

English Civil Procedure: A Synopsis

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Topics

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Select Bibliography

Rules

Outline of the Civil Procedure Rules (1998) ('CPR'): the CPR is accessible at the following site:

http://www.dca.gov.uk/civil/procrules_fin/menus/rules.htm

Architect's Drawings of the CPR (1998)

Lord Woolf:

Access to Justice: Interim Report (Stationery Office, London, June 1995);

Access to Justice: Final Report (Stationery Office, London, July 1996)

Detailed Bibliography:

(1) *Commentaries*

Blackstone's Civil Practice

* M.A., B.C.L., Barrister, Fellow of Clare College, Cambridge, Bencher of Middle Temple

Civil Procedure (the White Book) (regular new editions)

Civil Court Practice (the Green Book) (regular new editions)

The Admiralty and Commercial Courts Guide (2006)

(2) *General Books*

Neil Andrews, *English Civil Procedure* Oxford UP, 2003 [hereafter 'Andrews, ECP']

Neil Andrews, *The Modern Civil Process* (Mohr Siebeck, Tübingen, Germany, 2008); Neil Andrews, *English Civil Justice and Remedies* (Shinzan Sha, Tokyo, 2008)

Sir Jack Jacob *The Fabric of English Civil Justice* (1987) (a classic distillation of the pre-CPR (1998) system, its traditions and values, presented as the Hamlyn Lectures for 1986)

JA Jolowicz *On Civil Procedure* (Cambridge, 2000) (including comparative themes)

A A S Zuckerman and Ross Cranston (eds) *The Reform of Civil Procedure* (Oxford U Press, 1995)

A A S Zuckerman (ed) *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure* (Oxford U Press, 1999); *Zuckerman on Civil Procedure* (2006)

Note on Abbreviations

CCR (County Court Rules; sch 2 to the Civil Procedure Rules accommodates the survivors; again the intention is that they should be phased out);

CPR (Civil Procedure Rules, effective from 26 April, 1999, enacted SI 1998/3132, but with many later amendments);

ECP (Neil Andrews, *English Civil Procedure* (Oxford UP, 2003)

PD eg PD (3) 4.1 (Practice Directions appended to the Civil Procedure Rules; the relevant 'Part' of those rules is given in round brackets and the relevant paragraph is then indicated);

RSC (Rules of the Supreme Court; some of these survive in sch 1 to the Civil Procedure Rules, but the intention is to phase them out).

“The Overriding Objective” is defined in CPR (1998) 1.1, as follows:

- “(1) These Rules are a new procedural code with the overriding objective of dealing with cases justly.
- (2) Dealing with cases justly includes, so far as is practicable—
 - (a) ensuring that the parties are on an equal footing;
 - (b) saving expense;
 - (c) dealing with the case in ways which are proportionate-

- (i) to the amount of money involved;
- (ii) to the importance of the case;
- (iii) to the complexity of the issues;
- (iv) to the financial position of each party;
- (d) ensuring that it is dealt with expeditiously and fairly;
- (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

CPR (1998) 1.2 provides:

"The court must seek to give effect to the overriding objective when it (a) exercises any power given to it by the Rules; or (b) interprets any rule."

CPR (1998) 1.3 states:

"The parties are required to help the court to further the overriding objective."

The reference to "parties" will be taken to include their lawyers.

Section 42 of the Access to Justice Act 1999 provides:

"Every person who exercises before a court a right of audience . . . has

- (a) a duty to the court to act with independence in the interests of justice; and
- (b) [a duty to comply with its professional body's rules];

and those duties shall override any obligation which that person may have (otherwise than under the criminal law) if it is inconsistent with them."

1. Sources of Civil Procedure

[detailed account: Andrews, ECP paras 1.01 to 1.38]

The sources are: (1) primary legislation, (2) statutory instruments (notably the Civil Procedure Rules¹⁾), (3) practice directions (or "practice statements" or "practice notes") (4) pre-action protocols (5) precedent decisions, (6) practice (7) official guides to practice, (8) the High Court's inherent jurisdiction, (9) juristic writing.²⁾

Statutes

Some procedural rules are founded upon primary legislation. Examples are:

- (a) the Divisions of the High Court;³⁾

1) SI 1998/3132, with subsequent amendments.

2) Jacob, *The Fabric of English Civil Justice* (1987) 50 ff.

3) ss 5, 6, 61 and sch 1, Supreme Court Act 1981.

- (b) the power to issue injunctions;⁴⁾
- (c) the rule that proceedings must normally take place in public;⁵⁾
- (d) the rules of limitation of actions.⁶⁾

Secondary Legislation and Civil Procedure Rules

This is by far the largest source of procedural rules. Until April 1999 there were two sets of rules, the RSC dealing with matters in the High Court and Court of Appeal and the CCR for county court litigation.⁷⁾ But since April 26, 1999 there is an unified set of rules for both the High Court and the county courts, as well as the Court of Appeal.⁸⁾

These rules have been drafted by the Rule Committee, which replaced the former separate rules committees responsible for RSC and CCR.⁹⁾

Practice Directions

The Heads of Divisions of the High Court have an inherent power to issue practice directions governing matters of procedure. This power is now recognised and, to an extent, regulated by legislation.¹⁰⁾

Pre-action Protocols

These are codified statements of “best practice” in dealing with potential claims and they enjoy an official imprimatur. The three aims are: “to encourage the exchange of early and full information about the prospective legal claim; to enable the parties to avoid litigation by agreeing a settlement of the claim before the commencement of proceedings; to support the efficient management of proceedings where litigation cannot be avoided.”¹¹⁾

Judicial Decisions

This source of procedural law concerns the case law of the High Court and higher appellate courts, especially when it is authoritatively reported.¹²⁾ Judges in these courts will continue to apply the rules authoritatively and to develop new principles or doctrines. The creativity of these courts must be admired.¹³⁾

4) *ibid*, s 37(1).

5) *Ibid*, s 67.

6) Limitation Act 1980, primarily; the equitable doctrine of laches sometimes applies instead.

7) On the history of the RSC, M Dockray (1997) 113 LQR 120, 123-124, notably nn 32-33.

8) CPR 2.1 defines the scope of the new rules.

9) ss 2-4 Civil Procedure Act 1997, the full title of the committee is the Civil Procedure Rule Committee.

10) s 5 Civil Procedure Act 1997.

11) PD Protocols, 1.4; even where no specific protocol applies, the court expects the parties to engage in co-operative pre-action disclosure, *Ford v GKR Construction Ltd* [2000] 1 All ER 802, 810, CA *per* Lord Woolf MR.

12) Jacob, *The Fabric of English Justice* (1987), 57 ff.

13) For an appreciation of eight fundamental judicial innovations in civil procedure, N H Andrews “Development in English Civil Procedure” (1997) ZZPInt 2, at pp 7 ff.

Many decisions in the field of civil procedure since the introduction of the CPR (1998) have provided guidance or commentary upon the rules.¹⁴⁾

European Case Law

European Court of Justice (Luxembourg), especially concerning the Brussels Jurisdiction Regulation

European Court of Justice (Strasbourg), especially concerning Article 6(1) of the European Convention on Human Rights states:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.¹⁵⁾

Article 6(1) creates five guarantees:

- (a) access to justice [not mentioned in the text of Article 6(1) but implied by the European Court of Human Rights¹⁶⁾
- (b) “a fair hearing” [which includes:¹⁷⁾
 - the right to be present at an adversarial hearing;
 - the right to equality of arms;
 - the right to fair presentation of the evidence;
 - the right to cross examine;
 - the right to a reasoned judgment.]
- (c) “a public hearing”; this includes public pronouncement of judgment;
- (d) “a hearing within a reasonable time;” and

14) Case law illuminating the new process includes:

GKR Karate (UK) Ltd v Yorkshire Post Newspapers Ltd [2000] 1 WLR 2571, 2576-7, CA, (court taking preliminary);

Biguzzi v Rank Leisure Plc [1999] 1 WLR 1926, CA (range of court’s disciplinary powers);

Securum Finance Ltd v Ashton [2001] Ch 291, CA (delay; court’s power to terminate litigation);

Daniels v Walker [2000] 1 WLR 1382 CA (discussion of ‘single joint’ experts).

15) See Sch 1 to the Human Rights Act 1998.

16) *Golder v UK* (1975) 1 EHRR 524, ECtHR, para 35.

17) R Clayton and H Tomlinson, *The Law of Human Rights* (Oxford, 2000), para 11.201.

(e) “a hearing before an independent and impartial tribunal established by law.”

Practice

This concerns the unwritten customary aspects of practice which have been perhaps adopted and applied by the courts.

In a decision given on April 1, 1998, Scott V-C in the Court of Appeal emphasised the pliability of this source:

“... matters of practice are not to be regarded as carved in stone but must be adjusted as changing requirements of litigation indicate the need for adjustment... Matters of practice are always being adjusted to take account of changing requirements of litigation.”¹⁸⁾

Official Guides to Practice

See: The Chancery Guide, Admiralty and Commercial Court Guide, and the Queen’s Bench Division Guide.

The Superior Courts’ Inherent Jurisdiction

The High Court, Court of Appeal and House of Lords each enjoys a power to supplement the written rules by developing procedure under the rubric of “the court’s inherent jurisdiction”.¹⁹⁾ The courts can exercise this power to supplement legislation.²⁰⁾ An example is:

R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 2) [1999] 2 WLR 272, 281, 288-289, HL (lack of judicial impartiality; House of Lords’ (unprecedented) power to review own defective decision).

Learned Treatises and Comment

Finally, another source of civil procedure is juristic writing. Specialised learned works enjoy ‘persuasive’ authority.²¹⁾

18) *per* Scott V-C, *Stabilad Ltd v Stephens & Carter Ltd* [1999] 1 WLR 1201, 1206, CA.

19) Jacob, *The Reform of Civil Procedural Law* (1982), 221 ff; M Dockray “The Inherent Jurisdiction to Regulate Civil Proceedings” (1997) 113 LQR 120; (for his earlier criticism of this phenomenon’s amorphous nature, (1991) 107 LQR 376, 377-8); J A Jolowicz, “Practice Directions and the Civil Procedure Rules” [2000] CLJ 53 at n 1 cites Commonwealth discussion of inherent jurisdiction.

20) *Bremer v South Indian Shipping Co Ltd* [1981] AC 909, 917, HL, *per* Lord Diplock.

21) *eg* *Cross and Tapper on Evidence* (9th edn, 1999); the various writings of Sir Lawrence Collins, QC, LL D (*per* Bingham LJ *Re Harrods (Buenos Aires) Ltd* [1992] Ch 72 at 103, CA, a “very considerable authority”), notably *Dicey & Morris on the Conflict of Laws*; *Hollander Documentary Evidence*; *Spencer Bower, Turner and Handley, Res Judicata*, (3rd edn, 1996); *Arlidge, Eady and Smith on Contempt* (3rd edn, 2005) (“the leading textbook on contempt”, *per* Jacob *J Adam Phones Ltd*

Professional Bodies' Rules

These are the ethical rules of the Bar and the Law Society. These are not regarded by the courts as canonical, although they are sometimes considered in judicial decisions.²²⁾

2. Introduction to the Civil Procedure Rules 1998 ("CPR (1998)")

[detailed account: Andrews ECP ch 2]

Lord Woolf's two reports in 1995 and 1996 provided the blue-print for the Civil Procedure Rules ("CPR (1998)") which took effect on April 26, 1999.²³⁾

Lord Woolf proposed a new set of rules which would have five aims: (1) to speed up civil justice, (2) to render civil procedure more accessible to ordinary people, (3) to simplify the language of civil procedure, (4) to promote swift settlement, (5) to make litigation more efficient and less costly by avoiding excessive and disproportionate resort to procedural devices.

Lord Woolf's child, the CPR (1998), is a new procedural code.²⁴⁾ It took effect on April 26, 1999.

Case Management under the CPR: Farewell to the Adversarial Tradition²⁵⁾

Until the enactment of the CPR, English procedure was premised on the so-called adversarial principle, or the principle of party control. The parties and their lawyers controlled the following:

commencement and constitution of the action, especially the drawing up of "pleadings"²⁶⁾; selection of material facts; the legal framework within which the cause of action is to be considered (for example, the framing of a cause of action in contract

v *Goldschmidt* [1999] 4 All ER 486, 494).

22) eg *Browne-Wilkinson V-C English and American Insurance Co v Herbert Smith* [1988] FSR 232.

23) Lord Woolf, *Access to Justice, Interim Report* (1995) (hereafter "*Woolf Interim*"), and *Access to Justice, Final Report* (1996).

Among the responses to these reports were:

S Flanders "Case Management: Failure in America? Success in England and Wales?" (1998) 17 CQJ 308;

M Zander, "The Government's Plans on Civil Justice" (1998) 61 MLR 383-389 and "The Woolf Report: Forwards or Backwards for the New Lord Chancellor?" (1997) 16 CQJ 208;

AAS Zuckerman and R Cranston (eds), *Reform of Civil Procedure: Essays on "Access to Justice"* (Oxford, 1995) (essays by various authors);

AAS Zuckerman, "The Woolf Report on Access to Justice", ZZPInt 2 (1997), 31 ff.

24) So described in CPR 1.1(1).

25) On the new system from the perspective of the traditional adversarial principle, Neil Andrews, "A New Civil Procedural Code for England: Party-Control 'Going, Going, Gone'" (2000) 19 *Civil Justice Quarterly* 19-38.

26) Now "statement of case": see CPR 2.3 (definition).

or tort, or both) as well as the selection of remedies;

pre-trial progress of the litigation; including the decision to apply for conservatory, interim or summary relief;

settlement or withdrawal of the action;²⁷⁾

production and reception of evidence at trial or in other hearings;²⁸⁾ and submissions of law at the same.

Under the CPR, civil cases are divided into “small claims” (under £5,000), middling cases (which go to the “fast-track”, for matters between £5,000 and £15,000), and the “multi-track” (for larger cases). For fast-track and some multi-track litigation, case management need only involve standard directions applicable wholesale to the great traffic of such cases.

The Range of the Court’s Managerial Powers

Further reading:

Andrews, *English Civil Procedure* (2003), 13.12-13.41; 14.04-14.45; 15.65-15.72;

Some of the details of case management can now be supplied.

The CPR (1998) contains two lists of managerial responsibilities which mostly overlap and reinforce each other, and which are not intended to be exhaustive statements of the court’s new active role.²⁹⁾ On both the fast-track and multi-track, the judge has the following managerial responsibilities (which the author has bundled under separate headings):

co-operation and settlement

encouraging co-operation between the parties;³⁰⁾

helping parties to settle all or part of the case;³¹⁾

encouraging ADR (alternative dispute resolution);³²⁾

if necessary, staying the action (ie, placing it “on pause”) to enable such extra-curial

27) CPR (1998) 21.10, adopting old procedure, requires court’s supervision of settlement or withdrawal affecting children and mental patients.

28) eg the court could not interfere with the party’s proposed sequence of presenting witnesses: *Briscoe v Briscoe* [1968] P 501, Div Ct, noted (1966) 82 LQR 154-5 (ALG); considered, *Barnes v BPC (Business Forms) Ltd* [1976] 1 All ER 237.

29) CPR 1.4(2) setting out a dozen forms of “active case management”; CPR 3.1(2) presenting 13 forms of “general management”. See also the general provisions relating to case management: CPR Parts 26 (general), 28 (fast-track), 29 (multi-track) and parallel PD (26), (28), (29).

30) CPR 1.4(2)(a).

31) CPR 1.4(2)(f). This settlement responsibility is a controversial but salutary power. Its absence was regretted in the past, eg on the facts in *Jones v Padavatton* [1969] 2 All ER 616, 624 B, CA (mother and daughter in dispute over length of “perpetual student”/daughter’s stay in mother’s second home).

32) CPR 1.4(2)(e).

negotiations or discussions to be pursued;³³⁾

determining relevance and priorities

helping to identify the issues in the case;³⁴⁾

deciding the order in which the issues are to be resolved;³⁵⁾

deciding which issues need a full trial and which can be dealt with summarily;³⁶⁾

making summary decisions

deciding whether to initiate a summary hearing (under CPR Part 24)³⁷⁾, or

whether the claim or defence can be struck out as having no prospect of success³⁸⁾, or

whether to dispose of a case on a preliminary issue;³⁹⁾

excluding issues from consideration;⁴⁰⁾

maintaining impetus

fixing time-tables and controlling in other ways the progress of the case;⁴¹⁾

giving directions which will bring the case to trial as quickly and efficiently as possible;⁴²⁾

regulating expenditure

deciding whether a proposed step in the action is cost-effective, taking into account the size of the claim and other considerations (“proportionality”).⁴³⁾

Time-Tabling

A fundamental change is that the parties can no longer relax mandatory procedural time rules or orders, notably the rules or directions governing the progress and timetabling of the action.⁴⁴⁾

Sanctions for Non-Compliance with Procedural Directions

The three main sanctions for breach of a procedural requirement are: costs orders⁴⁵⁾; stay

33) CPR 3.1(2)(f).

34) CPR 1.4(2)(a).

35) CPR 1.4(2)(d); 3.1(2)(j).

36) CPR 1.4(2)(c).

37) This facet of case management is highlighted at PD (26) paras 5.1, 5.2.

38) CPR 3.4(2).

39) CPR 3.1(2)(l).

40) CPR 3.1(2)(k).

41) CPR 1.4(2)(g).

42) CPR 1.4(2)(l).

43) CPR 1.4(2)(h) and 1.1(2)(c).

44) CPR 3.8(3); cf non-mandatory time provisions, CPR 2.11.

45) CPR 3.8(2).

of the proceedings⁴⁶⁾; striking out part or all of the claim or defence.⁴⁷⁾

Assessment of Case Management

Lord Woolf has suggested that the danger of inconsistent or heavy-handed case management should not be exaggerated:

“... judges have to be trusted to exercise the wide discretions which they have fairly and justly in all the circumstances... When judges seek to do that, it is important that the [Court of Appeal] should not interfere unless judges can be shown to have exercised their powers in some way which contravenes the relevant principles.”⁴⁸⁾

But Lord Bingham has cautioned against an over-zealous and neurotically time-conscious application of case management powers:

“... both the trial judge and Court of Appeal must be constantly alert to the paramount requirements of justice: justice to the plaintiff and justice to the defendant. To expedite the just despatch of cases is one thing; merely to expedite the despatch of cases is another. The right of both parties to a fair trial of the issues between them cannot be compromised.”⁴⁹⁾

Settlement and Alternative Dispute Resolution

The CPR emphasizes that two of the court’s overall responsibilities during “active case management” are “helping the parties to settle the whole or part of the case”⁵⁰⁾ and “encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure.”⁵¹⁾

The court has a power to stay an action of its own motion to encourage alternative dispute resolution or other settlement negotiations.⁵²⁾

Trial

The CPR requires the court to take charge of the conduct of trial. Thus the court may “control the evidence by giving directions as to the issues on which it requires evidence”, the nature of the evidence which it requires to decide those issues, and the way in which

46) CPR 3.1(2)(f).

47) CPR 3.4(2)(c).

48) *Biguzzi v Rank Leisure plc* [1999] 1 WLR 1926, 1934 F, CA, per Lord Woolf MR.

49) *Abbey National Mortgages plc v Key Surveyors Nationwide Ltd* [1996] 3 All ER 184, 186-187, CA, per Sir Thomas Bingham MR (as he then was).

50) CPR 1.4(2)(f).

51) *ibid*, (e).

52) CPR 26.4(1), (2); the precursor was *Practice Direction (Commercial Cases: Alternative Dispute Resolution) (No 2)* [1996] 1 WLR 1024.

evidence is to be placed before the court.⁵³⁾ It can also exclude admissible evidence and can limit cross-examination.⁵⁴⁾

Appeal

Nearly all civil appeals now require permission (formerly known as “leave”).⁵⁵⁾

A New Role for the Parties’ Lawyers

The rules emphasize that a litigation lawyer’s foremost duty is to respect the abstract interests of justice, rather than blindly to be propelled by the adversarial vectors of his various duties to the client.⁵⁶⁾

Furthermore, the CPR makes clear that, “The parties are required to help the court to further the overriding objective.”⁵⁷⁾ That objective requires, among other things, the quest for justice, equality, efficiency, proportionality and due speediness in the conduct of litigation.⁵⁸⁾

Aspects of Continuity

County Courts and High Court

The distinction between the county courts and the High Court is preserved.

The county courts will tend to receive claims for less than £50,000.⁵⁹⁾

Judges

There are no plans for a career judiciary, as on the model of, for example, France and Germany.

Further Changes

Rights of Audience

The Access to Justice Act 1999 (sections 36-41) extends the rights of audience enjoyed by solicitors so that they can appear as advocates in all civil cases at first instance and on appeal within England and Wales without submitting to a

53) CPR 32.1(1).

54) CPR 32.1(2), (3).

55) CPR 52.3(1); the exceptions are appeals against committal orders, refusals to grant habeas corpus and secure accommodation orders made under Children Act 1989 s 25; on the new appellate restrictions, *Tanfern Ltd v Cameron-MacDonald* [2000] 2 All ER 801, CA.

56) Access to Justice Act 1999, s 42, advocates owe “a duty to the court to act with independence in the interests of justice”, as well as a duty to comply with prescribed professional rules, and “[both sets of duties] shall override any obligation which the person may have . . . if it is inconsistent with them.”

57) CPR 1.3.

58) CPR 1.1(2).

59) PD (29) 2.2 to 2.7.

cumbrous system of vetting by the courts.

3. Summary Judgment

[detailed account: Andrews, ECP ch 20]

Nature

This procedure allows claimants or defendants to gain final judgment if they can show that their opponent's claim or defence lacks a "real prospect" of success. It is a swift and stream-lined procedure, enabling the applicant to avoid the delay, expense and inconvenience of taking the case to trial.

Test for Granting Summary Judgment

Summary judgment is available both to test the legal (including points of construction of documents) and evidential merits of a claim or defence.⁶⁰⁾

CPR 24.2 states:

"The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if (a) it considers that (i) that claimant has no real prospect of succeeding on the claim or issue; or (ii) that defendant has no real prospect of successfully defending the claim or issue and (b) there is no other reason why the case or issue should be disposed of at a trial."

Lord Woolf has said that the words "no real prospect" in the test just cited "speak for themselves".⁶¹⁾ It means that there must indeed be a "realistic" rather than a "fanciful" chance of success, whether as a claim or defence.

Simplicity of Procedure

CPR Part 24 hearings are normally conducted by Masters or district judges.⁶²⁾ But only a circuit or High Court judge can award an injunction or specific performance.⁶³⁾

Factual issues are considered on the basis of written evidence in the form of witness statements and statements of truth.⁶⁴⁾

The Court's Options at a Hearing

The court can give judgment for the applicant, whether this is the claimant or the

60) PD (24) 1.2, 1.3.

61) *Swain v Hillman* [2000] 1 All ER 91, 92, CA.

62) PD (24) 3.

63) PD (2) 2 (Allocation of Cases to Levels of Judiciary) (subject to minor exceptions at 2(3)).

64) CPR 24.5.

defendant.⁶⁵⁾ If only part of a claim or defence has been successfully attacked, the effect of the order will be to strike out that part.⁶⁶⁾

Conversely the court can dismiss outright the application for summary judgment.⁶⁷⁾

A further permutation is that the court can grant a conditional order (discussed immediately below) where “it appears to the court that a claim or defence may succeed but improbable that it will do so.”⁶⁸⁾

The Modern Attitude to “Improbable” Defences

In 1981, the House of Lords made clear that a more robust use of conditional leave is justified. This is because many defences are distinctly “shadowy”. It is unjust for a claimant to be fobbed off with flimsy defences, often made merely so that judgment can be delayed.⁶⁹⁾

4. Security for Costs

[detailed account: Andrews, ECP paras 37.01-37.50]

Basic Rules

Grant of security for costs is discretionary and so does not follow automatically in any case. Thus CPR 25.13(1) states: “The court may make an order for security for costs . . . if (a) it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order. . . .”

CPR 25.13(2) specifies these six grounds for the grant of security for costs:

- (1) the claimant is resident out of the jurisdiction but not resident in a Brussels or Lugano State [as defined in section 1(3) Civil Jurisdiction and Judgments Act 1982];
- (2) the claimant is a company or other body (whether incorporated inside or outside Great Britain) and there is reason to believe that it will be unable to pay the defendant’s costs if ordered to do so;
- (3) the claimant has changed his address since the claim was commenced with a view to evading the consequence of the litigation;

65) PD (24) 5.1(1)(2).

66) PD (24) 5.1(2).

67) PD (24) 5.1(3). In the case of applications by a plaintiff under the old “Order 14”, this result was known as granting the defendant unconditional leave to defend.

68) This seems consistent with the modern practice crystallised in *Yorke Motors Ltd v Edwards* [1982] 1 WLR 444, HL, (robust attitude to flimsy or shadowy defences; greater resort to conditional leave rather than giving the respondent the benefit of a *scintilla* of doubt).

69) *Yorke Motors Ltd v Edwards* [1982] 1 WLR 444, HL.

- (4) the claimant failed to give his address in the claim form, or gave an incorrect address in that form;
- (5) the claimant is acting as a nominal claimant, other than as a representative claimant under [CPR] Part 19, and there is reason to believe that he will be unable to pay the defendant's costs if ordered to do so;
- (6) the claimant has taken steps in relation to his assets that would make it difficult to enforce an order for costs against him.

Factors Relevant To The Exercise Of The Discretion To Order Security For Costs

The courts have enunciated relevant factors which the judge should consider when exercising his discretion to award security for costs. These factors were identified in leading cases decided under the old rules, and in which the ground for award was the impecuniosity of a limited company.⁷⁰⁾

The factors are:

- whether the action is a sham or is made in good faith;
- whether the claimant has a reasonably good prospect of success in the case;⁷¹⁾
- whether there is an admission by the defendant in the statement of case or elsewhere that the money is due [or the claim is otherwise sound];⁷²⁾
- whether there is a substantial payment into court or offer to settle;
- whether the application is being used by the defendant to stifle an honest and sound claim;⁷³⁾
- whether the claimant's lack of funds has been caused by, or aggravated by, the defendant's failure to pay;⁷⁴⁾
- whether the application for security for costs has been made late.⁷⁵⁾

70) *Sir Lindsay Parkinson v Triplan Ltd* [1973] QB 609 at 626-7, *per* Lord Denning MR, CA, the classic statement, to be read in conjunction with *Keary Developments Ltd v Tarmac Construction Ltd* [1995] 3 All ER 534, 539-542, CA, enunciating 9 guidelines.

71) But elaborate investigation has been deprecated: see *Trident International v Manchester Ship Canal* [1990] BCLC 263 at 270, 271, CA (noting Browne-Wilkinson V-C's salutary warning against a mini-trial to determine the merits, *Porzelack KG v Porzelack (UK) Ltd* [1987] 1 WLR 420, 423); the matter was further explained in *Keary* **above**.

72) But not "without prejudice" communications: *Simaan Contracting Co v Pilkington Glass Ltd* [1987] 1 WLR 516.

73) A balancing of the parties' interest is now discernible, *Keary* case at 539 J-540, CA, considering *Okotcha v Voest Alpine Intertrading GmbH* [1993] BCLC 474, 479, CA.

74) *Farrer v Lacy, Hartland & Co* (1885) 28 Ch D 482, 485, CA *per* Bowen LJ, considered *Keary* *ibid* at 540.

75) *Jenred Properties Ltd v ENIT Financial Times* October 29, 1985, CA; *Keary* case at 542 F, 544.

Claimant Resident Outside England and Outside the Territories of the Brussels and Lugano Conventions

This rule was analysed by the Court of Appeal in 2001 in *Nasser v United Bank of Kuwait*.⁷⁶⁾

Mance LJ noted that the foreign residence ground must be reconciled with Article 14 of the European Convention on Human Rights, now incorporated as part of Sch 1, Human Rights Act 1998 (England). The prohibition in Article 14 against discrimination covers:

“any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”.

Consequences of Failure to Satisfy Order for Security

A claimant who fails to comply with such an order will find the action stayed until security is given or that the action is struck out.⁷⁷⁾

5. Expert Witnesses⁷⁸⁾

New Strategies

Andrews, ECP ch 32 for details

Lord Woolf rightly identified this topic as a feature of the old regime which needed to be rectified.⁷⁹⁾

The CPR (1998) Part 35 contains a mini-code regulating expert evidence in civil matters. These provisions have four aims. The first is to emphasise the court’s responsibility to ensure that expert testimony is not adduced unreasonably or disproportionately. Secondly, the expert’s duty to the court is re-emphasised. He is expected to refrain from presenting partisan opinions. Thirdly, the rules intensify the expert’s duty to make candid disclosure of his reasoning and the material which supports it. His opinion must be presented “warts and all” and not in a sanitised form designed to suit a party or to shore up the expert’s own vanity. Fourthly, Lord Woolf has introduced the institution of a “single, joint

76) [2002] 1 All ER 401, CA.

77) eg *Speed Up Holdings v Gough & Co (Handly Ltd)* [1986] FSR 330, *Eurocross Sales Ltd v Cornhill Insurance plc* [1995] 1 WLR 1517, CA and *Companhia Europeia de Transportes Aeros SA v British Aerospace plc* *The Times* January 12, 1999, CA.

78) For comparative observations, JA Jolowicz, *On Civil Procedure* (Cambridge, 2000), ch 12 (“The Expert, the Witness and the Judge in Civil Litigation: French and English Law”); see also Blom-Cooper (ed) *Experts in Civil Courts* (Oxford UP, 2006).

79) Lord Woolf, *Access to Justice: Interim Report* (1995) ch 23; *Access to Justice: Final Report* (1996) ch 13.

expert”. He is expected to stand independently of the parties’ own interests and to assess the issue dispassionately and accurately without any tincture of bias. See further below.

Need for Disclosure

Expert evidence must be disclosed pre-trial.⁸⁰⁾

Expert’s Duty to Court

The expert owes a duty to the court to present his honest, impartial and balanced opinion, and this duty overrides any obligation which he owes to the instructing or paying party.⁸¹⁾

Need for Candour

The expert must “state the substance of all material instructions, whether written or oral, on the basis of which the report was written”.⁸²⁾ An expert must “give details of any literature or other material which the expert has relied on in making the report”.⁸³⁾ “Where there is a range of opinion on the matters dealt with in his report” he must “summarise the range of opinion and give reasons for his own opinion.”⁸⁴⁾

Single, Joint Experts

The court can appoint a single, joint expert who will act for both parties.⁸⁵⁾ If the parties do not agree on who is to act as single, joint expert, the court can resolve the impasse by appointing from a list provided by the parties, or the court can direct that the expert shall be selected in some other fashion.⁸⁶⁾ A single, joint expert order will be the normal mode of receiving expert testimony in fast-track litigation.⁸⁷⁾

Court of Appeal Discussion of Use of ‘Single, Joint Experts’

In *Daniels v Walker* the Court of Appeal reviewed the power contained in the CPR (1998) to appoint a ‘single, joint expert’.⁸⁸⁾

80) CPR 35.13.

81) CPR 35.3; earlier *National Justice Compania Naviera SA v Prudential Assurance Co Ltd* (“*The Ikarian Reefer*”) [1993] 2 Lloyd’s Rep 68, 81, per Cresswell J, providing “guidelines” on expert evidence; *Vernon v Bosley (No 2)* [1997] 1 All ER 614, CA (party and lawyer’s responsibility to disclose a different and inconsistent expert opinion admitted in family proceedings after close of evidence in earlier compensation action). See also *Anglo Group plc v Winther Brown & Co Ltd* (2000) Solicitors’ Journal 630 (Judge Toulmin QC rejecting expert report as not impartial). See also *Stevens v Gullis* [2000] 1 All ER 527, CA.

82) CPR 35.10(3).

83) PD (35) para 1.2(2).

84) *ibid* para 1.2(5).

85) CPR 35.7 (expert nominated by parties, failing which selected from parties’ agreed list by court, failing which, expert will be appointed at court’s direction).

86) CPR 35.7(3).

87) PD (28) para 3.9(4).

88) [2000] 1 WLR 1382 CA, per Lord Woolf MR, Latham LJ agreeing.

This was the Court of Appeal's first opportunity to entrench the system of 'single, joint experts'. Lord Woolf MR offered this guidance:

- (1) "...in a case where there is a modest amount involved, it would be disproportionate to obtain a second report in any circumstances. At most what should be allowed is merely to put a question to the expert who has already prepared a report."
- (2) "In a substantial case . . . the correct approach is to regard the instruction of an expert jointly by the parties as *the first step* in obtaining expert evidence . . . If, having obtained a joint expert's report, a party, for reasons which are not fanciful, wishes to obtain further information before making a decision . . . they should, subject to the discretion of the court, be permitted to obtain that evidence."
- (3) "It is only as a last resort that you accept that it is necessary for *oral evidence* to be given by the experts before the court. The expense of cross examination of expert witnesses at the hearing, even in a substantial case, can be very expensive."

Recent Developments:

Equality of Arms: *ES v Chesterfield* [2003] EWCA Civ 1284

Fairness In Exchange of Reports and in Amplification of Reports at Trial: *DN v Greenwich* [2004] EWCA Civ 1659

Wasted Costs Orders: *Phillips v Symes* [2005] 1 WLR 2043, Peter Smith J; noted NHA [2005] CLJ 566

Litigation Privilege and Replacement of Unwanted Party Expert's draft opinion:

Beck v MOD [2005] 1 WLR 2206 CA; *Jackson v Marley* [2004] 1 WLR 2926 CA, *Vasilioi v Hajigeorgiou* [2005] 1 WLR 2195 CA

Expert Immunity:

Meadow v General Medical Council [2006] EWCA Civ 1390

ALI/UNIDROIT compromise; principle 22.4

(in ALI/UNIDROIT PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE (CUP 2006) also on American Law Institute's web-site:

The court may appoint an expert to give evidence on any relevant issue for which expert testimony is appropriate, including foreign law.

22.4.1: If the parties agree upon an expert, the court ordinarily should appoint that expert.

22.4.2: A party has a right to present expert testimony through an expert selected by that party on any relevant issue for which expert testimony is appropriate.

22.4.3: An expert, whether appointed by the court or by a party, owes a duty to the court to present a full and objective assessment of the issue addressed.

The comment to that Principle states:

‘Use of experts is common in complex litigation. Court appointment of a neutral expert is the practice in most civil-law systems and in some common-law systems. However, party-appointed experts can provide valuable assistance in the analysis of difficult factual issues. Fear that party appointment of experts will devolve into a “battle of experts” and thereby obscure the issues is generally misplaced. In any event, this risk is offset by the value of such evidence. Expert testimony may be received on issues of foreign law.’

6. Interim Injunctions

[detailed account: Andrews, ECP paras 18.41 to end]

Background

The court’s statutory power to grant injunctions includes the power to issue interlocutory injunctions, that is, preliminary orders given before trial.⁸⁹⁾ Before 1974, it used to be the practice that an interim injunction would be granted only if the applicant could show a *prima facie* case on the merits.⁹⁰⁾

American Cyanamid

The House of Lords in 1974 reconsidered the *prima facie* case test.⁹¹⁾ It established the general rule that the court should not consider a case’s merits. Instead it should strive to balance the hardship to the applicant caused by refusal of relief against the hardship to the other party if he is temporarily bound by an injunction. Only in rare cases would it be necessary to consider the merits. That would be just and proper only if the court discovered no real difference in weight between the parties’ respective potential hardships. Therefore, consideration of the merits would come into play as a “tie-breaking” factor.

American Cyanamid Side-Railed

Later decisions have produced a network of exceptions to *American Cyanamid*’s general

89) Supreme Court Act 1981, s 37.

90) *Hubbard v Vosper* [1972] 2 QB 84, CA; *JT Stratford & Son Ltd v Lindley* [1965] AC 269, 338-9 *per* Lord Upjohn, HL.

91) *American Cyanamid Ltd v Ethicon Ltd* [1975] AC 396, HL.

embargo upon considering a case's legal and factual merits.⁹²⁾

Laddie J, a Chancery judge, has persuasively attempted to give this embargo the *coup de grace* by declaring it largely irrelevant to most applications for interim injunctions:

Lord Diplock [in *American Cyanamid*] did not intend . . . to exclude consideration of the strength of the cases in most applications for interlocutory relief. It appears to me that what is intended is that the court should not attempt to resolve difficult issues of fact or law on an application for interlocutory relief. If, on the other hand, the court is able to come to a view as to the strength of the parties' cases on the credible evidence, then it can do so. In fact . . . it is frequently the case that it is easy to determine who is (more) likely to win the trial on the basis of the [documentary material].⁹³⁾

However, Laddie J's comments have not prevented courts in later cases from expressing loyalty to the *Cyanamid* case (see note 93).

Cross-Undertaking in Favour of Defendant

An applicant for an interlocutory injunction must give a cross-undertaking to indemnify the defendant (and in some situations non-parties) if the interlocutory order is subsequently held to have been improperly made.⁹⁴⁾

7. Freezing Injunctions

[detailed account: Andrews, ECP paras 17.01 to 17.105]

Nature

These were formerly known as Mareva injunctions but have now been renamed.⁹⁵⁾ They have stimulated a rich literature.⁹⁶⁾

92) These details are collected at Andrews, ECP 18.53 to 18.65; LA Sheridan, *Injunctions in General* (1994) 25-37.

93) *Series 5 Software Limited v Clarke* [1996] 1 All ER 853, 865; but this has not silenced reference to *American Cyanamid*, eg *Intelsec Systems Ltd v Grech-Cini* [1999] 4 All ER 11, 25 and *R v Secretary of State for Health* [2000] 1 All ER 572, 598, CA per Laws LJ ("American Cyanamid is the ordinary rule by which applications for interlocutory injunctions in private law proceedings are decided every day").

94) *F Hoffmann-La Roche & Co AG v Secretary of State for Trade & Industry* [1975] AC 295, 360-1, HL; *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, 407-9, HL; on enforcement of the cross-undertaking, *Cheltenham & Gloucester Building Society v Ricketts* [1993] 1 WLR 1545, CA; *Goldman Sachs International v Philip Lyons* *The Times* 28 February, 1995, CA; *Barratt Manchester Ltd v Bolton MBC* [1998] 1 WLR 1003, CA; *Customs & Excise Commissioners v Anchor Foods Ltd* [1999] 1 WLR 1139; AAS Zuckerman, "The Undertaking in Damages-Substantive and Procedural Dimensions" [1994] CLJ 546.

95) CPR 25.1(1)(f) renames the injunction.

96) The leading work is S Gee, *Commercial Injunctions* (5th edn, 2004).

Freezing injunctions are *in personam* orders compelling defendants to refrain from dealing with their assets and collaterally restraining non-parties, such as the defendant's bank. The function of such an injunction is to preserve assets from dissipation pending final execution against the defendant. Most freezing injunctions are awarded within the High Court.⁹⁷⁾

A freezing injunction does not give the applicant any proprietary interest in the defendant's assets.⁹⁸⁾

The injunction operates at first *ex parte* (without notice), usually before the main proceedings against the defendant have commenced. Its essence is a surprise procedural strike. But the merits of the order are later reviewed at an *inter partes* hearing, when the court must decide whether it should be continued or discharged.

Freezing injunctions are now regularly awarded and have received legislative endorsement.⁹⁹⁾ The Practice Direction appended to Part 25 of the CPR now accommodates the standard forms applicable to such injunctions, whether they apply to assets located in England and Wales ("domestic assets") or elsewhere ("worldwide").¹⁰⁰⁾

Criteria

First, the applicant must show a good arguable case that he is entitled to damages or some other underlying relief. But this is not an onerous requirement.¹⁰¹⁾

Secondly, the court must be satisfied that the underlying cause of action has accrued, that is, the respondent's breach in the main action has already occurred and is not merely anticipated.¹⁰²⁾

Thirdly, there must be a real risk that the respondent's assets will be removed or dissipated

97) PD (25) Interim Injunctions, 1.1; PD (25) 1.2 to 1.4 enable District judges in the county courts to make such orders in narrowly defined special cases.

98) *Cretanor Maritime Co Ltd v Irish Marine Maritime Ltd* [1978] 3 All ER 164, CA; *Capital Cameras Ltd v Harold Lines Ltd* [1991] 1 WLR 54.

99) *Per Mustill J, Third Chandris Corpn v Unimarine* [1979] QB 645: "At present applications are being made at the rate of about 20 per month. Almost all are granted." They have since become more frequent.

100) PD (25A) freezing injunctions.

101) *Ninemia Maritime Corpn v Trave* [1983] 2 Lloyd's Rep 600 (*per Mustill J*; approved [1983] 1 WLR 1412, CA, *per Kerr LJ*).

102) *Veracruz Transportation Inc v VC Shipping Co Inc (The Veracruz)* [1992] 1 Lloyd's Rep 353, CA, noted LA Collins (1992) 108 LQR 175-81 (expressing the hope that the House of Lords might reverse this decision); *Zucker v Tyndall Holdings plc* [1992] 1 WLR 1127, CA, noted R Harrison (1992) New LJ 1511-2; for doubts whether *Veracruz* case extends to equitable causes of action, Rix J in *Re Q's Estate* [1999] 1 Lloyd's Rep 931, 939; Rix J also fashioned a new procedure allowing applicant "without notice" to receive assurance that injunction would be granted the next day when the cause of action accrued and on later occasion injunction granted without notice once applicant's counsel confirms that there had been no change of circumstances.

unless the injunction is granted. “Dissipation” includes any act of alienation or charging of property.¹⁰³⁾ The threatened removal or dissipation of assets need not be unconscionable or heinous. It suffices that the applicant’s eventual judgment will go unsatisfied unless a freezing injunction is granted.¹⁰⁴⁾ However, “dissipation” does not ordinarily include (a) innocent transactions which are (b) made merely in the ordinary course of business.

Fourthly, even if the applicant shows that there is a risk of dissipation, the court must be satisfied that the applicant will be unable to receive satisfaction of the claim unless he receives an injunction.¹⁰⁵⁾

Fifthly:

... the court [must be] satisfied that any damage which the respondent may suffer through having to comply with the order is compensatable under the cross-undertaking or that the risk of uncompensatable loss is clearly outweighed by the risk of injustice to the applicant if the order is not made.¹⁰⁶⁾

Finally, relief is conditional upon certain undertakings being made by the applicant, notably, to indemnify the respondent if the injunction is wrongly granted, and to provide a guarantee to support this undertaking.¹⁰⁷⁾

The Impact of Freezing Injunctions upon Non-Parties

Once notified of the order, a non-party is obliged not to act inconsistently with it. It is common to notify the respondent’s bank of the order even before the relevant respondent receives notice. The bank must then refuse to undermine the injunction by continuing to honour its client’s cheques and instructions, except where such dealings are permitted by the order.¹⁰⁸⁾

Non-Party’s Liability in Negligence (Law of Tort) to Pay Compensation to Applicant

In *Customs & Excise Commissioners v Barclays Bank plc* [2005] 1 WLR 2082, CA; [2004] EWCA Civ 1555, the Court of Appeal held that a duty of care arises as soon as the non-party Bank is notified of the freezing order. But this has been reversed by the House of Lords in [2006] UKHL 28.

103) Dispositions, pledges, charges: in *CBS UK Ltd v Lambert* [1983] Ch 37, 42, CA, Lawton LJ and Lord Denning MR in *Z Ltd v A-Z* [1982] 1 QB 558, 571, CA, both cited the words “otherwise dealing with” in s 37(3), Supreme Court Act 1981.

104) *Ketchum International plc v Group Public Relations Holdings Ltd* [1997] 1 WLR 4, 13, CA; *Commissioner of Customs & Excise v Anchor Foods Ltd* [1999] 1 WLR 1139 (if a proposed transaction is *bona fide*, court’s discretion to grant injunction should be exercised very circumspectly).

105) *Etablissements Esefka International Anstalt v Central Bank of Nigeria* [1979] 1 Lloyd’s Rep 445.

106) *Per Hoffmann J, Re First Express Ltd* *The Times* 8 October, 1991.

107) PD (25) Interim Injunctions, at freezing injunctions.

108) *Z Ltd v A* [1982] QB 558, CA, the seminal discussion.

Freezing Injunctions to Support Foreign Proceedings

The English courts can grant interim relief even though the substantive proceedings have been, or are to be, commenced in a Brussels or Lugano contracting state other than England.¹⁰⁹⁾ This provision satisfies the United Kingdom's obligations under the Brussels and Lugano Conventions.

Since 1997 such supportive relief can now be applied "to proceedings commenced or to be commenced otherwise than in a Brussels or Lugano Contracting State" and, secondly, "to proceedings whose subject matter is not within the scope of the 1968 Convention as determined by Article 1 thereof".¹¹⁰⁾ The result is that the English High Court can grant interim and ancillary relief (both freezing injunctions and connected orders for disclosure of assets) to support substantive proceedings throughout the world, whether or not the relevant foreign jurisdiction which is, or will be, entertaining the main claim is affiliated to the Brussels or Lugano regimes.

The Court of Appeal has emphasized the importance of granting freezing injunctions to assist other jurisdictions, particularly in the struggle against large and sophisticated fraud.¹¹¹⁾

Freezing Injunctions and Foreign Assets

Freezing injunctions can apply to assets located outside England and Wales. In fact "worldwide" injunctions are now standard.¹¹²⁾ The applicant can gain both attachment of

109) Civil Jurisdiction and Judgments Act 1982, s 25.

110) The Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997, SI 1997, 302; and the Rules of the Supreme Court (Amendment) 1997, SI 1997, 415 (L2). The 1997 Order reverses in England the application of *The Siskina* rule in *Mercedes-Benz AG v Leiduck* [1996] AC 284, PC (Lord Nicholls dissenting), noted LA Collins (1996) 112 LQR 8, NH Andrews [1996] CLJ 12 (the *Mercedes-Benz* case in fact was an appeal from Hong Kong).

111) *Crédit Suisse Fides Trust SA v Cuoghi* [1998] QB 818, CA (considering *Roseel NV v Oriental Commercial Shipping (UK) Ltd* [1990] 1 WLR 1387, CA; *Republic of Haiti v Duvalier* [1990] 1 QB 202, CA and doubting *S & T Baurtrading v Nordling* [1997] 3 All ER 718, CA); noted D Capper (1998) 17 Civil Justice Quarterly 35 at 37-40; the decision contains important guidance on English "worldwide" freezing injunctions in the context of s 25, Civil Jurisdiction and Judgments Act 1982, (as extended); the *Crédit Suisse* case was analysed in *Refco Inc v Eastern Trading Co* [1999] 1 Lloyd's Rep 159, CA, which contains conflicting *dicta* on the propriety of granting freezing order relief when the primary jurisdiction (here the US, Illinois) is content to allow the English supplemental relief to be granted, but the foreign court cannot itself grant such relief: Morritt, Potter LJJ favouring English relief; Millett LJ suggesting that the absence of US jurisdiction preclude English relief, and distinguishing *Crédit Suisse* (at 174) as example of Swiss court having jurisdiction but lacking power to award order against non-resident person.

For an important survey of principles in cases of overlapping foreign and English freezing or similar relief, *Ryan v Friction Dynamics Ltd* (2 June 2000, Neuberger J).

112) PD (25) concerning freezing injunctions ("worldwide" assets); *Babanaft Co SA v Bassatne* [1990] Ch 13, CA; *Republic of Haiti v Duvalier* [1990] QB 202, CA; *Derby & Co v Weldon (No 1)* [1990] Ch 48, CA; *Derby & Co Ltd v Weldon (Nos 3 & 4)* [1990] Ch 65, CA; LA Collins, "The Territorial Reach of *Mareva* Injunctions" (1989) 105 LQR 262-99; LA Collins, ch's VIII and IX in *Essays in International*

foreign assets and information relating to such assets.¹¹³⁾ Arguably, the power to order disclosure is of greater practical and tactical importance.¹¹⁴⁾

Judicial Support for the International Fight against Fraud

The Court of Appeal has emphasised the importance of granting freezing injunctions to assist other jurisdictions, particularly in the struggle against large and sophisticated fraud.¹¹⁵⁾ Millett LJ said in an important decision:

It is becoming widely accepted that comity between the courts of different countries requires mutual respect for the territorial integrity of each other's jurisdiction, but that this should not inhibit a court in one jurisdiction from rendering whatever assistance it properly can to a court in another in respect of assets located or persons resident within the territory of the former.¹¹⁶⁾

Lord Bingham CJ emphasised that the court will always wish to be clear that "worldwide" freezing relief (and associated disclosure orders) are necessary in a particular case, because such relief is "far-reaching".¹¹⁷⁾ He said that such orders must not be granted "routinely or without very careful consideration". This is so even where the substantive proceedings are situated in England (not on the present facts). He then argued that the court should exercise even greater caution where, as here, the application occurs under section 25, namely relief is sought which is ancillary to substantive proceedings located elsewhere.

His Lordship offered the following set of non-exhaustive guidelines and he emphasised that these factors apply not just to "worldwide" relief but also to less extensive forms of relief granted under section 25 of the 1982 Act:¹¹⁸⁾

Reasons for Caution

- (a) "it would obviously weigh heavily, probably conclusively, against the grant of interim relief if such grant would obstruct or hamper the management of the case by the court seised of the substantive proceedings ("the primary court"), or

Litigation (Oxford, 1993); D Capper, "Worldwide *Mareva* Injunctions" (1991) 54 MLR 329-48; A Malek and C Lewis, "Worldwide Injunctions-The Position of International Banks" (1990) LMCLQ 88.

113) Relatedly, P Kaye "Examination of Judgment Debtors as to their Assets Abroad: Courts' Powers and Jurisdiction" [1989] LMCLQ 465-75.

114) *per* Millett LJ, *Crédit Suisse Fides Trust SA v Cuoghi* [1998] QB 818, 827-8, CA.

115) *Crédit Suisse Fides Trust SA v Cuoghi* [1998] QB 818, CA (Millett LJ and Lord Bingham CJ gave reasoned judgments, Potter LJ concurred with both judgments; the judgments consider *Rosseel NV v Oriental Commercial Shipping (UK) Ltd* [1990] 1 WLR 1387, CA; *Republic of Haiti v Duvalier* [1990] 1 QB 202, CA and *S & T Baurtrading v Nordling* [1997] 3 All ER 718, CA); noted D Capper (1998) CJQ 35 at 37-40.

116) *Per* Millett LJ [1998] QB 818 at 827.

117) [1998] QB 818, 831.

118) [1998] QB 818, 831-2.

- (b) “give rise to a risk of conflicting, inconsistent or overlapping orders in other courts.”
- (c) “It may weigh against the grant of relief by this court that the primary court could have granted such relief and has not done so, particularly if the primary court has been asked to grant such relief and declined.”

Reason for Action

- (d) “It may be thought to weigh in favour of granting such relief that a defendant is present in this country and so liable to effective enforcement of an order made in personam, always provided that by granting such relief this court does not tread on the toes of the primary court or any other court involved in the case.”

The criteria mentioned above did not preclude relief in the present case; in fact criterion (d) strongly supported the orders made in this litigation.

Subsequent Discussions of Supportive Orders Made under section 25 Civil Jurisdiction and Judgments Act 1982

The English court’s power to issue protective and interim relief under section 25 of the Civil Jurisdiction and Judgments Act 1982 (as amended)¹¹⁹⁾ has been considered by the Court of Appeal and by Neuberger J in later decisions, both of which considered the Court of Appeal’s guidelines in the *Credit Suisse* case (mentioned above).¹²⁰⁾

Foreign Court, although having Jurisdiction, unable on Present Facts, to Award Relief now Sought in English Proceedings

The Court of Appeal considered this situation in the *Refco* case.¹²¹⁾

Morritt and Potter LJJ (rejecting Rix J’s view at first instance) gave *dicta* saying that the English courts retain jurisdiction to grant a freezing injunction in this situation. Morritt LJ said:

“where, as here . . . , the principles [governing the foreign and English interim relief] are substantially different I do not see why it should make a difference that the foreign Court has jurisdiction but is, in principle, unable to exercise it as opposed to a case where it has no jurisdiction at all. In the latter case the Lord Chief Justice and Lord Justice Millett [in the *Credit Suisse* case] recognized that the Court in England is not limited to exercising the jurisdiction available to the foreign Court. In the former case

119) As amended by the Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997, SI 1997 No 302 (effective 1 April 1997).

120) *Refco Inc v Eastern Trading Co* [1999] 1 Lloyd’s Rep 159, CA; *Ryan v Friction Dynamics Ltd* (June 2, 2000, Neuberger J).

121) *Refco Inc v Eastern Trading Co* [1999] 1 Lloyd’s Rep 159, CA.

they both recognized that the refusal of the foreign Court might preclude the grant of relief by the Court in England but neither of them considered that it [necessarily] would.”¹²²⁾

Potter LJ agreed, emphasising that the US judge in the *Refco* litigation had “clearly demonstrated lack of any [anxiety] that the exercise of the English Court’s powers to grant interim relief would impinge in any way on the Illinois proceedings.”¹²³⁾

But Millett LJ opposed this liberal view, saying that the situation is equivalent to the US court having dismissed an application for such relief on the merits. In Millett LJ’s view, it would be excessive and contrary to notions of comity between nations for the English courts to override the limits of the foreign scheme for such relief.

It is submitted that the courts should follow the majority’s more flexible approach.

Foreign Attachment Relief: English Court Supplementing Protection by Granting Overlapping Freezing Injunction

The English court can grant overlapping freezing injunctive relief to supplement a foreign court’s related order, even though the latter court is the “primary forum” and despite the fact that the English relief overlaps with the foreign court’s remedy. In 2000 Neuberger J, a Chancery judge, enunciated various guidelines to meet this situation:¹²⁴⁾

- (i) the court should be cautious before granting any freezing injunction;
- (ii) the “threshold” criteria of freezing injunctive relief continue to apply in this context, no less than in the ordinary situation (eg, the need for the court to be satisfied that the claimant has a good arguable case and that there is a real risk of dissipation);
- (iii) the court must be especially cautious when granting supportive freezing relief under section 25 of the 1982 Act because the main facts occur in a foreign context and so they are likely to be less clear than facts occurring in England;
- (iv) but the English court should not be timid; instead various factors require it to make orders under section 25 in appropriate cases, namely international comity, the need to combat fraud wherever it occurs, and the language itself of section 25 (orders are available unless “inexpedient”);
- (v) the English High Court’s discretion to award supportive relief under section 25 of the 1982 Act is not barred because the foreign court has refused to grant similar relief; however, the English courts should be “slow” to proceed in this

122) Morritt LJ *ibid* at 173 col 2-174 col 1.

123) *Ibid*, at 174.

124) *Ryan v Friction Dynamics Ltd* (June 2, 2000, Neuberger J).

situation;¹²⁵⁾ (see the *Refco* case above)

- (vi) the English court retains jurisdiction to grant a freezing injunction when the foreign and primary court has already granted worldwide asset-freezing relief; in the same way, when an English court, having primary control of a dispute, orders worldwide freezing relief, this does not preclude, but often in fact the English court contemplates, the making of supportive injunctions in other jurisdictions (provided that the applicant obtains the English court's permission before seeking further relief in foreign courts to effectuate the English order);
- (vii) but where the English freezing injunction will overlap with foreign injunctions, "the court should expect to be given cogent reasons to justify it"; overlapping relief can create expensive and inefficient duplication of litigation, it can also lead to the risk of double jeopardy for the same conduct (where this involves breach of an injunction) and, thirdly, it can be oppressive to deploy multiple proceedings against the same defendants;¹²⁶⁾
- (viii) where overlapping relief is nevertheless justified, it is "sensible to have some indication as to which court is to have the primary role for enforcing the overlapping injunctions", and that court should normally be the court where the primary dispute is to be litigated;
- (ix) an overlapping order should "track" the foreign order's terms, unless there are good reasons for a deviation from those terms.¹²⁷⁾

8. Search Orders (formerly Anton Piller Orders)¹²⁸⁾

[detailed account: Andrews, ECP paras 17.106 to end]

Nature

This ancillary injunction allows the applicant to inspect the defendant's premises and remove or secure evidence of alleged wrongdoing. The order is made without notice, that is *ex parte*, so that the applicant can swoop like a hawk and seize vital evidence before it is lost or destroyed.

These orders are mainly used to tackle breaches of intellectual property rights and confidentiality. They are less common than freezing (*Mareva*) injunctions.

125) Citing the majority view (Millet LJ dissenting) in the *Refco* case [1999] 1 Lloyd's Rep 159, 173, 174, CA, *per* Morritt and Potter LJJ.

126) Citing *Re BCCI SA* [1994] 1 WLR 708, 713, CA, *per* Dillon LJ.

127) Citing *The State of Brunei Darussalam v Prince Jefri Bolkiah* (20 March 2000, Jacob J).

128) Renamed as such, CPR 25.1(1)(h).

The standard order is now regulated by a Practice Direction appended to Part 25 of the CPR.¹²⁹⁾

An order can be granted before or after the main proceedings have commenced, or even after judgment.¹³⁰⁾ When an order is sought in anticipation of the main proceedings, the applicant must undertake to commence and serve notice of the main action forthwith.

Criteria

First, a search order must not be used as a means of fishing for a cause of action.¹³¹⁾ Secondly, the applicant must have a very strong *prima facie* case on the substance of the main complaint.¹³²⁾ Thirdly, there must be a very serious risk of damage to the applicant's interests unless this special order is granted.¹³³⁾ Finally, the court must be satisfied both that the respondent possesses relevant material and that he will destroy this material unless subjected to a surprise search.¹³⁴⁾

Controls

The standard order contains numerous provisions aimed at controlling the process of executing these orders, especially the seizure of material.¹³⁵⁾ An independent and supervisory solicitor attends during the execution of an order to ensure fair-play and to prevent oppression.¹³⁶⁾

9. Conditional Fees¹³⁷⁾

[detailed account: Andrews ECP paras 35.02 to 35.64; M Cook COOK ON COSTS (2007); Ashby and Glasser (2005) CJK 130-35]

This is the “no win, no fee” system. If the case is won for his client, the lawyer might gain a special success fee.

129) PD (25) on search orders.

130) On this last situation, *Distributori Automatici Italia SpA v Holford General Trading Co Ltd* [1985] 1 WLR 1066.

131) *Hy-trac v Conveyors International* [1983] 1 WLR 44, CA.

132) *Per Ormrod LJ, Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55, 62, CA.

133) *ibid.*

134) *ibid.*, 59-60, *per* Lord Denning, “grave danger that vital evidence will be destroyed”.

135) PD (25) Interim Injunctions, search orders.

136) *eg, IBM v Prima Data International Ltd* [1994] 1 WLR 719, 724-5.

137) The main statutory provisions are: ss 58 and 58A of the Courts and Legal Services Act 1990 (substituted by s 27 of the Access to Justice Act 1999 and effective from April 1, 2000); Conditional Fee Agreements Regulations 2000, (SI 2000, No 692), revoking the 1995 regulations (SI 1995, No 1675); Conditional Fee Agreements Order 1998 (SI 1998, No 1860); CPR 43.2(1) (a) (l) (m) (o), 44.3A, 44.3B, 44.5, 44.15, 44.16, 48.9; PD (48) para 55.

The usual form of fee agreement is that the client will not pay any fee to his lawyer unless the case is won, in which case his lawyer will be entitled to his normal fee (based on hourly billing, and itself including a profit element) plus a success fee. The success fee in England is reckoned as a percentage of the normal fee, provided this is no greater than 100 *per cent* of that normal fee. This contrasts with the contingency fee in the USA which gives the successful attorney a percentage of the damages awarded in favour of his client (this difference is noted more fully below).

In England, the Courts and Legal Services Act 1990 first permitted conditional fees.¹³⁸⁾ In fact the scheme was not implemented until 1995.¹³⁹⁾ The scheme was expanded in 1998 to embrace most civil actions, other than cases concerning domestic violence matters or the welfare of children where the presence of incentives for lawyers would be unseemly.¹⁴⁰⁾

A report draws attention to the numerous issues of professional ethics engendered by conditional fees.¹⁴¹⁾

This dynamic topic has already produced extensive comment.¹⁴²⁾

No Common Law Power to Validate Conditional Fee Agreements

A conditional fee agreement is valid only if it complies with the statutory scheme.¹⁴³⁾ It was necessary to introduce conditional fees by statute because at common law a fee agreement which gives a lawyer a financial stake in the outcome of an action is invalid.¹⁴⁴⁾

Challenging the Success Fee

The successful client or, more importantly, the defeated opponent (“the paying party”¹⁴⁵⁾), can apply for an assessment of the percentage increase and the court can then reduce it “where it considers it to be disproportionate having regard to all relevant factors as they reasonably appeared to the solicitor or counsel when the conditional fee agreement was

138) Following the consultation paper, “Contingency Fees” (Cmnd 571: 1989).

139) By the Conditional Fee Agreements Order 1995, which has now been superseded by the Conditional Fee Agreements Order 1998 (SI 1998, No 1860).

140) The Conditional Fee Agreement Order 1998 (SI 1998 No 1860); Courts and Legal Services Act 1990 s 58A(1) lists the excluded actions.

141) “The Ethics of Conditional Fee Arrangements”, published by the Society for Advanced Legal Studies, London, 2001 (under chairmanship of Robert Southwell QC).

142) Notably, “The Ethics of Conditional Fee Arrangements”, published by the Society for Advanced Legal Studies (London, 2001), also citing further studies, at p 33, nn 38 and 39. For earlier discussion: *The Royal Commission on Legal Services*, “the Benson Report”, (Cmnd 7648: 1979); the *Civil Justice Review*, Report of the Review Body on Civil Justice, (Cm 394, 1988); Joint Bar and Law Society Report on the Future of the Legal Profession, *Time for a Change*, “The Marre Report”, (1988); Peter Kunzlik “Conditional Fees—the Ethical and Organisational Impact on the Bar” (1999) 62 MLR 850.

143) s 58(1) of the Courts and Legal Services Act 1990 (substituted by s 27(1) Access to Justice Act 1999).

144) eg *Aratra Potato Co Ltd v Taylor Joynson Garrett* [1995] 4 All ER 695.

145) CPR 44.3A, 44.16, PD (44) paras 20.1-20.8.

entered into".¹⁴⁶⁾ Here the relevant factors include:

“(a) the risk that the circumstances in which the fees or expense would be payable might not occur; (b) the disadvantages relating to the absence of payment on account; (c) whether the amount which might be payable under the conditional fee agreement is limited to a certain proportion of any damages recovered by the client [viz the success fee is *capped* in this way, albeit calculated by reference to normal fees]; (d) whether there is a conditional fee agreement between the solicitor and counsel; (e) the solicitor’s liability for disbursements.”¹⁴⁷⁾

Assessment of the Conditional Fee System

The possible merits and demerits of the conditional fee system have been conveniently listed in a 2001 report, “The Ethics of Conditional Fee Arrangements”:¹⁴⁸⁾

clear benefits

The list is short but impressive. First, conditional fees reduce the burden of government expenditure on civil legal aid. Secondly, it is contended that such fees reduce the risk of unmeritorious claims being made because they shift onto lawyers the risk of defeat and they will tend to screen out bad cases. Thirdly, this new fee system increases access to justice for those unable to afford civil litigation. This last point is the most important.

problems and anxieties

These can be grouped under various headings.

- (i) problems of professional ethics
- (ii) problems of over-charging
- (iii) problems of selective access to justice
- (iv) increase in the overall cost of litigation

10. Disclosure

[detailed account: Andrews, ECP ch 26]

Compulsory Nature

A party is obliged both to provide a list of documents (“disclosure”) and to allow inspection of these by the other side.¹⁴⁹⁾

¹⁴⁶⁾ CPR 48.9(5).

¹⁴⁷⁾ PD (48) para 2.16.

¹⁴⁸⁾ Published by the Society for Advanced Legal Studies, (London, 2001), paras 1.6, 1.7.

¹⁴⁹⁾ CPR 31.10(2) and 31.15, subject to certain qualifications added at CPR 31.3(2).

Scope of Documentary Disclosure

“Document”

The CPR defines a “document” as “anything in which information of any description is recorded”.¹⁵⁰⁾ That definition does not catch information held in the other party’s brain (nor the company’s officers’ brains). Nor does Part 31 of the CPR apply to non-documentary “things”, such as the claimant’s body, or physical chattels or even immovable property.¹⁵¹⁾

Standard Disclosure

“Standard disclosure” concerns documents:¹⁵²⁾

on which A will rely; or

which adversely affect A’s own case; or

adversely affect B’s case; or

support B’s case; or

any other documents which A is required to disclose by a relevant practice direction.¹⁵³⁾

Summary of Restrictions upon Duty to Disclose

The obligation to make disclosure applies only to:

“documents” (defined and explained above);

which become available before or during the relevant litigation;¹⁵⁴⁾ and

which fall within the scope of standard disclosure;¹⁵⁵⁾ and

which have been referred to in statements of case etc;¹⁵⁶⁾ or

which “are or have been in [the relevant party’s] control”; “control” means “it is or was in his physical possession”, or “he has or has had a right to possession of it”; or “he has or has had a right to inspect or take copies of it”.¹⁵⁷⁾ The third of these limbs

150) CPR 31.4.

151) cf, eg, s 14, Civil Evidence Act 1968.

152) CPR 31.6.

153) The court can order narrower disclosure in special situations: CPR 31.5(1), (2).

154) On the continuing duty to make disclosure until the end of the relevant proceedings, CPR 31.11.

155) See preceding discussion.

156) See preceding discussion.

157) CPR 31.8.

expands the scope of documents which are regarded as in a person's control.¹⁵⁸⁾

There is no obligation to produce for inspection (as distinct from listing during the first stage of discovery) material which is subject to the following privileges:¹⁵⁹⁾

legal advice or litigation privilege (together known as "legal professional privilege");¹⁶⁰⁾
[On the *Three Rivers* case(s): NHA (2005) CJQ 185-93; C Tapper (2005) 121 LQR 181-5; J Seymour [2005] CLJ 54-6; C Passmore (2006) NLJ 668-9]

public interest immunity;¹⁶¹⁾

the privilege against self-incrimination (see also section 13, Fraud Act 2006);¹⁶²⁾

the privilege relating to "without prejudice" negotiations;¹⁶³⁾

"conciliation" privilege.¹⁶⁴⁾

The duty to make disclosure extends to non-privileged confidential material.¹⁶⁵⁾ However, before the CPR the courts enjoyed a discretion, and this is likely to continue under the new rules, whether to order disclosure and inspection of confidential material, taking into account these factors:¹⁶⁶⁾

whether the information is available to the other side from some other convenient source;¹⁶⁷⁾

whether sensitive material might be blanked out;¹⁶⁸⁾

whether the class of recipients might be restricted so that the disclosing party is protected against misuse and dangerously wide dissemination of the material.

Implied Undertaking¹⁶⁹⁾

The implied undertaking requires the recipient of disclosure and his lawyer (and non-parties) to refrain from using the information so acquired for collateral purposes, notably to launch or fortify other proceedings. The undertaking also prevents the same recipients

158) For the former law, Andrews, PCP 11-023 to 11-28.

159) CPR 31.3(1)(b).

160) For detail, Andrews, ECP ch 27; and see also B Thanki, *The Law of Privilege* (Oxford UP, 2006).

161) For detail, Andrews, ECP ch 30.

162) For detail, Andrews, ECP ch 29; and see also *C plc v p* [2007] EWCA Civ 493.

163) For detail, Andrews, ECP ch 25, paras 25.01 to 25.44.

164) For detail, Andrews, ECP ch 25, paras 25.45 to end; see also *Brown v Rice* [2007] EWHC 625.

165) *Wallace Smith Trust Co v Deloitte Haskins & Sells* [1997] 1 WLR 257, CA.

166) eg, perhaps under CPR 31.12 when deciding whether to order specific disclosure.

167) See *Wallace Smith Trust Co v Deloitte Haskins & Sells* [1997] 1 WLR 257, CA.

168) *GE Capital etc v Bankers Trust Co* [1995] 1 WLR 172, CA.

169) A leading case is *Bourns Inc v Raychem Corp* [1999] 3 All ER 154, CA.

from revealing the information to non-parties.¹⁷⁰⁾

CPR Part 31.22 codifies the implied undertaking in the context of Part 31 disclosure and provides:

a party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed,¹⁷¹⁾ except (a) where the document has been read to or by the court, or referred to, at a hearing which has been held in public; or (b) the court gives permission;¹⁷²⁾ or (c) the party who disclosed the document and the person to whom the document belongs agree.”¹⁷³⁾

11. Trial

[detailed account: Andrews, ECP ch 34]

The Professional Judge

Except in those freakish exceptional actions involving a jury, civil trials are nowadays conducted by a legally qualified judge sitting alone.

Public Hearings

The general rule is that a hearing must be in public.¹⁷⁴⁾ The court can order that the identity of a party or of a witness must not be disclosed where this is necessary to protect that person's interest.¹⁷⁵⁾

Trial Bundles

The bundle consists (among other things) of copies of the following:¹⁷⁶⁾

170) Andrews, PCP 11-048 to 11-53; also *Omar v Omar* [1995] 1 WLR 1428; *Watkins v AJ Wright (Electrical) Ltd* [1996] 3 All ER 31; *Miller v Scorey* [1996] 1 WLR 1122; an implied undertaking also protects unused material disclosed by the prosecution to a *defendant* in criminal proceedings, *Taylor v Serious Fraud Office* [1999] 2 AC 177, HL; *Preston BC v McGrath* *The Times* 19 February, 1999, Burton J, holds that there is no reciprocal undertaking preventing the Crown from disclosing the same information to non-parties, who then use it to bring or buttress civil proceedings against the original accused.

171) cf, before CPR (1998) “collateral” use included certain uses in same action: *Milano Assicurazioni SpA v Walbrook Insurance Co Ltd* [1994] 1 WLR 977; and *Omar v Omar* [1995] 1 WLR 1428; respectively, proposed amendments to writ or statement of claim.

172) *SmithKline Beecham Biologicals SA v Connaught Laboratories Inc* [1999] 4 All ER 498, CA.

173) Even in situation (a), however, the court has power to make a special order restricting or prohibiting use of a document: CPR 31.22(2).

174) CPR 39.2(1); CPR 39.2(3) and PD (39) 1.5 set out exceptions; the primary source is s 67, Supreme Court Act 1981.

175) CPR 39.2(4); PD (39) 1.4A emphasises the need to consider the requirement of publicity enshrined in Art 6(1) of the European Convention on Human Rights (incorporated into English law, Human Rights Act 1998, Sch 1).

176) PD (39) 3.2.

the claim form and statements of case;
 a case summary;
 witness statements “to be relied on as evidence” and witness summaries;
 hearsay evidence notices;
 plans, photographs etc;¹⁷⁷⁾
 medical reports and responses to them, and other expert reports and responses;
 any order giving directions as to the conduct of the trial.

In large actions, a core bundle must also be prepared.¹⁷⁸⁾

Court Management at Trial

A 1950s High Court judge was dismissed by the Lord Chancellor for having asked too many questions at trial.¹⁷⁹⁾ A judge of the new age might be dismissed for excessive taciturnity, especially a failure to “take the case by the scruff of its neck”.

Thus the court at trial may now “control the evidence by giving directions as to (a) the issues on which it requires evidence”, (b) the nature of the evidence which it requires to decide those issues, and (c) the way in which evidence is to be placed before the court.¹⁸⁰⁾ It can also exclude admissible evidence and can limit cross-examination.¹⁸¹⁾ The court on both the fast track and the multi-track can restrict the number of witnesses (both lay and expert) used by each party.¹⁸²⁾

Preliminary questions of law or fact can be separated from other matters in the interest of economy.¹⁸³⁾ Appeals are unlikely to succeed against such orders for the marshalling of the issues.¹⁸⁴⁾

Witnesses of Fact

[detailed account: Andrews, ECP paras 31.41 to 31.51]

177) The notice requirement is strict: CPR 33.6, notably (3).

178) PD (39) 3.6.

179) For this episode, *Jones v NCB* [1957] 2 QB 55, CA.

180) CPR 32.1(1); for comment, *GKR Karate (UK) Ltd v Yorkshire Post Newspapers Ltd* [2000] 2 All ER 931, CA.

181) CPR 32.1(2), (3). On the exclusion of evidence, *Grobbelaar v Sun Newspapers Ltd The Times* 12 August, 1999, CA (prolix defence in libel action).

182) Fast-track: CPR 28.3(1) and PD (28) 8.4; CPR 32.1 (all tracks) are widely drafted.

183) CPR 3.1(2)(j), (l); for the pre-CPR(1998) emergence of this aspect of trial management, *Ashmore v Corporation of Lloyd's* [1992] 1 WLR 446, HL, *Thermawear Ltd v Linton The Times* 20 October, 1995, CA.

184) *Ward v Guinness Mahon plc* [1996] 1 WLR 894, CA, *Grupo Torras Sa v Al Sabah (No 2) The Times* 17 April, 1997, CA.

Witnesses can be compelled to attend a trial (or other hearing) by the issue of a “witness summons”. This phrase replaces the hallowed terms subpoena ad testificandum (order to attend to give oral evidence) and subpoena duces tecum (order to attend with relevant documents or other items).¹⁸⁵⁾ The witness must be offered compensation for travelling to and from court and for loss of time.¹⁸⁶⁾

If a party intends to call a particular witness, the latter’s proposed evidence-in-chief must be prepared in written form, signed and then served on the other parties.¹⁸⁷⁾ The statement must be supported by a statement of truth by the witness or his legal representative (the same applies to an expert’s report).¹⁸⁸⁾ It is an act of contempt of court to make, or to cause to be made, a dishonest and false statement and then to purport to verify this by a statement of truth.¹⁸⁹⁾

The normal practice will be for a witness statement to stand as that witness’s examination-in-chief.¹⁹⁰⁾ However, the court can allow the witness orally to amplify his statement and to introduce new matters which have subsequently arisen.¹⁹¹⁾

Sequence of Trial¹⁹²⁾

[detailed account: Andrews, ECP paras 31.21 to 31.24]

The trial is divided into the following segments:

- (1) opening speech (although this can be dispensed with);¹⁹³⁾
- (2) examination-in-chief of claimant’s witnesses (although this will not be oral where, as usual, the witness statement is received as a substitute for oral testimony);¹⁹⁴⁾
- (3) cross-examination of claimant’s witnesses by defendant’s counsel;
- (4) re-examination of witnesses;
- (5) examination-in-chief of defendant’s witnesses (although this will not be oral where, as usual, the witness statement is received as a substitute for oral testimony);¹⁹⁵⁾

185) CPR 34.2.

186) CPR 34.7; PD (34) 3, referring to provisions applicable also to compensation for loss of time in criminal proceedings.

187) CPR 32.10.

188) CPR 22.1(1)(c), 22.3.

189) CPR 32.14.

190) CPR 32.5(2).

191) CPR 32.5(3)(4).

192) J I H Jacob, *The Fabric of English Civil Justice* (1987) 169 ff.

193) Fast-track: PD (28) 8.2; multi-track: PD (29) 10.2.

194) CPR 32.5(2).

195) *ibid.*

- (6) cross-examination of the same by claimant's counsel;
- (7) re-examination of same;
- (8) defendant counsel's final speech;
- (9) claimant counsel's final speech [the reason the claimant ends is that this party ebars the burden of proof and so should have the last word];
- (10) judgment;¹⁹⁶⁾
- (11) order for costs, including in appropriate cases a summary assessment of costs.¹⁹⁷⁾

12. Appeals¹⁹⁸⁾

[detailed account: Andrews, ECP ch 38]

The Need for Permission

Nearly all civil appeals now require permission (formerly known as "leave").¹⁹⁹⁾

Time-Limit

Permission to appeal must be requested from the appeal court (if it has not been obtained from the lower court) within such period as directed by the lower court or within fourteen days after the date of the relevant lower court's decision.²⁰⁰⁾ The appeal court has power to vary this time limit, but the parties cannot agree to extend it.²⁰¹⁾

196) Or direction to the jury; for rules concerning judgments, CPR 40 and PD (40); on the court's discretion whether to complete judgment once it has begun to deliver it (or to deliver it initially in draft form) *Prudential Assurance Co v McBains* (2000) New LJ 832, CA; on the court's power to re-open a case before perfecting a judgment, *Stewart v Engel* [2000] 3 All ER 518, CA.

197) CPR 44.3, 44.7(a).

198) CPR Part 52, which is explained in *Tanfern Ltd v Cameron-MacDonald* [2000] 1 WLR 1311, 1314-21, CA; on the new system requiring "permission" in nearly all cases, IR Scott (1999) 18 CJQ 91-98; for background, Lord Woolf MR *Review of the Legal Year 1997-1998* (1999); *Review of the Court of Appeal (Civil Division)*, report to Lord Chancellor, September 1997 (the "Bowman Report"); for US comparisons, PS Atiyah and R Summers, *Form and Substance in Anglo-American Law* (Oxford UP, 1987) ch 10; for reflections on the private and public functions of civil appeals, especially in the highest chamber, see the reports by JA Jolowicz, P Lindblom, S Goldstein in P Yessiou-Faltsi (ed), *The Role of the Supreme Courts at the National and International Level* (Thessaloniki, Greece, 1998); for comparative perspectives on appeals, JA Jolowicz, *On Civil Procedure* (Cambridge, 2000), chs 14 to 16; for the background before the CPR (1998) system of appeals, Andrews, *Principles of Civil Procedure* (London, 1993) ch 16.

199) CPR 52.3(1): except decisions affecting a person's liberty, namely appeals against committal orders, refusals to grant *habeas corpus* and secure accommodation orders made under s 25, Children Act 1989.

200) CPR 52.4(2).

201) CPR 52.6(1), (2).

Matters of Evidence

The appeal court will rarely receive oral evidence, nor will it normally consider evidence which was not before the lower court, although it can “draw any inference of fact which it considers justified on the evidence”.²⁰²⁾

Power to Allow Appeals

The court will allow an appeal when the lower court’s decision was “wrong” or “unjust because of a serious procedural or other irregularity in the proceedings in the lower court.”²⁰³⁾

Routes of Appeal

These are set out in the Practice Direction to CPR Part 52.

In general, an appeal proceeds to the next level of civil judge (district judge to circuit judge, Master to High Court judge, circuit judge to High Court judge, High Court judge to Court of Appeal).

13. The UNIDROIT/American Law Institute’s Principles And Rules Of Transnational Civil Procedure²⁰⁴⁾

[detailed account: Andrews, ECP paras 43.07 to end]

The text can be found at: www.ali.org/ali/transrules.htm

It is also published as *ALI/UNIDROIT ‘PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE’ (Cambridge UP, 2006)*

The American Law Institute (“ALI”) and UNIDROIT (The International Institute for the Unification of Private Law, based in Rome) completed an ambitious project to produce both a set of principles and model rules for use in international civil litigation.²⁰⁵⁾ The idea was conceived by Geoffrey Hazard, an USA law professor, and Michele Taruffo, an Italian comparative lawyer.²⁰⁶⁾ They drafted an initial set of rules which attempted to fuse

202) CPR 52.11(2), (4); see now the *Datec* case [2007] UKHL 23, at [46].

203) CPR 52.11(3).

204) See the special issue of the Uniform Law Review (2002) Vol VI, for many articles discussing this project; Fouchard (ed) *Vers un Proces Civil Universel? Les Règles Transnationales de Procédure Civile de L’American Law Institute* (Paris, 2001); G Hazard Jr et al “Principles and Rules of Transnational Civil Procedure” 33 NYU J Int L and Pol 769, 785, 793; R Stürner, “Some European Remarks on a new Joint Project of the American Law Institute and UNIDROIT” (2000) 34 Int L 1071.

205) The ALI’s most famous products are the various Restatements on areas of law; its office is at 4025 Chestnut St, Philadelphia, USA, PA 19104-3099.

206) Professors Professor Geoffrey Hazard, Jr, University of Pennsylvania, USA, and Professor Michele Taruffo, University of Pavia, Italy.

common law and civil law approaches to civil litigation.

Draft rules were considered by a Working Group at meetings held each year in Rome in 2000-2003.²⁰⁷⁾ In 2002 the Group decided to expand the project to include principles and not just rules. In 2001-2003 the group considered draft principles and rules.

In May 2002 leading English judges and commentators attended a conference on the draft principles and rules.²⁰⁸⁾ Zuckerman has summarized that discussion.²⁰⁹⁾ He questioned whether this project's aim in achieving procedural uniformity, at least in commercial matters, might not be deleterious:

'Plurality of procedure encourages experimentation and promotes evolutionary progress. Jurisdictional competition could encourage efficiency and lead to improvement in dispute resolution. It might, therefore, be better to direct the efforts in this area not so much towards an unified procedural system for transnational cases but towards establishment of general normative standards that allow for considerable variations. Community of general standards would facilitate easier mutual recognition of judgments and . . . enable different jurisdictions to find their own way of providing adjudication that is effective and attractive . . .'²¹⁰⁾

207) The group's membership was as follows:

Neil Andrews, Clare College, Cambridge, UK;
 Professor Frédérique Ferrand, Lyon, France;
 Professor Pierre Lalive, University of Geneva and practice as an arbitrator, Switzerland;
 Professor Masanori Kawano, Nagoya University, Japan;
 Madame Justice Aida Kemelmajer de Carlucci, Supreme Court, Mendoza, Argentina;
 Professor Geoffrey Hazard, USA;
 Professor Ronald Nhlapo, formerly of the Law Commission, South Africa;
 Professor Dr Rolf Stürner, University of Freiburg, Germany.

The two General Reporters for the Unidroit project were Professors Hazard and Stürner; the two reporters for the ALI project were Professors Hazard and Taruffo (University of Pavia, Italy).

208) Organised by the Neil Andrews in conjunction with the British Institute of International and Comparative Law: the papers are published in M Andenas, N Andrews, R Nazzini (eds) *The Future of Transnational Commercial Litigation: English responses to the ALI/UNIDROIT Draft Principles and Rules of Transnational Civil Procedure* (2003, British Institute of Comparative and International Law; re-printed, 2006).

209) AAS Zuckerman, 'Conference on "The ALI-UNIDROIT Principles and Rules of Transnational Civil Procedure' (2002) CJQ 322.

210) *ibid.*