

inspection at the following offices of the High Court at the Royal Courts of Justice:

- (1) the Central Office of the Queen's Bench Division;
- (2) Chancery Chambers;
- (3) the Admiralty and Commercial Court Registry.

4.2 No registers of claims are at present available for inspection in county courts or in District Registries or other offices of the High Court.

4.2A A party to proceedings may, unless the court orders otherwise, obtain from the records of the court a copy of—

- (a) a certificate of suitability of a litigation friend;
- (b) a notice of funding;
- (c) a claim form or other statement of case together with any documents filed with or attached to or intended by the claimant to be served with such claim form;
- (d) an acknowledgement of service together with any documents filed with or attached to or intended by the party acknowledging service to be served with such acknowledgement of service;
- (e) a certificate of service, other than a certificate of service of an application notice or order in relation to a type of application mentioned in sub-paragraph (h)(i) or (ii);
- (f) a notice of non-service;
- (g) an allocation questionnaire;
- (h) an application notice, other than in relation to—
  - (i) an application by a solicitor for an order declaring that he has ceased to be the solicitor acting for a party; or
  - (ii) an application for an order that the identity of a party or witness should not be disclosed;
- (i) any written evidence filed in relation to an application, other than a type of application mentioned in sub-paragraph (h)(i) or (ii);
- (j) a judgment or order given or made in public (whether made at a hearing or without a hearing);
- (k) a statement of costs;
- (l) a list of documents;
- (m) a notice of payment into court;
- (n) a notice of discontinuance;
- (o) a notice of change of solicitor; or
- (p) an appellant's or respondent's notice of appeal.

4.3 An application under rule 5.4B(2), 5.4C(1B), 5.4C(2) or 5.4C(3)(b)(ii) for permission to obtain a copy of a document, even if made without notice, must be made under CPR Part 23 and the application notice must identify the document or class of document in respect of which permission is sought and the grounds relied upon.

4.4 An application under rule 5.4C(4) by a party or a person identified in a claim form must be made—

- (1) under CPR Part 23; and
- (2) to a Master or district judge, unless the court directs otherwise.

4.5 Rule 5.4B allows a person who is a party to proceedings to obtain copies of documents from court records. A person is a party to proceedings who has been named as a party on a statement of case irrespective of whether they have been served with that statement of case.

**Supply of documents from court records—statements of case filed before 2nd October 2006**

4A.1 Rule 5.4C(1A) provides that the rules of court relating to access by a non-party to statements of case in force immediately before 2nd October 2006 apply to statements of case filed before that date as if they had not been revoked. For ease of reference, those rules are set out in the following paragraphs as they applied to statements of case, along with the relevant supplementary provisions previously contained in this practice direction.

5APD.4A

4A.2 A person who is not a party to proceedings may—

- (1) unless the court orders otherwise, obtain from the records of the court a copy of a claim form, but not any documents filed with or attached to or intended by the claimant to be served with such claim form, subject to paragraph 4A.3 and to any order of the court under paragraph 4A.4; and
- (2) if the court gives permission, obtain from the records of the court a copy of any other statement of case.

4A.3 A person may obtain a copy of a claim form under paragraph 4A.2(1) only if—

- (1) where there is one defendant, the defendant has filed an acknowledgment of service or a defence;
- (2) where there is more than one defendant, either—
  - (a) all the defendants have filed an acknowledgment of service or a defence;
  - (b) at least one defendant has filed an acknowledgment of service or a defence, and the court gives permission;
- (3) the claim has been listed for a hearing; or
- (4) judgment has been entered in the claim.

4A.4 The court may, on the application of a party or any person identified in the claim form—

- (1) restrict the persons or classes of persons who may obtain a copy of the claim form;
- (2) order that persons or classes of persons may only obtain a copy of the claim form if it is edited in accordance with the directions of the court; or
- (3) make such other order as it thinks fit.

4A.5 A person wishing to obtain a copy of a document under paragraph 4A.2 must pay any prescribed fee and—

- (a) if the court's permission is required, file an application notice in accordance with Part 23; or
- (b) if permission is not required, file a written request for the document.

4A.6 An application for permission to obtain a copy of a statement of case, or for an order under paragraph 4A.4, may be made without

notice, but the court may direct notice to be given to any person who would be affected by its decision.

4A.7 An application under paragraph 4A.3(2)(b) for permission to obtain a copy of a claim form must be made under Part 23.

4A.8 An application notice under paragraph 4A.2(2) or paragraph 4A.3(2)(b) must identify the document or class of document in respect of which permission is sought and the grounds relied upon.

4A.9 An application under paragraph 4A.4 by a party or a person identified in a claim form must be made—

- (a) under Part 23; and
- (b) to a Master or district judge, unless the court directs otherwise.

#### Documents for Filing at Court

**5APD.5** 5.1 The date on which a document was filed at court must be recorded on the document. This may be done by a seal or a receipt stamp.

5.2 Particulars of the date of delivery at a court office of any document for filing and the title of the proceedings in which the document is filed shall be entered in court records, on the court file or on a computer kept in the court office for the purpose. Except where a document has been delivered at the court office through the post, the time of delivery should also be recorded.

**5APD.6** 5.3 Filing by Facsimile

- (1) Subject to paragraph (6) below, a party may file a document at court by sending it by facsimile ("fax").
- (2) Where a party files a document by fax, he must not send a hard copy in addition.
- (3) A party filing a document by fax should be aware that the document is not filed at court until it is delivered by the court's fax machine, whatever time it is shown to have been transmitted from the party's machine.
- (4) The time of delivery of the faxed document will be recorded on it in accordance with paragraph 5.2.
- (5) It remains the responsibility of the party to ensure that the document is delivered to the court in time.
- (6) If a fax is delivered after 4p.m. it will be treated as filed on the next day the court office is open.
- (7) If a fax relates to a hearing, the date and time of the hearing should be prominently displayed.
- (8) Fax should not be used to send letters or documents of a routine or non-urgent nature.
- (9) Fax should not be used, except in an unavoidable emergency, to deliver:
  - (a) a document which attracts a fee
  - (b) omitted
  - (c) a document relating to a hearing less than two hours ahead
  - (d) trial bundles or skeleton arguments
- (10) Where (9)(a) or (b) applies, the fax should give an explanation

tion for the emergency and include an undertaking that the fee or money has been dispatched that day by post or will be paid at the court office counter the following business day.

- (11) Where courts have several fax machines, each allocated to an individual section, fax messages should only be sent to the machine of the section for which the message is intended.

5.4 Where the Court orders any document to be lodged in Court, the document must, unless otherwise directed, be deposited in the office of that Court.

5.5 A document filed, lodged or held in any court office shall not be taken out of that office without the permission of the Court unless the document is to be sent to the office of another court (for example under CPR Part 30 (Transfer)), except in accordance with CPR rule 39.7 (impounded documents) or in accordance with paragraph 5.6 below.

**5APD.7**

5.6(1) Where a document filed, lodged or held in a court office is required to be produced to any Court, Tribunal or arbitrator, the document may be produced by sending it by registered post (together with a Certificate as in paragraph 5.6(8)(b)) to the Court, Tribunal or arbitrator in accordance with the provisions of this paragraph.

- (2) Any Court, Tribunal or arbitrator or any party requiring any document filed, lodged or held in any court office to be produced must apply to that court office by sending a completed request (as in paragraph 5.6(8)(a)), stamped with the prescribed fee.
- (3) On receipt of the request the court officer will submit the same to a Master in the Royal Courts of Justice or to a District Judge elsewhere, who may direct that the request be complied with. Before giving a direction the Master or District Judge may require to be satisfied that the request is made in good faith and that the document is required to be produced for the reasons stated. The Master or District Judge giving the direction may also direct that, before the document is sent, an official copy of it is made and filed in the court office at the expense of the party requiring the document to be produced.
- (4) On the direction of the Master or District Judge the court officer shall send the document by registered post addressed to the Court, Tribunal or arbitrator, with:
  - (a) an envelope stamped and addressed for use in returning the document to the court office from which it was sent;
  - (b) a Certificate as in paragraph 5.6(8)(b);
  - (c) a covering letter describing the document, stating at whose request and for what purpose it is sent, referring to this paragraph of the Practice Direction and containing a request that the document be returned to the court office from which it was sent in the enclosed envelope as soon as the Court or Tribunal no longer requires it.
- (5) It shall be the duty of the Court, Tribunal or arbitrator to

whom the document was sent to keep it in safe custody, and to return it by registered post to the court office from which it was sent, as soon as the Court, Tribunal or arbitrator no longer requires it.

(6) In each court office a record shall be kept of each document sent and the date on which it was sent and the Court, Tribunal or arbitrator to whom it was sent and the date of its return. It shall be the duty of the court officer who has signed the certificate referred to in para.5.6(8)(b) below to ensure that the document is returned within a reasonable time and to make inquiries and report to the Master or District Judge who has given the direction under paragraph (3) above if the document is not returned, so that steps may be taken to secure its return.

(7) Notwithstanding the preceding paragraphs, the Master or District Judge may direct a court officer to attend the Court, Tribunal or arbitrator for the purpose of producing the document.

(a) I, \_\_\_\_\_ of \_\_\_\_\_, an officer of the \_\_\_\_\_ Court/Tribunal at \_\_\_\_\_/an arbitrator of \_\_\_\_\_/the Claimant/Defendant/Solicitor for the Claimant/Defendant [describing the Applicant so as to show that he is a proper person to make the request] in the case of \_\_\_\_\_ v. \_\_\_\_\_ [19No.]

REQUEST that the following document [or documents] be produced to the Court/Tribunal/arbitrator on the \_\_\_\_\_ day of \_\_\_\_\_ 19 [and following days] and I request that the said document [or documents] be sent by registered post to the proper officer of the Court/Tribunal/arbitrator for production to that Court/Tribunal/arbitrator on that day.

(Signed).

Dated the \_\_\_\_\_ day of \_\_\_\_\_ 1999/2

(b) I, A.B. an officer of the \_\_\_\_\_ Court of \_\_\_\_\_ certify that the document sent herewith for production to the Court/Tribunal/arbitrator on the \_\_\_\_\_ day of \_\_\_\_\_ 1999/2 in the case of \_\_\_\_\_ v. \_\_\_\_\_ and marked "A.B." is the document requested on the \_\_\_\_\_ day of \_\_\_\_\_ 1999/2 and I FURTHER CERTIFY that the said document has been filed in and is produced from the custody of the Court.

(Signed)

Dated the \_\_\_\_\_ day of \_\_\_\_\_ 1999/2

#### Enrolment of Deeds and other Documents

**5APD.8** 6.1(1) Any deed or document which by virtue of any enactment is required or authorised to be enrolled in the Senior Courts may be enrolled in the Central Office of the High Court.

(2) Attention is drawn to the Enrolment of Deeds (Change of

Name) Regulations 1994 which are reproduced in the Appendix to this Practice Direction.

6.2 The following paragraph of the Practice Direction describes the practice to be followed in any case in which a child's name is to be changed and to which the 1994 Regulations apply.

6.3(1) Where a person has by any order of the High Court, County Court or Family Proceedings Court been given parental responsibility for a child and applies to the Central Office, Filing Department, for the enrolment of a Deed Poll to change the surname (family name) of a child who is under the age of 18 years (unless a child who is or has been married or has formed a civil partnership), the application must be supported by the production of the consent in writing of every other person having parental responsibility.

(2) In the absence of that consent, the application will be adjourned generally unless and until permission is given in the proceedings, in which the said order was made, to change the surname of the child and the permission is produced to the Central Office.

(3) Where an application is made to the Central Office by a person who has not been given parental responsibility for a child by any order of the High Court, County Court or Family Proceedings Court for the enrolment of a Deed Poll to change the surname of the child who is under the age of 18 years (unless the child is or has been married or has formed a civil partnership), permission of the Court to enrol the Deed will be granted if the consent in writing of every person having parental responsibility is produced or if the person (or, if more than one, persons) having parental responsibility is dead or overseas or despite the exercise of reasonable diligence it has not been possible to find him or her for other good reason.

(4) In cases of doubt the Senior Master or, in his absence, the Practice Master will refer the matter to the Master of the Rolls.

(5) In the absence of any of the conditions specified above the Senior Master or the Master of the Rolls, as the case may be, may refer the matter to the Official Solicitor for investigation and report.

#### Appendix

Regulations made by the Master of the Rolls, Sir Thomas Bingham M.R. on March 3, 1994 (SI 1994/604) under s.133(1) of the Senior Courts Act 1981

1(1) These regulations may be cited as the Enrolment of Deeds (Change of Name) Regulations 1994 and shall come into force on April 1, 1994.

(2) These Regulations shall govern the enrolment in the Central Office of the Supreme Court of deeds evidencing change of name (referred to in these Regulations as "deeds poll").

## 3. KL Defendants

**Starting a designated money claim**

**7APD.4A** 4A.1 In all designated money claims, practice form N1 must be sent to: County Court Money Claims Centre, PO Box 527, M5 0BY. The claims will then be issued in Northampton County Court.

4A.2 In proceedings referred to in paragraph 4A.1, the claimant must specify the preferred court on practice form N1.

**Start of proceedings**

**7APD.5** 5.1 Proceedings are started when the court issues a claim form at the request of the claimant (see rule 7.2) but where the claim form as issued was received in the court office on a date earlier than the date on which it was issued by the court, the claim is "brought" for the purposes of the Limitation Act 1980 and any other relevant statute on that earlier date.

5.2 The date on which the claim form was received by the court will be recorded by a date stamp either on the claim form held on the court file or on the letter that accompanied the claim form when it was received by the court.

5.3 An enquiry as to the date on which the claim form was received by the court should be directed to a court officer.

5.4 Parties proposing to start a claim which is approaching the expiry of the limitation period should recognise the potential importance of establishing the date the claim form was received by the court and should themselves make arrangements to record the date.

5.5 Where it is sought to start proceedings against the estate of a deceased defendant where probate or letters of administration have not been granted, the claimant should issue the claim against "the personal representatives of A.B. deceased". The claimant should then, before the expiry of the period for service of the claim form, apply to the court for the appointment of a person to represent the estate of the deceased.

**Claims by and against partnerships within the jurisdiction**

**7APD.5A** 5A.1 Paragraphs 5A and 5B apply to claims that are brought by or against two or more persons who—

- (1) were partners; and
- (2) carried on that partnership business within the jurisdiction, at the time when the cause of action accrued.

5A.2 For the purposes of this paragraph, 'partners' includes persons claiming to be entitled as partners and persons alleged to be partners.

5A.3 Where that partnership has a name, unless it is inappropriate to do so, claims must be brought in or against the name under which that partnership carried on business at the time the cause of action accrued.

**Partnership membership statements**

**7APD.5B** 5B.1 In this paragraph a 'partnership membership statement' is a written statement of the names and last known places of residence of

all the persons who were partners in the partnership at the time when the cause of action accrued, being the date specified for this purpose in accordance with paragraph 5B.3.

5B.2 If the partners are requested to provide a copy of a partnership membership statement by any party to a claim, the partners must do so within 14 days of receipt of the request.

5B.3 In that request the party seeking a copy of a partnership membership statement must specify the date when the relevant cause of action accrued.

(Signing of the acknowledgment of service in the case of a partnership is dealt with in paragraph 4.4 of Practice Direction 10.)

**Persons carrying on business in another name**

5C.1 This paragraph applies where—

- (1) a claim is brought against an individual;
- (2) that individual carries on a business within the jurisdiction (even if not personally within the jurisdiction); and
- (3) that business is carried on in a name other than that individual's own name ("the business name").

5C.2 The claim may be brought against the business name as if it were the name of a partnership.

**Particulars of claim**

6.1 Where the claimant does not include the particulars of claim in the claim form, they may be served separately: **7APD.6**

- (1) either at the same time as the claim form, or
- (2) within 14 days after service of the claim form provided that the service of the particulars of claim is within 4 months after the date of issue of the claim form<sup>1</sup> (or 6 months where the claim form is to be served out of the jurisdiction<sup>2</sup>).

6.2 If the particulars of claim are not included in or have not been served with the claim form, the claim form must contain a statement that particulars of claim will follow.<sup>3</sup>

(These paragraphs do not apply where the Part 8 procedure is being used. For information on matters to be included in the claim form or the particulars of claim, see Part 16 (statements of case) and Practice Direction 16.)

**Statement of truth**

7.1 Part 22 requires the claim form and, where they are not included in the claim form, the particulars of claim, to be verified by a statement of truth. **7APD.7**

7.2 The form of the statement of truth is as follows:

"[I believe][the claimant believes] that the facts stated in [this claim form] [these particulars of claim] are true."

7.3 Attention is drawn to rule 32.14 which sets out the consequences of verifying a statement of case containing a false statement without an honest belief in its truth.

<sup>1</sup> See rules 7.4(2) and 7.5(1).

<sup>2</sup> See rule 7.5(2).

<sup>3</sup> See rule 16.2(2).

**Extension of time**

**7APD.8** 8.1 An application under rule 7.6 (for an extension of time for serving a claim form under rule 7.6(1)) must be made in accordance with Part 23 and supported by evidence.

8.2 The evidence should state:

- (1) all the circumstances relied on,
- (2) the date of issue of the claim,
- (3) the expiry date of any rule 7.6 extension, and
- (4) a full explanation as to why the claim has not been served.

(For information regarding (1) written evidence see Part 32 and Practice Direction 32 and (2) service of the claim form see Part 6 and Practice Directions 6A and 6B.)

**Notes on Practice Direction supplementing CPR Pt 7 (see PD 1 para.7 et seq.)**

**7APD.9** 2.4 Not all cases over the financial limits specified by paras 2.1 and 2.2 will be suitable for trial in the High Court and some will be transferred elsewhere. The guidelines in this paragraph will assist the court in this exercise.

2.6 This refers to writs of *habeas corpus* and claims for judicial review.

3.3 A large number of procedures under the RSC and CCR are preserved in the Schedules to the CPR and the old rules with some modification continue to apply. These proceedings include in the High Court:

Interpleader Proceedings	Ord.17
Committal	Ord.52
Criminal Proceedings	Ord.79
Various statutory proceedings	Ord.93
Applications under Local Government Finance Act 1982 Pt III	Ord.98
Summary Proceedings for Possession	Ord.113
Criminal Confiscation Orders	Ord.115

5A-C These paragraphs were added in October 2006 when Ord.81 Partnerships was revoked from Sch.1, to give effect to rr.1, 2 and 9 of that Order.

**5A The name of the firm.** This must be the name at the time the cause of action accrued, not the name at the date of the proceedings. If the firm has been dissolved before proceedings are issued the claim can still be made against the former partners in the name of the dissolved firm.

**5B Partnership membership statements.** This provision enables the other party to obtain information on the partners that may be necessary for security for costs or enforcement. The old rule specifically gave the court the power to order the provision of the statement. Presumably if the partnership fails to provide the statement in accordance with a request under the PD the party could make an application under Pt 23 seeking an order for compliance.

**5C Persons carrying on business in another name.** This provision enables proceedings to be brought against a business even if the name of the individual or company who carry on that business is not known, providing the trading name is known.

**PRACTICE DIRECTION 7B—CONSUMER CREDIT ACT 2006—UNFAIR RELATIONSHIPS**

*This Practice Direction supplements CPR rule 7.9*

1.1 In this practice direction “the Act” means the Consumer Credit Act 1974, a section referred to by number means the section with that number in the Act, and expressions which are defined in the Act have the same meaning in this practice direction as they have in the Act.

1.2 “Consumer Credit Act procedure” means the procedure set out in this practice direction.

**When to use the Consumer Credit Act procedure**

2.1 A claimant must use the Consumer Credit Act procedure where he makes a claim under a provision of the Act to which paragraph 3 of this practice direction applies.

2.2 Where a claimant is using the Consumer Credit Act procedure the CPR are modified to the extent that they are inconsistent with the procedure set out in this practice direction.

2.3 The court may at any stage order the claim to continue as if the claimant had not used the Consumer Credit Act procedure, and if it does so the court may give any directions it considers appropriate.

2.4 This practice direction also sets out matters which must be included in the particulars of claim in certain types of claim, and restrictions on where certain types of claim may be started.

**The provisions of the Act**

3.1 Subject to paragraph 3.2 and 3.3 this practice direction applies to claims made under the following provisions of the Act:

- (1) section 141 (claim by the creditor to enforce regulated agreement relating to goods etc.);
- (2) section 129 (claim by debtor or hirer for a time order);
- (3) section 90 (creditor’s claim for an order for recovery of protected goods);
- (4) section 92(1) (creditor’s or owner’s claim to enter premises to take possession of goods);
- (5) section 140B(2)(a) (debtor’s or surety’s application for an order relating to an unfair relationship);
- (6) creditor’s or owner’s claim for a court order to enforce a regulated agreement relating to goods or money where the court order is required by—
  - (a) section 65(1) (improperly executed agreement),
  - (b) section 86(2) (death of debtor or hirer where agreement is partly secured or unsecured),
  - (c) section 111(2) (default notice etc. not served on surety),
  - (d) section 124(1) or (2) (taking of a negotiable instrument in breach of terms of section 123), or
  - (e) section 105(7)(a) or (b) (security not expressed in writing, or improperly executed).

3.2 This practice direction does not apply to any claim made under

**Heading**

**32PD.3** 3.1 The affidavit should be headed with the title of the proceedings (see paragraph 4 of Practice Direction 7A and paragraph 7 of Practice Direction 20); where the proceedings are between several parties with the same status it is sufficient to identify the parties as follows—

	Number:
A.B. (and others)	Claimants/Applicants
C.D. (and others)	Defendants/Respondents (as appropriate)

3.2 At the top right hand corner of the first page (and on the back sheet) there should be clearly written—

- (1) the party on whose behalf it is made,
- (2) the initials and surname of the deponent,
- (3) the number of the affidavit in relation to that deponent,
- (4) the identifying initials and number of each exhibit referred to, and
- (5) the date sworn.

**Body of Affidavit**

**32PD.4** 4.1 The affidavit must, if practicable, be in the deponent's own words, the affidavit should be expressed in the first person and the deponent should—

- (1) commence "I (*full name*) of (*address*) state on oath ...",
- (2) if giving evidence in his professional, business or other occupational capacity, give the address at which he works (1) above, the position he holds and the name of his firm or employer,
- (3) give his occupation or, if he has none, his description, and
- (4) state if he is a party to the proceedings or employed by a party to the proceedings, if it be the case.

4.2 An affidavit must indicate—

- (1) which of the statements in it are made from the deponent's own knowledge and which are matters of information or belief, and
- (2) the source for any matters of information or belief.

4.3 Where a deponent—

- (1) refers to an exhibit or exhibits, he should state "there is now shown to me marked "... the (*description of exhibit*)", and
- (2) makes more than one affidavit (to which there are exhibits) in the same proceedings, the numbering of the exhibits should run consecutively throughout and not start again with each affidavit.

**Jurat**

**32PD.5** 5.1 The jurat of an affidavit is a statement set out at the end of the document which authenticates the affidavit.

5.2 It must—

- (1) be signed by all deponents,
- (2) be completed and signed by the person before whom the

affidavit was sworn whose name and qualification must be printed beneath his signature,

- (3) contain the full address of the person before whom the affidavit was sworn, and
- (4) follow immediately on from the text and not be put on a separate page.

**Format of Affidavits**

6.1 An affidavit should—

- (1) be produced on durable quality A4 paper with a 3.5 cm margin,
- (2) be fully legible and should normally be typed on one side of the paper only,
- (3) where possible, be bound securely in a manner which would not hamper filing, or otherwise each page should be endorsed with the case number and should bear the initials of the deponent and of the person before whom it was sworn,
- (4) have the pages numbered consecutively as a separate document (or as one of several documents contained in a file),
- (5) be divided into numbered paragraphs,
- (6) have all numbers, including dates, expressed in figures, and
- (7) give the reference to any document or documents mentioned either in the margin or in bold text in the body of the affidavit.

6.2 It is usually convenient for an affidavit to follow the chronological sequence of events or matters dealt with; each paragraph of an affidavit should as far as possible be confined to a distinct portion of the subject.

**Inability of Deponent to Read or Sign Affidavit**

7.1 Where an affidavit is sworn by a person who is unable to read or sign it, the person before whom the affidavit is sworn must certify in the jurat that—

- (1) he read the affidavit to the deponent,
- (2) the deponent appeared to understand it, and
- (3) the deponent signed or made his mark, in his presence.

7.2 If that certificate is not included in the jurat, the affidavit may not be used in evidence unless the court is satisfied that it was read to the deponent and that he appeared to understand it. Two versions of the form of jurat with the certificate are set out at Annex 1 to this practice direction.

**Alterations to Affidavits**

8.1 Any alteration to an affidavit must be initialled by both the deponent and the person before whom the affidavit was sworn. **32PD.8**

8.2 An affidavit which contains an alteration that has not been initialled may be filed or used in evidence only with the permission of the court.

**Who May Administer Oaths and Take Affidavits**

9.1 Only the following may administer oaths and take affidavits— **32PD.9**

- (1) a commissioner for oaths,<sup>1</sup>
- (2) [Omitted]
- (3) other persons specified by statute;<sup>2</sup>
- (4) certain officials of the Senior Courts;<sup>3</sup>
- (5) a circuit judge or district judge;<sup>4</sup>
- (6) any justice of the peace;<sup>5</sup> and
- (7) certain officials of any county court appointed by the judge of that court for the purpose.<sup>6</sup>

**9.2** An affidavit must be sworn before a person independent of the parties or their representatives.

#### Filing of Affidavits

**32PD.10** **10.1** If the court directs that an affidavit is to be filed,<sup>7</sup> it must be filed in the court or Division, or Office or Registry of the court or Division where the action in which it was or is to be used, is proceeding or will proceed.

**10.2** Where an affidavit is in a foreign language—

- (1) the party wishing to rely on it—
  - (a) must have it translated, and
  - (b) must file the foreign language affidavit with the court and
- (2) the translator must make and file with the court an affidavit verifying the translation and exhibiting both the translation and a copy of the foreign language affidavit.

#### Exhibits

#### Manner of Exhibiting Documents

**32PD.11** **11.1** A document used in conjunction with an affidavit should be—

- (1) produced to and verified by the deponent, and remain separate from the affidavit, and
- (2) identified by a declaration of the person before whom the affidavit was sworn.

**11.2** The declaration should be headed with the name of the proceedings in the same way as the affidavit.

**11.3** The first page of each exhibit should be marked—

- (1) as in paragraph 3.2 above, and
- (2) with the exhibit mark referred to in the affidavit.

#### Letters

**32PD.12** **12.1** Copies of individual letters should be collected together and exhibited in a bundle or bundles. They should be arranged in chronological order with the earliest at the top, and firmly secured.

<sup>1</sup> Commissioner for Oaths Act 1889 and 1891.

<sup>2</sup> Sections 12 and 18 of, and Schedules 2 and 4 to, the Legal Services Act 2007.

<sup>3</sup> Section 2 of the Commissioners for Oaths Act 1889.

<sup>4</sup> Section 58 of the County Courts Act 1984.

<sup>5</sup> Section 58 as above.

<sup>6</sup> Section 58 as above.

<sup>7</sup> Rules 32.1(3) and 32.4(3)(b).

**12.2** When a bundle of correspondence is exhibited, the exhibit should have a front page attached stating that the bundle consists of original letters and copies. They should be arranged and secured as above and numbered consecutively.

#### Other Documents

**13.1** Photocopies instead of original documents may be exhibited provided the originals are made available for inspection by the other parties before the hearing and by the judge at the hearing. **32PD.13**

**13.2** Court documents must not be exhibited (official copies of such documents prove themselves).

**13.3** Where an exhibit contains more than one document, a front page should be attached setting out a list of the documents contained in the exhibit; the list should contain the dates of the documents.

#### Exhibits Other Than Documents

**14.1** Items other than documents should be clearly marked with an exhibit number or letter in such a manner that the mark cannot become detached from the exhibit. **32PD.14**

**14.2** Small items may be placed in a container and the container appropriately marked.

#### General Provisions

**15.1** Where an exhibit contains more than one document— **32PD.15**

- (1) the bundle should not be stapled but should be securely fastened in a way that does not hinder the reading of the documents, and
- (2) the pages should be numbered consecutively at bottom centre.

**15.2** Every page of an exhibit should be clearly legible; typed copies of illegible documents should be included, paginated with “a” numbers.

**15.3** Where affidavits and exhibits have become numerous, they should be put into separate bundles and the pages numbered consecutively throughout.

**15.4** Where on account of their bulk the service of exhibits or copies of exhibits on the other parties would be difficult or impracticable, the directions of the court should be sought as to arrangements for bringing the exhibits to the attention of the other parties and as to their custody pending trial.

#### Affirmations

**16.** All provisions in this or any other practice direction relating to affidavits apply to affirmations with the following exceptions— **32PD.16**

- (1) the deponent should commence “I (*name*) of (*address*) do solemnly and sincerely affirm ...”, and
- (2) in the Jurat the word “sworn” is replaced by the word “affirmed”.

#### Witness Statements

#### Heading

**17.1** The witness statement should be headed with the title of the **32PD.17**

proceedings (see paragraph 4 of Practice Direction 7A and paragraph 7 of Practice Direction 20); where the proceedings are between several parties with the same status it is sufficient to identify the parties as follows—

	Number:
A.B. (and others)	Claimants/Applicants
C.D. (and others)	Defendants/Respondents
	(as appropriate)

**17.2** At the top right hand corner of the first page there should be clearly written—

- (1) the party on whose behalf it is made,
- (2) the initials and surname of the witness,
- (3) the number of the statement in relation to that witness,
- (4) the identifying initials and number of each exhibit referred to, and
- (5) the date the statement was made.

#### Body of Witness Statement

**32PD.18** **18.1** The witness statement must, if practicable, be in the intended witness's own words, the statement should be expressed in the first person and should also state—

- (1) the full name of the witness,
- (2) his place of residence or, if he is making the statement in his professional, business or other occupational capacity, the address at which he works, the position he holds and the name of his firm or employer,
- (3) his occupation, or if he has none, his description, and
- (4) the fact that he is a party to the proceedings or is the employee of such a party if it be the case.

**18.2** A witness statement must indicate—

- (1) which of the statements in it are made from the witness's own knowledge and which are matters of information or belief, and
- (2) the source for any matters of information or belief.

**18.3** An exhibit used in conjunction with a witness statement should be verified and identified by the witness and remain separate from the witness statement.

**18.4** Where a witness refers to an exhibit or exhibits, he should state "I refer to the (*description of exhibit*) marked "...".

**18.5** The provisions of paragraphs 11.3 to 15.4 (exhibits) apply similarly to witness statements as they do to affidavits.

**18.6** Where a witness makes more than one witness statement in which there are exhibits, in the same proceedings, the numbering of the exhibits should run consecutively throughout and not start again with each witness statement.

#### Format of Witness Statement

**32PD.19** **19.1** A witness statement should—

- (1) be produced on durable quality A4 paper with a 3.5 mm margin,

- (2) be fully legible and should normally be typed on one side of the paper only,
- (3) where possible, be bound securely in a manner which would not hamper filing, or otherwise each page should be endorsed with the case number and should bear the initials of the witness,
- (4) have the pages numbered consecutively as a separate statement (or as one of several statements contained in a file),
- (5) be divided into numbered paragraphs,
- (6) have all numbers, including dates, expressed in figures, and
- (7) give the reference to any document or documents mentioned either in the margin or in bold text in the body of the statement.

**19.2** It is usually convenient for a witness statement to follow the chronological sequence of the events or matters dealt with, each paragraph of a witness statement should as far as possible be confined to a distinct portion of the subject.

#### Statement of Truth

**20.1** A witness statement is the equivalent of the oral evidence which that witness would, if called, give in evidence; it must include a statement by the intended witness that he believes the facts in it are true.

**20.2** To verify a witness statement the statement of truth is as follows—

"I believe that the facts stated in this witness statement are true."

**20.3** Attention is drawn to rule 32.14 which sets out the consequences of verifying a witness statement containing a false statement without an honest belief in its truth. (Paragraph 3A of Practice Direction 22 sets out the procedure to be followed where the person who should sign a document which is verified by a statement of truth is unable to read or sign the document.)

[THE NEXT PARAGRAPH IS 32PD.22.]

#### Alterations to Witness Statements

**22.1** Any alteration to a witness statement must be initialled by the person making the statement or by the authorised person where appropriate (see paragraph 21).

**22.2** A witness statement which contains an alteration that has not been initialled may be used in evidence only with the permission of the court.

#### Filing of Witness Statements

**23.1** If the court directs that a witness statement is to be filed,<sup>2</sup> it must be filed in the court or Division, or Office or Registry of the court or Division where the action in which it was or is to be used, is proceeding or will proceed.

<sup>1</sup> See Part 22 for information about the statement of truth.

<sup>2</sup> Rule 32.4(3)(b).

The court (including a County Court) may direct that the appropriate office is to be the Costs Office, in addition one County Court may direct another to be the appropriate office.

## II. Costs Payable By One Party to Another—Commencement of Detailed Assessment Proceedings

### Application of this Section<sup>1</sup>

**47.5** 47.5 This Section of Part 47 applies where a cost officer is to make a detailed assessment of—

- (a) costs which are payable by one party to another; or
- (b) the sum which is payable by one party to the prescribed charity pursuant to an order under section 194(3) of the Legal Services Act 2007.

### Editorial note

**47.5.1** For the practice where costs are payable by one party to another and also out of the legal aid fund at prescribed rates see ss.43 and 49 of the Costs Practice Direction.

### Commencement of detailed assessment proceedings<sup>2</sup>

**47.6** 47.6—(1) Detailed assessment proceedings are commenced by the receiving party serving on the paying party—

- (a) notice of commencement in the relevant practice form; and
- (b) a copy of the bill of costs.

(Rule 47.7 sets out the period for commencing detailed assessment proceedings.)

(2) The receiving party must also serve a copy of the notice of commencement and the bill on any other relevant persons, as specified in the Costs Practice Direction.

(3) A person on whom a copy of the notice of commencement is served under paragraph (2) is a party to the detailed assessment proceedings (in addition to the paying party and the receiving party).

(The Costs Practice Direction deals with—

- other documents which the party must file when he requests detailed assessment;
- the court's powers where it considers that a hearing may be necessary;
- the form of a bill; and
- the length of notice which will be given if a hearing date is fixed.)

### Editorial note

**47.6.1** The procedure for commencing detailed assessment does not at that stage involve the court. The receiving party must serve on the paying party, and any other relevant persons, notice of commencement (see Form N252) and a copy of the bill of costs.

For provisions as to the appropriate venue for detailed assessment proceedings see Section 31A of the Costs Practice Direction.

<sup>1</sup> Amended by Civil Procedure (Amendment) Rules 2008 (SI 2008/2178).  
<sup>2</sup> Amended by the Civil Procedure (Amendment No.2) Rules 2009 (SI 2009/3334).

Sections 32 to 40 of the Costs Practice Direction as to the procedure, and s.4 (para. 43BPD.1 et seq.) as to the form and contents of the bill of costs.

Where the successful party had had two firms of solicitors and agreed the amount of costs recoverable in respect of the second solicitors, it was not possible to claim a separate assessment in respect of the costs of the first solicitors. The court (Christopher Clarke J.) stated:

"33. The rules clearly provide that detailed assessment proceedings are commenced by the receiving party serving both a notice of commencement and the (not a) bill of costs. The bill is the receiving party's statement of what he claims is due to him pursuant to whatever order entitles him to costs. If the receiving party is entitled to recover his costs of instructing more than one solicitor the Practice Direction requires him to include the costs of each solicitor separately in the bill. If he fails to include the costs of his previous solicitor, and the Costs Judge completes his assessment of the costs without regard to the previous solicitor's costs and proceeds to a final certificate, the receiving party cannot claim a further assessment. The detailed assessment proceedings have been completed and an amount ordered to be paid. The receiving party cannot start again..." (*Harris v Moat Housing Group-South Ltd* [2007] EWHC 3092 (QB); [2008] 1 W.L.R. 1578, Christopher Clarke J.).

### Tomlin Orders

Many claims are settled on terms which are confidential, those terms being contained in a schedule to the Tomlin Order. Unless the order itself contains a provision for costs to be paid and assessed if not agreed, the right to detailed assessment does not arise.

Two claimants commenced proceedings to recover damages from a defendant company, but the action was lost, and the claimants were ordered to pay the defendant's costs jointly and severally of two consolidated actions. The receiving party's solicitors served a bill of costs on the first claimant, but not on the second. The second claimant was never served, and the assessment itself proceeded to a conclusion, the first claimant having attended as a litigant in person throughout. It was only when the receiving party applied for taxation certificates against both claimants that the omission came to light, but even at that point the second claimant was not served with a copy of the bill. The Court of Appeal decided that setting aside the assessment proceedings would not prevent the commencement of further proceedings against the second claimant, that the order for costs had been made against two paying parties and created a joint and several liability. At common law the discharge of one joint debtor released the other, and accordingly the taxation certificates should be re-issued showing the sum of costs allowed to be nil. Peter Gibson L.J. stated:

"If costs in that bill are disallowed against [the second claimants] they must, in my judgment, under the rules as they now stand, be disallowed as against [the first claimant] too, there being but one bill of costs... Those who ignore the time limits, which are prescribed by the rules and which are designed to achieve the convenient disposal of proceedings within a reasonable time do so at their peril."

*Maintwaring v Goldtech Investments Ltd (No.2)* [1999] 1 W.L.R. 745 CA.

### Period for commencing detailed assessment proceedings<sup>1</sup>

**47.7** The following table shows the period for commencing detailed assessment proceedings.

Case	Period for commencing detailed assessment proceedings
(a) The receiving party is the claimant or the defendant	14 days
(b) The receiving party is the claimant or the defendant and the paying party is a party to the proceedings	14 days
(c) The receiving party is the claimant or the defendant and the paying party is not a party to the proceedings	14 days
(d) The receiving party is the claimant or the defendant and the paying party is a party to the proceedings and the receiving party is not a party to the proceedings	14 days
(e) The receiving party is the claimant or the defendant and the paying party is a party to the proceedings and the receiving party is not a party to the proceedings	14 days
(f) The receiving party is the claimant or the defendant and the paying party is a party to the proceedings and the receiving party is not a party to the proceedings	14 days
(g) The receiving party is the claimant or the defendant and the paying party is a party to the proceedings and the receiving party is not a party to the proceedings	14 days
(h) The receiving party is the claimant or the defendant and the paying party is a party to the proceedings and the receiving party is not a party to the proceedings	14 days
(i) The receiving party is the claimant or the defendant and the paying party is a party to the proceedings and the receiving party is not a party to the proceedings	14 days
(j) The receiving party is the claimant or the defendant and the paying party is a party to the proceedings and the receiving party is not a party to the proceedings	14 days
(k) The receiving party is the claimant or the defendant and the paying party is a party to the proceedings and the receiving party is not a party to the proceedings	14 days
(l) The receiving party is the claimant or the defendant and the paying party is a party to the proceedings and the receiving party is not a party to the proceedings	14 days
(m) The receiving party is the claimant or the defendant and the paying party is a party to the proceedings and the receiving party is not a party to the proceedings	14 days
(n) The receiving party is the claimant or the defendant and the paying party is a party to the proceedings and the receiving party is not a party to the proceedings	14 days
(o) The receiving party is the claimant or the defendant and the paying party is a party to the proceedings and the receiving party is not a party to the proceedings	14 days
(p) The receiving party is the claimant or the defendant and the paying party is a party to the proceedings and the receiving party is not a party to the proceedings	14 days
(q) The receiving party is the claimant or the defendant and the paying party is a party to the proceedings and the receiving party is not a party to the proceedings	14 days
(r) The receiving party is the claimant or the defendant and the paying party is a party to the proceedings and the receiving party is not a party to the proceedings	14 days
(s) The receiving party is the claimant or the defendant and the paying party is a party to the proceedings and the receiving party is not a party to the proceedings	14 days
(t) The receiving party is the claimant or the defendant and the paying party is a party to the proceedings and the receiving party is not a party to the proceedings	14 days
(u) The receiving party is the claimant or the defendant and the paying party is a party to the proceedings and the receiving party is not a party to the proceedings	14 days
(v) The receiving party is the claimant or the defendant and the paying party is a party to the proceedings and the receiving party is not a party to the proceedings	14 days
(w) The receiving party is the claimant or the defendant and the paying party is a party to the proceedings and the receiving party is not a party to the proceedings	14 days
(x) The receiving party is the claimant or the defendant and the paying party is a party to the proceedings and the receiving party is not a party to the proceedings	14 days
(y) The receiving party is the claimant or the defendant and the paying party is a party to the proceedings and the receiving party is not a party to the proceedings	14 days
(z) The receiving party is the claimant or the defendant and the paying party is a party to the proceedings and the receiving party is not a party to the proceedings	14 days

<sup>1</sup> Amended by the Civil Procedure (Amendment No.3) Rules 2006 (SI 2006/3435).

**47.8.2.1** **Rule 47.8(3)** There is no conflict or inconsistency between r.47.8 and r.44.14. The former refers to the disallowance of interest and the latter to the disallowance of costs. Where a party or legal representative has been guilty of unreasonable or improper conduct in a case where there had been a delay of five years the court held there was no reference to any causative connection being required in r.44.14(2)(a) nor was there a necessity to imply such a requirement. Rule 47.8(3) made it clear that the court may disallow interest but may not impose any other sanction, except in accordance with r.44.14. It could not be said that where the court disallowed interest it would only be in exceptional circumstances that it could disallow costs under r.44.14. Neither refers to "exceptional circumstances": *Haji-Ioannou v Frangos* [2006] FWHC 273 (Ch). Lindsay J. On appeal it was held that there was a certain tension between r.44.14 and r.47.8, although failure to commence detailed assessment proceedings within three months was a failure to comply with a rule, not every failure to commence detailed assessment proceedings should be regarded as misconduct. "Misconduct" was the key to resolving the tension. A bad breach of a rule would enable a costs judge to exercise the power to disallow some or all of the costs which they were assessing. An inordinate and inexcusable delay which had prejudiced the paying party could come into that category. Excusable though inordinate delay might not, especially if it had caused no prejudice. The overriding objective required cases to be dealt with justly and therefore a penalty had to be proportional to the offence: *Haji-Ioannou v Frangos* [2006] All ER (Civ) 1663; [2007] 3 All E.R. 938, CA; *Haji-Ioannou v Frangos (No.2)* [2006] All ER (Civ) 1663; [2008] 1 W.L.R. 144, CA.

**47.8.3** **Rule 47.8(4)** Where costs are payable out of the Community Legal Services fund and there has been a delay in commencing detailed assessment proceedings, such delay is not infrequent and can cause difficulties for counsel who remain unpaid and cannot themselves commence detailed assessment proceedings. The rule enables the Legal Services Commission to make an application under r.47.8(1).

#### Points of dispute and consequence of not serving<sup>1</sup>

**47.9** **47.9—(1)** The paying party and any other party to the detailed assessment proceedings may dispute any item in the bill of costs by serving points of dispute on—

- (a) the receiving party; and
- (b) every other party to the detailed assessment proceedings.

(2) The period for serving points of dispute is 21 days after the date of service of the notice of commencement.

(3) If a party serves points of dispute after the period set out in paragraph (2) he may not be heard further in the detailed assessment proceedings, unless the court gives permission.

(The Costs Practice Direction sets out requirements about the form of points of dispute.)

(4) The receiving party may file a request for a default costs certificate if—

- (a) the period set out in rule 47.9(2) for serving points of dispute has expired; and
- (b) he has not been served with any points of dispute.

(5) If any party (including the paying party) serves points of dispute before the issue of a default costs certificate the court may not issue the default costs certificate.

<sup>1</sup> Amended by the Civil Procedure (Amendment No.2) Rules 2009 (SI 2009/3390)

(Section IV of this Part sets out the points of dispute have been f

**47.10** (1) If the paying party has served points of dispute within 21 days after the time laid down in this rule the court gives permission. See s.33 of the Costs Practice Direction. Failure to serve points of dispute in accordance with this rule the court may not subsequently

procedure where cost

**47.10—(1)** If the paying party has served points of dispute within 21 days after the time laid down in this rule the court gives permission. See s.33 of the Costs Practice Direction. Failure to serve points of dispute in accordance with this rule the court may not subsequently

(Rule 47.15 and 47.16 contain further provisions about interim and final costs certificates respectively.)

(2) An application for a certificate under paragraph (1) must be made to the court which would be the venue for detailed assessment proceedings under rule 47.4.

**47.10.1** (1) It is open to the parties to agree all or part of the costs being claimed. Either party may apply for an appropriate certificate from the court; i.e. an interim certificate, if part of the costs are agreed or a final certificate, if all the costs are agreed (see rr.47.15 and 47.16).

Except in the RCJ, if agreement is reached before the court has become involved in the detailed assessment proceedings, the application for a certificate is made to the court which gave the judgment or made the order giving the right to the detailed assessment proceedings, or if the proceedings have been transferred to another court to that court. In any other case the court will be the "appropriate office" ascertained in accordance with r.47.4. See s.36 of the Costs Practice Direction as to procedure where costs are agreed. In cases proceeding in the RCJ application should be made to the SCCO.

#### III. Costs Payable By One Party to Another—Default Provisions

**47.11** **Default costs certificate<sup>2</sup>**

**47.11—(1)** Where the receiving party is permitted by rule 47.9 to obtain a default costs certificate, that party does so by filing a request in the relevant practice form. (The Costs Practice Direction deals with the procedure by which the receiving party may obtain a default costs certificate.)

(2) A default costs certificate will include an order to pay the costs to which it relates.

(3) Where a receiving party obtains a default costs certificate, the costs payable to that party for the commencement of detailed assessment proceedings will be the sum set out in the Costs Practice Direction.

<sup>2</sup> Amended by the Civil Procedure (Amendment No.3) Rules 2000 (SI 2000/1317).  
<sup>3</sup> Amended by the Civil Procedure (Amendment) Rules 2008 (SI 2008/2178) and the Civil Procedure (Amendment No.2) Rules 2009 (SI 2009/3390).

SECTION IV ASSESSMENT OF COSTS  
(4) A receiving party may apply for a default costs certificate if the court gives permission. See s.33 of the Costs Practice Direction. Failure to serve points of dispute in accordance with this rule the court may not subsequently

Where Points

47.11.1

As to the procedure to pay

This the de

47.12

47.13

ment hearing later than the period specified in paragraph (2),  
the court may disallow all or part of the interest otherwise payable to the receiving party under—

(i) section 17 of the Judgments Act 1838<sup>1</sup>; or  
(ii) section 74 of the County Courts Act 1984,<sup>2</sup>  
but must not impose any other sanction except in accordance with rule 44.14 (powers in relation to misconduct).

(6) No party other than—  
(a) the receiving party;  
(b) the paying party; and  
(c) any party who has served points of dispute under rule 47.9,

may be heard at the detailed assessment hearing unless the court gives permission.

(7) Only items specified in the points of dispute may be raised at the hearing, unless the court gives permission.

(The Costs Practice Direction specifies other documents which must be filed with the request for hearing and the length of notice which the court will give when it fixes a hearing date.)

#### Editorial note

**47.14.1** If no application is made for a default costs certificate, the request for a detailed assessment hearing is likely to be the first occasion on which the court has come into contact with the detailed assessment proceedings.

If the receiving party does not apply for a detailed assessment hearing within the time specified, the paying party may make an application under r.47.14(3). Such an application enables the court to make an order which could result in the receiving party having disallowed all or part of the costs.

A claimant company sued five defendants, four of whom were represented by a firm of solicitors. Different heads of relief were claimed against each of the defendants, the judge allowed some and dismissed others. The three defendants were awarded their costs, but the solicitor's bill did not identify the costs incurred by each of them separately. On assessment the costs judge decided that the costs should be divided equally between them as there was no work which could be identified as being done for the benefit of one or more of them but not the others. There was only one retainer letter addressed to a single defendant but there was no doubt that the solicitor had clearly acted for all three. On appeal it was held that, where there was no express agreement concerning division of costs, a general rule of thumb was to divide them equally between the relevant parties. This rule of thumb should not be allowed to produce injustice and, where costs could be shown to be attributable to one party only, the liability for those costs fell only on that party. Once it was established that a firm of solicitors was acting for a particular party a presumption arose that the client was able to pay the solicitors and the onus was on the paying party to rebut that presumption. In order to do this it would have to be shown that there were no circumstances in which the solicitor would be able to look to the client for payment. In the same case a claim was made for the costs of work done by a property lawyer who had advised in relation to the transactions giving rise to the litigation. The court held that the costs incurred by the lawyer in assistance or general preparation of the case as a solicitor, and the costs of his attendance at court were allowable. Work done by a legal team in producing a witness statement for the lawyer was not allowable, save to the extent that the work done was attributable to the lawyer in his capacity as a solicitor rather than in his capacity as a witness of fact (*Meretz Investments NV v AGP* [2007] EWHC 2635 (Ch) Warren J.).

<sup>1</sup> 1838 c.110. Section 17 was amended by SI 1998/2940.

<sup>2</sup> S.74 was amended by s.(2) of the Private International Law (Miscellaneous Provisions) Act 1995 (c.42).

#### 47.14(5)—Interest

**47.14.1.1** Where the receiving party files the request for a detailed assessment hearing out of time before any application by the paying party, the court may disallow interest for the period of the delay but may not impose any other sanction. The court's powers in relation to misconduct under r.44.14 are unaffected.

#### 47.14(6)—Who may be heard

**47.14.2** The rule limits the number of parties who may be heard at the detailed assessment hearing and the matters which may be raised at the hearing unless the court gives permission. See Section 40 of the Costs Practice Direction as to the documents which must be filed with request for hearing, the document giving the right to detailed assessment and procedure, including agreement, adjournment and amendment. The court will give at least 14 days notice of the date of hearing.

#### 47.14(7)—Privilege and the power to order disclosure

**47.14.3** Where privileged documents are given to a costs judge in accordance with section 40 of the Costs Practice Direction privilege is not lost. The costs judge should direct the receiving party to produce a witness statement together with the relevant documents to the costs judge alone at first and should then decide whether the receiving party should be put to their election as to whether to disclose the documents in order to rely upon their contents or to decline disclosure and rely on witness statements alone per Nelson J., *Giambone v JMC Holidays* [2002] EWHC 495 (QB).

The [costs judge] does not have any power to order discovery to be given: he does not have any power to override a right of privilege. But it is the duty of the [costs judge] if the respondent raises a factual issue, which is real and relevant and not a sham or fanciful dispute, to require the claimant to prove the facts upon which he relies. The claimant then has to choose what evidence and to whom he will waive his privilege. That is a choice for the claimant alone. The [costs judge] then has to decide the issue of fact on the evidence. In considering whether he is satisfied by the evidence the [costs judge] will no doubt take into account that the claimant may have a legitimate interest in not adducing the most obvious or complete evidence, and may prefer only to rely on oral evidence rather than producing privileged documents" per Hobhouse J. in *Pamplin v Express Newspapers Ltd (Costs)* [1985] 1 W.L.R. 689 at 697.

"The Costs Officer is exercising a judicial function with substantial financial consequences for the parties if some feature of the case alerts him to the need to make further investigation he may seek further information. No doubt he would begin by asking for a letter or some form of written confirmation or reassurance as appropriate. If this were to prove inadequate he might then make orders for discovery or require evidence." per Judge L.J. in *Bailey v IBC Vehicles Ltd* [1998] 3 All E.R. 570.

Since J. found those views to be still valid, he continued:

"I can, in any event, see no good reason why the client care letter and the payment calculations should not have been disclosed to the defendant, since I have not been persuaded that they were privileged. But if anything in them might have been regarded as privileged one course which might at least have been considered was the redaction from them of the privileged parts ... The claimant chose to prove his version of a disputed issue of fact by reference to certain documents. In my view, the basic principle is that, if he wanted to do so, fairness required him also to disclose the documents to the defendant." *Dickinson v Rushmer* [2002] 1 Costs L.R. 128.

Once the document is of sufficient importance to be taken into account in arriving at a conclusion as to recoverability, then, unless otherwise agreed, it must be shown to the paying party or the receiving party should be put to its election in respect of every document relied on regardless of its degree of relevance. It was expected that in the great majority of cases the paying party would be content to agree that the costs judge alone should see privileged documents. Only where it was necessary and proportionate should the receiving party be put to their election. The redaction and production of privileged documents or the adducing of further evidence would lead to additional delay and increase costs. The court considered that the applicable principle was an absolute one. Privilege would not be overridden by the court and must be waived by the party entitled to assert it. It followed that the terms of para.40.14 of the Costs Practice Direction were consistent with the requirements of the ECHR. The court

expressed the view that the protection afforded to the receiving party by the rule about the waiver is for the purpose of the assessment only and that the document remains otherwise privileged should play a much more significant role than it appears to do. In *Shipping Co Ltd v Havant BC* [2002] 3 All E.R. 779. The court indicated that it should be standard practice where a client care letter was affirmatively relied on that it be produced to the paying party, per Gray J., *Adams v MacInnes* November 8, 2001, unrep.

The court again considered the question of disclosure of documents on detailed assessment where the costs judge had ordered the receiving parties, the claimants in the litigation, to elect either to disclose certain experts' reports for which they were seeking costs, those reports not having previously been disclosed in the litigation, or to decline disclosure and rely on other evidence. The court reviewed the judgments in *Pamplin v Express Newspapers Ltd* [1985] 1 W.L.R. 689, Hobhouse J.; *Goldman v Hesper* [1988] 1 W.L.R. 1238, Taylor J.; *Dickinson v Rushmer* [2002] 1 Costs L.R. 128, Buxton J.; and *South Coast Shipping Co Ltd v Havant BC* [2002] 3 All E.R. 779, Pumfrey J. The court held that the position in law was clear and the appeal was dismissed. *Chemicals Group Litigation v Gower Chemicals Ltd* [2008] EWHC 735 (QB), Davis J.

"When a party lodges a privileged document for detailed assessment in order to claim the costs of it; if the other party wishes to see it to dispute that claim, the costs the claimant must be given the right to elect to withdraw it and not claim costs or he must disclose it."

Per Drake J., *Skuse v Granada Television Ltd* [1994] 1 W.L.R. 1156, see also *Pamplin v Express Newspapers Ltd* [1985] 1 W.L.R. 689; *Goldman v Hesper* [1988] 1 W.L.R. 1238, CA and *Derby & Co v Weldon (No.7)* [1990] 1 W.L.R. 1156. Drake J. stated "Had I ordered disclosure ... of any part of the bundle I would have ordered that the document should be edited so as to remove the irrelevant material". It is permissible to blank out parts of documents disclosed on discovery on the ground that they are irrelevant to the issues in the action. See *G.E. Corporate Finance Group v Bankers Trust Co*, *The Times*, August 3, 1994, CA.

The court cannot order disclosure of "without prejudice" negotiations against the wishes of one of the parties to those negotiations. This may mean that in some cases the court, when it comes to the question of costs, cannot decide whether one side or the other was unreasonable in refusing mediation. The court does not have power to order any disclosure of the detail of the "without prejudice" negotiations for the purposes of deciding the question of costs: *Reed Executive Plc v Reed Business Information Ltd* [2004] EWCA Civ 887; [2004] 1 P&T 1087, CA. The rule in *Walker v Walker* (1889) L.R. 23 Q.B.D.335 remains good law.

Where documents were disclosed in the course of assessment proceedings, and the party to whom they were disclosed wished to use them in proceedings in the USA, the Court of Appeal decided that the documents were privileged and were disclosed for the purpose of assessment only. They were relevant to an issue and should have been disclosed in the interests of justice and an order for disclosure would have been made if sought. The privilege in them was waived only for the purposes of detailed assessment. The court rejected an argument that enforcing privilege amounted to interference with the US proceedings. It was for the US court to decide whether there had been a breach of US law and what to do about it. The documents were subject to an implied undertaking (*Prudential Insurance Co v Fountain Page Ltd* [1991] 1 W.L.R. 756) even though they were disclosed without an order. Special circumstances were required if the undertaking was to be released and this depended on all the facts (*East Homes Plc v Marks* [1997] 1 A.C. 829), *Bourns Inc v Raychem Corp* [1999] 3 All E.R. 154, *The Times*, May 12, 1999, CA.

In detailed assessment proceedings the paying party sought an order requiring the receiving party's solicitors to give full particulars of their dealings with their client both in relation to their original retention as the party's solicitors and in relation to a subsequent conditional fee agreement. Information was sought by way of disclosure of documents and otherwise to support the contention that there had in truth been an agreement whereby the client was liable to the solicitors' costs prior to a particular date and as to the validity of the CFA. In the event the receiving party's solicitors disclosed full details of the CFA and ultimately their file and attendance notes. The paying party argued that a retainer is or becomes champertous and therefore void and unenforceable if a solicitor is or becomes aware at any time that their client could not possibly have afforded to pay their costs whatever might have been the result.

agreement between them, and continues to act thereafter. The court held that the costs judge undoubtedly had jurisdiction to make the orders requested and if it had been necessary to make such orders in order to ensure a fair determination of the issue, the application should have been acceded to. The mere fact that the issue has been raised is not of itself sufficient if there is no prospect that cross examination could either undermine or further elucidate the receiving party's case. To refuse to accede to the application will not be unfair and will not breach the requirement of the overriding objective that the parties are on an equal footing but would save expense and deal with the issues proportionately and expeditiously: *Times Newspapers Ltd v Burslein* [2002] EWCA Civ 1739.

In cases involving vast amounts of documents, a party may sometimes reduce a document into an electronic form to ease management. The cost of the equipment necessary to undertake this work is not normally recoverable, although the actual work required to analyse the documents may be regarded as fee earners work. The party contemplates reducing documents into electronic form may apply to the court in advance for an order regulating the matter, including the basis of charge for electronic copies. The court has power to give directions as to whether inspection should be by electronic means or hard copy (*Grupo Torras SA v Al-Sabah (No.3)* [1997] C.L.C. 1553). In the particular facts of that case the court directed that inspection should be by means of CD, which could be produced at a relatively modest cost, as against production of photostat copies of the documents themselves, which would have cost a very great deal of money. The actual work of assembling the database was a matter to be left to the outcome of the trial and subsequent assessment.

#### The Indemnity Principle

"Costs as between party and party are given by the law as an indemnity to the person entitled to them; they are not imposed as a punishment on the party who pays them, or given as a bonus to the party who receives them." (*Harold v Smith* [1860] 5 Hurl & N. 381, Bramwell B.). "It is of great importance to litigants who are unsuccessful that they should not be oppressed into having to pay an excessive amount of costs ... the costs chargeable as between party and party are all that are necessary to enable the adverse party to conduct the litigation and no more. Any charges merely for conducting litigation more conveniently may be called luxuries and must be paid by the party incurring them" (*Smith v Buller* [1874-75] L.R. 19 Eq. 473, Sir Richard Malins V.-C.). The test is now one of reasonableness and proportionality rather than necessity. The purpose of assessment is to ascertain the amount payable to the party recovering costs not to fix the remuneration of solicitors. The order for costs may not be more than an indemnity, i.e. the amount which the successful party has to pay to their own solicitor (*Gundry v Sainsbury* [1910] 1 K.B. 99).

The indemnity principle is to be applied on an item by item basis rather than on a global basis "where applicable the figures in a contentious business agreement provide both a measure and a ceiling for each recoverable item of costs", per Sir Brian Neill, *The General of Berne Insurance Co v Jardine Reinsurance Management* [1998] 2 All E.R. 501, CA. That judgment related to a contentious business agreement where the hourly rate was agreed. The principle applies even where there is no contentious business agreement: "In my judgment there should be no distinction between those cases where a formal contentious business agreement is in place and which are governed by s.69(3) of the Solicitors Act 1974 and other cases where there is an agreement partly evidenced in writing, an unwritten agreement or no agreement at all, but merely an understanding arising perhaps from a long established relationship ..."; *Nederlandse Reassurantie Groep Holding NV v Bacon & Woodrow* [1998] 2 Costs L.R. 32, Tucker J.

*Re Eastwood (deceased); Lloyds Bank Ltd v Eastwood* [1975] Ch 112, established that the conventional method, appropriate to assessing the bill of a solicitor in private practice, was also appropriate for a bill of an in-house solicitor in all but special cases where it was reasonably plain that that method would infringe the indemnity principle. This had the merit of simplicity and of avoiding the burden of detailed enquiry. A special case would arise where a sum could be identified, different from that produced by a conventional approach, which was adequate to cover the actual cost incurred in doing all the work done. Such a sum might be identified by concession or by the formal assessment of the costs officer, but that possibility did not justify detailed investigation in every case (*Cole v British Telecommunications Plc* [2000] 2 Costs L.R. 310; July 3, 2000, CA). The decision in *London & Scottish Benefits Society v Chorley* [1883-84] 15 Q.B.D. 872 dealt with the costs of a solicitor appearing in person:

will often be attended by one party only. Although the judge or lord justice will pre-read the relevant documents, they are unlikely to be as familiar with the details of the case as the judge below or the advocates who appeared below. The advocates appearing at the permission hearing should use their limited time wisely. They should present their best points clearly and fairly. Any necessary exposition should be succinct and to the point. Also, assuming that the other parties are absent, the advocates should remember their duty to draw attention to any adverse authorities or factors. The rules governing permission to appeal have the potential to protect litigants from enormous cost and delay. If they are to achieve this objective without causing injustice, there must be both careful preparation by the court and high standards of preparation and presentation by the advocates.

The appellant's advocate should ensure that para.16(1) of Practice Direction 52B is complied with. In particular, at least four days before the hearing they must lodge a brief written statement identifying (a) the points which they propose to raise and (b) why they contend that permission should be granted, despite the reasons previously given for refusing permission.

#### The role of respondents in relation to permission applications

**52.3.17** In *Jolly v Jay* [2002] EWCA Civ 277 the Court of Appeal gave guidance as to the role of respondents at the permission stage. A respondent should only file submissions at this early stage, if they are addressed to the point that the appeal would not meet the relevant threshold test or tests, or if there is some material inaccuracy in the papers placed before the court (para.44). In general respondents should not make submissions on the merits at the permission stage (para.45). Respondents will not be prejudiced at the appeal itself by such restraint at the permission stage, since this is essentially a "without notice" procedure (para.46).

Where a permission application is to be determined on paper, any submissions from the respondent should be in writing. Even at an oral permission hearing, it may well suffice for the respondent's submissions to be made in writing. See *Jolly v Jay* [2002] EWCA Civ 277 at [47]. The respondent is unlikely to recover their costs of submitting written submissions or attending an oral hearing at the permission stage unless such submissions or attendance are specifically requested by the court. The effect of *Jolly v Jay* is now codified in para.20 of Practice Direction 52C.

If the court requests the respondent's attendance at the permission hearing, the respondent will receive a copy of the appeal bundle from the appellant and para.16(3) of Practice Direction 52C.

#### Position of judge who has initially refused permission on paper

**52.3.18** A judge who has initially refused permission to appeal to the Court of Appeal on consideration of the papers is entitled (absent special circumstances) to sit as a member of the court hearing the substantive appeal: see *Sengupta v Holmes* [2002] EWCA Civ 1104; *The Times*, August 19, 2002, CA; *Dŵr Cymru Cynnyddig v Albion Water* [2008] EWCA Civ 97, January 14, 2008, CA, unrep. It is, however, quite often the practice of the Court of Appeal to direct that the lord justice who refused permission on paper should not be a member of the constitution which hears the substantive appeal (where, for example, he expressed his adverse views strongly on paper).

In relation to junior appellate courts, different considerations may arise. On the one hand, it may be thought undesirable that the only judge hearing a substantive appeal is one who has previously expressed the view in writing that the appeal has no real prospect of success. On the other hand, the reasoning in *Sengupta v Holmes* would seem to be equally applicable to junior appellate courts. Furthermore, in practice, designated civil judges try to deal with CPR appeals themselves, in order to achieve consistency of approach. There would therefore be practical problems if circuit judges were precluded from hearing substantive appeals in cases where they had initially refused permission on paper. There might also be practical problems if High Court judges were precluded from hearing substantive appeals in cases where they had initially refused permission on paper. It is quite often the case on circuit that, owing to pressure of criminal work, only one High Court judge is available to hear civil appeals. See further, Vol.2 para.9A-48 (Judicial bias).

#### Procedure after permission

**52.3.19** Provisions stating the practice to be followed after permission to appeal is granted are set out in Sections 5 to 8 of Practice Direction 52B (which applies to appeals to the

county courts and the High Court) and in Sections 5 to 7 of Practice Direction 52D (which applies to appeals to the Court of Appeal).

#### Changes in appellant's case or change in circumstances after grant of permission

**52.3.20** Where the appellant's case changes after the grant of permission, the appellant's representatives should write to the appeal court and to the other party, indicating the proposed nature of the changed case. The court should be asked to indicate whether it will deal with the matter at the beginning of the hearing of the appeal or whether it will give directions on an earlier date. After being informed of the respondent's attitude, the court can decide whether to shut out the new grounds or allow them to be argued: see *Shire v Secretary of State for Work and Pensions* [2003] EWCA Civ 1465 at [6]-[7]. See also the commentary following r.52.8.

Where there is a material change in circumstances after the grant of permission, which would affect the question of whether permission should have been given, the appellant should inform the court in writing: *Walbrook Trustee (Jersey) Ltd v Fattal* [2008] EWCA Civ 427 at [49].

If the guidance in this paragraph is not followed, both costs and court time may be wasted, with possible adverse costs orders to follow: see *R (a Child)* [2010] EWCA Civ 203 at [14]-[16] per Arden L.J.

#### Time estimates

**52.3.21** One of the most important elements of the appeal questionnaire is the estimate of time for the hearing of the appeal, which must be made by the appellant's advocate. The respondent's advocate must consider this estimate. If they take a different view, their own estimate of time must be sent to the court within seven days. See para.24 of Practice Direction 52C. Two general points need to be made about time estimates. Accurate estimation is crucial to the efficient planning and listing of hearings. Equally, accurate estimation is sometimes difficult. Not all judges pre-read with equal attention to detail. Points have a habit of cropping up or fading away at appeals, with the effect of either shortening or elongating the hearing. Despite these handicaps, the opposing advocates must exercise judgment, draw on their own experience and, most importantly, talk to each other about the likely course and length of the hearing. Advocates who make no serious effort to estimate the length of an appeal hearing are in breach of their duty to the court.

#### The effect of a "leapfrog" certificate

**52.3.22** Where a judge grants a "leapfrog" certificate under s.12 of the Administration of Justice Act 1969 to any party, that party may apply to the Supreme Court for leave to appeal directly from the High Court to the Supreme Court. Section 13 of the 1969 Act provides that, if the Supreme Court grants such leave, "no appeal from the decision of the judge to which the certificate relates shall lie to the Court of Appeal". Thus any permission to appeal to the Court of Appeal which the judge may have granted is overridden. If, however, the Supreme Court grants permission to appeal subject to conditions and the appellant does not accept those conditions, then their right of appeal to the Court of Appeal revives: *R (Jones) v Ceredigion County Council* [2007] UKHL 28; [2007] 1 W.L.R. 1400.

#### Advocate to the court — role of on appeal

**52.3.23** Where there is an appeal in proceedings in which an advocate to the court has participated, the appeal court may be considerably assisted if he also participates in the appeal. However, because an advocate to the court is not a party to proceedings, he is not routinely notified if an appeal is launched. In *M v F* [2011] EWCA Civ 273, March 17, 2011, C.A., unrep., Thorpe L.J. stated (at para.24) that, for the purpose of ensuring that the role (if any) of the advocate on an appeal to the Court of Appeal was properly considered, the judge giving directions for an oral hearing or an appeal should give attention to the matter and the advocate should seek directions if nothing has been said by the supervising lord justice. His lordship also expressed the opinion that there should be an obligation on the appellant, when filing the appeal notice, to notify those instructing the advocate.

#### Appeals and judicial review

**52.3.24** The overriding importance of the appeals permission procedure is illustrated by the decision of *R (Capewell) v Stoke-on-Trent County Council* [2011] EWHC 3851 (Admin),

December 14, 2011, unrep. (Beatson J.), a case in which claimant sought judicial review of a circuit judge's decision to refuse him permission to appeal against the striking out of his claim and where it was held that, in the circumstances, there was no basis for a judicial review claim, which was itself a remedy that recognised the finality in decisions.

#### Dispensation of Requirement for Oral Hearing

#### 52.3.25

Whilst a renewed application for permission to appeal will usually be resolved at an oral hearing, it does not always follow that such a hearing is required. In *Friends Life v Pine* [2012] EWCA Civ 1734, the Court of Appeal acknowledged that Practice Direction 52 (now superseded), envisaged such a hearing, but held that, where a respondent had a good reason not to attend the hearing, the court had power to dispense with a hearing and deal with the matter by way of a written decision. For this reason, the court held that the trial judge had been wrong to make an order, the effect of which was that, unless the application was made orally through counsel at a hearing, it was to be refused.

#### Appellant's notice<sup>1</sup>

#### 52.4

**52.4—(1) Where the appellant seeks permission from the appeal court it must be requested in the appellant's notice.**

**(2) The appellant must file the appellant's notice at the appeal court within—**

- (a) such period as may be directed by the lower court (which may be longer or shorter than the period referred to in sub-paragraph (b)); or
- (b) where the court makes no such direction, 21 days after the date of the decision of the lower court that the appellant wishes to appeal.

**(3) Subject to paragraph (4) and unless the appeal court orders otherwise, an appellant's notice must be served on each respondent—**

- (a) as soon as practicable; and
- (b) in any event not later than 7 days, after it is filed.

**(4) Where an appellant seeks permission to appeal against a decision to refuse to grant an interim injunction under section 41 of the Policing and Crime Act 2009<sup>2</sup> the appellant is not required to serve the appellant's notice on the respondent.**

#### Time for filing appellant's notice

#### 52.4.1

The appellant's notice must be filed within 21 days after the date of the decision under appeal, unless the lower court directs a different period. Before r.52.4(2) was amended by the Civil Procedure (Amendment No.4) Rules 2005 (SI 2005/3515) (with effect from April 6, 2006) the period was 14 days. The brevity of the time allowed reflects a clear policy decision in favour of finality. Any party seeking to challenge a judicial decision must move with expedition. In the immediate aftermath of the judgment below both the party and their advisers are fully seized of the case. They can be expected to formulate any grounds of appeal without delay. The background to the rule is set out by Brooke L.J. in *Sayers v Clarke Walker* [2002] EWCA Civ 645 at [12]-[16]; [2002] 1 W.L.R. 3095. The Bowman Report (1997) recommended in respect of appeals to the Court of Appeal that the time limit for appeals against final decisions

<sup>1</sup> Introduced by the Civil Procedure (Amendment) Rules 2000 (SI 2000/221) and amended by the Civil Procedure (Amendment No.4) Rules 2005 (SI 2005/3515) and the Civil Procedure (Amendment No.2) Rules 2010 (SI 2010/1953).

<sup>2</sup> 2009 c. 26.

should be six weeks and that the time limit for appeals against procedural decisions should be seven days (see Ch.7, paras 7 and 8). The Civil Procedure Rule Committee endorsed these recommendations. It adopted a uniform time limit of, initially, 14 days for all appeals, save in respect of judicial review permission appeals, where the time limit is seven days (see r.52.15 below). However, as explained above, the 14 day time limit was subsequently increased by the Civil Procedure Rule Committee to 21 days.

If a party has good reason for seeking a longer period in which to appeal, they should apply to the lower court on the occasion when judgment is given (unless that court is adjourned pursuant to para.4.1(a) of Practice Direction 52A). For provisions applicable where a party wishes to apply to the lower court for an extension of time filed on appellant's notice, see Practice Direction 52B para.3). An example of a good reason for seeking a modest extension of time may be that the appellant (through no fault of its own) has an unwieldy decision-making process, such as a board of trustees which needs to be convened. Another example may be that a national holiday period is about to begin. Another example may be that an approved transcript of judgment or a perfected written judgment may reasonably be required before the notice of appeal can be prepared.

An application to the lower court to extend time pursuant to r.52.4(2)(a) may be made on a date after judgment was given, although this course involves additional and considerable expense. Indeed such an application may even be made after expiry of the 21 day period: see *Dalkia Utilities Services plc v Celtech International Ltd (No.2)* [2006] EWHC 63-2 (Comm). Although *Dalkia* was decided under the old regime, when the relevant time limit was 14 days (not 21 days), the statements of principle in paras 5-6 remain valid. Nevertheless, once the appellant's notice has been filed (albeit out of time), the lower court should not exercise its discretion to extend time. The matter should be left for the appeal court to consider in accordance with r.52.6. See *Aujla v The Law Society* [2004] EWCA Civ 121 at [14]-[21].

If an extension of time is needed beyond the period specified by the lower court (or beyond the 21 day period mentioned in r.52.4(2)(b)), then the appellant should apply to the appeal court. See r.52.6(1). The application must be made in the appellant's notice. See para.3.2 of Practice Direction 52B. The notice should state the reason for the delay and the steps taken prior to the application being made. The respondent has a right to be heard on this application. (If such time extension application is granted without a hearing a respondent wishing to oppose it may apply for a hearing; para.3.3 of Practice Direction 52B.) This perilous course for appellants (which is discussed further in the commentary on r.52.6) emphasises: (a) the importance of complying with the time limits in the first place; (b) the wisdom of applying *prospectively* to the lower court for any extension of time which really is necessary.

It should be noted that specific time limits for particular categories of appeal, whether imposed by statute, rule or practice direction, may override the general 21 day time limit imposed by r.52.4(2): see r.52.1(4). Time limits applicable for statutory appeals, for appeals by way of case stated and for a variety of specific appeals are found in the appropriate places in Practice Direction 52D and Practice Direction 52E.

#### Statutory time limits for filing notice of appeal

The provisions of Pt 52, including r.52.4, are subject to "any rule, enactment or practice direction which sets out special provisions with regard to any particular category of appeal" (r.52.1(4)). Practitioners should be alert to the fact that, in relation to certain appeals brought under statute, different time limits to those fixed by r.52.4 may apply. Generally, such statutory variations will be reflected in directions in Section 4 of Practice Direction 52D (Provisions about specific appeals); see, e.g. para.19.1 (appeals against decisions affecting the registration of architects and health care professional professionals), and para.21.1 (appeals under the Extradition Act 2003). It is particularly important that such statutory variations should be noted because, being time limits fixed by statute (and not by rule, practice direction or court order), the court will not have power, unless the statute itself so provides, to extend them under r.52.4(2)(a) and r.52.6; see para.3.1.2 above and para.52.6.4 below.

#### When time starts to run

Time starts to run on the date when the judge below makes their decision, not on the date when the order reflecting that decision is drawn up. See *Sayers v Clarke Walker* [2002] EWCA Civ 645 at [5]; [2002] 1 W.L.R. 3095. The problems which arise when

#### 52.4.1.1

#### 52.4.2

the judge below (wrongly) dispenses with the formality of handing down judgments, as discussed in *Owusu v Jackson* [2002] EWCA Civ 877 at [24]–[27].

The time limit for the filing of the notice of appeal in the case of an appeal from the Upper Tribunal to the Court of Appeal is to be calculated in accordance with paragraph 4 of Practice Direction 52D (see para.52DPD.4 below). The notice must be filed within 21 days of the date on which the Upper Tribunal's decision on permission to appeal to the Court of Appeal "is given". The Court of Appeal has expressed the opinion that a decision is "given" to parties when it is received or can be taken to have been received by them; the giving of a decision requires the transmission of the decision in the case in question, and it is given to him or her when he receives it or would in the ordinary course receive it (*Rust-Andrews v First-Tier Tribunal (Social Entitlement Chamber)* [2011] EWCA Civ 1548, December 19, 2011, CA, unrep.).

#### Service of appellant's notice

**52.4.3** The general rule is that, unless the court orders otherwise, an appellant's notice must be served on all respondents as soon as practicable and in any event within seven days: see r.52.4(3) and para.5.21 of the Practice Direction.

Special rules apply, however, in relation to applications for injunctions to prevent gang-related violence. The procedure for such applications is set out in Pt 4 of the Policing and Crime Act 2009 and in Section VIII of CPR Pt 65. An application for such an injunction may be made and granted without notice under ss.39 and 41 of the 2009 Act. If the court refuses to grant an interim injunction on a without notice application and the applicant seeks permission to appeal, the notice of appeal does not have to be served on the respondent: see s.48 (2) of the 2009 Act, r.52.4(4) and para.5.21 of the Practice Direction. The skeleton argument is also exempt from the requirement of service: see para.5.9 (2A) of the Practice Direction. In an appeal to a case of contempt of court as provided for by the Administration of Justice Act 1985 (Vol.2, para.9B–18) in addition the appellant's notice must be served on the court, tribunal etc (as defined in s.13) from whose decision or order the appeal is brought (Practice Direction 52 para.21.4). See further paras 52.1.2 and 52.3.2 above. Note also Sch.1 RSC Ord.109 (para.sc109.1 below) for rules relevant to appeals and applications under s.13.

#### Content of appellant's notice

**52.4.4** If permission has not already been granted by the lower court, the appellant's notice must include an application for permission. See r.52.4(1) and para.4.2 of Practice Direction 52A. The appellant's notice must be in Form N161 (or, in respect of a small claim, Form N164). The grounds of appeal (Section 7 of Form N161) should set out clearly why it is said (a) that the decision of the lower court is wrong or (b) that the decision of the lower court is unjust because of a serious procedural or other irregularity (see r.52.11(3)). In respect of each ground, the appellant must specify whether the ground raises an appeal on a point of law or is an appeal against a finding of fact. See para.4.2(d) of Practice Direction 52B and para 5(1) of Practice Direction 52C.

#### Skeleton argument

**52.4.5** Paragraph 8.3 of Practice Direction 52B states that, subject to any order of the court, the parties to the appeal should file and serve skeleton arguments only where (a) the complexity of the issues of fact or law in the appeal justify them, or (b) skeleton arguments would assist the court in respects not readily apparent from the papers in the appeal; subject to any order of the court, a copy of the appellant's or respondent's skeleton argument should be included in the appeal bundle (ibid., para.6.4 (b)). Where an appeal is started in the Court of Appeal, at the same time as filing the appellant's notice the appellant must provide the Court with a skeleton argument in support of the appeal (Practice Direction 52C para.3(3)(g)), and a respondent who files a respondent's notice must, within 14 days of filing the notice, lodge a skeleton argument with the court and serve a copy of the skeleton argument on every other party to the appeal (ibid., para.9).

The content of skeleton arguments is dealt with in para.5.1 of Practice Direction 52A. In the case of appeals started in the Court of Appeal, additional provisions are imposed by para.31 of Practice Direction C. Paragraph 5.1 is clear and specific in its requirements and there are costs consequences for non-compliance: see para.3.1(4) (note also para.31(4) of PD 52C). The skeleton argument is a vital document and must be prepared with great care. It will perform two functions. First, it will assist the ap-

pellant court in its case management function (hence the need for its early production). Secondly, it will be the document upon which the appellant relies at the full hearing, as a summary of their submissions. In *Raja v Van Hoogstraten (No.9)* [2008] EWCA Civ 1143 at [122]–[128]; [2008] 1 W.L.R. 1143 the court strongly criticised counsel for one party (Lambstone Ltd) for the excessive length of their skeleton argument. The court expressed similar criticisms in *Midgulf International Ltd v Groupe Chimique Tunisien* [2010] EWCA Civ 66. In this jurisdiction skeleton arguments should not become full written briefs. Where skeleton arguments do not comply with the relevant directions, they may be disallowed; see para.5.1(4) of Practice Direction 52A and para.31(4) of Practice Direction 52C.

As to supplementary skeleton arguments in appeals to the Court of Appeal, see para.32 of Practice Direction 52C.

In addition to their skeleton argument, the appellant should also provide a chronology (if appropriate, as it usually is) and, if necessary, a list of persons featuring in the case and/or a glossary of technical terms: see para.5.1 of Practice Direction 52A.

#### Documents to be lodged with the appellant's notice

**52.4.6** The documents to be filed with an appellant's notice in appeals in the county courts and the High Court are as stated in para.4.2 of Practice Direction 52B. Paragraph 6.4 lists the documents to be included (or to be considered for inclusion) in the appeal bundle (which should be filed as soon as practicable, but in any event within 35 days of the appellant's notice). Any relevant document which is obtained or created after the appeal bundle has been filed (for example a respondent's notice or a skeleton argument) should be added to the appeal bundle as soon as practicable and, in any event, no less than seven days before the hearing of the appeal or any application (ibid., para.6.4).

Where permission to appeal is sought from the Court of Appeal, the documents referred to in para.3 of Practice Direction 52C should be filed with the appeal notice. If the appellant is unable to provide any of the necessary documents in time, the appeal notice should be completed on the basis of the available documents (ibid., para.6). Within 14 days of filing the appeal notice the appellant must lodge a bundle containing only those documents which are necessary for the court to determine that application (ibid., para.14(1)). Where permission to appeal is granted the detailed provisions as to the filing of bundles of documents and bundles of authorities, and as to the contents thereof as stated in paras 27 to 29 of Practice Direction 52C apply. It should be noted that the document bundle "must contain only those documents relevant to the appeal" (para.27(1)) and generally the authorities bundle should be limited to ten authorities relevant to propositions in dispute (para.29(4)).

In *Smiles v Lea* [2011] EWCA Civ 1325, October 19, 2011, CA, unrep., Lord Neuberger M.R. noted that the requirement that the documents provided to the appeal court should be limited to those which are necessary for the determination of the appeal was being routinely ignored and stated that, unless there was an improvement in relation to the extent of the documents included in appeal bundles, he would have to consider whether to propose some appropriate sanctions to ensure compliance with the requirement in the future.

In appeals to which Practice Direction 52D applies (statutory appeals and appeals subject to special provisions) numerous provisions in Section 3 thereof deal with the filing and service of documents. Those provisions are in addition to any documents required to be filed under Pt 52, PD 52B or PD 52C (ibid., para.3.2).

Any plan, map, diagram or photograph should be in such form, or accompanied by such explanation, that it is readily intelligible to the judge or lord justice who is presiding over the papers: see *Hunte v E. Bottomley & Sons Ltd* [2007] EWCA Civ 1168.

Save in the most exceptional cases, it is not appropriate to include the transcript of an interlocutory hearing in the appeal bundle: see *Fiddes v Channel Four Television Corporation* [2010] EWCA Civ 730 at [13]–[14].

#### Practice where the proposed appeal court lacks jurisdiction

**52.4.7** Paragraph 2A.5 of the Practice Direction states the practice to be followed by a court officer in giving notice to an applicant who has attempted to file an appellant's notice in circumstances where the appeal court does not have jurisdiction to issue the notice. Where that officer is an officer of the Court of Appeal (Civil Division), r.52.16(5) and (6) is disapplied, with the effect that the applicant may not request the court officer that rule to review the officer's decision.

**PRACTICE DIRECTION 73—CHARGING ORDERS, STOP ORDERS AND STOP NOTICES***This Practice Direction supplements CPR Part 73***Section I—Charging Orders****Application notice—rule 73.3**

**73PD.1** 1.1 An application for a charging order must be made by filing an application notice in Practice Form N379 if the application relates to land, or N380 if the application relates to securities.

1.2 The application notice must contain the following information—

- (1) the name and address of the judgment debtor;
- (2) details of the judgment or order sought to be enforced;
- (3) the amount of money remaining due under the judgment or order;
- (4) if the judgment debt is payable by instalments, the amount of any instalments which have fallen due and remain unpaid;
- (5) if the judgment creditor knows of the existence of any other creditors of the judgment debtor, their names and (if known) their addresses;
- (6) identification of the asset or assets which it is intended to charge;
- (7) details of the judgment debtor's interest in the asset; and
- (8) the names and addresses of the persons on whom an interim charging order must be served under rule 73.5(1).

1.3 A judgment creditor may apply in a single application for charging orders over more than one asset, but if the court makes interim charging orders over more than one asset, it will draw up a separate order relating to each asset.

**High Court and county court jurisdiction**

**73PD.2** 2. The jurisdiction of the High Court and the county court to make charging orders is set out in section 1(2) of the 1979 Act.

**Transfer**

**73PD.3** 3. The court may, on an application by a judgment debtor who wishes to oppose an application for a charging order, transfer it to the court for the district where the judgment debtor resides or carries on business, or to another court.

**Enforcement of charging orders by sale—rule 73.10**

**73PD.4** 4.1 A county court has jurisdiction to determine a claim under rule 73.10 for the enforcement of a charging order if the amount owing under the charge does not exceed the county court limit.

4.2 A claim in the High Court for an order for sale of land to enforce a charging order must be started in Chancery Chambers at the Royal Courts of Justice, or a Chancery district registry.

(There are Chancery district registries at Birmingham, Bristol, Caernarfon, Cardiff, Leeds, Liverpool, Manchester, Mold, Newcastle upon Tyne and Preston.)

4.3 The written evidence in support of a claim under rule 73.10

- (1) identify the charging order and the property sought to be sold;
- (2) state the amount in respect of which the charge was imposed and the amount due at the date of issue of the claim;
- (3) verify, so far as known, the debtor's title to the property charged;
- (4) state, so far as the claimant is able to identify—
  - (a) the names and addresses of any other creditors who have a prior charge or other security over the property; and
  - (b) the amount owed to each such creditor; and
- (5) give an estimate of the price which would be obtained on sale of the property.
- (6) if the claim relates to land, give details of every person who to the best of the claimant's knowledge is in possession of the property; and
- (7) if the claim relates to residential property—
  - (a) state whether—
    - (i) a land charge of Class F; or
    - (ii) a notice under section 31(10) of the Family Law Act 1996, or under any provision of an Act which preceded that section, has been registered; and
  - (b) if so, state—
    - (i) on whose behalf the land charge or notice has been registered; and
    - (ii) that the claimant will serve notice of the claim on that person.

4.4 The claimant must take all reasonable steps to obtain the information required by paragraph 4.3(4) before issuing the claim.

4.5 Sample forms of orders for sale are set out in Appendix A to this practice direction for guidance. These are not prescribed forms of order and they may be adapted or varied by the court to meet the requirements of individual cases.

Note—In reference to PD 73 para.4.2 see commentary at para.73.10.4.

**73PD.4.1** 4A.1 A charging order or interim charging order may be made against any property, within the jurisdiction, belonging to a judgment debtor that is a partnership. **73PD.4A**

4A.2 For the purposes of rule 73.5(1)(a) (service of the interim order), the specified documents must be served on—

- (1) a member of the partnership within the jurisdiction;
- (2) a person authorised by a partner; or
- (3) some other person having the control or management of the partnership business.

4A.3 Where an order requires a partnership to appear before the court, it will be sufficient for a partner to appear before the court.

**Section II—Stop Notices**

5. A sample form of stop notice is set out in Appendix B to this practice direction. **73PD.5**

## Section III—Applications for orders made under section 23 of the Partnership Act 1890

**73PD.6** 6.1 This paragraph relates to orders made under section 23 of the Partnership Act 1890 ("Section 23").

6.2 The following applications must be made in accordance with Part 23—

- (1) an application for an order under Section 23 of the 1890 Act made by a judgment creditor of a partner;
- (2) an application for any order by a partner of the judgment debtor in consequence of any application made by the judgment creditor under Section 23.

6.3 The powers conferred on a judge by Section 23 may be exercised by—

- (1) a Master;
- (2) the Admiralty Registrar; or
- (3) a district judge.

6.4 Every application notice filed under this paragraph by a judgment creditor, and every order made following such an application, must be served on the judgment debtor and on any of the other partners that are within the jurisdiction.

6.5 Every application notice filed under this paragraph by a partner of a judgment debtor, and every order made following such an application, must be served—

- (1) on the judgment creditor and the judgment debtor; and
- (2) on the other partners of the judgment debtor who are not joined in the application and who are within the jurisdiction.

6.6 An application notice or order served under this paragraph on one or more, but not all, of the partners of a partnership shall be deemed to have been served on all the partners of that partnership.

## Appendix A

73PD.7

## Order for sale following a charging order

(property solely owned by judgment debtor)

In the

Claim No.

Appn. No.

Claimant

Defendant

On the \_\_\_\_\_ 20 \_\_\_\_\_ sitting at \_\_\_\_\_

heard \_\_\_\_\_

The claimant is entitled to an equitable charge upon the defendant's interest in the property \_\_\_\_\_

Registered at H.M. Land Registry under Title No. \_\_\_\_\_

("the property") \_\_\_\_\_

under a charging order made on the \_\_\_\_\_

in the \_\_\_\_\_ in Claim No. \_\_\_\_\_

and the court orders that

1. The remainder of this order will not take effect if the defendant by 4.00 p.m. on the \_\_\_\_\_ 20 \_\_\_\_\_ pays to the claimant the judgment debt of £ \_\_\_\_\_ secured by the charge and his costs to date of this application assessed at £ \_\_\_\_\_, making together £ \_\_\_\_\_ [together \_\_\_\_\_ with interest at the rate of £ \_\_\_\_\_ per day from the date of this order until payment is received by the claimant].
2. The property shall be sold without further reference to the court at a price not less than £ \_\_\_\_\_, unless that figure is changed by a further order of the court.
3. The [claimant] [claimant's solicitor] will have conduct of the sale.
4. To enable the claimant to carry out the sale, there be created and vested in the claimant pursuant to section 90 of the Law of Property Act 1925 a legal term in the property of [3000 years] [one day less than the remaining period of the term created by the lease under which the defendant holds the property].
5. The defendant must deliver possession of the property to the claimant [on or before the \_\_\_\_\_ 20 \_\_\_\_\_] [within { \_\_\_\_\_ } days of this order being served on him].

Part 8 or an arbitration claim form under CPR Part 62: see paragraph 10.1 below. All claims allocated to the TCC are assigned to the Multi-Track: see CPR Rule 60.6(1).

### 3.2 Part 7 Claims

**2C-50** 3.2.1 The Part 7 claim form must be marked "Technology and Construction Court" in the appropriate place on the form.

3.2.2 Particulars of Claim may be served with the claim form, but this is not a mandatory requirement. If the Particulars of Claim are not contained in or served with the claim form, they must be served within **14 days** after service of the claim form.

3.2.3 A claim form must be verified by a statement of truth, and this includes any amendment to a claim form, unless the court otherwise orders.

### 3.3 Part 8 Claims

**2C-51** 3.3.1 The Part 8 claim form must be marked "Technology and Construction Court" in the appropriate place on the form.

3.3.2 A Part 8 claim form will normally be used where there is no substantial dispute of fact, such as the situation where the dispute turns on the construction of the contract or the interpretation of statute. For example, claims challenging the jurisdiction of an adjudicator or the validity of his decision are sometimes brought under Part 8. In those cases the relevant primary facts are often not in dispute. Part 8 claims will generally be disposed of on written evidence and oral submissions.

3.3.3 It is important that, where a claimant uses the Part 8 procedure, his claim form states that Part 8 applies and that the claimant wishes the claim to proceed under Part 8.

3.3.4 A statement of truth is again required on a Part 8 claim form.

### 3.4 Service

**2C-52** 3.4.1 Claim forms issued in the TCC at St Dunstan's House in London are to be served by the claimant, not by the Registry. In some other court centres claim forms are served by the court, unless the claimant specifically requests otherwise.

3.4.2 The different methods of service are set out in CPR Part 6 and the accompanying Practice Direction.

3.4.3 Applications for an extension of time in which to serve a claim form are governed by CPR Rule 7.6 and there are only limited grounds on which such extensions of time are granted. The evidence required on an application for an extension of time is set out in paragraph 8.2 of **Practice Direction A supplementing CPR Part 7**.

3.4.4 When the claimant has served the claim form, he must file a certificate of service: Rule 6.14 (2). This is necessary if, for instance, the claimant wishes to obtain judgment in default (CPR Part 12).

3.4.5 Applications for permission to serve a claim form out of the jurisdiction are subject to Rules 6.19–6.31 inclusive.

### 3.5 Acknowledgment of Service

**2C-53** 3.5.1 A defendant must file an acknowledgment of service in response to both Part 7 and Part 8 claims. Save in the special circumstances that arise when the claim form has been served out of the jurisdiction, the period for filing an acknowledgment of service is **14 days** after service of the claim form.

*Paragraph numbers marked with a "+" can be found online and on CD.*

### 3.6 Transfer

3.6.1 Proceedings may be transferred from any Division of the High Court or from any specialist list to the TCC pursuant to CPR rule 30.5. The order made by the transferring court should be expressed as being subject to the approval of a TCC judge. The decision whether to accept such a transfer must be made by a TCC judge: see rule 30.5 (3). Many of these applications are uncontested, and may conveniently be dealt with on paper. Transfers from the TCC to other Divisions of the High Court or other specialist lists are also governed by CPR rule 30.5. In London there are quite often transfers between the Commercial Court and the TCC, in order to ensure that cases are dealt with by the most appropriate judge. Outside London there are quite often transfers between the TCC and the mercantile courts. **2C-54**

3.6.2 A TCC claim may be transferred from the High Court to one of the county courts noted above, and from any county court to the High Court, if the criteria stated in CPR Rule 30.3 are satisfied. In ordinary circumstances, proceedings will be transferred from the TCC in the High Court to the TCC in an appropriate county court if the amount of the claim does not exceed £50,000.

3.6.3 Where no TCC judge is available to deal with a TCC claim which has been issued in a district registry or one of the county courts noted above, the claim may be transferred to another district registry or county court or to the High Court TCC in London (depending upon which court is appropriate).

3.6.4 On an application to transfer the case to the TCC from another court or Division of the High Court, there are a number of relevant considerations:

- Is the claim broadly one of the types of claim identified in paragraph 2.1 of the Part 60 Practice Direction?
- Is the financial value of the claim and/or its complexity such that, in accordance with the overriding objective, the case should be transferred into the TCC?
- What effect would transfer have on the likely costs, the speed with which the matter can be resolved, and any other broader questions of convenience for the parties?

3.6.5 On an application to transfer into the TCC, when considering the relative appropriateness of different courts or divisions, the judge will ascertain where and in what areas of judicial expertise and experience the bulk or preponderance of the issues may lie. If there was little significant difference between the appropriateness of the two venues, and the claimant, having started in one court or division, was anxious to remain there, then the application to transfer in by another party is likely to be unsuccessful.

3.6.6 Where a TCC Claim is proceeding in a District Registry and it becomes apparent that the case would merit case management or trial before a High Court judge, the matter should be raised with the TCC judge at the District Registry who will consult the Judge in Charge: see paragraph 3.7.3 below. If the case does merit the involvement of a High Court judge it is not necessary for the case to be transferred to London but rather a High Court judge can in appropriate cases sit outside London to deal with the case in the District Registry.

### 3.7 Assignment

3.7.1 Where a claim has been issued at or transferred to the TCC in London, the Judge in Charge of the TCC ("the Judge in Charge") shall with the assistance of court staff classify the case either "HCJ" or "SCJ" and assign it to a particular TCC judge. **2C-55**

- If the case is classified "HCJ", it shall be managed by a High Court judge and tried by a High Court judge or a deputy High Court judge.
- If the case is classified "SCJ", it shall generally be managed by a senior circuit judge and tried by a senior circuit judge or by a recorder.

*Paragraph numbers marked with a "+" can be found online and on CD.*

- (iii) In general the assigned TCC judge who case manages a case will also try that case. Although this continuity of judge is regarded as important, it will sometimes be necessary for there to be a change of assigned judge to case manage or try a case but such changes are kept to a minimum.

3.7.2 When classifying a case "HCJ" or "SCJ", the Judge in Charge will take into account the following matters, as well as all the circumstances of the case:

1. The size and complexity of the case.
2. The nature and importance of any points of law arising.
3. The amount of money which is at stake.
4. Whether the case is one of public importance.
5. Whether the case has an international element or involves overseas parties.
6. The limited number of High Court judges and the needs of other court users, both civil and criminal.

The Judge in Charge may change the classification of any case from "HCJ" to "SCJ" or from "SCJ" to "HCJ", if it becomes appropriate to do so. There will be a band of cases near the borderline between "HCJ" and "SCJ", where the classification will be liable to change depending upon the settlement rate of other cases and the availability of judges.

3.7.3 When proceedings are commenced in, or transferred to, the TCC at St Dunstan's House in London, any party to those proceedings may write to the court setting out matters relevant to classification. Any such letter should be clear and concise and should be copied to all other parties. A defendant who wishes to send such a letter should do so as soon as he becomes aware of the proceedings. Any party who believes that a case has been wrongly classified (whether "HCJ" or "SCJ") should write to the court promptly setting out his grounds for that belief. All letters referred to in this paragraph are referred to the judge in charge of the TCC or (in his absence) to the other TCC High Court judge for consideration.

- (a) When a TCC case has been assigned to a named High Court judge, all communications about case management should be made to the assigned High Court judge's clerk with email communications copied to the TCC Registry at [tcc@hmcourts-service.gsi.gov.uk](mailto:tcc@hmcourts-service.gsi.gov.uk).
- (b) When a case has been assigned to a named senior circuit judge in the TCC at St Dunstan's House, all communications about case management shall be made to that judge's clerk.
- (c) All communications in respect of the issue of claims or applications and all communications about fees, however, should be sent to the TCC Registry.
- (d) All statements of case and applications should be marked with the name of the assigned judge.

3.7.5 There are currently full time TCC judges at Birmingham and Manchester. There are principal TCC judges at other court centres outside London. TCC cases at these court centres are assigned to judges either (a) by direction of the full time or principal TCC judge or (b) by operation of a rota. It will not generally be appropriate for the Judge in Charge (who is based in London) to consider TCC cases which are commenced in, or transferred to, court centres outside London. Nevertheless, if any TCC case brought in a court centre outside London appears to require management and trial by a High Court judge, then the full time or principal TCC judge at that court centre should refer the case to the Judge in Charge for a decision as to its future management and trial.

3.7.6 When a TCC case has been assigned to a named circuit judge at a court centre other than in London, all communications to the court about the case (save for communications in respect of fees) shall be made to that judge's clerk. All communications in respect of fees should be sent to the relevant registry. All statements of case and applications should be marked with the name of the assigned judge.

*Paragraph numbers marked with a "+" can be found online and on CD.*

### 3.8 Electronic Working in London

3.8.1 Since 20 July 2009 all TCC claims in the TCC Registry in London can be issued electronically and all proceedings, whether the claims were commenced electronically or by a paper claim form issued after that date, can be continued by taking advantage of the electronic issuing and filing process ("e-working"). It is hoped that in future years e-working in the TCC will be extended to courts outside London.

3.8.2 After a pilot scheme which ended on 31 March 2010, all e-working is now dealt with by Practice Direction 5C to CPR Part 5. A summary of the process is set out below.

3.8.3 Requirements for e-working. To carry out e-working all that is required is an email address and the relevant version of Adobe Acrobat.

3.8.4 Starting a Claim Electronically. To start a claim electronically it is necessary to send an email to [getform@justice.gsi.gov.uk](mailto:getform@justice.gsi.gov.uk) with the relevant form name in the title: eg NI(TCC) for a Part 7 claim form in the TCC. An email will then be received with the necessary blank claim form which can be saved and then used for future use. After completing the form it is sent to [submit@justice.gsi.gov.uk](mailto:submit@justice.gsi.gov.uk). It is necessary to pay the fee which will generally be by a one off online payment or payment from an electronic account set up for that purpose. The claim form is then received as an issued and sealed claim form.

3.8.5 Effect of starting a claim on paper. If a party has started a claim by issuing a claim form after 20 July 2009 then that claim is scanned and an electronic file created so that the same facilities for e-working are available as with a claim which was started by issuing a claim electronically.

3.8.6 Steps after the Claim Form. The claim form contains a number of document keys or links for standard forms to allow the parties to use them to obtain the necessary forms to continue the process eg acknowledgment of service, part 20 claim forms. In addition, by the use of the multipurpose form a party can file any other documents with the court such as pleadings, witness statements or skeleton arguments.

3.8.7 The court process. As all documents issued or filed electronically are automatically filed in the court file there is no requirement for any hard copy documents to be filed with the court except when it is necessary to file a hard copy case management bundle, a bundle for any application and a trial bundle.

3.8.8 Communications with the court. When there is an electronic file, the court will communicate with the parties at one or more nominated email addresses. Parties are also now accepting service by email but this will only apply if they have expressly given consent to service by email. The court would encourage solicitors and the parties to adopt service by email.

3.8.9 Further information on e-working. Parties who require assistance with e-working should contact the TCC Registry in London on 020 7947 6022 or the e-working helpline on 020 8123 0846.

## 4.

### ACCESS TO THE COURT

#### 4.1 General Approach

4.1.1 There may be a number of stages during the case management phase when the parties will make applications to the court for particular orders: see Section 6 below. There will also be the need for the court to give or vary directions, so as to enable the case to progress to trial.

4.1.2 The court is acutely aware of the costs that may be incurred when both parties prepare for an oral hearing in respect of such interlocutory matters and is always

*Paragraph numbers marked with a "+" can be found online and on CD.*

the assignee would be a breach of covenant is not automatically unreasonable. It is necessary to consider what the reasonable landlord would do in the particular circumstances of the case (*Ashworth Frazer Ltd v Gloucester City Council (No.2)* [2001] UKHL 25 [2001] 1 W.L.R. 2180).

### Apportionment of rents

**3B-76** 20.—(1) An order of apportionment of a rent reserved by a lease or any such other rent or payment as is mentioned in section ten of the Inclosure Act, 1854, may be made by the under sections ten to fourteen of that Act, on the application of any person interested in the rent or payment, or any part thereof, or in the land in respect of which such rent or payment is payable, without the concurrence of any other person: Provided that the Minister may in any such case, on the application of any person entitled to the rent or payment or any part thereof, require as a condition of making the order that any apportioned part of the rent or payment which does not exceed the yearly sum of [£5] shall be redeemed forthwith [in accordance with sections 8 to 10 of the Rentcharges Act 1977(which, for the purposes of this section, shall have effect with the necessary modifications)].

[(1A) An order of apportionment under sections 10 to 14 of the said Act of 1854 may provide for the amount apportioned to any part of the land in respect of which the rent or payment is payable to be nil.]

(2) Where the reason for the application was due to any action taken by a person other than the applicant, the Minister shall, notwithstanding anything in section fourteen of the Inclosure Act, 1854, have power to direct by whom and in what manner the expenses of the application or any part thereof are to be paid.

**3B-77** Note—Section 20 was amended by Housing Act 1980, s.143(1), the Rentcharges Act 1977 s.17(1) and Sch. 1, para.3 and by Housing Act 1980 s.143(3). The functions of the Minister of Agriculture and Fisheries under s.20 are now exercisable by the Secretary of State: see Transfer of Functions (Ministry of Food) Order 1955 (SI 1995/554); Minister of Land and Natural Resources Order 1965 (SI 1965/143); Ministry of Land and Natural Resources (Dissolution) Order 1967 (SI 1967/156) and Secretary of State for the Environment Order 1970 (SI 1970/1681).

## PART III

### GENERAL

#### The tribunal

**3B-78** 21. The tribunal for the purposes of Part I of this Act shall be the court exercising jurisdiction in accordance with the provisions of section sixty-three of the Landlord and Tenant Act, 1954.

**3B-79** Note—The current s.21 was substituted by Landlord and Tenant Act 1954 s.63(10).

\* \* \* \*

#### Service of notices

**3B-80** 23.—(1) Any notice, request, demand or other instrument under

Paragraph numbers marked with a “+” can be found online and on CD.

this Act shall be in writing and may be served on the person on whom it is to be served either personally, or by leaving it for him at his last known place of abode in England or Wales, or by sending it through the post in a registered letter addressed to him there, or, in the case of a local or public authority or a statutory or a public utility company, to the secretary or other proper officer at the principal office of such authority or company, and in the case of a notice to a landlord, the person on whom it is to be served shall include any agent of the landlord duly authorised in that behalf.

(1A) Occupation or the carrying on of a business—

(a) by a company in which the tenant has a controlling interest; or

(b) where the tenant is a company, by a person with a controlling interest in the company,

shall be treated for the purposes of this section as equivalent to occupation or, as the case may be, the carrying on of a business by the tenant.

(1B) Accordingly references (however expressed) in this Part of this Act to the business of, or to use, occupation or enjoyment by, the tenant shall be construed as including references to the business of, or to use, occupation or enjoyment by, a company falling within subsection (1A)(a) above or a person falling within subsection (1A)(b) above.

(2) Unless or until a tenant of a holding shall have received notice that the person theretofore entitled to the rents and profits of the holding (hereinafter referred to as “the original landlord”) has ceased to be so entitled, and also notice of the name and address of the person who has become entitled to such rents and profits, any claim, notice, request, demand, or other instrument which the tenant shall serve upon or deliver to the original landlord shall be deemed to have been served upon or delivered to the landlord of such holding.

Note—Section 23 was amended by the Recorded Delivery Service Act 1962 s.1.

#### “tenant”

Any person entitled in possession to the holding under any contract of tenancy, whether the interest of such tenant was acquired by original contract, assignment, operation of law or otherwise (s.25). This includes sub-tenants. Note that the designation of landlord and tenant continues to apply to the parties until the conclusion of any proceedings taken under or in pursuance of this Act in respect of compensation (s.25(2)).

#### “landlord”

Any person who under a lease is, as between himself and the tenant or other lessee, for the time being entitled to the rents and profits of the demised premises payable under the lease (s.25).

#### “service of notices”

Section 23 provides that any notice, request, demand or other instrument can be served personally or left at the last known place of abode (which includes place of business—*Price v West London Investment Building Society Ltd* [1964] 1 W.L.R. 616; [1964] 2 All E.R. 318, CA; cf. *Arundel Corp v Khokher* [2003] EWCA Civ 1784; [2004] 148 S.J.L.B. 25) of the person to be served or posted by registered or recorded delivery (s.1 of the Recorded Delivery Service Act 1962). (As to change of landlords, see s.23(2)).

Paragraph numbers marked with a “+” can be found online and on CD.

Secretary of State or by the official receiver at his direction, and whether made in the High Court or a county court.<sup>1</sup>

#### Rights of audience

**3J-10** It is occasionally assumed that because official receivers and deputy official receivers have rights of audience, the court will take a more flexible approach to directors being represented by accountants or insolvency advisers. This assumption is incorrect, and the general practice of the Companies Court is to require strict observance of the relevant statutory provisions as to rights of audience.

### Part II

#### Disqualification applications

#### 4. Commencement

**3J-11** **4.1** Sections 2(2)(a), 3(4), 4(2), 6(3), 8(3) and 9E(3) of the Act identify the civil courts which have jurisdiction to deal with disqualification applications.

**4.1A** A disqualification application must be commenced by a claim form issued:

- (1) in the case of a disqualification application under section 9A of the Act, in the High Court out of the office of the companies court registrar at the Royal Courts of Justice;
- (2) in any other case,
  - (a) in the High Court out of the office of the companies court registrar or a chancery district registry; and
  - (b) in the county court, out of a county court office.

**4.2** Disqualification applications shall be made by the issue of a claim form in the form annexed hereto and the use of the procedure set out in CPR Part 8,<sup>2</sup> as modified by this practice direction and (where the application is made under sections 7, 8 or 9A of the Act) the Disqualification Rules. CPR rule 8.1(3) (power of the Court to order the application to continue as if the claimant had not used the Part 8 Procedure) shall not apply.

**4.3** When the claim form is issued, the claimant will be given a date for the first hearing of the disqualification application. This date is to be not less than eight weeks from the date of issue of the claim form.<sup>3</sup> The first hearing will be before a registrar.

#### Use of Pt 8 procedure

**3J-12** The use of the Pt 8 procedure (and prior to 1999 the originating summons procedure under the RSC) is in some respects not entirely satisfactory, particularly in cases where a substantial amount of the factual evidence is disputed (a point indirectly alluded to by Sir Donald Nicholls V.-C. in *Re Rex Williams Leisure Plc* [1994] Ch. 1, at 9). However, use of the Pt 7 procedure with statements of case would be even less satisfactory, as the claimant's case (based on his conclusion that it is "expedient in the public interest that a disqualification order should be made") is not a cause of action which

<sup>1</sup> Rule 10 of the Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987.

<sup>2</sup> Rule 2(2) of the Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987 as amended.

<sup>3</sup> Rule 7(1) of the Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987.

Paragraph numbers marked with a "+" can be found online and on CD.

usually lends itself to being pleaded in the orthodox way (though the courts have recognised that the evidence in support of the application "has of necessity something of the character of a pleading": Laddie J. in *Re Finelist* [2003] EWHC 1780 (Ch); [2004] B.C.C. 877 at [14]). The intention is that all the evidence deemed relevant by the parties can be put before the court, normally without the need for disclosure, so that (in the case of ss.6 to 9 of the Act) the court can decide the question of unfitness. Thus, although applications are occasionally made for an order that disqualification proceedings should proceed by way of statements of case, it is suggested that it will only be in the most exceptional circumstances that the court would consider it appropriate to make such an order.

#### County Court Proceedings

Most disqualification cases are issued in the High Court. By s.6(3) of the Act the only County Court which may make a disqualification order in relation to a director of a given lead company is the County Court which wound up the company, or had jurisdiction to do so. It has been held that the court has no jurisdiction to transfer a case from that County Court to a different one: see *Secretary of State v Shakespeare* [2005] B.C.C. 891. However, it should be noted that if proceedings are commenced in the wrong court they are not invalid, and they may be retained in that court: see s.6(3B) of the Act.

#### 5. Headings

**5.1** Every claim form by which an application under the Act is begun and all affidavits, notices and other documents in the proceedings must be entitled in the matter of the company or companies in question and in the matter of the Act. In the case of any disqualification application under section 7 or 9A of the Act it is not necessary to mention in the heading any company other than that referred to in section 6(1)(a) or 9A(2) of the Act (as the case may be).

#### 6. The claim form

**6.1** CPR rule 8.2 does not apply. The claim form must state:

- (1) that CPR Part 8 (as modified by this practice direction) applies, and (if the application is made under sections 7, 8 or 9A of the Act) that the disqualification application is made in accordance with the Disqualification Rules;<sup>1</sup>
- (2) that the claimant seeks a disqualification order, and the section of the Act pursuant to which the disqualification application is made;
- (3) the period for which, in accordance with the Act, the court has power to impose a disqualification period.

The periods are as follows—

- (a) where the application is under section 2 of the Act, for a period of up to 15 years;
- (b) where the application is under section 3 of the Act, for a period of up to 5 years;
- (c) where the application is under section 4 of the Act, for a period of up to 15 years;

<sup>1</sup> Rule 4(a) of the Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987.

Paragraph numbers marked with a "+" can be found online and on CD.

- (d) where the application is under section 7 of the Act, for a period of not less than 2, and up to 15, years;<sup>1</sup>
- (e) where the application is under section 8 or 9A of the Act, for a period of up to 15 years.<sup>2</sup>
- (4) in cases where the disqualification application is made under sections 7, 8 or 9A of the Act, that on the first hearing of the application, the court may hear and determine it summarily, without further or other notice to the defendant, and that, if the application is so determined, the court may impose a period of disqualification of up to 5 years but that if at the hearing of the application the court, on the evidence then before it, is minded to impose, in the case of any defendant, disqualification for any period longer than 5 years, it will not make a disqualification order on that occasion but will adjourn the application to be heard (with further evidence, if any) at a later date that will be notified to the defendant;<sup>3</sup>
- (5) that any evidence which the defendant wishes the court to take into consideration must be filed in court in accordance with the time limits set out in paragraph 9 below (which time limits shall be set out in the notes to the Claim Form).<sup>4</sup>

### 7. Service of the claim form

**7.1** Service of claim forms in disqualification proceedings will be the responsibility of the claimant and will not be undertaken by the court.

**7.2** The claim form shall be served by the claimant on the defendant. It may be served by sending it by first class post to his last known address; and the date of service shall, unless the contrary is shown, be deemed to be the 7th day following that on which the claim form was posted.<sup>5</sup> CPR r.6.7(1) shall be modified accordingly. Otherwise Sections I and II of CPR Part 6 apply.<sup>6</sup>

**7.3** Where any claim form or order of the court or other document is required under any disqualification proceedings to be served on any person who is not in England and Wales, the court may order service on him to be effected within such time and in such manner as it thinks fit, may require such proof of service as it thinks fit,<sup>7</sup> and may give such directions as to acknowledgment of service as it thinks fit. Section III of CPR Part 6 shall not apply.

<sup>1</sup> Rule 4(b)(i) of the Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987.

<sup>2</sup> Rule 4(b)(ii) of the Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987.

<sup>3</sup> Rule 4(c) and (d) of the Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987.

<sup>4</sup> Rule 4(e) of the Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987.

<sup>5</sup> Rule 5(1) of the Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987.

<sup>6</sup> Attention is drawn to CPR rule 6.14(2) regarding a certificate of service of the claim form.

<sup>7</sup> Rule 5(2) of the Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987.

Paragraph numbers marked with a "+" can be found online and on CD.

**7.4** The claim form served on the defendant shall be accompanied by an acknowledgement of service.

#### Service to be by the claimant

One of the more substantial changes effected by the CPR to High Court practice was the provision (since October 1, 2008 to be found in CPR r.6.4) that service by the court is the general rule. Rule 7.1 of the Disqualification Rules preserves the pre-1999 High Court practice for disqualification proceedings. There is a great deal of sense in this approach, in particular because of the very tight limitation period of two years following insolvency which applies in relation to applications under s.6 of the Act. Investigations into the conduct of directors can be very time-consuming, and many applications are only issued towards the end of the two year period. It is clearly appropriate that the burden of complying with the time limits should in such circumstances be the particular responsibility of the claimants, and not the court.

Service should always comprise service of the claim form, the evidence in support, and the acknowledgment of service.

NB—the reference in the footnote to r.6.14(2) is now obsolete. The provisions as to certificates of service are now found in CPR r.6.17. The reference in para.7.2 to CPR r.6.7(1) (deemed service) is also obsolete. The current deemed service provisions are found in CPR r.6.14.

#### Service to be at last known address

It should be noted that the wording of para.7.2 is more flexible than r.5(1) of the Disqualification Rules (which states that "The claim form shall be served on the defendant by sending it by first class post to his last known address"). In the light of *Cranfield v Bridgegrove Ltd* [2003] EWCA Civ 656; [2003] 1 W.L.R. 2441 (inter alia dealing with the former CPR, r.6.5(6)), service at the last known address is good service, even when the claimant knows or believes the defendant no longer resides there.

#### Deemed service

The phrase "unless the contrary is shown" contained in para.7.2 (and r.5(1) of the Disqualification Rules) means that deemed service in this context was significantly different to the deemed service provision found until October 1, 2008 in CPR r.6.7(1) (where the phrase was absent). The position on deemed service in general civil litigation reached as a result of *Anderton v Clwyd CC (No.2)* [2002] EWCA Civ 933; [2002] 1 W.L.R. 3174 therefore did not apply. The general CPR provisions as to service were substantially recast with effect from October 1, 2008.

#### Service out of the jurisdiction

As indicated above (see 3J-3, Application of the CPR), service out of the jurisdiction is governed by the discretion given to the court under r.5(2) of the Disqualification Rules (repeated as para.7.3 of the Practice Direction), rather than the provisions now found in CPR, Pt 6. It should be noted that when the Disqualification Rules were brought into effect, in this respect they reflected the approach in r.12.12 of the Insolvency Rules 1986. Rule 12.12 has now been revoked and replaced with r.12A.20, which states that "CPR Part 6 applies to the service of court documents outside the jurisdiction with such modifications as the court may direct". The position on service out of the jurisdiction in disqualification proceedings is therefore now out of step with insolvency proceedings generally.

### 8. Acknowledgment of service

**8.1** The form of acknowledgment of service is annexed to this practice direction. CPR rules 8.3(2) and 8.3(3)(a) do not apply to disqualification applications.

**8.2** In cases brought under section 7, 8 or 9A of the Act, the form

Paragraph numbers marked with a "+" can be found online and on CD.

## 7A-8.3

**Editorial note**

Section 58AA of the Courts and Legal Services Act 1990 introduces requirements in respect of contingency fee agreements, known as "Damages Based Agreements Relating to Employment Matters" which bear a marked similarity to the regulations governing conditional fee agreements in 2000, which were revoked in 2005. A damages based agreement which relates to an employment matter, and satisfies the conditions set out in the Act, is not unenforceable by reason only of its being a damages based agreement; but one which does not satisfy those conditions is unenforceable ( Courts and Legal Services Act 1990 ss.58AA(1), (2) and (3).

Under the 1990 Act the agreement:

- (a) must be in writing;
- (b) must not provide for a payment above a prescribed amount, or for a payment above an amount calculated in a prescribed manner;
- (c) must comply with such other requirements as to its terms and conditions as are prescribed; and
- (d) must be made only after the person providing services under the agreement has provided prescribed information ( Courts and Legal Services Act 1990 s.58AA(4)).

The Act does not apply to an agreement entered into before the coming into force of the Regulations. The Damages Based Agreements Regulations 2010 (SI 2010/1206) came into force on April 6, 2010. The Regulations set out the requirements prescribed for the purposes of s.58AA of the 1990 Act. The requirements are that the terms and conditions of a damages based agreement must specify:

- (a) the claim or proceedings or parts of them to which the agreement relates;
- (b) the circumstances in which the representative's payment, expenses and costs or part of them are payable; and
- (c) the reason for setting the amount of the payment at the level agreed including having regard to, where appropriate, whether the claim or proceedings is one of several similar claims or proceedings ( Damages Based Agreements Regulations 2010 reg.2).

The information which has to be given before an agreement is made must be provided to the client in writing about the matters set out below, and such further explanation, advice or other information about any of those matters as the client may request. Those matters are:

- (a) the circumstances in which the client may seek a review of the costs and expenses of the representative and the procedure for doing so;
- (b) the dispute resolution service provided by the Advisory Conciliation and Arbitration Service (ACAS) in regard to actual and potential claims;
- (c) whether other methods of pursuing the claim or financing the proceedings, including:
  - (i) advice under the Community Legal Service;
  - (ii) legal expenses insurance;
  - (iii) pro bono representation; or
  - (iv) trade union representation
 are available, and if so how they apply to the client and the claim or proceedings in question;
- (d) the point at which expenses become payable; and
- (e) a reasonable estimate of the amount that is likely to be spent upon expenses, inclusive of VAT ( Damages Based Agreements Regulations 2010 reg.3).

Any amendment to a damages based agreement to cover additional causes of action must be in writing and signed by the client and the representative. The prescribed amount of payment is the amount which, including VAT, is equal to 35 per cent of the sum ultimately recovered by the client in the claim or proceedings ( Damages Based Agreements Regulations 2010 reg.5).

The additional requirements prescribed under the Act are that the terms and conditions of a damages based agreement must be in accordance with the following:

- (a) if the agreement is terminated the representative may not charge the client more than the representative's costs and expenses for the work undertaken in respect of the client's claim or proceedings. "Costs" means the total of the

*Paragraph numbers marked with a "+" can be found online and on CD.*

representative's time reasonably spent in respect of the claim or proceedings, multiplied by the reasonable hourly rate of remuneration of the representative. "Expenses" means disbursements incurred by the representative, including counsel's fees and the expense of obtaining an expert's report.

the client may not terminate the agreement:

- (i) after settlement has been agreed; or
- (ii) within seven days before the start of the tribunal hearing;

the representative may not terminate the agreement and charge costs, unless the client has behaved or is behaving unreasonably (Damages Based Agreements Regulations 2010 regs 4, 5 and 6).

**Litigation funding agreements**

(1) A litigation funding agreement which satisfies all of the conditions applicable to it by virtue of this section shall not be unenforceable by reason only of its being a litigation funding agreement. **7A-9**

(2) For the purposes of this section a litigation funding agreement is an agreement under which—

- (a) a person ("the funder") agrees to fund (in whole or in part) the provision of advocacy or litigation services (by someone other than the funder) to another person ("the litigant"); and
- (b) the litigant agrees to pay a sum to the funder in specified circumstances.

(3) The following conditions are applicable to a litigation funding agreement—

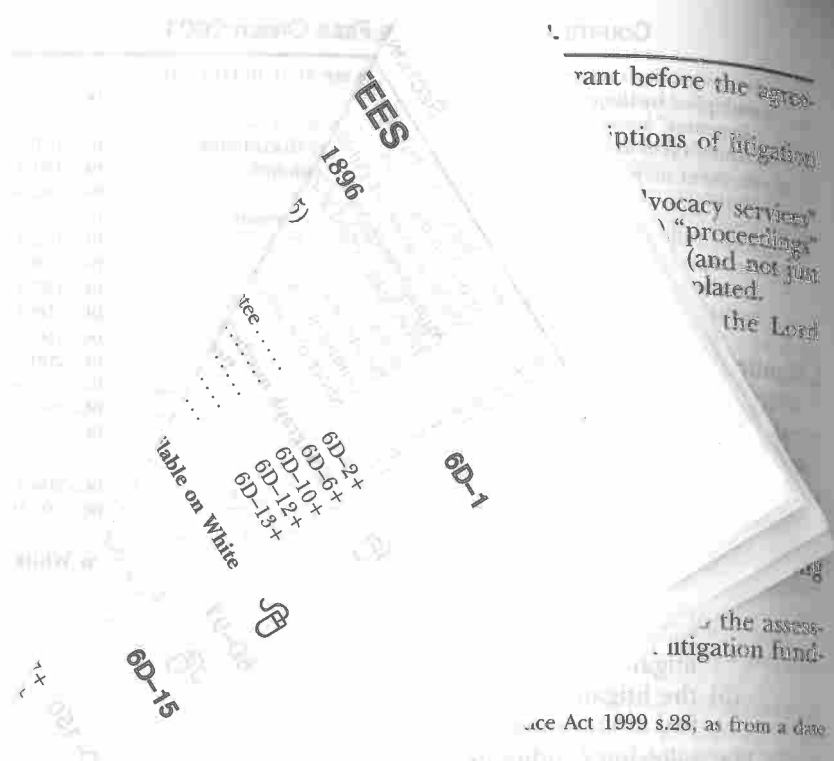
- (a) the funder must be a person, or person of a description, prescribed by the Lord Chancellor;
- (b) the agreement must be in writing;
- (c) the agreement must not relate to proceedings which by virtue of section 58A(1) and (2) cannot be the subject of an enforceable conditional fee agreement or to proceedings of any such description as may be prescribed by the Lord Chancellor;
- (d) the agreement must comply with such requirements (if any) as may be so prescribed;
- (e) the sum to be paid by the litigant must consist of any costs payable to him in respect of the proceedings to which the agreement relates together with an amount calculated by reference to the funder's anticipated expenditure in funding the provision of the services; and
- (f) that amount must not exceed such percentage of that anticipated expenditure as may be prescribed by the Lord Chancellor in relation to proceedings of the description to which the agreement relates.

(4) Regulations under subsection (3)(a) may require a person to be approved by the Lord Chancellor or by a prescribed person.

(5) The requirements which the Lord Chancellor may prescribe under subsection (3)(d)—

- (a) include requirements for the funder to have provided

*Paragraph numbers marked with a "+" can be found online and on CD.*



vant before the agree  
ptions of litigation  
vocacy services  
"proceedings"  
(and not just  
olated.  
the Lord

the assess-  
ntigation fund-  
ce Act 1999 s.28, as from a date

**Access to Justice Act 1999**

(1999 c.22)

ARRANGEMENT OF SECTIONS

PART II

OTHER FUNDING OF LEGAL SERVICES

Costs

SECT.		
29.	Recovery of insurance premiums by way of costs.....	7A-12
30.	Recovery where body undertakes to meet costs liabilities.....	7A-14

PART II

OTHER FUNDING OF LEGAL SERVICES

COSTS

**Recovery of insurance premiums by way of costs**

7A-12

29. Where in any proceedings a costs order is made in favour of any party who has taken out an insurance policy against the risk of incurring a liability in those proceedings, the costs payable to him may, subject in the case of court proceedings to rules of court, include costs in respect of the premium of the policy.

Paragraph numbers marked with a "+" can be found online and on CD.

Note — For commentary on the recovery of insurance premiums as costs, see Vol.1, para. 44.3A.3.

7A-13

**Recovery where body undertakes to meet costs liabilities**

7A-14

30.—(1) This section applies where a body of a prescribed description undertakes to meet (in accordance with arrangements satisfying prescribed conditions) liabilities which members of the body or other persons who are parties to proceedings may incur to pay the costs of other parties to the proceedings.

(2) If in any of the proceedings a costs order is made in favour of any of the members or other persons, the costs payable to him may, subject to subsection (3) and (in the case of court proceedings) to rules of court, include an additional amount in respect of any provision made by or on behalf of the body in connection with the proceedings against the risk of having to meet such liabilities.

(3) But the additional amount shall not exceed a sum determined in a prescribed manner; and there may, in particular, be prescribed as a manner of determination one which takes into account the likely cost to the member or other person of the premium of an insurance policy against the risk of incurring a liability to pay the costs of other parties to the proceedings.

(4) In this section "prescribed" means prescribed by regulations made by the Lord Chancellor by statutory instrument; and a statutory instrument containing such regulations shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(5) Regulations under subsection (1) may, in particular, prescribe a description of body one which is for the time being approved by the Lord Chancellor by a prescribed person.

Note — Amended by SI 2005/3429.

7A-15

**The Courts and Legal Services Act 1990 s.58 and the Access to Justice Act 1999 s.27**

7A-16

Prior to the enactment of the Courts and Legal Services Act 1990 the historical position had been that conditional fee agreements were not lawful. A solicitor acting for a client in litigation was not entitled to agree with the client to accept a financial reward which varied according to the success of the case. See the Court of Appeal's judgment in *Thai Trading (A firm) v Taylor* [1998] Q.B. 781 for a summary of the early development of the law relating to Champerty and Maintenance. Following a policy review in 1985 and consultation, the original form of s.58 of the Courts and Legal Services Act 1990 was enacted, with Regulations following in 1995 to permit CFAs to be used in a fairly circumscribed range of six types of case. New regulations in 1998 extended the range of cases in which a CFA could be used but 'no win no fee' funding as it became known had to await developments in case law and statute before becoming commonplace. In early 1998 the Court of Appeal gave judgment in *Thai Trading (A firm) v Taylor* [1998] Q.B. 781, holding that an agreement between solicitor and client that the solicitor would charge no fee in the event of failure and only his normal fee in the event of success was no longer contrary to public policy and was not an unlawful agreement despite involving conduct by the solicitor which had been in breach of rule 8 of the then Solicitor's Practice Rules (which forbade conditional fee agreements). *Thai Trading* was initially not followed at Divisional Court level (*Hughes v Kingston upon Hull City Council* [1999] Q.B. 1193), on the basis that a dictum in the House of Lords case of *Swain v The Law Society* [1983] 1 AC 598, that the Solicitors' Practice rules "had the force of a statute" was incompatible with the *Thai Trading* decision and that *Swain* had not been considered in *Thai Trading*. Rule 8 of the Solicitor's Practice rules was then swiftly amended to permit CFA agreements to be entered into provided they were lawful either at common law or under statute.

Paragraph numbers marked with a "+" can be found online and on CD.

In 1999 reform to the whole subject of litigation funding was considered by the Access to Justice Act 1999 above, which wholly replaced s.58 of the Courts and Legal Services Act 1990 and introduced s.58A. By these sections CFA agreements, provided they complied with the Act and any relevant regulations, are no longer unenforceable but any other forms of CFA are rendered unenforceable, a fact confirmed by the Court of Appeal in *Awad v Geraghty & Co* [2001] Q.B. 570 to the effect that there was no longer scope for development of the Common Law in the area of CFA agreements.

#### The Solicitors' Costs Information and Client Care Code 1999

**7A-17** The Law Society published the Solicitors' Costs Information and Client Care Code in 1999 with the effect that solicitors were professionally obliged to provide to clients a wide range of information about charging and about funding options available to them, orally and in writing. The Code was amended in June 2006 in the light of the revocation in November 2005 of the Conditional Fees Regulations of 2000 and 2003. See now the SRA Code of Conduct 2011, Chapter 1.

#### The developing role of professional rules and guidance as to conditional fee agreements

**7A-18** The history of the courts' approach to the consequences of breach of Law Society practice rules in relation to CFA's might give encouragement to litigators seeking to raise challenges to the new-form CFA agreements if there are departures from the Code. If the strict letter of the Code supplied by the Law Society is not followed it may be that a challenge could be founded upon that breach on the basis that the guidance is made pursuant to Law Society rules. It will be recalled that in *Thai Trading (A Firm) v Taylor* [1998] Q.B. 781, the Court of Appeal had regarded a breach of r.15 of the Solicitor's practice rules as not affecting the enforceability or lawfulness of a fee agreement, but that the Divisional Court in *Hughes v Kingston upon Hull City Council* [1999] Q.B. 1193, in refusing to follow *Thai Trading*, relied upon a dictum in *Swain v The Law Society* [1983] 1 AC 598 that the Law Society's rules 'had the force of a statute ... just as much as if the rules, ... were set out in a Schedule to the Act' (per Lord Brightman in *Swain* at page 621G, cited in *Hughes*).

It appears however that more recent re-interpretation of *Swain* given by the Court of Appeal in *Garbutt v Edwards* [2005] EWCA Civ 1206 treats the Solicitors' Practice Rules (in that instance r.15) as a species of subordinate legislation the breach of which does not of itself necessarily render a funding contract unlawful and similarly decides that a breach of the Solicitors' Costs Information and Client Care Code does not necessarily have that consequence either. It is suggested that that is the correct approach, not least on the basis that to adopt too literal a reading of Lord Brightman's dictum in *Swain* quoted above might imply that the Law Society is empowered to create primary legislation. In a sense the *Thai Trading* public policy approach towards breaches of the Solicitors Practice rules has been revived, Per Arden L.J. at para.31 in *Garbutt v Edwards*:

"Estimates are required only by the Code (as defined above). The Code is made pursuant to Rule 15 of the Solicitors' Practice Rules. These Rules are made by the Council of the Law Society pursuant to section 31 of the 1974 Act (set out above). In making these Rules, the Council of the Law Society is acting in the public interest, and the Rules have the force of subordinate legislation. *Swain v Law Society* [1983] A.C. 598. The inference I would draw is that the Code is there to protect the legitimate interests of the client, and the administration of justice, rather than to relieve paying parties of their obligations to pay costs which have been reasonably incurred."

#### The 2000 and 2003 Regulations

**7A-19** The protections provided in the Solicitors' Costs Information and Client Care Code 1999 were joined by a series of arguably precipitate regulations in circumstances which were described at paras 25-30 of the Court of Appeal's judgment in the subsequent case of *Hollins v Russell* [2003] EWCA Civ 718. The Conditional Fee Agreements Regulations 2000 (SI 2000/692), the Collective Conditional Fee Agreements Regulations 2000 (SI 2000/2988), Conditional Fee Agreements (Miscellaneous Amendments) Regulations 2003 (SI 2003/1240), and the Conditional Fee Agreements (Miscellaneous

Paragraph numbers marked with a "+" can be found online and on CD.

Amendments) (No.2) Regulations 2003 (SI 2003/3344), were highly prescriptive and intended to provide a technical battleground for challenges to CFA agreements by paying parties in the course of detailed assessment. The case history of technical challenges is lengthy: for a cross-section of challenges concerning the adherence to regulations see *Hollins v Russell* [2003] EWCA 718; *Sarwar v Alam* [2002] 1 W.L.R. 125; *Bowen v Bridgend BC* [2004] EWHC 9010 (Costs); *Richards v Davis*, November 25, 2005, [2005] 1 W.L.R. 105; *Hughes v Newham LBC* (2005) 102(34) L.S.G. 30; *Samonini v London General Transport Services Ltd* [2005] P.I.Q.R. P20; *Woods v Chaleff* [1999] C.L.Y. 500, and the numerous test and first instance cases which can be accessed through the Senior Costs Office website at <http://www.justice.gov.uk/guidance/courts-and-tribunals/courts-senior-costs-office/transcripts.htm> [accessed November 21, 2011].

The Court of Appeal, considering the words "or otherwise" in reg.3A(1) of the Conditional Fee Agreements (Miscellaneous Amendments) Regulations 2003, was not persuaded that those words were never intended to include insurance. When considering the actual terms of the CFA Waller L.J. expressed the view that he could see no reason why the court should not look at the whole package produced by the solicitor: the CFA, the Rule 15 letter explaining to the client the effect of the agreement and the insurance policy recommended by the solicitor. In that way it could be ascertained whether, as between client and solicitor, the proper understanding was that the client would not be liable for any own side's costs whatever the result of the proceedings, save to the extent that they could be recovered from the other side or under the insurance policy. As to whether the particular CFA was a "CFA lite" depended on the construction of the arrangement made between the solicitor and the client, including such arrangement as may have been made by the Rule 15 letter and by insurance. On the facts, the court found that the agreement was a CFA lite. The court also considered the extent to which the solicitors had an interest in recommending the particular policy. Had the court not found the agreement to be a CFA lite it would have held that there had been non-compliance with reg.4(2)(e) by the solicitors' failure to disclose their interest and the CFA would have been unenforceable. The solicitors were on the claims management company's panel and were required by the operations manual to use the company's precedents, i.e. the Rule 15 letter and CFA which included the recommendation of the company's own policy (*Jones v Wrexham BC* [2007] EWCA Civ 1356).

#### Revocation of the 2000 and 2003 Regulations

In 2003 and 2004 the Government conducted consultation on the subject of the simplification of the regulatory legislation governing CFAs in the light of the state of affairs described above. The conclusion was that the CFA regulations were not necessary or effective and to a large extent duplicated existing professional regulation and should be revoked so that the primary legislation in the form of s.27 of the Access to Justice Act 1999 would provide the basic legislative framework for the use of CFAs. The primary responsibility for client care, contractual and guidance aspects would be via the Law Society's Professional Rules and supporting guidance. The Conditional Fee Agreements (Revocation) Regulations 2005 (SI 2005/2305), reproduced in this section were the result, together with the Solicitors' Practice (Client Care) Amendment Rule [2005] and the Law Society's model CFA and guidance text for clients (see paras 7A-76 and 7A-77 for the model CFA and guidance). The entire new regime—effectively revoking the whole of the body of regulations governing the form and content of CFA agreements—came into force on November 1, 2005 and has been observed judicially as being intended by Parliament to prevent further technical challenges. See the judgment of the Senior Costs Judge in *Richards v Davis* 25/11/2005 SCCO case No.PTH0504722 at para.91:

"...in revoking the CFA regulations Parliament's desire is clearly to prevent further technical challenges. Such challenges take up a disproportionate amount of court time and prevent the proper development of the CFA and ATE market. The client's protection has not simply been abandoned, but the regulation of the funding regime has been taken on by the professional bodies, in particular, by the Law Society which has passed the Solicitors' Practice (Amendment) Rule 2005."

Note that by reg.3 the 2000 and 2003 regulations continue to have effect in respect of agreements entered into before November 1, 2005, though there is presumably no

Paragraph numbers marked with a "+" can be found online and on CD.