keynes	Aylesbury
	Milton Keynes
Mold (Chancery)	Mold
Newcastle upon Tyne (Chancery)	Newcastle upon Tyne
Newport (Gwent)	Newport (Gwent)
Northampton	Northampton
Norwich	Norwich
Nottingham	Nottingham
Oxford	Oxford
Peterborough	Peterborough
Plymouth	Plymouth
Pontypridd	Pontypridd
Portsmouth	Newport (Isle of Wight)
	Portsmouth
Port Talbot	Port Talbot
	Swansea
Prestatyn	Prestatyn
Preston (Chancery)	Blackburn
	Preston
Reading	Reading
	Slough
Romford	Basildon

	Romford
St. Helens	St. Helens
	Wigan
Salisbury	Salisbury
Scarborough	Scarborough
Sheffield	Sheffield
Skipton	Skipton
Southampton	Southampton
Southend-on-Sea	Southend-on-Sea
South Shields	North Shields
	South Shields
South Shields	
Stafford	Stafford
Stockport	Stockport
Stoke on Trent	Stoke on Trent
Sunderland	Gateshead
	Sunderland
Swindon	Swindon
Taunton	Taunton
Telford	Telford
Truro	Bodmin
	Truro
Wakefield	Wakefield
Walsall	Walsall
Weymouth	Weymouth
Winchester	Winchester
Wolverhampton	Wolverhampton
Worcester	Worcester
Worthing	Horsham
	Worthing
Yeovil	Yeovil
York	York

Note

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Table substituted by the [Civil Courts Order 2014 \(SI 2014/819\)](#), with effect from 22 April 2014. Amended by the [Civil Courts \(Amendment\) Order 2016 \(SI 2016/974\)](#) art.2(3), with effect from 31 October 2016. Entries relating to "Halifax" revoked by the [Civil Courts \(Amendment No.2\) Order 2016 \(SI 2016/1068\)](#) art.2(2)(a)(i), (b), with effect from 28 November 2016; entries relating to "Tunbridge Wells" revoked by the [Civil Courts \(Amendment No.2\) Order 2016 \(SI 2016/1068\)](#) art.2(2)(a)(ii), (b), with effect from 9 December 2016; entries relating to "Scunthorpe" revoked by the [Civil Courts \(Amendment No.2\) Order 2016 \(SI 2016/1068\)](#) art.2(2)(a)(iii), (b), with effect from 13 January 2017; entries relating to "Hartlepool" revoked by the [Civil Courts \(Amendment No.2\) Order 2016 \(SI 2016/1068\)](#) art.2(2)(a)(iv), (b), with effect from 30 January 2017; and entry in the second column relating to "Reigate" revoked by the [Civil Courts \(Amendment No.2\) Order 2016 \(SI 2016/1068\)](#) art.2(2)(c), with effect from 31 March 2017; entry relating to Llangefni and reference to corresponding County Court Centre revoked by the [Civil Courts \(Amendment\) Order 2017 \(SI 2017/574\)](#) art.2.(2)(a)(i), (b), with effect from 12 May 2017; entries relating to Bolton and Bury and references to corresponding County Court Centre revoked by the [Civil Courts \(Amendment\) Order 2017 \(SI 2017/574\)](#) art.2.(2)(a)(ii), (iii), (b), with effect from 2 June 2017; entry relating to Kendal and reference to corresponding County Court Centre revoked by the [Civil Courts \(Amendment\) Order 2017 \(SI 2017/574\)](#) art.2.(2)(a)(iv), (b), with effect from 30 June 2017; entry relating to Oldham and reference to corresponding County Court Centre revoked by the [Civil Courts \(Amendment\) Order 2017 \(SI 2017/574\)](#) art.2.(2)(a)(v), (b), with effect from 14 July 2017; entry in the second column relating to Kettering County Court revoked by the [Civil Courts \(Amendment\) Order 2017 \(SI 2017/574\)](#) art.2.(2)(c), (b), with effect from 7 July 2017; entries relating to Chichester and Colchester in the first column and entries relating to Chichester, Colchester and Clacton, Chippenham and Trowbridge and Banbury revoked by the [Civil Courts \(Amendment\) Order 2019 \(SI 2019/889\)](#) art.2, with effect from 30 April 2019. The list of courts was updated using data from the Ministry of Justice in January 2022.

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County Court Directory

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County Court Directory

Editorial note

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The County Court Directory was set out in the Schedule to PD 2C—Starting Proceedings in the County Court. It is retained here for information and has been updated with information provided by HMCTS.

County Court Directory

Schedule: County Court Directory

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Key	Proceedings and co-located courts	Relevant provisions
I	Insolvency	Insolvency (England and Wales) Rules 2016/1024
C/LLP	Company and Limited Liability Partnerships	Practice Direction 2C, paragraph 3
CDR	Chancery District Registry	The Civil Courts Order 2014, S.I. 2014/819
CEA	Certification of Enforcement Agents	Practice Direction 84—Enforcement by Taking Control of Goods
CTC	Civil Trial Centre	Practice Direction 26—Case Management – Preliminary Stage: Allocation and Reallocation
DR	District Registry	The Civil Courts Order 2014, S.I. 2014/819
GVI	Application on notice for an injunction under the Policing and Crime Act 2009	Practice Direction 65—Proceedings Relating to Anti-social Behaviour and Harassment
CCC	Circuit Commercial Court	Practice Direction 59—Circuit Commercial Courts
RR	Race Relations	The Civil Courts Order 1981, S.I. 1983/713

TCC	Technology and Construction Court	Practice Direction 63—Technology and Construction Courts		
Column 1	Column 2	Column 3	Column 4	Column 5
County Court Hearing Centre	District Registry, Chancery District Registry, Circuit Commercial Court Or Civil Trial Centre	Civil Trial Centre to Which Cases Allocated to the Multi-Track Will Be Transferred	Additional Proceedings	Civil Trial Centres — Feeder Courts
Aberystwyth	DR	Swansea	I C/LLP	
Barnet		Central London	Part of the London Insolvency District (High Court for Parts 1 to 7, County Court at Central London for Parts 7A to 11) (C/LLP should be started in the High Court)	
Barnsley	DR	Sheffield	I C/LLP	
Barnstaple	DR	Exeter	I C/LLP	
Barrow-in-Furness	DR	Carlisle	I C/LLP	
Basildon		Southend		
Basingstoke	DR	Winchester		
Bath	DR	Bristol	I C/LLP	
Bedford	DR	Luton	I C/LLP	
Birkenhead	DR	Liverpool	I C/LLP CEA	
Birmingham	DR CDR CCC CTC		I C/LLP CEA GVI RR TCC	Dudley
Blackpool	DR		I C/LLP	
Blackwood	DR	Cardiff	I C/LLP	
Bodmin		Truro		
Boston	DR	Lincoln	I C/LLP	
Bournemouth & Poole	DR CTC		I C/LLP	Weymouth
Bradford	DR CTC		I C/LLP GVI	Skipton
Brentford		Central London	Part of the London Insolvency District (High Court for Parts 1 to 7, County Court at Central London for Parts 7A to 11) (C/LLP should be started in the High Court)	
Brighton	DR CTC		I C/LLP CEA GVI	Hastings, Horsham, Lewes, Worthing
Bristol	DR CDR CCC CTC		I C/LLP CEA GVI RR TCC	Bath, Weston-super-Mare
Bromley		Central London		
Burnley	DR CTC		I C/LLP CEA	
Bury St Edmunds	DR	Cambridge	I C/LLP	
Caernarfon	DR CDR CTC		I C/LLP	
Cambridge	DR CTC		I C/LLP RR	Bury St Edmunds, Chelmsford, Peterborough
Canterbury	DR CTC		I C/LLP RR	Maidstone, Medway, Thanet

Cardiff*	DR CDR CCC CTC		I C/LLP CEA GVI TCC RR	Blackwood, Newport (Gwent)
Carlisle	DR CTC		I C/LLP RR	Barrow-in-Furness, West Cumbria
Carmarthen (hearings only)	DR	Swansea	I C/LLP	
Central London	CTC		Part of the London insolvency district (High Court for Parts 1 to 7, County Court at Central London for Parts 7A to 11) (C/LLP should be started in the High Court) CEA RR	Barnet, Bow, Brentford, Bromley, Clerkenwell & Shoreditch, Croydon, Edmonton, Kingston-upon-Thames, Mayor's & City of London, Romford, Stratford, Willesden, Uxbridge
Chelmsford	DR	Southend	I C/LLP CEA GVI	
Chester	DR CTC		I C/LLP TCC	Crewe
Chesterfield	DR	Derby	I C/LLP	
Clerkenwell and Shoreditch		Central London	Part of the London Insolvency District (High Court for Parts 1 to 7, County Court at Central London for Parts 7A to 11) (C/LLP should be started in the High Court)	
Coventry	DR CTC		I C/LLP	Nuneaton, Warwick
Crewe	DR	Chester	I C/LLP	
Croydon	DR CTC	Central London	I C/LLP GVI	
Darlington	DR	Middlesbrough	I C/LLP	
Dartford	CTC	Central London	CEA	
Derby	DR CTC		I C/LLP	Chesterfield
Doncaster	DR	Sheffield	I C/LLP	
Dudley (hearings take place at Dudley Magistrates' Court)	DR	Birmingham	I C/LLP	
Durham	DR	Newcastle-upon-Tyne	I C/LLP	
Edmonton		Central London	Part of the London Insolvency District (High Court for Parts 1 to 7, County Court at Central London for Parts 7A to 11) (C/LLP should be started in the High Court)	
Exeter	DR CTC		I C/LLP RR TCC	Barnstaple, Torquay & Newton Abbott
Gateshead		Newcastle-upon-Tyne	CEA	
Gloucester and Cheltenham	DR CTC		I C/LLP	Cheltenham
Great Grimsby	DR CTC		I C/LLP	
Guildford	DR		I C/LLP	Staines
Harrogate	DR	York	I C/LLP	
Hastings	DR	Brighton	I C/LLP	
Haverfordwest	DR	Swansea	I C/LLP	
Hereford	DR	Worcester	I C/LLP	
Hertford		Luton	I C/LLP CEA	
High Wycombe		Reading		
Horsham		Brighton		
Huddersfield	DR CTC		I C/LLP	

Ipswich	DR	Norwich or Southend	I C/LLP	
Kingston-upon-Hull	DR CTC		I C/LLP CEA	Grimsby
Kingston-upon-Thames		Central London	I C/LLP	
Lancaster	DR CTC		I C/LLP	None
Leeds	DR CDR CCC CTC		I C/LLP TCC RR	Wakefield
Leicester	DR CTC		I C/LLP GVI	
Lewes		Brighton		
Lincoln	DR CTC		I C/LLP	Boston
Liverpool	DR CDR CCC CTC		I C/LLP GVI TCC	Birkenhead, St Helens, Wigan
Llanelli		Swansea		
Luton	DR CTC		I C/LLP	Bedford, Hertford, Watford
Maidstone	DR	Canterbury	I C/LLP	
Manchester	DR CDR CCC CTC		I C/LLP GVI RR TCC	Stockport
Mansfield	DR	Nottingham		
Mayor's & City of London	CTC	Central London	Part of the London Insolvency District (High Court for Parts 1 to 7, County Court at Central London for Parts 7A to 11) (C/LLP should be started in the High Court)	
Medway	DR	Canterbury		
Merthyr Tydfil	DR	Cardiff	I C/LLP	
Middlesbrough	DR CTC		I C/LLP CEA	Darlington
Milton Keynes	DR	Oxford	I C/LLP	
Mold (hearings only — all administration is undertaken at Wrexham)	DR CDR	Wrexham		
Newcastle-upon-Tyne	DR CDR CCC CTC		I C/LLP GVI RR TCC	Durham, Gateshead, North Shields, South Shields, Sunderland
Newport (Gwent)	DR	Cardiff	I C/LLP	
Newport (Isle of Wight)	DR	Portsmouth	I C/LLP	
Northampton	DR CTC		I C/LLP CEA	Peterborough
North Shields		Newcastle-upon-Tyne		
Norwich	DR CTC		I C/LLP CEA	Ipswich
Nottingham	DR CTC		I C/LLP CEA GVI RR TCC	Mansfield
Nuneaton		Coventry		
Oxford	DR CTC		I C/LLP CEA GVI RR	Milton Keynes
Peterborough	DR	Cambridge	I C/LLP GVI	
Plymouth	DR CTC		I C/LLP CEA RR	None
Pontypridd	DR	Cardiff	I C/LLP	
Portsmouth	DR CTC		I C/LLP GVI	Newport (Isle of Wight)
Port Talbot	DR	Swansea		
Prestatyn	DR	Contact the Prestatyn hearing centre for information regarding the CTC	I C/LLP	
Preston	DR CDR CTC		I C/LLP GVI	Blackburn

Reading	DR CTC		I C/LLP	High Wycombe, Slough
Romford	DR	Central London	I C/LLP	
Salisbury	DR	Swindon	I C/LLP	
Scarborough	DR	York	I C/LLP	
Sheffield	DR CTC		I C/LLP GVI	Barnsley, Doncaster
Skipton	DR	Bradford		
Slough		Reading	I C/LLP	
Southampton	DR CTC		I C/LLP CEA RR	None
Southend	DR CTC		I C/LLP	Basildon, Chelmsford, Colchester, Ipswich
South Shields	DR	Newcastle-upon-Tyne		
St Helens	DR	Liverpool		
Stafford	DR	Stoke-on-Trent	I C/LLP	
Staines		Guildford		
Stockport	DR	Manchester	I C/LLP	
Stoke-on-Trent	DR CTC		I C/LLP	Stafford
Sunderland	DR	Newcastle-upon-Tyne	I C/LLP	
Swansea	DR CTC		I C/LLP CEA	Aberystwyth, Carmarthen, Haverfordwest, Llanelli, Merthyr Tydfil, Pontypridd
Swindon	DR CTC		I C/LLP	Trowbridge, Salisbury
Taunton	DR CTC		I C/LLP	Yeovil
Telford	DR CTC		I C/LLP	Wolverhampton
Thanet	DR	Canterbury		
Torquay & Newton Abbot	DR	Exeter	I C/LLP	
Truro	DR CTC		I C/LLP	Bodmin
Uxbridge		Central London		
Wakefield	DR	Leeds	I C/LLP	
Walsall	DR	Stoke-on-Trent	I C/LLP	
Warwick		Coventry	I C/LLP	
Watford		Luton		
Welshpool & Newtown (hearings only— all administration is undertaken at Wrexham)	DR	Wrexham	I C/LLP	
West Cumbria	DR (to be called Workington District Registry)	Carlisle	I C/LLP	
Weston-super-Mare		Bristol		
Weymouth	DR	Bournemouth	I C/LLP	
Wigan	DR	Liverpool	I C/LLP	
Willesden		Central London	Part of the London Insolvency District (High Court for Parts 1 to 7, County Court at Central London for Parts 7A to 11) (C/LLP should be started in the High Court)	
Winchester	DR CTC		I C/LLP	Aldershot & Farnham, Basingstoke
Wolverhampton	DR	Telford	I C/LLP	

Worcester	DR CTC		IC/LLP CEA	Hereford
Worthing	DR	Brighton		
Wrexham	DR CTC	Wrexham	IC/LLP RR CEA	Mold, Welshpool and Newton
Yeovil	DR	Taunton	IC/LLP	
York	DR CTC		IC/LLP CEA	Harrogate, Scarborough

End of Document

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Directory of High Court Enforcement Officers—Addresses and Contact Details for Appointed Enforcement Officers

White Book 2023 | Commentary last updated November 16, 2022

Volume 2

Appendix 1 - Courts Directory

Courts Directory

Directory of High Court Enforcement Officers—Addresses and Contact Details for Appointed Enforcement Officers

Editorial note

- AP-10+** The High Court Enforcement Officer Regulations 2004 and [Sch. 7 of the Courts Act 2003](#), provide that High Court Enforcement Officers can be assigned to a district, and that the Lord Chancellor can assign an enforcement officer to more than one district.
-  Currently all High Court Enforcement Officers are authorised for all districts.

A directory of High Court Enforcement Officers can also be found on the High Court Enforcement Officers Association website: <https://www.hceoa.org.uk/choosing-a-hceo/find-a-member>.

AP-11+	NAME	POSTAL ADDRESS	TELEPHONE AND FAX NUMBERS	EMAIL ADDRESS			
					(DX ADDRESS IN ITALICS)	(MOBILE OR OUT OF HOURS NUMBERS IN ITALICS)	(WEB ADDRESS IN ITALICS)
	ANDERSON, Michael	141 Walter Road Swansea SA1 5RW	Tel: 01792 466 771 <i>DX 52966 Swansea</i>	manderson@hcegroup.co.uk Fax: 01792 455 755			
	ARNOLD, John	Marches High Court Enforcement PO Box 3941 Chester CH1 9PE	Tel: 07711 163 846	john.arnold@marcheshighcourtenfo			
	ASKER, David	SHCE Ltd t/a The Sheriffs Office Vaughan Thomas House 141 Walter Road Swansea SA1 5RW	Tel: 0333 001 5100	dja@thesheriffsoffice.com			

Directory of High Court Enforcement Officers—Addresses..., UKBC-WHITEBK...

BADGER, Chris	Just Digital Marketplace Ltd One Lyric Square London W6 0NB	Tel: 0203 848 9060	chris.badger@justdebt.co.uk			
			Fax: 0845 890 9208	http://www.justdebt.co.uk		
BARNETT, Simon	High Court Enforcement Group Limited 1st Floor Helix Edmund Street Liverpool L3 9NY	Tel: 0151 236 4751	clientservices@hcgroup.co.uk	DX 14104 Liverpool	http://www.hcgroup.co.uk	
BOVAN, Gary	High Court Enforcement Group Limited 1st Floor Helix Edmund Street Liverpool L3 9NY	Tel: 0151 236 4751	gary.bovan@hcgroup.co.uk	DX 14104 Liverpool	http://www.hcgroup.co.uk	
BRADLEY, Andrew	Marston Recovery 148 Great Charles Street Birmingham West Midlands B3 3HT	Tel: 0333 320 2549	hccs@marstonrecovery.co.uk	DX 13014 Birmingham	http://www.marstonrecovery.co.uk	
BUTLER, Malcolm	Marston Recovery 148 Great Charles Street Birmingham West Midlands B3 3HT	Tel: 0333 320 2549	hccs@marstonrecovery.co.uk	DX 13014 Birmingham	http://www.marstonrecovery.co.uk	
CADDY, Paul	Court Enforcement Services	Tel: 01992 663 399	p.caddy@cdergroup.co.uk			
		PO Box 396 Loughton IG10 9GL			http://www.cdergroup.co.uk	
		DX 7903 - LOUGHTON				
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COOKSON, Kelly	Wilson & Roe and Andrew Wilson & Co 26 Missouri Avenue Salford Manchester M50 2NP	Tel: 0161 925 1800	https://www.wilsonandroe.com			
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		DX 13014 Birmingham			http://www.marstonrecovery.co.uk	

Directory of High Court Enforcement Officers—Addresses..., UKBC-WHITEBK...

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HARRISON, Karl	TBC	TBC	TBC			
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			<i>DX 11701 Bradford</i>	Fax: 01274 734 773	http://www.wilsonandroe.com
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WHITWORTH, Frank	Able Investigations and Enforcement 4 Paramo House Denmark Street Darlington DL3 0LP				
WILLIAMSON, Simon	Direct Collection Bailiffs Ltd Direct House Greenwood Drive Manor Park Runcorn Cheshire WA7 1UG	Tel: 0203 298 0201	enquiries@dcb ltd.com		http://www.dcb ltd.com
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			<i>DX 710252 Manchester 3</i>		