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9A MAIN STATUTES

Senior Courts Act 1981

(1981 c.54)

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Paragraph numbers marked with a “+” denote content that is available on White Book on Westlaw UK or the Civil Procedure CD.

Introductory note

9A-1 This Act repealed and replaced the Supreme Court of Judicature (Consolidation)

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SENIOR COURTS ACT 1981

Act 1925 as well as the whole or parts of several other statutes, some ancient, obsolete or unnecessary and others more recent, which had dealt with the administration of justice in the Supreme Court in England and Wales. It also made consequential amendments in many other similar enactments and introduced several amendments.

The Act came into force on January 1, 1982 (s.153(2) (para.20A–566) except for ss.72, 143 and 152(2) which came into force on the day the Act received Royal Assent, July 28, 1981).

By the Constitutional Reform Act 2005 s.59 and Sch.11 Pt I para.1(1) the Supreme Court Act 1981 is re-titled the Senior Courts Act 1981 and throughout the 1981 Act “Senior Courts” is substituted for “Supreme Court”. Certain other amendments are also made by the 2005 Act to the 1981 Act, in particular amendments made necessary by the transfer of the judicial functions of the House of Lords to the Supreme Court of the United Kingdom (see s.40 and Sch.9 para.36 of the 2005 Act).

Interpretation

Whereas the JA 1925 was a consolidating statute, the SCA 1981 is not a mere consolidating statute but is, as expressly stated in its preamble, an Act “to consolidate with amendments” the JA 1925 and other enactments. A major consequence of this fact is that, in interpreting the provisions of the 1981 Act the Court will not be bound to apply the presumption, applicable to the construction of a consolidating statute that Parliament did not intend to alter but simply to reproduce or repeat the existing law; nor will the Court be bound by the presumption that the words used in the 1981 Act should have the same meaning as they had at the time the Act was passed (see Ben-nion, *Statutory Interpretation* (3rd edn, 1997) Sect.211, and authorities cited there). The Court will bear in mind that these presumptions are rebuttable, and will lean towards giving effect to the overriding intention of Parliament to provide an efficient and effective system for the administration of justice, both civil and criminal.

9A-2

Continuity of procedure

Whereas the JA 1925 contained an express provision for the saving of the former practice and procedure (see s.103 which replaced s.73 of the JA 1873), the SCA 1981 omits this provision (note also the JA 1925 s.32 was repealed but not replaced by the 1981 Act). Nevertheless, there are to be found scattered through the Act provisions which recall and reimpose those as to jurisdiction, practice and procedure which prevailed before the passing of the Act and which may, in some instances, refer back to the jurisdiction, practice and procedure prevailing before JA s.1873–1875 (see, e.g. s.15(2)(b) (jurisdiction, civil and criminal of the Court of Appeal); s.19(2)(b) (jurisdiction, civil and criminal exercisable by the High Court); s.28(3)(b) (jurisdiction of the High Court to determine appeals from Crown Court and inferior courts); s.29(1) (orders of mandamus, prohibition and certiorari); s.44 (extraordinary functions of Judges of High Court); s.49(2) (jurisdiction as to the current administration of law and equity to be exercised “as hitherto”); s.84(2) (powers to make rules of court); s.96(2) (business of the Central Office)).

9A-3

Impact of Constitutional Reform Act 2005

The Constitutional Reform Act 2005 (c.4) modifies the office of Lord Chancellor and makes provision relating to the functions of that office. The Act also (1) establishes a Supreme Court of the United Kingdom and abolishes the appellate jurisdiction of the House of Lords, and (2) makes provision about the jurisdiction of the Judicial Committee of the Privy Council. In addition the Act makes provision about the judiciary (their appointment and discipline). The Act is being brought into force over a period of time. It alters in many respects the Senior Courts Act 1981 (and other legislation printed in Section 9 of *The White Book*). At the time of going to press, only a few of the provisions in the 2005 Act had been brought into force. Those provisions having an impact on the SCA 1981 are referred to in commentary where relevant and some (but not all) of the prospective amendments are also noted. Provisions in the Courts Act 2003 (c.39) also amended sections in the 1981 Act. Some of those provisions are September 19, 2007. When they are they will take effect as amended (if at all) by the 2005 Act. Further provisions in the Constitutional Reform Act 2005 altering provisions in the Senior Courts Act 1981 were brought into force with effect from April 3, 2006, by the Constitutional Reform Act 2005 (Commencement No.5) Order

9A-4

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2006 (SI 2006/1014). Included among them was s.13 of the 2005 Act which deals with, to give directions. Other provisions brought into force by that Order affect provisions relating to the organisation of the courts but most are a consequence of the transfer of functions from the Lord Chancellor to the Lord Chief Justice.



For ss.1 to 8 of the Senior Courts Act 1981 (see Arrangement) plus any related commentary see paragraphs 9A–5+ to 9A–29+ on White Book on Westlaw UK or the Civil Procedure CD.

OTHER PROVISIONS

Assistance for transaction of judicial business of Senior Courts

9A–30 9.—(1) A person within any entry in column 1 of the following Table may subject to the proviso at the end of that Table at any time, at the request of the appropriate authority, act—

- (a) as a judge of a relevant court specified in the request; or
- (b) if the request relates to a particular division of a relevant court so specified, as a judge of that court in that division.

9A–31

| | 1 | 2 |
|----|---|--|
| | <i>Judge or ex-judge</i> | <i>Where competent to act on request</i> |
| 1. | A judge of the Court of Appeal. | The High Court and the Crown Court. |
| 2. | A person who has been a judge of the Court of Appeal. | The Court of Appeal, the High Court and the Crown Court. |
| 3. | A puisne judge of the High Court. | The Court of Appeal. |
| 4. | A person who has been a puisne judge of the High Court. | The Court of Appeal, the High Court and the Crown Court. |
| 5. | A Circuit judge. | The High Court and the Court of Appeal. |
| 6. | A Recorder. | The High Court. |

The entry in column 2 specifying the Court of Appeal in relation to a Circuit judge only authorises such a judge to act as a judge of a court in the criminal division of the Court of Appeal.

(1A) A person shall not act as a judge by virtue of subsection (1) after the day on which he attains the age of 75.

(2) In subsection (1) “the appropriate authority”—

- (a) the Lord Chief Justice or a judicial office holder (as defined in section 109(4) of the Constitutional Reform Act 2005) nominated by him to exercise his functions under this section, or
- (b) at any time when the Lord Chief Justice or the nominated judicial office holder is unable to make such a request himself, or there is a vacancy in the office of Lord Chief Justice, the Master of the Rolls;

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“relevant court”, in the case of a person within any entry in column 1 of the Table, means a court specified in relation to that entry in column 2 of the Table.

(2A) The power of the appropriate authority to make a request under subsection (1) is subject to subsections (2B) to (2D).

(2B) In the case of a request to a person within entry 1, 3, 5 or 6 in column 1 of the Table, the appropriate authority may make the request only after consulting the Lord Chancellor.

(2C) In any other case the appropriate authority may make a request only with the concurrence of the Lord Chancellor.

(2D) In the case of a request to a Circuit judge or Recorder to act as a judge of the High Court, the appropriate authority may make the request only with the concurrence of the Judicial Appointments Commission.

(3) In the case of—

(a) a request under subsection (1) to a Lord Justice of Appeal to act in the High Court; or

(b) any request under that subsection to a puisne judge of the High Court or a Circuit judge,

it shall be the duty of the person to whom the request is made to comply with it.

(4) Without prejudice to section 24 of the Courts Act 1971 (temporary appointment of deputy Circuit judges and assistant Recorders), if it appears to the Lord Chief Justice, after consulting the Lord Chancellor, that it is expedient as a temporary measure to make an appointment under this subsection in order to facilitate the disposal of business in the High Court or the Crown Court, he may appoint a person qualified for appointment as a puisne judge of the High Court to be a deputy of the High Court during such period or on such occasions as the Lord Chief Justice, after consulting the Lord Chancellor, thinks fit; and during the period or on the occasions for which a person is appointed as a deputy judge under this subsection, he may act as a puisne judge of the High Court.

(4A) No appointment of a person as a deputy judge of the High Court shall be such as to extend beyond the day on which he attains the age of 70, but this subsection is subject to section 26(4) to (6) of the Judicial Pensions and Retirement Act 1993 (Lord Chancellor’s power to authorise continuance in office up to the age of 75).

(5) Every person while acting under this section shall, subject to subsections (6) and (6A), be treated for all purposes as, and accordingly may perform any of the functions of, a judge of the court in which he is acting.

(6) A person shall not by virtue of subsection (5)—

(a) be treated as a judge of the court in which he is acting for the purposes of section 98(2) or of any statutory provision relating to—

(i) the appointment, retirement, removal or disqualification of judges of that court;

(ii) the tenure of office and oaths to be taken by such judges; or

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- (iii) the remuneration, allowances or pensions of such judges; or
 - (b) subject to section 27 of the Judicial Pensions and Retirement Act 1993, be treated as having been a judge of a court in which he has acted only under this section.
- (6A) A Circuit judge or Recorder shall not by virtue of subsection (5) exercise any of the powers conferred on a single judge by sections 31, 31B, 31C and 44 of the Criminal Appeal Act 1968 (powers of single judge in connection with appeals to the Court of Appeal and appeals from the Court of Appeal to the Supreme Court).
- (7) [...]
- (8) Such remuneration and allowances as the Lord Chancellor may, with the concurrence of the Minister for the Civil Service, determine may be paid out of money provided by Parliament—
- (a) to any person who has been—
 - (i) a judge of the Supreme Court; or
 - (ii) a judge of the Court of Appeal; or
 - (iii) a judge of the High Court,and is by virtue of subsection (1) acting as mentioned in that subsection;
 - (b) to any deputy judge of the High Court appointed under subsection (4).
- (9) The Lord Chief Justice may nominate a judicial office holder (as defined in section 109(4) of the Constitutional Reform Act 2005) to exercise his functions under subsection (4).

9A–32 *Note* —Amended by the Administration of Justice Act 1982 s.58; the Judicial Pensions and Retirement Act 1993 ss.26 and 31; Schs 6 and 9; the Criminal Justice and Public Order Act 1994 s.52; the Courts Act 2003 s.109(1), Sch.8, para.260; the Constitutional Reform Act 2005 s.15(1), Sch.4 para.121 and by the 2005 Act, ss 40, 59, Sch.9 para.36(2), Sch.11 para.26, Sch 17 para 22(3), with effect from October 1, 2009 (SI 2009/1604).

Judicial assistance

9A–33 The most interesting feature of this section is that it provides for circumstances in which puisne judges of the High Court may sit in the Court of Appeal and in which circuit judges may sit in the High Court or in the Court of Appeal. This facilitates the flexible deployment of judge power and has other advantages. This section gathers together in simplified language and with the use of a table, scattered provisions from several enactments enabling judicial assistance to be obtained for the business of the Supreme Court, see the JA 1925 ss.3, 7 and 8; the A.J. (M.P.) A. 1933 s.2(1); the Criminal Appeal Act 1966 s.1(3); and the Courts Act 1971 ss.4(3), 23 and 24.

Under the common law doctrine of *de facto* authority, the acts of a circuit judge in dealing with a High Court case, though not authorised to do so under s.9, may be upheld (*Fawdry & Co v Murfitt* [2002] EWCA Civ 643; [2002] 3 W.L.R. 1354, CA; see also *Baldock v Webster* [2004] EWCA Civ 1869, CA; *Coppard v Customs and Excise Commissioners* [2003] EWCA Civ 511; [2003] 2 W.L.R. 1618, CA). Note also s.68 (Exercise of High Court jurisdiction otherwise than by judges of that court). Where the necessary judicial authority of a judge is provided by the *de facto* authority doctrine, the judge constitutes a tribunal established by law within the meaning of art.6 of the Convention, as the doctrine validates the judge's office as well as his acts (*Coppard v Customs and Excise Commissioners* [2003] EWCA Civ 511; [2003] 2 W.L.R. 1618, CA).

Subsection (1)

9A–34 Item 6 in the table was added by the AJA 1982 s.58.

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

For ss.10 to 13 of the Senior Courts Act 1981 (see Arrangement) plus any related commentary see paragraphs 9A-35+ to 9A-45+ on White Book on Westlaw UK or the Civil Procedure CD.



Power of judge of Senior Courts to act in cases relating to rates and taxes

14.—(1) A judge of the Senior Courts or of the Crown Court shall not be incapable of acting as such in any proceedings by reason of being, as one of a class of ratepayers, taxpayers or persons of any other description, liable in common with others to pay, or contribute to, or benefit from, any rate or tax which may be increased, reduced or in any way affected by those proceedings. **9A-46**

(2) In this section “rate or tax” means any rate, tax, duty or liability, whether public, general or local, and includes—

- (a) any fund formed from the proceeds of any such rate, tax, duty or liability; and
- (b) any fund applicable for purposes the same as, or similar to, those, for which the proceeds of any such rate, tax, duty or liability are or might be applied.

Note—Derived from the JA 1925 s.17. Amended by the Constitutional Reform Act 2005 s.59 and Sch.11 para.26 with effect from October 1, 2009 (SI 2009/1604). **9A-47**

Judicial bias—“incapable” and “apparent”

Under the Human Rights Act 1998 Sch.1 Pt 1 art.6.1 (right to a fair trial), in the determination of his civil rights and obligations, everyone is entitled to a fair hearing by an independent and impartial tribunal (see para.3D-76 above). The requirement that the tribunal should be independent and impartial is one that has long been recognised by English common law. An appellate or reviewing court will set aside a decision affected by bias. **9A-48**

On the matter of impartiality, the decided cases draw a distinction between “actual bias” and “apparent bias” (*Director General of Fair Trading v Proprietary Association of Great Britain* [2001] 1 W.L.R. 700, CA, para.38). The phrase “actual bias” has been applied to the situation (1) where a judge has been influenced by partiality or prejudice in reaching his decision and (2) where it has been demonstrated that a judge is actually prejudiced in favour of or against a party. Findings of actual bias on the part of a judge are rare.

The phrase “apparent bias” describes the situation where circumstances exist which give rise to a reasonable apprehension that the judge may have been, or may be, biased. After *R. v Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte (No.2)* [1999] 2 W.L.R. 272, HL, allegations of apparent bias in the court became increasingly prevalent (in particular, allegations against part-time professional judges and against full-time judges recruited from the solicitors’ branch of the legal profession). In *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, CA, after hearing a number of appeals at the same time, the Court of Appeal sought to give guidance as to the principles which should be applied. Subsequently, in *Porter v Magill* [2001] UKHL 67; [2002] 2 A.C. 357, HL, the House of Lords approved the following test formulated in the *Re Medicaments* case: “The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility or a real danger, the two being the same, that the tribunal was biased”. The fair-minded observer is not unduly sensitive or suspicious (*Helow v Secretary of State for the Home Department* [2008] UKHL 62; [2008] 1 W.L.R. 2416, HL). Actual or apparent bias against a witness is as serious as bias against or in favour of a party (*Phillips v Symes* [2003] EWCA Civ 1769; December 5, 2003, CA, unrep.).

In *Helow v Secretary of State for the Home Department* [2008] UKHL 62; [2008] 1

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

W.L.R. 2416, HL, an application by a Palestinian asylum-seeker for the review of a removal order was refused by a judge of the Scottish Court of Session. The applicant's appeal to the Inner House, made on the ground of apparent bias, in particular on the ground that the judge was a member of a voluntary association (the International Association of Jewish Lawyers and Jurists) in whose publications pro-Israel sentiments expressed by the association's president had been published, was dismissed. The House of Lords dismissed the applicant's further appeal. It was held that, in the absence of evidence that the judge had read the material complained of, or endorsed the views expressed thereon, a fair-minded and informed observer would not have concluded that there was a real possibility of bias.

Conceivably, cases may arise in which judges have to decide questions as to the raising and levying of rates and taxes, the outcome of which may affect their interests as rate payers or tax payers. The Senior Courts Act 1981 s.14 states that a judge shall not be "incapable of acting" by reason of that interest.

On application or on his own motion a judge may recuse himself on the ground of bias. Applications for recusal go to the heart of the administration of justice and must be raised as soon as is practicable (*Baker v Quantum Clothing Group* [2009] EWCA Civ 566; June 6, 2009, CA, unrep.). A judge is always wise to err on the side of caution and to reveal at the outset anything that might provoke an application to recuse. It is incumbent on the judge to explain in sufficient detail matters that may be relevant to the informed bystander test, particularly in those cases where he is likely to be the only source of such information (*Re L-B (Children)* [2010] EWHC Civ 1118, September 23, 2010, unrep, CA.). No litigant is entitled to hand pick his court by demanding information which may with luck enable him to challenge a judge for bias (*D'Silva v University College Union* [2009] EWCA Civ 1258, October 14, 2009, CA, unrep.). As an impartial judge is a fundamental prerequisite of a fair trial a judicial officer should not hesitate to recuse himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reason, was not or will not be impartial (*Locabail (UK) Ltd v Bayfield Properties Ltd*, op. cit., at p.479). The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves (ibid.). Where, following trial, an application is made by a party for a costs order against a non-party under CPR r.48.2, the application should normally be determined by the trial judge who could give effect to any views he had expressed as to the conduct of the non-party without constituting bias or the appearance of bias (*Thomson v Berkhamsted Collegiate School* [2009] EWHC 2374 (QB), October 2, 2009, unrep. (Blake J.)). The circumstances in which an application to a trial judge under CPR r.48.2 for a costs order against a non-party arise may be such as to cause the judge to consider whether he should recuse himself on the grounds of apparent bias (*Bahai v Rashidian* [1985] 1 W.L.R. 1337, CA, *Symphony Group Plc v Hodgson* [1994] Q.B. 179; [1993] 3 W.L.R. 830, CA, *Phillips v Symes (No.2)* [2004] EWHC 2330; 154 New L.J. 1615, (Ch) (Peter Smith J.)). In a case where proceedings are brought to commit a person for contempt in the face of the court, the judge should, if there is a risk of the appearance of bias, ask another judge to hear the committal application (Practice Direction (Committal Applications) para.13(6); see Vol.1, para.scpd52.7). It is not a breach of art.6 of the ECHR for the judge to deal with the contempt himself (*Wilkinson v S.* [2003] EWCA Civ 95; [2003] 1 W.L.R. 1254, CA, (see further Vol.1, para.sc52.1.17)).

As to the risk of apparent bias in an appeal, where the appeal court is constituted by several judges, of whom one had dealt with the application for permission to appeal on paper (both generally and where that judge has specialist experience in the area of law involved), see *Sengupta v Holmes* [2002] EWCA Civ 1104; *The Times* August 19, 2002, CA, and *Dŵr Cymru Cyfyngedig v Albion Water* [2008] EWCA Civ 97, January 14, 2008, unrep. CA; and note commentary in Vol.1 para. 52.3.18. See also *Desmond v Bower* [2009] EWCA Civ 857; July 20, 2009, CA, unrep. (at permission stage, appeal panel judge recusing himself where a possible consequence of allowing an appeal against an admissibility of evidence decision would be that a person known to the judge would become a trial witness).

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The disqualification of a judge for apparent bias is not a discretionary matter; either there is a real possibility of bias or there is not. A real danger of bias might well be thought to arise where the judge was closely acquainted with a member of the public involved in the case, whether or not that person was to give evidence. Judicial impartiality is the fundamental principle of justice (both at common law and under art.6 of the Convention). Consequently, a judge's concerns about the prejudicial effect that his withdrawal would have on the parties and on the administration of justice (delays, costs, listing problems) are not relevant, as efficiency and convenience are not the determinative legal values in this context (*AWG Group Limited v Morrison* [2006] EWCA Civ 6; [2006] 1 W.L.R. 1163, CA (appeal allowed where, shortly before trial, assigned judge realising that a prospective witness was known to him but dismissing defendant's application for recusal)).

Other English cases on apparent bias coming to attention since the *Locabail* case include: *Hampshire CC v Gillingham* April 5, 2000, unrep., CA; *Taylor v Lawrence* [2001] EWCA Civ 119; January 25, 2001, unrep., CA; *Re Bank of Credit and Commerce International (SA)* (2001) 151 New L.J. 1852, (Lawrence Collins J.); *Taylor v Lawrence* [2002] EWCA Civ 90; [2002] 2 All E.R. 353, CA; *Taylor v Williamsons* [2002] EWCA Civ 1380, *The Times*, August 9, 2002, CA; *Sengupta v Holmes* [2002] EWCA Civ 1104; *The Times*, August 19, 2002, CA; *Berg v I.M.L. London Ltd* [2002] 1 W.L.R. 3271; [2002] 4 All E.R. 87 (Stanley Burnton J.) (Master dealing with application for summary judgment seeing "without prejudice" correspondence); *Hart v Relentless Records Ltd* [2002] EWHC 1984 (Jacob J.) (corridor meeting between judge and counsel in which judge indicated case was weak and parties should reconsider settlement). See also *Geveran Trading Co Ltd v Skjevesland* [2002] EWCA Civ 1567; [2003] 1 W.L.R. 912, CA (test of apparent bias not relevant to application to prevent an advocate from acting); *Garratt v Saxby* (*Practice Note*) [2004] EWCA Civ 341; [2004] 1 W.L.R. 2152, CA (offer to settle inadvertently disclosed to judge); *Foenander v Foenander* [2004] EWCA Civ 1675, (judges formerly in same chambers as counsel); *Birmingham City Council v Yardley*, [2004] EWCA Civ 1756, CA (part-time judge and counsel belonging to same chambers); *Howell v Lees Millais* [2007] EWCA Civ 720, July 4, 2007, CA (judge ought to have recused himself from dealing with application in which partner of firm of solicitors involved where alleged he had had personal dealings with another partner in the same firm); *Amjad v Steadman-Byrne* [2007] EWCA Civ 625; *The Times* July 30, 2007, CA, (before presentation of defence case, judge meeting privately with counsel and expressing various views on the progress of the case and giving opinion on the effectiveness of the defendant's cross examination of the claimants' witnesses); *Thompson v Collins* [2009] EWCA Civ 525; April 6, 2009, CA, unrep. (solicitor for one party contacting part-time judge directly when parties unable to resolve issues required to be agreed in accordance with judge's order); *Baker v Quantum Clothing Group* [2009] EWCA Civ 566; June 6, 2009, CA, unrep. (website links between claimant's solicitors and voluntary organisation of which appeal panel judge was honorary president and which provided self-help for persons afflicted by the particular disability suffered by the claimant as a result of the defendants' alleged negligence); *Desmond v Bower* [2009] EWCA Civ 857; July 20, 2009, CA, unrep. (at permission stage, appeal panel judge recusing himself where a possible consequence of allowing an appeal against an admissibility of evidence decision would be that a person known to the judge would become a trial witness). In *OFT v Abbey National plc* [2009] EWCA Civ 116; [2009] 2 W.L.R. 1286, CA, each of the three lord justices sitting to hear an appeal in a case involving a number of banks was a customer of one or more of them, but (as their lordships noted) none of the parties to the appeal suggested that they should not continue to sit (*ibid* at [3]). In the Scottish case of *Davidson v Scottish Ministers (No.2)* [2004] UKHL 34; *The Times* July 16, 2004, HL, it was held that a risk of apparent bias is liable to arise where a judge who had participated in the drafting or promotion of legislation during the parliamentary process is called upon to rule judicially on the effect of the legislation. But the fact that a judge has been a member of a government is not enough to disqualify that judge in respect of decisions made by that government; there must be a nexus between the issue before the court and the role of the judge while he was a minister (*R. (Ewing) v Secretary of State for Justice* [2008] EWHC 3416 (Admin); December 19, 2008, unrep. (Beatson J.)). A party may be taken to have waived his right to object to a particular judge hearing his case on grounds of apparent bias provided he was given a fair opportunity to reach an unpressured decision and did so freely and in full knowledge of the facts giving rise to an appearance of bias

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SECTION 9A: MAIN STATUTES

(*Smith v Kvaerner Cementation Foundations Ltd* [2006] EWCA Civ 242; [2006] 3 All E.R. 593, CA (re-trial before different judge ordered where claimant's decision assisted by counsel's advice did not amount to waiver of right to complain of bias)).

In *Locabail (UK) Ltd v Bayfield Properties Ltd*, op. cit., Lord Bingham C.J., stated that, among the factors which were likely to give rise to a soundly based objection of apparent (or perceived) bias, was personal friendship between, or close acquaintance with, the judge and any member of the public involved in the case. If the credibility of a judge's friend or acquaintance is an issue to be decided by him, the judge should be readier to recuse himself. It is clear that a legal practitioner acting as a part-time judge should not sit to determine a case where, in his capacity as a practitioner, he is acting under current instructions for a party in the case in another matter. Particular difficulties may arise where a part-time judge has, or has had, a professional relationship in other matters with a guardian ad litem acting for children in a case coming before the judge. The role of a guardian in legal proceedings may vary and each case is fact-specific. Consequently, there is no general rule that it will inevitably follow that a practitioner judge must recuse himself in these circumstances (*Re L-B (Children)* [2010] EWCA Civ 1118, September 23, 2010, unrep, CA.). In *Grant v Teacher's Appeal Tribunal* [2006] UKPC 59, December 7, 2006, unrep., PC, the Privy Council dismissed an appeal from the Court of Appeal of Jamaica in part based on this factor. In doing so the Board recognised the special problems that judges in small communities face where parties and witnesses are known, and not infrequently well known, to judges assigned to sit.

Circumstances may arise where it would be improper for a judge to sit (1) to hear an application in, or (2) to try a particular issue arising for determination in, particular proceedings because of his earlier involvement in those proceedings or in related proceedings. An obvious example would be where, in the course of managing a case, a judge who was to try the case necessarily had communicated to him the fact that Pt 36 payment had been made (see r.36.13(2)). There are less obvious examples not specifically dealt with by extant legal provisions (such as r.36.13(2)). Under the CPR case management system, the risks of a judge sitting for certain purposes knowing of matters that in fairness he should not be increased. Such difficulties have arisen in a number of post-CPR cases. Examples are: *Thomson Directories Ltd v Planet Telecom Plc* [2003] EWHC 1882 (Ch); July 4, 2003, unrep. (Laddie J.) (inquiry as to damages after trial of preliminary issue); *ALM Manufacturing v Black & Decker* [2003] EWHC 1646 (Ch); May 21, 2003, unrep. (Pumfrey J.) (without prejudice communication between defendant and third party); *GE Capital Commercial Finance Ltd v Sutton* [2003] EWHC 1648 (QB); July 4, 2003, unrep. (McCombe J.) (evidence ruling on material obtained by improper means); *Smithkline Beecham Plc v Generics (UK) Ltd* [2003] EWCA Civ 1109, *The Times*, August 25, 2003, CA (confidential documents where claims tried together). The handling of judicial review claims (especially those involving nationality and asylum issues) in which a judge is required to look at particular documents for interlocutory purposes may pose particular hazards in this respect. In such circumstances, the judge may think it right not to take part in a determination of the merits; all depends upon the circumstances (*R. (AHK & FM) v Secretary of State for the Home Department* [2009] EWCA Civ 287, April 2, 2009, CA, at para.20). In *Mireskandari v The Law Society* [2009] EWCA Civ 864; July 8, 2009, CA, unrep., the Court of Appeal noted that, where a recusal application is made to a judge managing a case and, whilst that application is pending, the judge makes case management directions, questions of the status of those directions may arise (should orders made in the meantime be set aside as of right?, or is there a more general discretion and, if so, in accordance with what principles should it be exercised?). In this case, the judge granted the claimant's recusal application, not on a ground alleged in the claimant's initial application (all of which the judge rejected), but on a single ground (relating to the judge's trial of an action 12 years previously in which the applicant was a witness) of which the judge became aware after he had refused the claimant's application for an extension of time for complying with an unless order. The Court of Appeal held that, in these circumstances, there was no principle pursuant to which it could be said that the judge was under a duty to stop giving case management directions or that he erred in principle in continuing to do so; accordingly, no question as to the status of those directions arose.

A judge to whom a case has been assigned for trial has to be very careful, in ruling

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on pre-trial applications, not to pre-judge any matter that will be argued and decided at trial, and not to pre-empt any decision that will be made on that occasion (*Hammond v Pro-Fit USA Limited* [2007] EWHC 2941 (Ch), June 28, 2007, unrep. (Morgan J.) (defendant's application for disclosure raising issue whether, on ground of fraud, claimant unable to claim document privileged); *Bank of Tokyo-Mitsubishi UFJ Ltd v Basakan Gida Sanayi Ve Pazarlama AS* [2008] EWHC 659 (Ch), April 9, 2008, unrep. (Briggs J.) (minor defendant's application in heavy proceedings for summary judgment on single conspiracy claim against him)). A judge's role in actively managing a case or group of cases (whether subject to a group litigation order or not) may require the judge to further consider or re-consider issues that have already arisen for determination, either at a case management hearing, or on an interlocutory application (e.g. for an interim injunction) or at a trial (e.g. of a preliminary issue). Obviously, circumstances may arise in which a judge assigned at an early stage to a particular case or group of cases should recuse himself from hearing particular matters; e.g. where successive applications are made in relation to the same interim injunction (e.g. one for continuation and another for variation) and fairness dictates that the same judge should not hear each (*Dadourian Group International Inc v Simms* (Practice Note) [2006] EWCA Civ 399; [2006] 1 W.L.R. 2499; [2006] 3 All E.R. 48, CA, at para.66 per Arden L.J.), or where, in ruling on a question whether part of a claim has been compromised, an assigned judge has seen documents he would not have seen were he trying the case (*Baris Ltd v Kasima Construction Europe (UK) Ltd* [2006] EWHC 31 (TCC), January 20, 2006, unrep.), or where, in dealing with a case management issue a judge to whom a case had been assigned for trial expressed the opinion that the claim was exaggerated (*Stallwood v David* [2006] EWHC 2600 (QB); October 25, 2006, unrep.), or where on a pre-trial application in a libel claim the parties wished to refer to matters which could not be mentioned to the designated judge (managing the case and due to try it) (*Adelson v Associated Newspapers Ltd* [2007] EWHC 997 (QB); *The Times* May 10, 2007). However, to characterise too readily a judge's conduct in this role as conduct at risk of being perceived as apparent bias would subvert the proactive management of cases expected of judges under the CPR (*A-B v British Coal Corp* [2006] EWCA Civ 172, January 24, 2006, unrep., CA, per Auld L.J.).

In the Family Proceedings Rules 1991, the procedural code for the handling of applications for ancillary relief under the Matrimonial Causes Act 1973 includes, in r.2.61A et seq, provisions for the hearing by a judge of a "Financial Dispute Resolution appointment", a meeting held for the purposes of discussion and negotiation, and in r.2.61E(2) it is expressly provided that, subject to exceptions, the judge "must have no further involvement with the application" (for purpose and ambit of this restriction and dicta on question whether it may be waived by party agreement, see *Myerson v Myerson* [2008] EWCA Civ 1376; *The Times* January 7, 2009, CA).

Cases have arisen in which, after trial, it has been argued that the appearance of bias was given by the way in which the judge conducted himself during the trial. The dictum of Lord Greene M.R. in *Yuill v Yuill* [1945] P. 15, about the judge who "descends into the arena and is liable to have his vision clouded by the dust of the conflict" has been much-quoted. The cases that have caused concern are those in which judges' interventions have taken the form, either of dealing brusquely with counsel, arguably frustrating the development of submissions, or of pointed and regular questioning of witnesses, arguably preventing the witness from giving of his best, or both (e.g. *Southwark LBC v Kofi-Adu* [2006] EWCA Civ 281; *The Times*, June 1, 2006, CA). Such behaviour causes concern, not simply because the judge has abandoned his traditional passive role, but because the manner in which he has chosen to play a more active role threatens the fairness of the trial. Most commonly, the connection between the judge's behaviour and the possibility of unfairness is the impression that the judge had pre-judged the issues he was required to try. Thus the argument has been that a fair-minded lay observer might reasonably apprehend from the judge's interventions that he had pre-judged the very questions he was to decide and therefore might not bring an impartial and unprejudiced mind to the resolution of those questions. Such pre-judgment may form the basis for a challenge of apparent bias (or, indeed, of actual bias). However, not every case in which it is contended that a trial was unfair because of excessive judicial intervention should be analysed in terms of apparent bias (*Opportunity Equity Partners Ltd v Almeida* [2006] UKPC 44, October 3, 2006, unrep., PC).

The surest means by which a judge might avoid any allegations of apparent bias on

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the grounds that he pre-judged issues would be for him to remain silent throughout the proceedings, giving no hint of his thought processes, listening to advocates without interruption, asking no question and voicing no opinion until breaking his silence to give judgment. In a number of cases (most of them involving allegations of bias against members of tribunals) the impracticality of such passive judicial behaviour and the advantages of judges engaging in dialogue with parties and counsel, whilst avoiding premature expressions of factual conclusions or anything which may prematurely indicate a closed mind, have been noted and explained (see *Arab Monetary Fund v Hashim* (1993) 6 Admin. L.R. 348, CA, and authorities referred to in *Southwark LBC v Jiminez* [2003] EWCA Civ 502; [2003] I.C.R. 1176, CA). At a trial a judge may legitimately give assistance to the parties by telling them about the views that he is forming in his mind as the evidence goes along, but it is not acceptable for a judge to form (or to give the impression of having formed) a firm view in favour of one side's credibility when the other side has not yet called evidence which is intended to impugn it (*Amjad v Steadman-Byrne* [2007] EWCA Civ 625; *The Times* July 30, 2007, CA). A judge who intervenes to suggest new lines of argument to counsel risks being accused of entering into the arena on behalf of one side, especially where for good reasons unknown to the court experienced counsel has chosen not to utilise them (*W.X. Investments Ltd v Bragg* [2002] EWHC 925 (Ch); [2002] 1 W.L.R. 2849 (Patten J.)). On the other hand, where counsel fail to refer the judge to the law relevant to the determination of a procedural application it is proper for the judge to direct their attention to it and to invite submissions (*James v London Borough of Havering* [2007] EWHC 2168 (QB), September 26, 2007 (Keith J.)) (application to lift automatic stay).

As to bias in arbitrators, see *Save and Prosper Pensions Ltd v Homebase Ltd* [2001] L. & T.R. 11; *AT&T Corp v Saudi Cable Co* [2000] 2 Lloyd's Rep. 127, CA.

As to bias in tribunal, see *Harada Ltd v Turner* [2001] EWCA Civ 599; April 6, 2001, unrep., CA; *Bennett v London of Southwark* [2002] EWCA Civ 223; February 21, 2002, unrep., CA; *Lawal v Northern Spirit Limited* [2003] UKHL 35; [2003] I.C.R. 856, HL (part-time tribunal member acting as advocate); *Bennett v London Borough of Southwark* [2002] EWCA Civ 223; February 21, 2002, unrep., CA (whether industrial tribunal should have recused itself when claimant's lay representative accused it of racism); *Jones v DAS Legal Expenses Insurance Co Ltd* [2003] EWCA Civ 1071 (chairman of tribunal related to barrister in chambers routinely receiving cases from defendants); *ASM Shipping Ltd of India v TTMI Ltd of England* [2005] EWHC 2238 (Comm); [2006] 1 Lloyd's Rep. 375 (Morison J.); *Ansar v Lloyds Bank TSB Plc* [2006] EWCA Civ 1462, October 9, 2006, CA, unrep. (allegations of bias and misconduct made against tribunal chairman by claimant in previous proceedings); *Ezias v North Glamorgan NHS Trust* [2007] EWCA Civ 330, March 7, 2007, CA, unrep. (premature expression of concluded view); *R. (Riseborough) v Lands Tribunal* [2010] EWHC 1436 (Admin), May 25, 2010, unrep. (party represented by lawyers with whom judge had had professional dealings).

As to bias in coroners, see *R. (Dowler) v HM Coroner for North London* [2009] EWHC 3300 (Admin), November 6, 2009, unrep. (Dobbs J.) and *R. (Pounder) v HM Coroner for North and South Districts of Durham and Darlington* [2010] EWHC 328 (Admin), February 23, 2010, unrep. (Burnett J.).

PART II

JURISDICTION

THE COURT OF APPEAL

General jurisdiction of Court of Appeal

9A-49 15.—(1) The Court of Appeal shall be a superior court of record.

(2) Subject to the provisions of this Act, there shall be exercisable by the Court of Appeal—

(a) all such jurisdiction (whether civil or criminal) as is conferred on it by this or any other Act; and

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- (b) all such other jurisdiction (whether civil or criminal) as was exercisable by it immediately before the commencement of this Act.
- (3) For all purposes of or incidental to—
 - (a) the hearing and determination of any appeal to the civil division of the Court of Appeal; and
 - (b) the amendment, execution and enforcement of any judgment or order made on such an appeal,
 the Court of Appeal shall have all the authority and jurisdiction of the court or tribunal from which the appeal was brought.
- (4) It is hereby declared that any provision in this or any other Act which authorises or requires the taking of any steps for the execution or enforcement of a judgment or order of the High Court applies in relation to a judgment or order of the civil division of the Court of Appeal as it applies in relation to a judgment or order of the High Court.

Criminal and Civil Divisions of the Court of Appeal

The Court of Appeal is divided into the Criminal Division and the Civil Division. For the provisions governing distribution of business between the Divisions see s.53 below.

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Appeals in civil matters

For procedure regulating appeals to the Court of Appeal (Civil Division), see CPR Pt 52 and the practice direction supplementing that Part. The courts and tribunals from which the Court of Appeal hears appeals in civil matters include:

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- (1) *High Court*—Subject to exceptions, appeal lies to the Court of Appeal from all Divisions of the High Court (s.16); see para.9A-59 below and note (5) below (bankruptcy appeals).
- (2) *County courts*—Subject to exceptions, appeal lies to the Court of Appeal from decisions of the county courts in civil matters, including matrimonial proceedings (County Courts Act 1984 s.77); see para.9A-568.
- (3) *Employment Appeal Tribunal*—Appeal lies to the Court of Appeal from the EAT, but only with the leave of the EAT or the Court of Appeal (Employment Protection (Consolidation) Act 1978 s.136(4)).
- (4) *Patents Court*—Appeal lies to the Court of Appeal from decisions of the Patents Court (see the SCA 1981 s.6 (which provides that the Patents Court is part of the Chancery Division of the High Court) and the Patents Act 1977 s.97(3) (which sets out the requirements concerning leave to appeal)).
- (5) *Bankruptcy*—An appeal lies from a decision made by a county court or by a registrar in bankruptcy of the High Court to a single judge of the High Court and an appeal lies from a decision of that judge with his leave or the leave of the Court of Appeal (Insolvency Act 1986 s.375(2)).
- (6) *Lands Tribunal*—Appeal lies to the Court of Appeal from decisions of the Lands Tribunal Act 1949 s.3(4)). Section 4(1) of the 1949 Act was amended by the Civil Procedure (Modification of Enactments) Order 2000 (SI 2000/941), with the result that the requirement that appeals from the Lands Tribunal on points of law should be by case stated was removed. Such appeals are now governed by CPR Pt 52, with permission to appeal being required in every case (*Practice Direction (Lands Tribunal: Appeals: Applications)* [2000] R.V.R. 223).
- (7) *Social Security Commissioners*—Appeal lies to the Court of Appeal from decisions of the Social Security Commissioners, with the leave of the Commissioner or the Court of Appeal (Social Security Act 1980 s.14). Although s.55(1) of the Access to Justice Act 1999, s.55(1) (Second appeals) does not apply to these appeals, a robust attitude to the “prospect of success” criterion (CPR r.52.3(6)) should be adopted in these cases (*Cooke v Secretary of State for Social Security* [2001] EWCA Civ 734, April 25, 2001, unrep., CA).

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- (8) *Upper Tribunal* —By the Tribunal, Courts and Enforcement Act 2007 s.13 (para 9B–994 below), where the Court of Appeal is “the relevant appeal court” (see s.13(13), an appeal lies to that Court, with permission, on a point of law arising from a decision made by the Upper Tribunal, other than an “excluded decision” (as defined, see s. 3(8)). Permission to appeal to the Court of Appeal shall not be granted unless the Upper Tribunal, or where the Upper Tribunal refuses permission, the Court, considers that (a) the proposed appeal would raise some important point of principle or practice, or (b) there is some other compelling reason to hear the appeal (Appeals from the Upper Tribunal to the Court of Appeal Order 2008 (SI 2008/2834)).

For appeals to the Court of Appeal from the Pathogens Access Appeal Commission, and from the Proscribed Organisations Appeal Commission established, respectively, by the Anti-terrorism, Crime and Security Act 2001, and the Terrorism Act 2000, see respectively, Court of Appeal (Appeals from Pathogens Access Appeal Tribunal) Rules 2002 (SI 2002/1844) and the Court of Appeal (Appeals from Proscribed Organisations Appeal Commission) Rules 2002 (SI 2002/1843).

The Court of Appeal has no jurisdiction to hear an appeal from Immigration Appeal Tribunal decision on appeal from a special adjudicator sitting in Scotland; in these circumstances, appeal lies to the Court of Session (*Gardi v Secretary of State for the Home Department* (No.2) [2002] EWCA Civ 1560; [2002] 1 W.L.R. 3282, CA).

“all purposes of or incidental to”

- 9A–52** In judicial review proceedings, the High Court has an inherent jurisdiction to make ancillary orders temporarily releasing an applicant from detention, and by virtue of s.15(3), on appeal in those proceedings, the Court of Appeal could make like order (*R. (Sezek) v Secretary of State for the Home Department*, *The Times*, June 20, 2001, CA).

Application of High Court enforcement provisions to Court of Appeal judgments

- 9A–53** The purpose of the declaration in s.15(4) to the effect that provisions for the enforcement of High Court judgment or orders (which are legion) apply to the enforcement by the High Court of judgments and orders of the Court of Appeal (Civil Division) is obvious. The County Courts Act 1984 contains no similar provision. However, in *Ager v Ager* [1998] 1 W.L.R. 1074, CA, it was held that the jurisdiction conferred on the High Court by s.15(4) constituted a “general principle of practice” within the meaning of s.76 of the 1984 Act which could be adopted and applied in proceedings in a county court.

Jurisdiction where appeal raising “academic” or “hypothetical” point of law

- 9A–54** See para.9A–77 below.

Inherent jurisdiction of Court of Appeal

- 9A–55** Circumstances have arisen in which, under its inherent jurisdiction, procedural innovations relating, not only to its own procedures, but also to procedures affecting the lower courts, have been initiated by the Court; see *YD (Turkey) v Secretary of State for the Home Department* [2006] EWCA Civ 52; [2006] 1 W.L.R. 1646, CA (Court’s power to suspend removal directions pending determination of application for extension of time for appealing in asylum-seeker case), and illustrations given there.

Appeals from Court of Appeal to House of Lords

- 9A–56** The Administration of Justice (Appeals) Act 1934 s.1(3) states that no appeal shall lie from any order or judgment made or given by the Court of Appeal except with the leave of that Court or of the House of Lords. That provision does not affect any other restriction that may exist apart from that imposed by s.1(3) on the bringing of appeals from the Court of Appeal to the House of Lords.

Appeals from High Court

- 9A–57** **16.—**(1) Subject as otherwise provided by this or any other Act (and in particular to the provision in section 13(2)(a) of the Administration of Justice Act 1969 excluding appeals to the Court of Appeal in cases where leave to appeal from the High Court directly

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to the Supreme Court is granted under Part II of that Act) or as provided by any order made by the Lord Chancellor under section 56(1) of the Access to Justice Act 1999, the Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of the High Court.

(2) An appeal from a judgment or order of the High Court when acting as a prize court shall not be to the Court of Appeal, but shall be to Her Majesty in Council in accordance with the Prize Acts 1864 to 1944.

Note —Amended by the Constitutional Reform Act 2005 s.40 and Sch.9 para.36(3) **9A–57.1**
with effect from October 1, 2009 (SI 2009/1604).

Appeals directly from the High Court to the Supreme Court—“leap-frog” petitions

See the AJA 1969 s.13 (para.9B–33 below) and Section 4 paras 4.1.5 and 4.5.9 **9A–58**
above.

Jurisdiction to hear appeals from High Court

The general rule is that the Court of Appeal shall have jurisdiction “to hear and determine appeals from any judgment or order of the High Court” (s.16(1)). Two exceptions (provided for in s.16) are “leap-frog” appeals to the Supreme Court of the United Kingdom (formerly to the House of Lords) and Prize Court appeals. The general rule is further qualified by the Access to Justice Act 1999. Section 56(1) of that Act states that the Lord Chancellor may by order provide that appeals “which would otherwise lie to the Court of Appeal”, for example, appeals falling within the general rule stated above, shall lie instead to the High Court (see para.9A–775 below). Accordingly, the power of the Lord Chancellor by order to affect the jurisdiction of the Court of Appeal in relation to appeals from the High Court was added to s.16(1) by the Access to Justice Act 1999 (Destination of Appeals) Order 2000 (SI 2000/1071) art.7. Provisions exercising this power in relation to appeals to the Court of Appeal from the High Court are found in arts 2, 4 and 5 of that statutory instrument. Article 2 states that, where the decision to be appealed is a decision made by (inter alia) a Master or a district judge, then, subject to two exceptions, the appeal shall not go according to the general rule (i.e. from the High Court to the Court of Appeal) but shall go to a judge of the High Court. In this context, “decision” includes any judgment, order or direction. The two exceptions are: (1) where the decision is a final decision in a claim allocated to the multi-track under CPR rr.12.7, 14.8 or 26.5, or is made in “specialist proceedings” provided for by CPR Pt 49 (e.g. proceedings in the Commercial Court, the Patents Court, or the Technology and Construction Court) (see art.4); and (2) where the decision appealed was itself a decision made on appeal (other than from the decision of an officer of the court authorised to assess costs) (so-called “second appeals”) (see art.5). In this context, “final decision” means any decision that would finally determine (subject to any possible appeal or detailed assessment of costs) the entire proceedings whichever way the court decided the issues before it (ibid., art.1(2)(c)). Certain decisions, though not strictly falling within this definition, are to be treated as final decisions (ibid., art.1(3)) (see further *Roerig v Valiant Trawlers Ltd* [2002] EWCA Civ 21; [2002] 1 W.L.R. 2304, CA, and authorities referred to therein).

The Access to Justice Act 1999, s.57 (see para.9A–848 below) states that, where in any proceedings in a county court or the High Court a person seeks permission to make an appeal which, but for the operation of the alternative destination of appeals provisions explained above, would go to the Court of Appeal, the Master of the Rolls or the court from which or to which the appeal is made, or from which permission to appeal is sought, may direct that the appeal shall be heard instead by the Court of Appeal. Where this power is exercised, in effect the alternative destination provisions are overridden. In the case of *Re Claims Direct Test Cases* [2002] EWCA Civ 428; *The Times*, April 4, 2002, CA, it was held that this procedure could not be used to “leapfrog” the requirement that an application for permission to appeal should be made.

No appeal shall lie to the Court of Appeal: (1) from any order, judgment or decision of the High Court which is final, or (2) from any order of the High Court allow-

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ing an extension of time for appealing from a judgment or order (paras (b) and (c) of s.18(1); see para.9A–62 below).

No appeal shall lie from a decision of the High Court refusing leave required by s.42 (Restriction of vexatious legal proceedings) (see para.9A–148 below).

As to appeals to the Court of Appeal against an order of the High Court refusing permission to appeal, see *Foenander v Bond Lewis & Co* [2001] EWCA Civ 759; [2001] 2 All E.R. 1019, CA. In those circumstances where there is no appeal to the Court of Appeal without the permission of the High Court, generally, where such permission is refused, that refusal cannot be reviewed by the Court of Appeal. But the Court of Appeal has a residual discretion to permit an appeal, despite the lower court's refusal of permission, where that refusal can be challenged on the grounds of unfairness pursuant to art.6 of the Convention on Human Rights (*CGU International Insurance plc v AstraZeneca Insurance Co Ltd* [2006] EWCA Civ 1340; *The Times*, November 3, 2006, CA (leave required by *The Times*, November 3, 2006, Arbitration Act 1996 s.68(6) refused)).

For rules of court affecting appeals from the High Court to the Court of Appeal, see CPR Pt 52, and for further information as to the jurisdiction of the Court of Appeal in relation to appeals from the High Court, see notes on the rules in Pt 52 (Vol.1, paras 52.0.1 et seq).

Section 13(2)(a) of the Administration of Justice Act 1969 provides that where a trial judge grants a certificate unders.12 of that Act and permission is given for an appeal from the High Court directly to the House of Lords, no appeal from “the decision of the judge” as to which the certificate relates shall lie to the Court of Appeal (see paras 9B–33 and 9B–35 below).

Applications for new trial

9A–60 17.—(1) Where any cause or matter, or any issue in any cause or matter, has been tried in the High Court, any application for a new trial thereof, or to set aside a verdict, finding or judgment therein, shall be heard and determined by the Court of Appeal except where rules of court made in pursuance of subsection (2) provide otherwise.

(2) As regards cases where the trial was by a judge alone and no error of the court at the trial is alleged, or any prescribed class of such cases, rules of court may provide that any such application as is mentioned in subsection (1) shall be heard and determined by the High Court.

(3) Nothing in this section shall alter the practice in bankruptcy.

Effect of the section

9A–61 See CPR Pt 52 and notes thereto (see para.52.1).

Restrictions on appeals to Court of Appeal

9A–62 18.—(1) No appeal shall lie to the Court of Appeal—

- (a) except as provided by the Administration of Justice Act 1960, from any judgment of the High Court in any criminal cause or matter;
- (b) from any order of the High Court or any other court or tribunal allowing an extension of time for appealing from a judgment or order;
- (c) from any order, judgment or decision of the High Court or any other court or tribunal which, by virtue of any provision (however expressed) of this or any other Act, is final;
- (d) from a decree absolute or nullity of marriage, by a party who, having had time and opportunity to appeal from

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- the decree nisi on which that decree was founded, has not appealed from the decree nisi;
- (dd) from a divorce order;
 - (e) [...]
 - (f) [...]
 - (fa) from a dissolution order, nullity order or presumption of death order under Chapter 2 of Part 2 of the Civil Partnership Act 2004 that has been made final, by a party who, having had time and opportunity to appeal from the conditional order on which that final order was founded, has not appealed from the conditional order;
 - (g) except as provided by Part I of the Arbitration Act 1996, from any decision of the High Court under that Part;
 - (h) [...]
 - (1A) [...]
 - (1B) [...]
 - (2) [...]

Note —Amended by the Children Act 1989 Sch.13; the Courts and Legal Services Act 1990 s.7(2) and s.125(7); the Arbitration Act 1996 Sch.3; the Family Law Act 1996 Sch.8 para.30 and Sch.10; the Civil Procedure Act 1997 Sch.2; the Access to Justice Act 1999 s.106, Sch.15 Pt III; and the Civil Partnership Act 2004 s.261(1), Sch.27 para.68. **9A–63**

Restrictions on appeals

Section 18(1) indicates that, in certain circumstances, no appeal shall lie to the Court of Appeal. The legislative basis for the requirement that an appeal may not be made to the Court of Appeal without permission (i.e. without leave) was removed from s.18 and is now found in the Access to Justice Act 1999 s.54; note also ss.55 to 58 of that Act (see para.9A–843). The effect of other statutory provisions (either in this Act or elsewhere) may be to restrict appeals to the Court of Appeal. For example, s.28A of this Act (para.9A–93 below) provides that certain decisions of the High Court are final. For powers of High Court in relation to arbitrations, see Arbitration Act 1996 ss.66 to 71 (para.2E–241 et seq.); for appeals to Court of Appeal, see section 69 and notes thereto and note *Inco Europe Ltd v First Choice Distribution* [2000] 1 W.L.R. 586, HL; *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* [2001] 1 All E.R. 193, CA; [2000] 2 Lloyd's Rep. 625, CA.

The leading House of Lords authority on the phrase “in any criminal cause or matter” is *Amand v Home Secretary and Minister of Defence of Royal Netherlands Government* [1943] A.C. 147, HL, see *United States Government v Montgomery* [2001] UKHL 3; [2001] 1 W.L.R. 196, HL, where the *Amand* case and other authorities are examined. In *R. (South West Yorkshire Mental Health NHS Trust) v Crown Court at Bradford* [2003] EWCA Civ 1857; [2004] 1 W.L.R. 1664, CA, it was held that, although an order made by the Crown Court upon a verdict being entered was made under a statute empowering the court to make a custodial order in the absence of conviction (in this instance, the Criminal Procedure (Insanity) Act 1964 s.5(2)(a)), the order did not for that reason cease to be an order in a criminal cause or matter. In determining whether an appeal is in a criminal cause or matter it is appropriate for the court to take an overall view and not to enter into a detailed order by order analysis.

An appeal from the High Court in a “criminal cause or matter” lies, not to the Court of Appeal, but to the Supreme Court. Where the High Court holds that a person subject to a civil proceedings order requires leave under s.42(3) of the Senior Courts Act 1981 to institute judicial review proceedings in a criminal cause or matter, an appeal by that person against that decision lies to the Court of Appeal, as that decision is not “a judgment of the High Court in any criminal cause or matter” but an appeal in collateral civil proceedings (*R. (Ewing) v Director of Public Prosecutions* [2010] EWCA Civ 70, February 11, 2010, CA unrep.).

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The Magistrates' Courts Act 1980 s.111 is an important example of a statutory provision, other than one found in the 1981 Act, providing that a decision of the High Court in a non-criminal cause or matter will be final and ousting the jurisdiction of the Court of Appeal (*Westminster City Council v O'Reilly* [2003] EWCA Civ 1007; *The Times*, August 21, 2003, CA (decision of High Court on appeal by way of case stated from magistrates' court in licensing matter final)).

The effect of the various restrictions on appeals contained in this section is discussed in detail in notes to CPR Pt 52 (see Vol.1, para.52.1). See also para.9A–59 above.

THE HIGH COURT

GENERAL JURISDICTION

General jurisdiction of High Court

9A–65 19.—(1) The High Court shall be a superior court of record.

(2) Subject to the provisions of this Act, there shall be exercisable by the High Court—

- (a) all such jurisdiction (whether civil or criminal) as is conferred on it by this or any other Act; and
- (b) all such other jurisdiction (whether civil or criminal) as was exercisable by it immediately before the commencement of this Act (including jurisdiction conferred on a judge of the High Court by any statutory provision).

(3) Any jurisdiction of the High Court shall be exercised only by a single judge of that court, except in so far as it is—

- (a) by or by virtue of rules of court or any other statutory provision required to be exercised by a divisional court; or
- (b) by rules of court made exercisable by a master, registrar or other officer of the court, or by any other person.

(4) The specific mention elsewhere in this Act of any jurisdiction covered by subsection (2) shall not derogate from the generality of that subsection.

9A–66 *Note* —Derived from the JA 1925 s.18.

Jurisdiction exercisable by the High Court

9A–67 By s.16 of the Judicature Act 1873, the High Court of Justice was created as a superior court of record and the jurisdiction which, at the commencement of that Act, was vested in or capable of being exercised by, certain courts of common law and equity, and certain other courts, was transferred to and vested in the High Court. The courts so merged in the High Court included, for example, the High Court of Chancery and the Court of Queen's Bench. Thus the jurisdiction of the High Court was co-extensive with the aggregate of the jurisdictions of the courts from whom jurisdiction was transferred, subject to legislative changes made by the 1873 Act itself (and by subsequent legislation) (see *Re Mill's Estate* (1886) 34 Ch.D. 24, at 33 per Cotton L.J.; *Bow, McLachlan and Co v Ship Camosun* (1909) 101 L.T. 167, PC, at 170, per Lord Gorell).

In the main, questions as to the extent of the jurisdiction of the High Court had to be answered by investigating the extent of the jurisdictions of the courts from whom jurisdiction was transferred and, as is indicated by s.19(1)(b), to an important degree, this remains the position to the present day. Obviously, the jurisdiction of the High Court has been affected by legislation coming into force after 1873 (see s.19(1)(a)) and by case law. Section 19(1)(b) states that the High Court shall have all such jurisdiction

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“as was exercisable by it immediately before the commencement of this Act”. Comparable provisions were found in the predecessors to the 1981 Act, the successive Judicature Acts (e.g. s.18(2) of the JA 1925). In effect, the cumulative effect of these provisions has been to keep alive s.16 of the 1873 Act referred to above.

Section 19 confers jurisdiction on the High Court in general terms. It is expressed as “subject to the provisions of this Act”. Provisions following s.19 deal with particular fields of jurisdiction, e.g. ss.20 to 24 (Admiralty), s.25 (probate), etc.

The general jurisdiction defined in s.19 is vested in all the Judges of the High Court, irrespective of the Division to which they are attached (see subs.(4), ss.4(3) and 5(5)).

Inherent jurisdiction of High Court

The provision in s.19(2)(b), that there shall be exercisable by the High Court “all such other jurisdiction (whether civil or criminal) as was exercisable by it immediately before the commencement of the Act” of 1981, subsumes and incorporates “the inherent jurisdiction of the court”. Such jurisdiction has been exercisable by the superior courts from the earliest days of the common law (see e.g. *Metropolitan Bank v Pooley* (1885) 10 App.Cas. 210, HL, at 220–221 per Lord Blackburn).

The court may execute its inherent jurisdiction even in respect of matters which are regulated by statute or by rules of court (see *Willis v Earl Beauchamp* (1886) 11 P.D. 59, at 63 per Bowen L.J., *Davey v Bentick* [1893] 1 Q.B. 185, CA, at 187 per Lord Esher M.R., *Stewart Charting v C. & O. Managements SA, The Venus Destiny* [1980] 1 W.L.R. 460, [1980] 1 All E.R. 718 (Goff J.)).

An important practical illustration of the Court’s inherent jurisdiction is the Court’s power to stay proceedings. The power may be exercised in various contexts (e.g. on abuse of process grounds); see s.49(3) below and notes thereto.

The powers which may said to be “inherent” in the High Court’s jurisdiction cannot be stated succinctly. It has been said by the highest authority that there can be no doubt that a court which is endowed with a particular jurisdiction has powers “which are necessary to enable it to act effectively within such jurisdiction” and that a court must enjoy such powers “in order to enforce its rules of practice and to suppress any abuse of its process and to defeat any attempted thwarting of its processes” (*Connelly v DPP* [1964] A.C. 1254, HL, at 1301 per Lord Morris). It has also been said that it would be “conducive to legal clarity” if the use of the expressions “inherent power” and “inherent jurisdiction” were confined “to the doing by the court of acts which it needs must have power to do in order to maintain its character as a court of justice” (*Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corp Ltd* [1981] A.C. 909, HL, at 971 per Lord Diplock). See, further, Jacob, “The Inherent Jurisdiction of the Court” (1970) 23 *Current Legal Problems* 27, and authorities cited there.

The overriding features of the inherent jurisdiction of the court are that it is a part of procedural law, both civil and criminal and not part of substantive law: it is exercisable by summary process, without a plenary or full trial; it may be invoked not only in relation to parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in the litigation between the parties; it must be distinguished from the exercise of judicial discretion; and it may be exercised even in circumstances governed by rules of court (see *Jacob*, *ibid.*).

The Court of Appeal exercises its own inherent jurisdiction, e.g. the power to strike out a notice of appeal where the appeal is frivolous, vexatious or an abuse of the process of the court (*Burgess v Stafford Hotel Ltd* [1990] 1 W.L.R. 1215; [1990] 3 All E.R. 222, CA; *Aviagents Ltd v Balstravest Investments Ltd* [1966] 1 W.L.R. 150; [1966] 1 All E.R. 450, CA).

A county court has inherent jurisdiction to regulate its own procedures (*Langley v North West Water Authority* [1991] 1 W.L.R. 697; [1991] 3 All E.R. 610, CA); but note County Courts Act 1984 s.74A.

In *Tombstone Limited v Raja* [2008] EWCA Civ 1444, December 17, 2008, CA, unrep., one of the questions arising was whether the judge at first instance was right to dispose of a matter that fell for his determination by exercising a discretion derived from provisions found in the CPR in circumstances where it was arguable that he ought to have dealt with the matter by exercising the court’s inherent jurisdiction. The Court of Appeal stated that the position pre-CPR was that “the inherent powers of the court could not be invoked to do something which was inconsistent with a rule”, and the same po-

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sition has applied since the introduction of the CPR. The court held that, where the subject matter of an application is governed by rules in the CPR, it should be dealt with by the court in accordance with the rules, and not by exercising the court's inherent jurisdiction (para.78).

For modern illustrations of reliance by court on its inherent jurisdiction, see the following Court of Appeal cases: *Rocksteady Services Ltd, Re* [2001] C.P. Rep. 1 (court can decline to proceed with a trial which it feels it can no longer conduct fairly because of delay caused by the court); *Woodford & Ackroyd v Burgess*, [2000] C.P. Rep. 79, CA (admissibility of an alleged expert's evidence); *C.J. Hurst (Lickfold) Ltd v Belchamber*, November 20, 1998, unrep., CA (county court's power to restrain a litigant from making further applications without leave, a "*Grepe v Loam*" order); *Dowles Manor Properties Ltd v Bank of Namibia* [1999] C.P.L.R. 259, January 19, 1999, unrep., CA (dismissing action for claimant's failure adequately to comply with an "unless" order requiring exchange of witness statements within particular period); *Riniker v University College London*, *The Times* April 17, 1999, CA (backdating issue of writ from date when actually issued to date when received by the court for purpose of ensuring that action brought within relevant limitation period, see now CPR r.7.2(2) and Practice Direction (How to Start Proceedings—The Claim Form), para.5.1); *Reichhold Norway A.S.A. v Goldman Sachs International* [2000] 1 W.L.R. 173; [2000] 2 All E.R. 679, CA (stay of English proceedings in favour of foreign arbitration); *Maimwaring v Encyclopedia Britannica International Ltd*, June 21, 1999, unrep., CA (jurisdiction (acknowledged in CPR r.3.1) to strike out appeal, even though no "unless" order has been made); *Al-Naimi v Islamic Press Agency Inc* [2000] 1 Lloyd's Rep. 522, CA (jurisdiction to stay in addition to power under Arbitration Act 1996 s.9); *Walsh v Misseldine*, February 29, 2000, unrep., CA (residual inherent abuse of process jurisdiction and power to strike out under CPR r.3.4(2)); *R. (Sezek) v Secretary of State for the Home Department (Bail Application)*, [2001] EWCA Civ 795, CA (ancillary order in judicial review proceedings temporarily releasing an applicant from detention). Note also, *Harley v McDonald* [2001] UKPC 18; [2001] 2 W.L.R. 1749, PC (jurisdiction to award costs personally against practitioner where serious dereliction of duty); and *Orton v Collins* [2007] EWHC 803 (Ch); [2007] 1 W.L.R. 2953 (Mr. Peter Prescott Q.C.) (jurisdiction to enforce terms of offer to settle), and *Grupo Torras SA v Al-Sabah (Costs)* [2003] EWHC 262 (Treachy J.) (jurisdiction to restrict disclosure to paying party of reasons for success fee in receiving party's conditional fee agreement).

The court has inherent power to control its own process and it is entitled to bring argument to a close when it concludes that its process is being abused and that nothing of value will be lost by ending it (*Attorney General v Scriven* February 4, 2000, unrep., CA, courts are "not required to listen to litigants, whether represented or not, for as long as they like", per Simon Brown L.J.).

Where a winding up petition is dismissed, and the whole purpose of presenting it had been to obtain payment of a debt, the starting of fresh proceedings by the petitioner or his assignees to recover the same debt without paying the costs of the petition was an abuse of process (*Investment Invoice Financing Ltd v Limehouse Board Mills* [2006] EWCA Civ 9; [2006] 1 W.L.R. 985, CA).

See also authorities referred to in notes following s.42 (Restriction on vexatious legal proceedings) (paras 9A–149 et seq. below).

The court has no power under the Family Law Reform Act 1969 s.21 or the inherent jurisdiction to enforce compliance with an order requiring samples to be taken of a child's blood for the purposes of determining paternity (*In Re O. (Minor) (Blood Tests: Constraint)* [2000] 2 W.L.R. 1284; [2000] 2 All E.R. 29).

Jurisdiction to be exercised by single judge

9A–69 Subsection (3)(a) requires that the jurisdiction of the High Court should be exercised only by a single Judge of the Court except where such jurisdiction is required by virtue of rules of court or other statutory provision to be exercised by a Divisional Court, constituted under s.66 (see s.151(1)) i.e. consisting of not less than two Judges. A Divisional Court consisting of two judges has no jurisdiction to deal with a matter or proceeding which the Act confers on the High Court (see, e.g. *In Re Fletcher, The Times*, June 12, 1984, where held that a Divisional Court had no jurisdiction to make a civil proceedings order under s.42).

Subsection (3)(b) requires that the jurisdiction of the High Court should be

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exercised only by a single Judge of the Court except where such jurisdiction “by or by virtue of rules of court” is made exercisable by a master, district judge or other officer of the Court or by any other person. CPR r.2.4 provides that where the Civil Procedure Rules provide for the Court “to perform any act” masters and district judges may exercise any function of the High Court except where an enactment, rule or practice direction provides otherwise. Practice Direction (Allocation of Cases to Levels of Judiciary) sets out the matters over which masters and district judges do not have jurisdiction or which they may deal with only on certain conditions, but does not affect jurisdiction conferred by other enactments.

Ouster of jurisdiction

The general principle is that parties cannot by agreement between themselves oust the jurisdiction of the High Court. Such an agreement is void, as contrary to public policy (*Czarnikow v Roth & Co* [1922] 2 K.B. 478, CA; *Re Davstone Estates Ltd's Leases, Manprop Ltd v O'Dell* [1969] 2 Ch. 378). There are important exceptions. An agreement to refer to arbitration, or that the ascertainment of facts by the arbitrator is to be a condition precedent to the exercise of jurisdiction does not oust the jurisdiction of the court, and is valid (*Scott v Avery* (1856) 5 H.L.Cas. 811; *Atlantic Co v Dreyfus* [1922] 2 A.C. 250; *Cipriani v Burnett* [1933] A.C. 83). An agreement that disputes shall be referred to a foreign tribunal equally does not oust the jurisdiction of the English Courts and is valid, and prima facie the English Courts will stay proceedings instituted in this country in breach of such agreement (*The Fehmarn* [1958] 1 W.L.R. 159; [1958] 1 All E.R. 333, CA). As to agreement to seek to settle a dispute by mediation, see *Halifax Financial Services Ltd v Intuitive Systems Ltd*, December 21, 1998 (unrep.) (McKinnon J.).

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The parties to an agreement may validly provide, expressly or impliedly, that it shall be an agreement of honour only and not enforceable at law (*Balfour v Balfour* [1919] 2 K.B. 571; *Rose & Frank Co v Crompton* [1923] 2 K.B. 261; *Jones v Vernon's Pools Ltd* [1938] 2 All E.R. 626; *Appleson v Littlewood Ltd* [1939] 1 All E.R. 464, CA).

A settlor is not entitled to make any power or discretion exercisable with consent of the Ch.D. or a Judge thereof except in the event of trustees failing or refusing to exercise such discretion (*Re H.'s Settlement* [1939] W.N. 318).

Ouster of jurisdiction by statute

Many statutes depute to other tribunals, or to officials, or other bodies, the right to determine questions of various kinds, and often give finality to such determination; e.g. *Joseph Crosfield & Sons Ltd v Manchester Ship Canal Co* (1904) 90 L.J. 557. Unless the statute in clear terms deprives the claimant of his remedy at law, the jurisdiction of the Court is not ousted (*Lowther v Clifford* [1927] 1 K.B. 130, CA, cf. *R. & W. Paul v Wheat Commission* [1937] A.C. 139). In such cases, subject to exceptions that need not be canvassed here, the High Court has no jurisdiction to interfere by way of appeal, judicial review or otherwise.

9A-71

Under the Housing Act 1985 s.110, certain jurisdiction under Pt IV of that Act is conferred on county courts (see Vol.2 para.3A-443), but this provision does not oust the jurisdiction of the High Court (*Fletcher v Sheffield City Council* [2007] EWHC 419 (Ch), January 12, 2007, unrep. (Lewison J.)) (High Court has power, when dismissing a secured tenant's appeal against the refusal of application to vary an order for possession forthwith, to suspend the date of possession or stay or suspend execution of the order)).

Section 7 of the Human Rights Act 1998 states that a person who claims that a public authority has acted in a way which is made unlawful by s.6(1) of the Act may bring proceedings in “the appropriate court or tribunal”. In *R. (A) v Director of Establishments of the Security Service* [2009] UKSC 12; [2010] 2 W.L.R. 1, SC; [2010] 1 All E.R. 1149, SC, the Supreme Court held that jurisdiction over the proceedings brought in that case fell within the exclusive jurisdiction of a tribunal created by statute (the Regulation of Investigatory Powers Act 2000) and rejected the submission that this was constitutionally objectionable on the ground that it constituted an ouster of the ordinary jurisdiction of the courts.

Want of jurisdiction—waiver

It is sometimes a question of difficulty whether a proceeding is void for want of ju-

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jurisdiction or whether there has been merely an irregularity in procedure which has been waived; see *Smythe v Wiles* [1921] 2 K.B. 66; *Shrager v Dighton* [1924] 1 K.B. 274; *Pringle v Hales* [1925] 1 K.B. 573; *Key v Bastin* [1925] 1 K.B. 650; *Wyndham v Jackson* [1937] W.N. 291. See also CPR r.3.10 (General power of the court to rectify matters where there has been an error of procedure). Want of jurisdiction cannot be cured by consent, see *Papadopoulos v Papadopoulos* [1930] P. 44; *Simons v Simons* [1939] 1 K.B. 490; *Rothman of Pall Mall (Overseas) Ltd v Saudi Arabia Airlines Corp* [1981] Q.B. 368; [1980] 3 All E.R. 359, CA.

Bail

- 9A-73** The High Court has an inherent jurisdiction to grant bail. This jurisdiction extends to the grant of bail to persons under remand but does not extend to the grant of bail to persons who have been tried and convicted (In *Re L.* (1944) 61 T.L.R. 180, *Ex p. Speculand* [1946] K.B. 48). The jurisdiction has been affected by, and is exercised in accordance with, legislative provisions. For relevant rules of court, see CPR Sch.1, RSC O.79 (Criminal Proceedings), r.9 (Bail) (see Vol.1, para.sc79.9).

Benefice

- 9A-74** Order to admit against bishop (*Nolley v Bp. of Birmingham* [1930] W.N. 110; [1931] 1 Ch. 529).

Domestic forum

- 9A-75** The Court cannot interfere with the decision of a “domestic tribunal” if made bona fide, in accordance with its rules, and not contrary to the elementary principles of justice (*Catt v Wood* [1910] A.C. 404; *Leeson v General Council of Medical Education* (1890) L.R. 43 Ch.D. 366; *Maclean v Workers’ Union* [1929] 1 Ch. 602; *Cotter v N.U.S.* [1929] 2 Ch. 58).

Foreign state or sovereign

- 9A-76** See “Parties generally,” The Supreme Court Practice 1999, Vol.2,23 paras 17B—23 et seq.

Jurisdiction where proceedings raising “academic” or “hypothetical” point of law

- 9A-77** In *Ainsbury v Millington (Note)* [1987] 1 W.L.R. 379, HL, Lord Bridge said (at 381) that it has always been a fundamental feature of the English judicial system that the courts, whether first instance or appellate, “decide disputes between the parties before them” and that they do not “pronounce on abstract questions of law where there is no dispute to be resolved”. In a number of reported cases it has been argued that the court either lacked jurisdiction on the ground that the proceedings raised an “academic” or “hypothetical” point of law, or should decline to exercise its jurisdiction on that ground. Generally, the issue has arisen in courts exercising appellate or review jurisdiction (see, e.g. *Sun Life Assurance Co of Canada v Jervis* [1944] A.C. 111, HL, at 113 per Viscount Simon L.C., and *R. v Secretary of State for the Home Department, Ex p. Wynne* [1993] 1 W.L.R. 115, HL, at 120 per Lord Goff). In some cases, the outcome of this question of jurisdiction has turned on the question whether the point of law raised was truly “academic” or “hypothetical” (e.g. *R. v Canons Park Mental Health Review Tribunal Ex p. A* [1995] Q.B. 60, CA).

A live issue between parties may become “academic” or “hypothetical” for various reasons. Generally, it is inappropriate for parties seeking to resolve a dispute between them as to costs to seek to do so by litigating to a conclusion a substantive issue that has become “academic” (*R. v Holderness BC Ex p. James Robert Developments Ltd* [1993] L.G.R. 643, *R. v Hackney London BC, Ex p. Jarram*, June 14, 1999, unrep.), *R. (Tshikangu) v Newham LBC*, [2001] EWHC Admin 92 (Stanley Burnton J.).

In *Ainsbury v Millington* [1987] 1 W.L.R. 379, op. cit. Lord Bridge conceded that the court may entertain proceedings where, although there was no *lis* to be determined directly affecting the parties’ rights and obligations inter se, the proceedings could be described as a “friendly action” and, conceivably, where the proceedings were instituted specifically as a “test” case (*ibid.*, 381).

In modern times, the appellate courts have indicated a greater willingness to entertain proceedings which raise points of law which, although “academic” or “hypothetical”, are points of general public interest (see cases cited *arguendo* in *R. v Canons*

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Park Mental Health Review Tribunal Ex p. A [1995] Q.B. 60, op. cit. at 63) but no general principle to this effect has emerged (see also *Don Pasquale v Customs & Excise* [1990] 1 W.L.R. 1108, CA; *Watford BC v Simpson*, February 10, 2000, unrep., CA; *Prudential Assurance Co Ltd v McBains Cooper* [2000] 1 W.L.R. 2000, CA; *Callery v Gray (No.2)* [2001] EWCA Civ 1246; [2001] 1 W.L.R. 2142, CA (Court deciding not to resolve hypothetical questions as to recovery of insurance premiums as costs)). The law is not settled. In *R. v Secretary of State for the Home Department Ex p. Salem* [1999] 2 W.L.R. 483, HL, it was held that the House of Lords has a discretion, to be exercised sparingly, to hear an appeal on an “academic” issue of public law involving a public authority where there was good reason in the public interest for doing so. Note also *R. v Secretary of State for Health, Ex p. Imperial Tobacco Ltd* [2001] 1 W.L.R. 127, HL; *R. v Secretary of State for Employment Ex p. Equal Opportunities Commission* [1995] 1 A.C. 1, HL; *R. (Barron) v Surrey CC* [2002] EWCA Civ 713; May 7, 2002, unrep., CA (and cases cited therein); *Pridding v Secretary of State for Work and Pensions* [2002] EWCA Civ 306; *R. (Customs and Excise Commissioners) v Canterbury Crown Court*, 2002 S.L.T. 834 (court declaring that Crown Court judge had no jurisdiction to make order even though matter had become academic); *R. (W.) v Commissioner of Police for the Metropolis* [2006] EWCA Civ 458; [2006] All E.R. (D.) 144 (May), CA (Court determining meaning and effect of statutory provision affecting powers of police). It is not unusual for the Court of Appeal, especially in public law proceedings, to give permission to appeal in a case raising a short point of some practical importance set in a context in which there is some uncertainty as to related issues with the intention that the court should not only determine the short point, but also should carry out an authoritative review of the whole position and give guidance on matters which are (strictly speaking) academic (e.g. *R. (Davay) v Aylesbury Vale DC* [2007] EWCA Civ 1166; *The Times*, November 21, 2007, CA (successful respondent’s recovery of pre-permission costs in judicial review proceedings)).

In *R. (Bushell) v Newcastle Licensing Justices* [2006] UKHL 7; [2006] 1 W.L.R. 496, HL, licensing justices granted the application of a company for the transfer of a licence from premises sold to the local authority to new premises. The objectors successfully applied for judicial review, arguing that the justices had no jurisdiction under the relevant statute, and this decision was affirmed by the Court of Appeal. The House of Lords granted the company permission to appeal, but by the time the appeal came on, by legislative reform, licences of the variety held by the company had ceased to exist unless converted within a particular time limit which had expired. Thus the subject matter of the appeal had ceased to exist and the point of law raised was no longer of general public importance. The House rejected the submission of the objectors that the appeal should be dismissed without a hearing because it had become moot. The appeal was not moot because its outcome could have practical consequences for the parties. In particular, it would affect the company’s outstanding claim for damages on a cross-undertaking given by the objectors on the company’s undertaking not to commence trading at the new premises until after the judicial review application had been determined. If the appeal was successful that claim had prospects of success, but if it failed it would have none. (The House also held that there is no rule of law or practice that the House would not proceed with an appeal because of a change of circumstances as a result of which the issues between the parties were no longer of general public importance.) On the merits, the House allowed the appeal, granting the company their costs of the appeal and below. In expressing his own opinion, Lord Simon Brown said (at paras 23 and 28) it would not be proper for the House to give permission to appeal “if the only reason for doing so was to determine what had become a purely academic point just so as to see whether the Court of Appeal had decided it correctly and thus made the right costs order below”; the present appeal was not to be regarded “as any kind of precedent for this House to decide points of law for no purpose other than to determine who should be liable for past costs”.

In *Bowman v Fels* [2005] EWCA Civ 226; [2005] 1 W.L.R. 3083, CA, a county court judge made an order in a private law claim (involving a dispute as to the beneficial interest in property) requiring the claimant to make certain disclosures to the defendant. The claimant appealed. The appeal raised important issues as to the application to the legal profession of certain provisions in the Proceeds of Crime Act 2002. The Bar Council, The Law Society and the National Criminal Intelligence Service appeared as intervening parties in the appeal. By the time the appeal came on the substantive litigation between the parties had been settled. The Court held that, never-

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theless, the Court had jurisdiction to hear the appeal. The Court said that, had this been a public law claim, the Court would readily have found that it had jurisdiction on the basis of *R. v Secretary of State for the Home Department Ex p. Salem*, op. cit. The difficulty was that the underlying proceedings sounded in private law and not in public law. However, the question at the heart of this appeal was an issue of public law of very great importance and all of the parties involved in the appeal wished the appeal to proceed. The Court said (para.10): “To send them away empty-handed on an issue of such importance seemed to be not only churlish but also in breach of the overriding objective which illuminates all civil practice today”. Instances have occurred in which the Court of Appeal has taken the opportunity to give detailed guidance intended to be authoritative on procedural points in appeals in which, in the event, no issue as to the particular point arose; e.g. *King v Telegraph Group Ltd (Practice Note)* [2004] EWCA Civ 613; [2005] 1 W.L.R. 2282, CA (guidance on costs capping orders).

In *Gawler v Raettig* [2007] EWCA Civ 1560, December 12, 2007, CA, unrep., the Court of Appeal stated (para.34) that the conclusion to be drawn from *Bowman v Fels* [2005] EWCA Civ 226; [2005] 1 W.L.R. 3083, CA, is that, even in cases where the litigation is private, the court may entertain an appeal if it is in the public interest to do so. However, such cases are likely to be very rare. They are likely to have a number of characteristics in addition to the critical requirement that an academic appeal is in the public interest. They include the necessity that all sides of the argument will be fully and properly put. In the vast majority of such cases, this must involve counsel being instructed by solicitors instructed by those with a real interest in the outcome of the appeal. Further, before giving permission the court will wish to consider what the other options are and how the proposed issues could otherwise be resolved without doing so by way of academic appeal. All will depend upon the facts of the particular case.

In public law cases, a declaration on a point which, though moot, may have public interest benefits. In *R. v Oxfordshire CC Ex p. Pittick* [1996] E.L.R. 153, Laws J. said (at p.157): “A decision to refuse [a remedy] as a matter of discretion on the footing that the claim is academic ought not in my view to be made without some appreciation of the force of those arguments. In a public law case, [a claimant] may have an important point to bring to the court’s attention whose resolution might be required in the public interest, even if [the claimant] himself has suffered no perceptible prejudice as a result of the decision in question”. In *R. (COURONNE) v CRAWLEY BC* [2007] EWCA Civ 1086; November 2, 2007, unrep., CA, a judicial review claim brought by British citizens against a decision refusing them exemption from the legislative “habitual residence” test for determining entitlement to certain state benefits was unsuccessful. By the time the appeal came on it was clear that, as the claimants had become habitually resident, the determination in their favour of the point of law on which the decision was based, would be of very little practical effect to them. However, partly for the reason that the question whether the test was discriminatory raised a point of principle that might affect others, and with the defendants not submitting that the appeal should be dismissed on the ground that it was academic, the Court of Appeal proceeded to hear and determine the appeal (holding that the test was not discriminatory). See also *Levy v The Environment Agency* [2002] EWHC 1663 (Admin), July 30, 2002, unrep., per Silber J. (at para.127). However, although judicial review proceedings may often serve to clarify issues of wider importance than the particular concerns of the parties, it is important not to forget the interest of the person or group in whose name the case is being brought. The court decides issues between parties, not issues in the abstract (*R. (England) v Tower Hamlets London Borough Council* [2006] EWCA Civ 1742; December 20, 2006, unrep., CA (refusing application for permission to appeal (for purpose of raising question of European law) by unsuccessful applicant for judicial review of planning decision for development involving demolition of building made after the building had been demolished and practical purpose of the proceedings had gone)).

See further s.31(2) (declarations in judicial review proceedings), Human Rights Act 1998 s.4 (declarations of incompatibility), and CPR r.40.20 (Binding declarations) and commentary following that rule. For other authorities on question whether court should make a declaration on a question that is or has become academic, see *The Supreme Court Practice* 1999, Vol.1, paras 15/16/2 and 15/16/3.

In *A v B plc* [2002] EWCA Civ 337; [2003] QB 195, CA, the Court of Appeal, having

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apparently come to the conclusion that the defendant's appeal should be allowed on the merits, but reserving judgment, declined to hear oral argument on another ground of appeal. That other ground was not related to the merits, but raised the procedural issue whether the judge acted properly in acceding to an application to re-consider his judgment. In the light of the court's conclusions on the merits that issue had become academic. Nevertheless, in its reserved judgment the court gave a decision on the procedural appeal, having been urged to do so by the parties on the bases that the points involved raised issues of principle and could be relevant on the question of costs.

In *Fawdry & Co v Murfitt* [2002] EWCA Civ 643; [2003] Q.B. 104, CA, the Court of Appeal, having held that a case had been validly transferred from the Queen's Bench Division for trial in the Technology and Construction Court, gave an extended judgment on the question (though it had become academic) whether, had the transfer not been valid, the circuit judge would have had de facto authority at common law. The point was of jurisdictional significance and the Court had heard full argument, including submissions from counsel for the Lord Chancellor intervening.

In *Williams v Devon CC* [2003] EWCA Civ 365; [2003] CP Rep. 47, CA, a two-judge court of the Court of Appeal, having disposed an appeal in a personal injuries case on the ground that the trial judge erred in finding that the claimant was guilty of contributory negligence, gave an extended judgment on a point (though it had become academic) concerning the costs implications of Pt 36 payments where social security benefits were recoverable. The point was of practical significance and the Court had heard full argument, including submissions from the Secretary of State.

In *Ebert v Official Receiver (No.2)* [2001] EWCA Civ 340, [2002] 1 W.L.R. 320, CA, the Court of Appeal gave a considered judgment on the question whether a High Court judge's refusal to grant a vexatious litigant leave to apply to the Court of Appeal for permission to appeal infringed his rights under art.6 of the Convention even though the point was moot as the judge had in fact granted such leave. In *Poole BC v Hambridge* [2007] EWCA Civ 990; September 25, 2007, unrep., CA, the court held that the appellant's appeal had no prospects of success and refused permission to appeal on that ground, but gave a considered judgment (which was expressly released for citation) on the question (which had become academic and was conceded) whether as a matter of law the appellant did not require permission.

As to appropriate order for costs where the subject-matter of proceedings becomes academic during the course of proceedings, leaving costs as the only issue, see Vol.1, para.44.3.5.1.

For authorities concerning the issue of justiciability in the Court of Appeal, see notes to CPR Pt 52, Vol.1, para.52.1.

Rent for foreign property

See *St. Pierre v S. American Stoves Ltd* [1936] 1 K.B. 382, CA.

9A-78

Admiralty jurisdiction

For text of ss.20 to 24 and s.27 of the Senior Courts Act 1981 (Admiralty jurisdiction), and commentary thereon, see para.2D-145 et seq above.

9A-78.1

For ss.20 to 27 of the Senior Courts Act 1981 (see Arrangement) plus any related commentary see paragraphs 9A-79+ to 9A-89+ on White Book on Westlaw UK or the Civil Procedure CD.



Appeals from Crown Court and inferior courts

28.—(1) Subject to subsection (2), any order, judgment or other decision of the Crown Court may be questioned by any party to the proceedings, on the ground that it is wrong in law or is in excess of jurisdiction, by applying to the Crown Court to have a case stated by that court for the opinion of the High Court.

9A-90

(2) Subsection (1) shall not apply to—

(a) a judgment or other decision of the Crown Court relating to trial on indictment; or

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- (b) any decision of that court by the Local Government (Miscellaneous Provisions) Act 1982 which, by any provision of any of those Acts, is to be final.

(3) Subject to the provisions of this Act and to rules of court, the High Court shall, in accordance with section 19(2), have jurisdiction to hear and determine—

- (a) any application, or any appeal (whether by way of case stated or otherwise), which it has power to hear and determine under or by virtue of this or any other Act; and
- (b) all such other appeals as it had jurisdiction to hear and determine immediately before the commencement of this Act.

(4) In subsection (2)(a) the reference to a decision of the Crown Court relating to trial on indictment does not include a decision relating to an order under section 17 of the Access to Justice Act 1999.

9A-91 *Note* —Derived from the JA 1925 s.24; and the Courts Act 1971 s.10. Amended by the Local Government (Miscellaneous Provisions) Act 1982 s.3, Sch.3, para.27(6); the Access to Justice Act 1999 s.24 and Sch.4, para.22; the Licensing Act 2003 s.99 and Sch.7; and the Gambling Act 2005 s.356(4), Sch.17, with effect from September 1, 2007 (SI 2006/3272), rules of court. For the procedure, see CPR, Pt 52.

9A-92 “rules of court” —For the procedure, see CPR Pt 52.

Proceedings on case stated by magistrates’ court or Crown Court

9A-93 **28A.**—(1) This section applies where a case is stated for the opinion of the High Court—

- (a) by a magistrates’ court under section 111 of the Magistrates’ Courts Act 1980; or
- (b) by the Crown Court under section 28(1) of this Act.

(2) The High Court may, if it thinks fit, cause the case to be sent back for amendment and, where it does so, the case shall be amended accordingly.

(3) The High Court shall hear and determine the question arising on the case (or the case as amended) and shall—

- (a) reverse, affirm or amend the determination in respect of which the case has been stated; or
- (b) remit the matter to the magistrates’ court, or the Crown Court, with the opinion of the High Court,

and may make such other order in relation to the matter (including as to costs) as it thinks fit.

(4) Except as provided by the Administration of Justice Act 1960 (right of appeal to the Supreme Court in criminal cases), a decision of the High Court under this section is final.”

9A-94 *Note* —Amended by the Access to Justice Act 1999 s.61 and the Constitutional Reform Act 2005 s.40 and Sch.9 para.36(6) with effect from October 1, 2009 (SI 2009/1604).

“decision of the High Court ... is final”

9A-95 In *Westminster City Council v O’Reilly* [2003] EWCA Civ 1007; [2004] 1 W.L.R. 195, CA, the Court of Appeal held that a decision of the High Court on an appeal by way

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of case stated is indeed a decision that is final, and therefore, whatever may have been the position under the statutory antecedents of s.28A, its effect (at least when read with s.18) is to provide that no appeal from such a decision lies to the Court of Appeal.

In *Farley v Secretary of State for Work and Pensions (No.2)* [2005] EWCA Civ 869; *The Times*, June 30, 2005, CA, this point was overlooked and the Court of Appeal entertained and allowed the defendant's appeal from the decision of a High Court judge on case stated. The claimants petitioned the House of Lords for leave to appeal. Subsequently, when the Court's lack of jurisdiction was drawn to the attention of the Court by the parties the Court exercised its exceptional jurisdiction to re-open the appeal and set aside the decision (see r.52.17). However, by adopting considerable procedural ingenuity, the Court was able to retrieve the position for the parties (both of whom were anxious to have the important point upon which the case turned authoritatively determined). The Court noted that, had the judge's decision been made on an application for judicial review, the Court would have had jurisdiction to entertain an appeal. Accordingly, the Court ruled that, on the defendant's undertaking to make an application to the Court for permission to apply for judicial review the Court (a) first sitting as a court of first instance, would dismiss the application, but (b) then sitting as an appellate court, would allow the defendant's appeal against that refusal (issuing a declaration in the terms of the Court's previous decision made without jurisdiction). The claimants could then pursue their petition for leave to appeal to the House of Lords. The Court was satisfied that it had jurisdiction to proceed in this manner but stressed that, in doing so, it was exercising a wholly exceptional jurisdiction. In any usual circumstances the procedure would amount to an abuse of process.

Mandatory, prohibiting and quashing orders

29.—(1) The orders of mandamus, prohibition and certiorari shall be known instead as mandatory, prohibiting and quashing orders respectively. **9A-96**

(1A) The High Court shall have jurisdiction to make mandatory, prohibiting and quashing orders in those classes of case in which, immediately before 1st May 2004, it had jurisdiction to make orders of mandamus, prohibition and certiorari.

(2) Every such order shall be final, subject to any right of appeal therefrom.

(3) In relation to the jurisdiction of the Crown Court, other than its jurisdiction in matters relating to trial on indictment, the High Court shall have all such jurisdiction to make mandatory, prohibiting and quashing orders as the High Court possesses in relation to the jurisdiction of an inferior court.

(3A) The High Court shall have no jurisdiction to make mandatory, prohibiting and quashing orders in relation to jurisdiction of a court-martial in matters relating to—

- (a) trial by court martial for an offence, or
- (b) appeals from a Standing Civilian Court;

and in this subsection “court-martial” means a court martial under the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957.

(4) The power of the High Court under any enactment to require justices of the peace or a judge or officer of a county court to do any act relating to the duties of their respective offices, or to require a magistrates' court to state a case for the opinion of the High Court, in any case where the High Court formerly had by virtue of any enactment jurisdiction to make a rule absolute, or an order, for any of those purposes, shall be exercisable by mandatory order.

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- (5) In any statutory provision —
- (a) references to mandamus or to a writ or order of mandamus shall be read as reference to a mandatory order;
 - (b) references to prohibition or to a writ or order of prohibition shall be read as reference to a prohibiting order;
 - (c) references to certiorari or to a writ or order of certiorari shall be read as reference to a quashing order; and
 - (d) references to the issue or award of a writ of mandamus, prohibition and certiorari shall be read as references to the making of the corresponding mandatory, prohibiting or quashing order.

(6) In subsection (3) the reference to Crown Court's jurisdiction in matters relating to trial on indictment does not include if jurisdiction relating to orders under section 17 of the Access to Justice Act 1999.

9A-97 *Note* —Derived from the A.J. (M.P.) A. 1938 ss.7 and 8; and the Courts Act 1971 s.10. Amended by the Access to Justice Act 1999 s.24 and Sch.4 para.23. Amended by the Armed Forces Act 2001 (c.19) s.23. With effect from May 1, 2004, it was amended by the Civil Procedure (Modification of Senior Courts Act 1981) Order 2004 (SI 2004/1033), so as to provide that orders of mandamus, prohibition and certiorari should be known instead as mandatory, prohibiting and quashing orders respectively.

Matters relating to trial on indictment

9A-98 The Crown Court is a superior court. Nevertheless, the High Court may make orders of mandamus, prohibition or certiorari in relation to the jurisdiction of the Crown Court “other than its jurisdiction in matters relating to trial on indictment” (subs.(3)) (see also s.28(1)). This provision first appeared as s.10(5) of the Courts Act 1971 and was designed to ensure that such jurisdiction as the High Court then had over the jurisdiction of the courts of quarter sessions (whether civil or criminal) absorbed by the Crown Court, when the latter superior court was created and the former inferior courts were abolished by the 1971 Act, was preserved. In the years since, the meaning of the phrase “relating to trial on indictment” has fallen for determination on a number of occasions and the provision has been extended beyond the circumstances for which it was originally intended. The many authorities were referred to, in argument if not in speeches, in *R. v DPP, Ex p. Kebilene* [1999] 3 W.L.R. 972, HL; see also *R. v Maidstone Crown Court Ex p. Harrow LBC* [1999] 3 All E.R. 542; *The Times*, May 14, 1999, DC (whether order under Criminal Procedure (Insanity) Act 1964 s.5, a matter relating to trial on indictment); see also *R. v Canterbury Crown Court Ex p. Regentford Ltd*, *The Times*, February 6, 2001, DC, and *R. v Leicester Crown Court Ex p. Commissioners for Customs and Excise*, *The Times*, February 23, 2001, DC; *R. (Kenneally) v Crown Court at Snaresbrook* [2002] EWHC 968 (Admin); [2002] 2 W.L.R. 1430; *R. (Sullivan) v Maidstone Crown Court* [2002] EWHC 967 (Admin); [2002] 4 All E.R. 427, DC; *R. (H.) v Crown Court at Wood Green* [2006] EWHC 2683 (Admin); [2007] 1 W.L.R. 1670, DC; *R. (Faithfull) v Ipswich Crown Court* [2007] EWHC 2763; [2008] 1 W.L.R. 1636, DC

Injunctions to restrain persons from acting in offices in which they are not entitled to act

9A-99 **30.**—(1) Where a person not entitled to do so acts in an office to which this section applies, the High Court may—

- (a) grant an injunction restraining him from so acting; and
- (b) if the case so requires, declare the office to be vacant.

(2) This section applies to any substantive office of a public nature

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and permanent character which is held under the Crown or which has been created by any statutory provision or royal charter.

Note —Derived from the AJ (MP) A 1938 s.9, which had abolished informations in the nature of *quo warranto*. **9A-100**

Application for judicial review

31.—(1) An application to the High Court for one or more of the following forms of relief, namely— **9A-101**

- (a) a mandatory, prohibiting or quashing order,
- (b) a declaration or injunction under subsection (2); or
- (c) an injunction under section 30 restraining a person not entitled to do so from acting in an office to which that section applies,

shall be made in accordance with rules of court by a procedure to be known as an application for judicial review.

(2) A declaration may be made or an injunction granted under this subsection in any case where an application for judicial review, seeking that relief, has been made and the High Court considers that, having regard to—

- (a) the nature of the matters in respect of which relief may be granted by mandatory, prohibiting and quashing orders;
- (b) the nature of the persons and bodies against whom relief may be granted by such orders; and
- (c) all the circumstances of the case,

it would be just and convenient for the declaration to be made or the injunction to be granted, as the case may be.

(3) No application for judicial review shall be made unless the leave of the High Court has been obtained in accordance with rules of court; and the court shall not grant leave to make such an application unless it considers that the applicant has a sufficient interest in the matter to which the application relates.

(4) On an application for judicial review the High Court may award to the applicant damages, restitution or the recovery of a sum due if—

- (a) the application includes a claim for such an award arising from any matter to which the application relates; and
- (b) the court is satisfied that such an award would have been made if the claim had been made in an action begun by the applicant at the time of making the application.

(5) If, on an application for judicial review, the High Court quashes the decision to which the application relates, it may in addition—

- (a) remit the matter to the court, tribunal or authority which made the decision, with a direction to reconsider the matter and reach a decision in accordance with the findings of the High Court, or
- (b) substitute its own decision for the decision in question.

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(5A) But the power conferred by subsection (5)(b) is exercisable only if

- (a) the decision in question was made by a court or tribunal,
- (b) the decision is quashed on the ground that there has been an error of law, and
- (c) without the error, there would have been only one decision which the court or tribunal could have reached.

(5B) Unless the High Court otherwise directs, a decision substituted by it under subsection (5)(b) has effect as if it were a decision of the relevant court or tribunal.

(6) Where the High Court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant—

- (a) leave for the making of the application; or
- (b) any relief sought on the application,

if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.

(7) Subsection (6) is without prejudice to any enactment or rule of court which has the effect of limiting the time within which an application for judicial review may be made.

9A-102 *Note* —For relevant rules of court, see CPR Pt 54 (Judicial Review); see Vol.1, paras 54.0.1 et seq. With effect from May 1, 2004, subss.(1), (2) and (5) amended, and subs.(4) substituted, by the Civil Procedure (Modification of Senior Courts Act 1981) Order 2004 (SI 2004/1033), as a consequence of amendments to s.31, see para.9A-97 above. Subsection (4) provided that, on an application for judicial review, in certain circumstances the High Court should have power to award damages. As substituted, the subs.(4) provides that the Court has, in addition to the power to award damages, power to award restitution or the recovery of a sum due. Subsections (5) and (5A) are substituted for original subs.(5) by the Tribunals Courts and Enforcement Act 2007 s.141, with effect from April 6, 2008 (SI 2008/749).

Transfer of judicial review applications to Upper Tribunal

9A-102.1 **31A.**—(1) This section applies where an application is made to the High Court—

- (a) for judicial review, or
- (b) for permission to apply for judicial review.

(2) If Conditions 1, 2, 3 and 4 are met, the High Court must by order transfer the application to the Upper Tribunal.

(3) If Conditions 1, 2 and 4 are met, but Condition 3 is not, the High Court may by order transfer the application to the Upper Tribunal if it appears to the High Court to be just and convenient to do so.

(4) Condition 1 is that the application does not seek anything other than—

- (a) relief under section 31(1)(a) and (b);
- (b) permission to apply for relief under section 31(1)(a) and (b);
- (c) an award under section 31(4);
- (d) interest;
- (e) costs.

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(5) Condition 2 is that the application does not call into question anything done by the Crown Court.

(6) Condition 3 is that the application falls within a class specified under section 18(6) of the Tribunals, Courts and Enforcement Act 2007.

(7) Condition 4 is that the application does not call into question any decision made under—

- (a) the Immigration Acts,
- (b) the British Nationality Act 1981 (c. 61),
- (c) any instrument having effect under an enactment within paragraph (a) or (b), or
- (d) any other provision of law for the time being in force which determines British citizenship, British overseas territories citizenship, the status of a British National (Overseas) or British Overseas citizenship.

Note —Inserted by the Tribunals, Courts and Enforcement Act 2007 s.19, with effect from November 3, 2008 (SI 2008/2696). **9A-102.2**

POWERS

Orders for interim payment

32.—(1) As regards proceedings pending in the High Court, provision may be made by rules of court for enabling the court, in such circumstances as may be prescribed, to make an order requiring a party to the proceedings to make an interim payment of such amount as may be specified in the order, with provision for the payment to be made to such other party to the proceedings as may be so specified or, if the order so provides, by paying it into court. **9A-103**

(2) Any rules of court which make provision in accordance with subsection (1) may include provision for enabling a party to any proceedings who, in pursuance of such an order, has made an interim payment to recover the whole or part of the amount of the payment in such circumstances, and from such other party to the proceedings, as may be determined in accordance with the rules.

(3) Any rules made by virtue of this section may include such incidental, supplementary and consequential provisions as the rule-making authority may consider necessary or expedient.

(4) Nothing in this section shall be construed as affecting the exercise of any power relating to costs, including any power to make rules of court relating to costs.

(5) In this section “interim payment”, in relation to a party to any proceedings, means a payment on account of any damages, debt or other sum (excluding any costs) which that party may be held liable to pay to or for the benefit of another party to the proceedings if a final judgment or order of the court in the proceedings is given or made in favour of that other party.

Note —Derived from the AJA 1969 s.20. See also County Courts Act 1984 s.50. **9A-104**

Rules of court

Rules of court are found in CPR rr.25.6 to 25.9, and note Practice Direction (Interim **9A-105**

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SECTION 9A: MAIN STATUTES

Payments) (see Vol.1, para.25BPD.1). For additional commentary on interim payments, see s.15 (Interim Remedies) Sub-sect.D (Vol.2, para.15–94).

Exclusion of costs

- 9A–106** Subsection (5) expressly excludes “costs” from the definition of “interim payment”, so that rules of court cannot be made to authorise a payment on account of costs which one party had been held liable to pay another.

Orders for provisional damages for personal injuries

- 9A–107** **32A.**—(1) This section applies to an action for damages for personal injuries in which there is proved or admitted to be a chance that at some definite or indefinite time in the future the injured person will, as a result of the act or omission which gave rise to the cause of action, develop some serious disease or suffer some serious deterioration in his physical or mental condition.

(2) Subject to subsection (4) below, as regards any action for damages to which this section applies in which a judgment is given in the High Court, provision may be made by rules of court for enabling the court, in such circumstances as may be prescribed, to award the injured person—

- (a) damages assessed on the assumption that the injured person will not develop the disease or suffer the deterioration in his condition; and
- (b) further damages at a future date if he develops the disease or suffers the deterioration.

(3) Any rules made by virtue of this section may include such incidental, supplementary and consequential provisions as the rule-making authority may consider necessary or expedient.

(4) Nothing in this section shall be construed—

- (a) as affecting the exercise of any power relating to costs, including any power to make rules of court relating to costs; or
- (b) as prejudicing any duty of the court under any enactment or rule of law to reduce or limit the total damages which would have been recoverable apart from any such duty.

- 9A–108** *Note* —Added by the AJA 1982 s.6(1). Referred to in the Social Security (Recovery of Benefits) Act 1997 s.11(4), and in the Damages Act 1996 s.3. See also County Courts Act 1984 s.51 (para.9A–497 below).

“rules of court”

- 9A–109** For rules of court under this section, see CPR Pt 41.

Powers of High Court exercisable before commencement of action

- 9A–110** **33.**—(1) On the application of any person in accordance with rules of court, the High Court shall, in such circumstances as may be specified in the rules, have power to make an order providing for any one or more of the following matters, that is to say—

- (a) the inspection, photographing, preservation, custody and detention of property which appears to the court to

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be property which may become the subject-matter of subsequent proceedings in the High Court, or as to which any question may arise in any such proceedings; and

- (b) the taking of samples of any such property as is mentioned in paragraph (a), and the carrying out of any experiment on or with any such property.

(2) On the application, in accordance with rules of court, of a person who appears to the High Court to be likely to be a party to subsequent proceedings in that court, the High Court shall, in such circumstances as may be specified in the rules, have power to order a person who appears to the court to be likely to be a party to the proceedings and to be likely to have or to have had in his possession, custody or power any documents which are relevant to an issue arising or likely to arise out of that claim—

- (a) to disclose whether those documents are in his possession, custody or power; and
- (b) to produce such of those documents as are in his possession, custody or power to the applicant or, on such conditions as may be specified in the order—
 - (i) to the applicant's legal advisers; or
 - (ii) to the applicant's legal advisers and any medical or other professional adviser of the applicant; or
 - (iii) if the applicant has no legal adviser, to any medical or other professional adviser of the applicant.

Note —Derived from the AJA 1969 s.21(1); and the AJA 1970 s.31. Subsection (2) was amended by Civil Procedure Act 1997 s.8 and the Civil Procedure (Modification of Enactments) Order 1998 (SI 1998/2940) art.5(a). See also County Courts Act 1984 s.52.

9A-111

“rules of court”

For rules of court under this section, see CPR Pt 25 and commentary in Vol.1, paras 25.1.26 and 25.1.27; CPR rr.31.16 and 48.1. For provisions supplementing s.33, see s.35 below.

9A-112

Powers exercisable before action commenced

The powers referred to in subs.(1) and subs.(2) may be exercised by the High Court after proceedings have been commenced (*Arsenal Football Club Plc v Elite Sports Distribution Ltd (No.1)*, [2002] EWHC 3057 (Mr Geoffrey Vos Q.C.)). The significance of this section is that it provides that, in accordance with rules of court, application may be made to the Court for those powers to be exercised before proceedings have been commenced. Initially, subs.(2) was confined to proceedings in which a claim in respect of personal injuries to a person, or in respect of a person's death, was likely to be made. That restriction was removed by an amendment coming into effect on April 25, 1999. (For discussion of changed arrangements, see *Black v Sumito Corp* [2001] EWCA Civ 1819; [2002] 1 W.L.R. 1562, CA.) Subsection (2), in its amended form, binds the Crown. However, in its application to the Crown subs.(1) is limited to property which may be the subject-matter of proceedings involving a claim for personal injuries or death (see s.35(4), para.9A-118 below).

9A-113

Section 35 (below) contains provisions supplementary to this section.

Persons to whom documents to be produced

Under subs.(2) the Court may order that relevant documents should be produced

9A-114

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to the applicant. Alternatively, the Court may order, on such conditions as may be specified in the order, that they should be produced to the applicant's legal adviser and any medical or other professional adviser of the applicant. In the latter event, the Court may impose a condition that the contents of a document should not be disclosed by the legal, medical or other adviser to the applicant (see *Dunning v United Liverpool Hospitals' Board of Governors* [1973] 1 W.L.R. 586; [1973] 2 All E.R. 454, CA; cf. *McIvor v Southern Health and Social Services Board* [1978] 1 W.L.R. 757; [1978] 2 All E.R. 625, HL).

Power of High Court to order disclosure of documents, inspection of property etc. in proceedings for personal injuries or death

9A-115 34.—(1) [...]

(2) On the application, in accordance with rules of court, of a party to any proceedings, the High Court shall, in such circumstances as may be specified in the rules, have power to order a person who is not a party to the proceedings and who appears to the court to be likely to have in his possession, custody or power any documents which are relevant to an issue arising out of the said claim—

- (a) to disclose whether those documents are in his possession, custody or power; and
- (b) to produce such of those documents as are in his possession, custody or power to the applicant or, on such conditions as may be specified in the order—
 - (i) to the applicant's legal advisers; or
 - (ii) to the applicant's legal advisers and any medical or other professional adviser of the applicant; or
 - (iii) if the applicant has no legal adviser, to any medical or other professional adviser of the applicant.

(3) On the application, in accordance with rules of court, of a party to any proceedings, the High Court shall, in such circumstances as may be specified in the rules, have power to make an order providing for any one or more of the following matters, that is to say—

- (a) the inspection, photographing, preservation, custody and detention of property which is not the property of, or in the possession of, any party to the proceedings but which is the subject-matter of the proceedings or as to which any question arises in the proceedings;
- (b) the taking of samples of any such property as is mentioned in paragraph (a) and the carrying out of any experiment on or with any such property.

(4) The preceding provisions of this section are without prejudice to the exercise by the High Court of any power to make orders which is exercisable apart from those provisions.

9A-116 *Note* —Derived from the AJA 1970 s.32. Subsection (1) was omitted and subss.(2) and (3) were amended by the Civil Procedure (Modification of Enactments) Order 1998 (SI 1998/2940) art.5(b) made by the Lord Chancellor in exercised of powers conferred by Civil Procedure Act 1997 s.4. The section is referred to in CPR rr.25.1, 25.5, 31.17 and 48.1.

“rules of court”

9A-117 See CPR Pt 25 and commentary in Vol.1, paras 25.1.28 and 25.1.29. For provision supplementing s.34, see s.35 below.

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Provisions supplementary to ss.33 and 34

35.—(1) The High Court shall not make an order under section 33 or 34 if it consider that compliance with the order, if made, would be likely to be injurious to the public interest. **9A-118**

(2) Rules of court may make provision as to the circumstances in which an order under section 33 or 34 can be made; and any rules making such provision may include such incidental, supplementary and consequential provisions as the rule-making authority may consider necessary or expedient.

(3) Without prejudice to the generality of subsection (2), rules of court shall be made for the purpose of ensuring that the costs of and incidental to proceedings for an order under section 33(2) or 34 incurred by the person against whom the order is sought shall be awarded to that person unless the court otherwise directs.

(4) Sections 33(2) and 34 and this section bind the Crown; and section 33(1) binds the Crown so far as it relates to property as to which it appears to the court that it may become the subject-matter of subsequent proceedings involving a claim in respect of personal injuries to a person or in respect of a person's death.

In this subsection references to the Crown do not include references to Her Majesty in Her private capacity or to Her Majesty in right of Her Duchy of Lancaster or to the Duke of Cornwall.

(5) In sections 32A 33 and 34 and this section—

“property” includes any land, chattel or other corporeal property of any description;

“personal injuries” includes any disease and any impairment of a person's physical or mental condition.

Note —Derived from the AJA 1969 s.21; and the AJA 1970 ss.32 and 33, 35; amended by the AJA 1982 s.6(2). **9A-119**

“rules of court”

See CPR Pt 25 and paras 9A-112 and 9A-133+.

9A-120**“personal injuries”**

See further commentary on meaning of “claim for personal injuries” in CPR r.2.3(1) (Vol.1, para.2.3.6). **9A-121**

Power of High Court to award interest on debts and damages

35A.—(1) Subject to rules of court, in proceedings (whenever instituted) before the High Court for the recovery of a debt or damages there may be included in any sum for which judgment is given simple interest, at such rate as the court thinks fit or as rules of court may provide, on all or any part of the debt or damages in respect of which judgment is given, or payment is made before judgment, for all or any part of the period between the date when the cause of action arose and— **9A-122**

(a) in the case of any sum paid before judgment, the date of the payment; and

(b) in the case of the sum for which judgment is given, the date of the judgment.

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(2) In relation to a judgment given for damages for personal injuries or death which exceed £200 subsection (1) shall have effect—

- (a) with the substitution of “shall be included” for “may be included”; and
- (b) with the addition of “unless the court is satisfied that there are special reasons to the contrary” after “given,” where first occurring.

(3) Subject to rules of court, where—

- (a) there are proceedings (whenever instituted) before the High Court for the recovery of a debt; and
- (b) the defendant pays the whole debt to the plaintiff (otherwise than in pursuance of a judgment in the proceedings),

the defendant shall be liable to pay the plaintiff simple interest at such rate as the court thinks fit or as rules of court may provide on all or any part of the debt for all or any part of the period between the date when the cause of action arose and the date of the payment.

(4) Interest in respect of a debt shall not be awarded under this section for a period during which, for whatever reason, interest on the debt already runs.

(5) Without prejudice to the generality of section 84, rules of court may provide for a rate of interest by reference to the rate specified in section 17 of the Judgments Act 1838 as that section has effect from time to time or by reference to a rate for which any other enactment provides.

(6) Interest under this section may be calculated at different rates in respect of different periods.

(7) In this section “plaintiff” means the person seeking the debt or damages and “defendant” means the person from whom the plaintiff seeks the debt or damages and “personal injuries” includes any disease and any impairment of a person’s physical or mental condition.

(8) Nothing in this section affects the damages recoverable for the dishonour of a bill of exchange.

9A-123 Note —Inserted by the AJA 1982 s.15(1), Sch.1 Pt I.

Power to award interest on debts and damages

9A-124 Section 35A together with s.69 of the County Courts Act 1984 superseded ss.3 and 22 of the L.R.(M.P.) A. 1934 and the words from “and section 22” onwards in s.34(3) of the AJA 1969, so far as the provisions of those sections apply to the High Court and county courts (see the AJA 1982 s.15(4)(5)). The result is that s.3 of the Act of 1934 (see para.9B-1218+ below) remains in force so far as courts of record, other than the High Court and county courts are concerned, e.g. the Court of Appeal (Civil Division) when it gives a judgment on appeal for debt or damages.

It is common, but not inevitable, for interest under s.35A to be at a rate of two per cent over base. The authorities on the point were comprehensively reviewed in *Claymore Services Limited v Nautilus Properties Ltd* [2007] EWHC 805 (TCC); [2007] B.L.R. 452 (Jackson J.) at paras [70] to [81]. See further, Vol.1 paras 7.0.13 and 7.0.22.

Interest is awarded pursuant to s.35A as compensation to the successful claimant for having been kept out of his money. The award is discretionary. A relevant factor in the exercise of such discretion is whether the successful claimant has sought payment of the money in question promptly. Where he has chosen not to pursue a claim for his

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own reasons and has made that known to the defendant, so that his own failure to prosecute his claim is the predominant cause of his being kept out of his money, a court may decide not to award interest (see *Sawiris v Marwan* [2010] EWHC 89 (Comm), January 28, 2010, unrep. (Teare J.) at para.[59] and authorities referred to there).

Various important amendments to provisions in the RSC were made after s.35A came into force. Where necessary, these provisions were carried forward into the Civil Procedure Rules. Rules in the CPR relating to the award of interest include r.12.6 (Interest on default judgment), r.14.14 (Interest where admission), r.16.4 (Contents of particulars of claim), and r.40.8 (Time from which interest begins to run). For detailed notes on the award of interest, see Vol.1, paras 7.0.9 to 7.0.23 and paras 40.8.1 to 40.8.16. As to (1) reducing the period for which interest is payable on an award, or (2) altering the rate at which interest is calculated, or both, as a procedural sanction, see Vol.1, para.3.1.6.

It has been held at first instance that CPR r.36.21(2), which grants the court power to award interest on damages awarded to a claimant in case where he recovers more than he proposed in his Pt 36 offer, is not ultra vires the rule-making power and that “interest” within r.36.21 is not the same as “interest” within s.35A (*All-in-One Design & Build Ltd v Motcomb Estates Ltd* (2000) 144 S.J.L.B. 219).

There are some significant points of difference between s.35A of the 1981 Act and s.3 of the 1934 Act. Under s.35A interest is to be included in any judgment for debt or damages whether or not the proceedings have been “tried” (as required by s.3). Thus, the court may award interest on default judgments, summary judgments and judgments given in admissions (see, generally, CPR Pts 12, 14 and 24). Section 35A provides for interest to be included in the judgment, not only in respect of the debt or damages for which judgment is given but also in respect of any sum paid before the judgment up to the date of payment (see subs.(1)) thereby negating the effect of *The Medina Princess* [1962] 2 Lloyd’s Rep. 17. Section 35A provides that the defendant will be liable to pay simple interest in respect of the debt paid in full after proceedings are instituted, at such rate as the Court thinks fit or rules of court provide on all or part of the debt for the whole or part of the period from the date the cause of action arose and up to the date of payment. Section 35A provides for rates of interest to be fixed by rules of court by reference to the rate specified in s.17 of the Judgments Act 1838 as that section has effect from time to time. Section 35A makes awards of interest under that section “subject to rules of court”.

Other significant points in the provisions of s.35A which should be emphasised are as follows.

- (a) The award of interest in actions for personal injuries is mandatory unless the Court is satisfied that there are special reasons to the contrary.
- (b) Except in the case of claims for damages for personal injuries or death, the award of interest under s.35A as it is under s.3 of the Act of 1934 is in the discretion of the Court which may award interest at such rate as it thinks fit on all or any part of the debt or damages in respect of which judgment is given or payment is made before judgment for all or any part of the period between the date when the cause of action arose and the date of payment or the date of judgment whichever is the earlier (see s.35A(1) (6)). The interest may be awarded at different rates in respect of different periods (see s.35A(6)), but interest will not be awarded under s.35A for a period during which, for whatever reason, interest on the debt already runs, e.g. under a contract (see s.35A(4), cf. proviso (b) of s.3 of the Act of 1934).
- (c) The award of interest under s.35A must be for “simple interest” which is perhaps similar to the prohibition contained in proviso (a) to s.3 of the Act of 1934 against “the giving of interest upon interest” (see *Bushwall Properties Ltd v Vortex Properties Ltd* [1975] 1 W.L.R. 1659; [1975] 2 All E.R. 214).
- (d) As in the case of s.3 of the Act of 1934 under proviso (c), s.35A does not affect the damages recoverable for the dishonour of a bill of exchange (see s.35A(8)).

As to calculation of s.35A interest and of judgment interest where (1) defendant making installment payments under interim payment order, and (2) before all installments paid, claimant granted unopposed final judgment for same sum, see *Kuwait Airways Corp v Kuwait Insurance Co (No.3)* [2000] 1 All E.R. (Comm) 972, April 19, 2000, unrep. (where held by Langley J. that judgment interest on s.35A interest

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should not be backdated). Where interest is entered under the Arbitration Act 1996 s.66 in terms of an arbitration award, the court has no power to grant interest under s.35A on the sum awarded but remaining unpaid after the award (*Walker v Rowe* [2000] 1 Lloyd's Rep. 116, (Aikens J.))

In *Cookson v Knowles* [1979] A.C. 556, HL, it was stated that interest on damages for loss of financial dependency under the Fatal Accidents Act 1976 should be awarded at one half of the special account rate, and only on that part of the loss arising between the date of death and the date of trial. In *Fletcher v A Train & Sons Ltd* [2008] EWCA Civ 413; [2008] 4 All E.R. 699, CA, the trial judge (sitting in a county court) made an award of interest at the full rate (17.5 per cent) for that period upon the whole of the sum of the damages claim, including future loss. The Court of Appeal allowed the defendant's appeal, holding there were no special circumstances and the judge's exercise of discretion (in this instance, not under s.35A of the 1981 Act, but under the equivalent provisions in s.69 of the 1984 Act) was contrary to binding authority as to the principle upon which such discretion should be exercised.

Under English conflict of laws rules and the Private International Law (Miscellaneous Provisions) Act 1995 s.11, the assessment of damages in tort is a procedural matter and, therefore, is governed by the law of the forum, but the right to claim interest by way of damages in a claim in tort depends on the proper law and is not in any sense a procedural question for the law of the forum. Section 35A does not create a substantive legal right to interest, but merely gives the court a discretionary power to award interest on damages as a remedy in appropriate cases; the power is to be classified as procedural rather than as substantive and, therefore, is a matter for the *lex fori*. However, in exercising that power, the factors to be taken into account by the English court may well include any relevant provisions of the proper law relating to the recovery of interest on damages (including, for example, provisions as to rate of interest) (*Maher v Grouppama Grand Est* [2009] EWCA Civ 1191, November 12, 2009, CA, unrep.).

Subpoena issued by High Court to run throughout United Kingdom

9A-125 36.—(1) If in any cause or matter in the High Court it appears to the court that it is proper to compel the personal attendance at any trial of a witness who may not be within the jurisdiction of the court, it shall be lawful for the court, if in the discretion of the court it seems fit so to do, to order that a writ of subpoena ad testificandum or writ of subpoena duces tecum shall issue in special form commanding the witness to attend the trial wherever he shall be within the United Kingdom; and the service of any such writ in any part of the United Kingdom shall be as valid and effectual for all purposes as if it had been served within the jurisdiction of the High Court.

(2) Every such writ shall have at its foot a statement to the effect that it is issued by the special order of the High Court, and no such writ shall issue without such a special order.

(3) If any person served with a writ issued under this section does not appear as required by the writ, the High Court, on proof to the satisfaction of the court of the service of the writ and of the default, may transmit a certificate of the default under the seal of the court or under the hand of a judge of the court—

- (a) if the service was in Scotland, to the Court of Session at Edinburgh; or
- (b) if the service was in Northern Ireland, to the High Court of Justice in Northern Ireland at Belfast;

and the court to which the certificate is sent shall thereupon proceed against and punish the person in default in like manner as if

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that person had neglected or refused to appear in obedience to process issued out of that court.

(4) No court shall in any case proceed against or punish any person for having made such default as aforesaid unless it is shown to the court that a reasonable and sufficient sum of money to defray—

- (a) the expenses of coming and attending to give evidence and of returning from giving evidence; and
- (b) any other reasonable expenses which he has asked to be defrayed in connection with his evidence,

was tendered to him at the time when the writ was served upon him.

(5) Nothing in this section shall affect—

- (a) the power of the High Court to issue a commission for the examination of witnesses out of the jurisdiction of the court in any case in which, notwithstanding this section, the court thinks fit to issue such a commission; or
- (b) the admissibility at any trial of any evidence which, if this section had not been enacted, would have been admissible on the ground of a witness being outside the jurisdiction of the court.

(6) In this section references to attendance at a trial include references to attendance before an examiner or commissioner appointed by the High Court in any cause or matter in that court, including an examiner or commissioner appointed to take evidence outside the jurisdiction of the court.

Note —Derived from the JA 1925 s.49, which replaced the Attendance of Witnesses Act 1854 as amended by the JA 1884 s.16; and the Arbitration Act 1889 s.18 as regards references by oath. **9A-126**

Subsection (4) was amended by the Courts and Legal Services Act 1990 Sch.17. Subsection (6) is derived from s.4 of the Evidence (Proceedings in Other Jurisdictions) Act 1975.

Channel Islands and the Isle of Man

The Interpretation Act 1978 s.5, Sch.1 provides that in every Act the expression “British Islands” shall mean the United Kingdom, the Channel Islands, and the Isle of Man. By inference, these islands are not part of the United Kingdom. A High Court subpoena cannot be issued in the Islands as they are outside the jurisdiction. The Court has power under this section to give leave to issue a subpoena to Scotland or Northern Ireland, but it has no power to give such leave in respect of the Channel Islands or the Isle of Man. As to the Isle of Man, see also *Davison v Farmer* (1851) 6 Exch. 242; *Re Brown* (1864) 33 L.J.Q.B. 193. **9A-127**

Powers of High Court with respect to injunctions and receivers

37.—(1) The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so. **9A-128**

(2) Any such order may be made either unconditionally or on such terms and conditions as the court thinks just.

(3) The power of the High Court under subsection (1) to grant an interlocutory injunction restraining a party to any proceedings from removing from the jurisdiction of the High Court, or otherwise

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dealing with, assets located within that jurisdiction shall be exercisable in cases where that party is, as well as in cases where he is not, domiciled, resident or present within that jurisdiction.

(4) The power of the High Court to appoint a receiver by way of equitable execution shall operate in relation to all legal estate and interests in land, and that power—

- (a) may be exercised in relation to an estate or interest in land whether or not a charge has been imposed on that land under section 1 of the Charging Orders Act 1979 for the purpose of enforcing the judgment, order or award in question; and
- (b) shall be in addition to, and not in derogation of, any power of any court to appoint a receiver in proceedings for enforcing such a charge.

(5) Where an order under the said section 1 imposing a charge for the purpose of enforcing a judgment, order or award has been, or has effect as if, registered under section 6 of the Land Charges Act 1972, subsection (4) of the said section 6 (effect of non-registration of writs and orders registrable under that section) shall not apply to an order appointing a receiver made either—

- (a) in proceedings for enforcing the charge; or
- (b) by way of equitable execution of the judgment, order or award or, as the case may be, of so much of it as requires payment of moneys secured by the charge.

9A-129 *Note* —Derived from the JA 1925 s.45; and the AJA 1956 s.36. Amended by the Charging Orders Act 1979 s.7.

Effect of this section

9A-130 This section restates the law and practice governing the power of the Court with respect to injunctions and receivers. The section does not, in terms, fetter the court's power in any way (*Motorola Credit Corp v Uzan* (No.6) [2003] EWCA Civ 752, CA), and neither does Civil Jurisdiction and Judgments Act 1982 s.25 (interim relief in absence of substantive proceedings) (*ibid*). Section 37(3) makes it clear (if it was a matter for doubt) that a Mareva injunction, described in the CPR as a “freezing” injunction (see CPR r.25.1(1)), may be granted against a party domiciled, resident or present within the jurisdiction. The phrase “or otherwise dealing with” in s.37(3) confirms that a freezing injunction may be granted where there is a danger that assets of the defendant or judgment debtor within the jurisdiction may be dissipated by disposal sale or charge or otherwise “salted away” or placed out of the reach of the plaintiff or judgment creditor (see *Z Ltd v A-Z and AA-LL* [1982] Q.B. 558; [1982] 1 All E.R. 796, CA; *C.B.S. United Kingdom v Lambert* [1983] Ch. 37; [1982] 3 All E.R. 237, CA).

The power to prosecute legal proceedings granted to local authorities by the Local Government Act 1972 s.222 (see para.3A-57.2 above) includes a power in some circumstances to bring proceedings for relief in the form of an injunction under s.37(1). Section 222 does not give authorities substantive powers. It is simply a procedural provision which gives them powers formerly vested only in the Attorney-General (*Birmingham City Council v Shafi* [2008] EWCA Civ 1186; [2009] 1 W.L.R. 1961, CA, at [21] to [25]) (see further paras 3A-57.2 and 3A-57.4 above).

Application for injunctions

9A-131 See CPR r.25.1 and commentary thereto. The words in brackets in s.37(1) “whether interlocutory or final” are thought to be mere words of description of the practice prevailing before the passing of the Act and are not apt to create a new or extended jurisdiction to grant an injunction. It should, however, be explained that the power to grant an injunction may be exercised not only before judgment but also after judg-

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ment in order to assist the process of the enforcement of the judgment. This is specially important in relation to a freezing injunction (see *Stewart-Chartering Ltd v C. & O. Managements SA* [1982] 1 W.L.R. 460; [1980] 1 All E.R. 718; *Faith Panton Property Plan v Hodgetts* [1981] 1 W.L.R. 927; [1981] 2 All E.R. 877, CA). The words “whether interlocutory or final” do not have the effect of removing or diminishing this power.

The Human Rights Act 1998 s.3 and art.6 of the ECHR do not require that insofar as section 37 confers jurisdiction to grant an anti-suit injunction it should be read more narrowly than heretofore (*O.T. Africa Line Ltd v Hijazy (The Kribi)*, [2001] 1 Lloyd’s Rep. 76, Aikens J.). The 1998 Act requires that a marginally higher threshold test than that which applied previously should apply in all applications for interlocutory injunctions likely to affect freedom of expression (*Imutran Ltd v Uncaged Campaigns Ltd* [2001] 2 All E.R. 385, Sir Andrew Morritt V.-C.).

Appointment of receiver

See CPR Sch.1, RSC O.30 (Receivers); and RSC O.51 (Receivers; equitable execution). **9A–132**

Relief against forfeiture for non-payment of rent

For the text of s.38 of the Senior Courts Act 1981 (Relief against forfeiture for non-payment of rent), and commentary thereon, see para.3A–294 above. For the related text of ss.138 to s.140 of the County Courts Act 1984 (Forfeiture for non-payment of rent), see para.3A–297 et seq above. **9A–132.1**

For s.38 of the Senior Courts Act 1981 (see Arrangement) plus any related commentary see paragraphs 9A–133+ to 9A–135+ on White Book on Westlaw UK or the Civil Procedure CD.



Execution of instrument by person nominated by High Court

39.—(1) Where the High Court has given or made a judgment or order directing a person to execute any conveyance, contract or other document, or to indorse any negotiable instrument, then, if that person— **9A–136**

(a) neglects or refuses to comply with the judgment or order; or

(b) cannot after reasonable inquiry be found, the High Court may, on such terms and conditions, if any, as may be just, order that the conveyance, contract or other document shall be executed, or that the negotiable instrument shall be indorsed, by such person as the court may nominate for that purpose.

(2) A conveyance, contract, document or instrument executed or indorsed in pursuance of an order under this section shall operate, and be for all purposes available, as if it had been executed or indorsed by the person originally directed to execute or indorse it.

Note —Derived from the JA 1925 s.47, replacing the JA 1884, s.14.

9A–137

Powers of the court

An order under this section should not be made in anticipation of a failure to execute unless the defendant has already shown by his conduct that he refuses and will refuse to execute (*Savage v Norton* [1908] 1 Ch. 290).

Once an order has been made under this section the document executed by the appointed person has the same effect as if it had been executed by the person originally directed to execute it (see subs.(2), and *Savage v Norton* [1908] 1 Ch. 290).

There is no limitation on the class of document in relation to which the powers accorded by this section might be invoked nor on the purpose for which a document executed in accordance with those powers might be used, and accordingly the court has

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jurisdiction to order a party to execute an essential document by a specified time on a specified date, failing which to order a Master of the Queen's Bench Division to sign such document even though the execution of such document would be to fulfil the requirement of a contract other than the parties immediately before the court (*Astro Exito Navegacion SA v Soulland Enterprise Co Ltd (No.2)* [1983] 2 A.C. 787; [1983] 2 All E.R. 725, HL).

The section applies where an order has been made for payment of costs to compel obedience (*Re Cathcart* [1893] 1 Ch. 466; and see *Re Lumley* [1893] W.N. 13).

Where a wife was granted a writ of sequestration over the matrimonial home and the court had ordered the husband to transfer the title to the sequestrators, the court had the power under s.39(1) to order that, if such transfer was refused, the necessary conveyance be executed (*Mir v Mir* [1992] Fam. 79; [1992] 2 W.L.R. 225; [1992] 1 All E.R. 765).

Person nominated by the court

- 9A-139** Cases have arisen in which masters and district judges have been nominated by the court to execute instruments (see *Re Edwards* (1885) 33 W.R. 578) or in the Family Division the District Judge of the Principal Registry (*Howarth v Howarth* (1886) 11 P.D. 68) and in which court officers have been nominated in vacations (see *Hoare v Gray* (1887) 31 S.J. 744). In protection cases the Official Solicitor has been appointed (*Re Cathcart* [1893] 1 Ch. 466). In *Hood-Barrs v Cathcart* (1895) 39 S.J. 639, the Bank of England was ordered to execute, the Bank being given leave to move to discharge the order.

Practice

- 9A-140** Application is normally made by application notice. The court has made an order under the section on an application for attachment for refusal to execute pursuant to an order to do so.

For form of order, see *Savage v Norton* [1908] 1 Ch. 290, at 301.

Alternative procedure

- 9A-141** Before applying for an order under this section, consideration should be given to the advantages of an application for a vesting order (see *Jones v Davies* [1940] W.N. 174) or for an order appointing a person to convey pursuant to the TA 1925 s.50, or the AEA 1925 s.43(2), which give to a third person the protection of the TA 1925 s.66.

Attachment of debts

- 9A-142** 40.—(1) Subject to any order for the time being in force under subsection (4), this section applies to any deposit account, and any withdrawable share account, with a deposit-taker.

(2) In determining whether, for the purposes of the jurisdiction of the High Court to attach debts for the purpose of satisfying judgments or orders for the payment of money, a sum standing to the credit of a person in an account to which this section applies is a sum due or accruing to that person and, as such, attachable in accordance with rules of court, any condition mentioned in subsection (3) which applies to the account shall be disregarded.

(3) Those conditions are—

- (a) any condition that notice is required for any money or share is withdrawn;
- (b) any condition that a personal application must be made before any money or share is withdrawn;
- (c) any condition that a deposit book or share-account book must be produced before any money or share is withdrawn; or
- (d) any other prescribed condition.

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(4) The Lord Chancellor may by order make such provision as he thinks fit, by way of amendment of this section or otherwise, for all or any of the following purposes, namely—

- (a) including in, or excluding from, the accounts to which this section applies accounts of any description specified in the order;
- (b) excluding from the accounts to which this section applies all accounts with any particular deposit-taker so specified or with any deposit-taker of a description so specified.

(5) Any order under subsection (4) shall be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

(6) “Deposit-taker” means a person who may, in the course of his business, lawfully accept deposits in the United Kingdom.

(7) Subsection (6) must be read with—

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

Note—Derived from the AJA 1956 s.38. Amended by the Banking Act 1987 s.108(1), Sch.6. Subsections (1), (4)(b) and (6) were amended by subs.(7), added by, the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001 (SI 2001/3649) art.290. As to garnishee proceedings, see CPR Sch.1, RSC O.49. **9A-143**

Administrative and clerical expenses of garnishees

40A.—(1) Where an interim third party debt order made in the exercise of the jurisdiction mentioned in subsection (2) of the preceding section is served on a deposit-taker, it may, subject to the provisions of this section, deduct from the relevant debt or debts an amount not exceeding the prescribed sum towards its administrative and clerical expenses in complying with the order; and the right to make a deduction under this subsection shall be exercisable as from the time the interim third party debt order is served on it. **9A-144**

(1A) In subsection (1) “the relevant debt or debts,” in relation to an interim third party debt order served on a deposit taker, means the amount, as at the time the order is served on it, of the debt or debts of which the whole or a part is expressed to be attached by the order.

(1B) A deduction may be made under subsection (1) in a case where the amount referred to in subsection (1A) is insufficient to cover both the amount of the deduction and the amount of the judgment debt and costs in respect of which the attachment was made, notwithstanding that the benefit of the attachment to the creditor is reduced as a result of the deduction.

(2) An amount may not in pursuance of subsection (1) be deducted or, as the case may be, retained in a case where, by virtue of section 346 of the Insolvency Act 1986 or section 183 of the Insolvency Act 1986 or otherwise, the creditor is not entitled to retain the benefit of the attachment.

(3) In this section—

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“deposit-taker” has the meaning assigned to it by section 40(6); and

“prescribed” means prescribed by an order made by the Lord Chancellor.

(4) An order under this section—

- (a) may make different provision for different cases;
- (b) without prejudice to the generality of paragraph (a) of this subsection, may prescribe sums differing according to the amount due under the judgment or order to be satisfied.
- (c) may provide for this section not to apply to deposit-takers of any prescribed description.

(5) Any such order shall be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

9A-145 *Note* —Added by the AJA 1982 s.55 and Sch.4 Pt 1. Amended by the Companies Consolidation (Consequential Provisions) Act 1985 s.32 and Sch.2; the Insolvency Act 1985 s.235 and Sch.8 para.35; the Insolvency Act 1986 s.439(2) and Sch.14. The AJA 1985 s.52 replaced subs.(1) and added subss.(1A) and (1B). Subsections (1), (1A), (3) and (4)(c) were amended by the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001 (SI 2001/3649), art.291. Referred to in the Attachment of Debts (Expenses) Order 1996 (SI 1996/3098) art.2. In subss.(1) and (1A), with effect from March 23, 2002, “interim third party debt order” was substituted for “order nisi” by the Civil Procedure (Modification of Enactments) Order 2002 (SI 2002/439); see further CPR Pt 72 (Third Party Debt Orders).

Wards of court

9A-146 **41.**—(1) Subject to the provisions of this section, no minor shall be made a ward of court except by virtue of an order to that effect made by the High Court.

(2) Where an application is made for such an order in respect of a minor, the minor shall become a ward of court on the making of the application, but shall cease to be a ward of court at the end of such period as may be prescribed unless within that period an order has been made in accordance with the application.

(2A) Subsection (2) does not apply with respect to a child who is the subject of a care order (as defined by section 105 of the Children Act 1989).

(3) The High Court may, either upon an application in that behalf or without such an application, order that any minor who is for the time being a ward of court shall cease to be a ward of court.

9A-147 *Note* —Derived from the LR (M.P.) A 1949 s.9. Amended by the Children Act 1989 Sch.13.

Restriction of vexatious legal proceedings

9A-148 **42.**—(1) If, on an application made by the Attorney General under this section, the High Court is satisfied that any person has habitually and persistently and without any reasonable ground—

- (a) instituted vexatious civil proceedings, whether in the High Court or any inferior court, and whether against the same person or against different persons; or

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- (b) made vexatious applications in any civil proceedings, whether in the High Court or any inferior court, and whether instituted by him or another; or
- (c) instituted vexatious prosecutions (whether against the same person or different persons),

the court may, after hearing that person or giving him an opportunity of being heard, make a civil proceedings order, a criminal proceedings order or an all proceedings order.

(1A) In this section—

“civil proceedings order” means an order that—

- (a) no civil proceedings shall without the leave of the High Court be instituted in any court by the person against whom the order is made;
- (b) any civil proceedings instituted by him in any court before the making of the order shall not be continued by him without the leave of the High Court; and
- (c) no application (other than one for leave under this section) shall be made by him, in any civil proceedings instituted in any court by any person, without the leave of the High Court;

“criminal proceedings order” means an order that—

- (a) no information shall be laid before a justice of the peace by the person against whom the order is made without the leave of the High Court; and
- (b) no application for leave to prefer a bill of indictment shall be made by him without the leave of the High Court; and

“all proceedings order” means an order which has the combined effect of the two other orders.

(2) An order under subsection (1) may provide that it is to cease to have effect at the end of a specified period, but shall otherwise remain in force indefinitely.

(3) Leave for the institution or continuance of, or for the making of an application in, any civil proceedings by a person who is the subject of an order for the time being in force under subsection (1) shall not be given unless the High Court is satisfied that the proceedings or application are not an abuse of the process of the court in question and that there are reasonable grounds for the proceedings or application.

(3A) Leave for the laying of an information or for an application for leave to prefer a bill of indictment by a person who is the subject of an order for the time being in force under subsection (1) shall not be given unless the High Court is satisfied that the institution of the prosecution is not an abuse of the criminal process and that there are reasonable grounds for the institution of the prosecution by the applicant.

(4) No appeal shall lie from a decision of the High Court refusing leave required by virtue of this section.

(5) A copy of any order made under subsection (1) shall be published in the London Gazette.

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9A-149 Note —Amended by the Prosecution of Offences Act 1985 s.24.

Effect of section

9A-150 The section gives the High Court power, on the application of the Attorney General, to make orders having the effects described in para.(1A). This power should be distinguished from the power which the court has to make a civil restraint order (CRO), as provided for by CPR r.3.11, and elsewhere (see Vol.1 para.3.11.1). For an account of the court's inherent jurisdiction to prevent abuse of process by "protective measures", of which the power to make orders under s.42 and under the several CPR provisions relating to CROs are examples, see the judgments of the Court of Appeal in *Ebert v Vennil* [2000] Ch. 484, CA, and *Bhamjee v Forsdick* [2003] EWCA Civ 1113; [2004] 1 W.L.R. 88, CA.

In recent years the courts have become more conscious of the extent to which vexatious proceedings represent a drain on the resources of the court itself, which of necessity are not infinite (*Attorney-General v Jones* [1990] 1 W.L.R. 859, CA, at p.865 per Staughton L.J.; *Attorney-General v Ebert* [2000] EWHC Admin 286, July 7, 2000, DC, at para.50 per Laws L.J.; *Bhamjee v Forsdick* [2003] EWCA Civ 1113; [2004] 1 W.L.R. 88, CA, at para 8).

See also Vol.1, para.52.0.16.

Application for an order (s.42(1))

9A-151 An application by the Attorney-General for an order under s.42 is made in accordance with CPR Pt 8 procedure and is heard and determined by a Divisional Court. The claim form (accompanied by a witness statement) must be filed at the Administrative Court (Practice Direction—Alternative Procedure for Claims, para.16; see Vol.1, para.8PD.16. The claim form should be served on the person against whom the order is sought (ibid).

Interlocutory injunction

9A-152 Where an application for an order under s.42 has been lodged in the Administrative Court Office on behalf of the Attorney General, but there is no prospect of an early hearing, the court has power to grant an interlocutory injunction under s.37(1) of the Senior Courts Act 1981 to prevent the allegedly vexatious litigant from instituting, taking any further step or making any application in any civil proceeding until the application for the order under s.42 has been heard (*Re Blackstone* [1995] C.O.D. 105, DC).

The court will only grant an interlocutory injunction in proceedings under s.42 where (a) a strong case for the granting of final relief is made out, (b) there is likely to be substantial delay before the matter can be finally heard and (c) there is a probability that, unless restrained by an interlocutory injunction, the respondent will resort to further allegedly vexatious proceedings. It is always open to a litigant, where an interim injunction is granted, to apply for leave under s.42(3) to institute, continue or make any applications in such proceedings (*Attorney General v Campbell* [1997] C.O.D. 249, DC).

Conditions to be satisfied (s.42(1))

9A-152.1 An order may be made where the court is satisfied as to the matters stated in s.42(1). The appropriate standard of proof is the civil standard having due regard to the seriousness of the issue at stake, and not the criminal standard (*Attorney-General v Hayward*, November 10, 1995, unrep., CA). Where the court is so satisfied it has a discretion to make an order, but is not obliged to do so.

9A-152.2 *Vexatious legal proceedings* —In *Attorney-General v Barker* [2000] 1 F.L.R. 759, DC, it was stated (at para.19) by Lord Bingham C.J. that the hallmark of a "vexatious" proceeding is (1) that it has little or no basis in law (or at least no discernible basis), (2) that whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant, and (3) that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process.

9A-152.3 *Instituted or made "habitually and persistently"* —In *Attorney-General v Barker* op. cit.

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Lord Bingham C.J. stated (at para.22) that the distinguishing features of the behaviour of a claimant whose conduct may be found to fall within s.42(1) are that the claimant: (1) sues the same party repeatedly in reliance on essentially the same cause of action, perhaps with minor variations, after it has been ruled upon, thereby imposing on defendants the burden of revisiting claim after claim; (2) relies on essentially the same cause of action, perhaps with minor variations, after it has been ruled upon, in actions against successive parties who, if they were to be sued at all should be joined in the same action; (3) automatically challenges every adverse decision on appeal, and (4) refuses to take any notice of or give any effect to orders of the court. His lordship added: “The essential vice of habitual and persistent litigation is keeping on and on litigating when earlier litigation has been unsuccessful and when on any rational and objective assessment the time has come to stop”. It is necessary to look at the whole picture. It is the cumulative effect of the claimant’s activities, both against the individuals who are drawn into the proceedings and on the administration of justice generally that has to be taken into account (*Attorney General v Covey* [2001] EWCA Civ 254, February 19, 2001, CA, unrep., at para.61 per Lord Woolf C.J.).

9A–152.4
“whether in the High Court or any inferior court” —Section 42(1) states that the court must be satisfied that vexatious legal proceedings have habitually, etc. been brought in the High Court “or any inferior court”. The terms of s.42(1) in this respect are not co-extensive with s.42(1A) (see further para.9A–152.5 below). In *Attorney General v British Broadcasting Corp* [1981] A.C. 303, HL, in a different context (commitments for contempt of court), the principles to be applied in deciding whether a body exercising judicial functions is an “inferior court” were the subject of examination (see also *Peach Grey & Co v Sommers* [1995] I.C.R. 549, DC).

Effect of civil proceedings order (s.42(1A))

9A–152.5
 A person against whom an order is made may not, without leave, “in any court” institute, or continue, or (subject to the obvious qualification in s.41(1A)(c)) make an application in, “civil proceedings”. Where a person subject to a civil proceedings order commences, or seeks to commence, proceedings before a body that is not obviously a “court” as popularly understood, the meanings, in this context, of “in any court” and “civil proceedings” may have to be determined; e.g. *In re Ewing* [2002] EWHC 3169, December 12, 2002, unrep. (Davis J.) (appeal to Information Tribunal); *Ewing v Security Service* December 10, 2008, unrep. (Douglas Brown J.) (complaint to Investigatory Powers Tribunal); *R. (Oakes) v The Information Commissioner* [2007] EWHC 2956 (Admin), November 28, 2007, unrep. (Sullivan J.) (appeal to Information Tribunal). Proceedings for judicial review in a criminal cause or matter are civil proceedings and therefore an application to bring those proceedings was itself “civil proceedings” within s.42(3)(1A). Consequently, a person subject to a civil proceedings order required permission under s.42(3) before he could make such an application (*R. (Ewing) v Director of Public Prosecutions* [2010] EWCA Civ 70, February 11, 2010, CA unrep.).

Period of order (s.42(2))

9A–152.6
 Unless the court orders otherwise, an order under s.42 will remain in force indefinitely. Generally, in the first instance, orders should be for an unlimited period. The object of an order is to prevent the person subject to it from bringing vexatious proceedings. Persons who would be put to the inconvenience of defending proceedings if the order were not effective should not be put in a position where, because of the expiry of a specified period, they should be again exposed to unjustified proceedings (*Attorney General v Covey*, op cit., at para.64 per Lord Woolf). The court always has a jurisdiction, in the light of entirely new circumstances, to vary orders which have been made (ibid).

Where an order for a limited period is sought the court, having first concluded that a civil proceedings order is necessary, will then go on to consider whether there is any logical or rational basis for such a limitation (*Attorney General v Benton* [2004] EWHC 1952 (Admin)).

Application for leave by person subject of an order (s.42(3))

9A–152.7
 A Master or district judge may not make orders or grant interim remedies in applications under s.42 by a person subject to an order under that section for permission

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to start or continue proceedings (Practice Direction—Allocation of Cases to Levels of Judiciary, para.3.1(f) (see Vol.1 para.2BPD.3)).

For practice and procedure relating to such applications for permission, see Practice Direction—Striking out a Statement of Case, para.7, and commentary thereon (see Vol.1 paras 3.4.9 and 3PD.7).

In *R. (Ewing) v Secretary of State for Justice* [2008] EWHC 3416 (Admin); December 19, 2008, unrep. (Beatson J.), it was explained that, where a person subject to an order under s.42(1A) wishes to apply, under s.42(3), for leave to apply, under CPR r.54.4, for permission to proceed with a claim for judicial review, it may, depending on the circumstances, be appropriate for the High Court to consider the applications together or in stages; see also Vol.1 para. 54.4.1.

No appeal from decision refusing leave (s.42(4))

- 9A–152.8** The restriction on appeal in s.42(4) does not infringe Convention rights or any provision of the Human Rights Act 1998 (*Ebert v Official Receiver* [2001] EWCA Civ 340; [2002] 1 W.L.R. 320, CA). In the circumstances where a judge (1) gives a person subject to a civil proceedings order leave to make an application, but (2) refuses that substantive application, and (3) also refuses that person's application to him for permission to appeal to the Court of Appeal, then (3) by virtue of s.42(4) there is no appeal against that decision (ibid).

Power of High Court to vary sentence on application for quashing order

- 9A–153** **43.—**(1) Where a person has been sentenced for an offence—
- (a) by a magistrates' court; or
 - (b) by the Crown Court after being convicted of the offence by a magistrates' court and committed to the Crown Court for sentence; or
 - (c) by the Crown Court on appeal against conviction or sentence,

applies to the High Court in accordance with section 31 for a quashing order to remove the proceedings of the magistrates' court or the Crown Court into the High Court, then, if the High Court determines that the magistrates' court or the Crown Court had no power to pass the sentence, the High Court may, instead of quashing the conviction, amend it by substituting for the sentence passed any sentence which the magistrates' court or, in a case within paragraph (b), the Crown Court, has power to impose.

(2) Any sentence passed by the High Court by virtue of this section in substitution for the sentence passed in the proceedings of the magistrates' court or the Crown Court shall, unless the High Court otherwise directs, begin to run from the time when it would have begun to run if passed in those proceedings; but in computing the term of the sentence, any time during which the offender was released on bail in pursuance of section 37(1)(d) of the Criminal Justice Act 1948 shall be disregarded.

(3) Subsections (1) and (2) shall, with the necessary modifications, apply in relation to any order of a magistrates' court or the Crown Court which is made on, but does not form part of, the conviction of an offender as they apply in relation to a conviction and sentence.

- 9A–154** *Note* —Derived from the AJA 1960 s.16. Amended by the Courts Act 1971 Sch.8 para.40; and the Bail Act 1976 Sch.2. With effect from May 1, 2004, amended by the Civil Procedure (Modification of Senior Courts Act 1981) Order 2004 (SI 2004/1033), as a consequence of amendments to s.31, see para.9A–97 above.

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Effect of this section

This section extends the powers of the High Court when an application for an order of certiorari is made in an application for judicial review under CPR Pt 54 (Judicial Review) to remove proceedings from a magistrates' court or the Crown Court on the ground that the court has no power to pass the sentence it imposed. In such case, the High Court is empowered, instead of quashing the conviction, to amend by substituting for the sentence passed any sentence which the magistrates' court or the Crown Court, as the case may be, has power to impose.

9A-155

Power of High Court to vary committal in default

43ZA.—(1) Where the High Court quashes the committal of a person to prison or detention by a magistrates' court or the Crown Court for—

9A-156

- (a) a default in paying a sum adjudged to be paid by a conviction; or
- (b) want of sufficient distress to satisfy such a sum,

the High Court may deal with the person for the default or want of sufficient distress in any way in which the magistrates' court or Crown Court would have power to deal with him if it were dealing with him at the time when the committal is quashed.

(2) If the High Court commits him to prison or detention, the period of imprisonment or detention shall, unless the High Court otherwise directs, be treated as having begun when the person was committed by the magistrates' court or the Crown Court (except that any time during which he was released on bail shall not be counted as part of the period).

Note —This section was inserted after s.43 by the Access to Justice Act 1999 s.62. The section extends the powers of the High Court in the circumstances referred to in the section in a manner which avoids the necessity of proceedings being remitted to the Crown Court or a magistrates' court.

9A-157

Specific powers of arbitrator exercisable by High Court

43A. In any cause or matter proceeding in the High Court in connection with any contract incorporating an arbitration agreement which confers specific powers upon the arbitrator, the High Court may, if all parties to the agreement agree, exercise any such powers.

9A-158

Note —Added by the Courts and Legal Services Act 1990 s.100.

9A-159

The addition of s.43A restores the law to the position existing before the decision of the Court of Appeal in *Northern Regional Health Authority v Crouch (Derek) Construction Co* [1984] 1 Q.B. 644, CA, in so far as that case decided that the powers referred to in the new section were only exercisable under the contract by the arbitrator. The Court of Appeal's decision in *Crouch* was overruled by the House of Lords in *Beaufort Developments (NI) Ltd v Gilbert Ash NI Ltd* [1999] 1 A.C. 266, HL. As a result the utility of s.43A is now less obvious.

For ss.44 to 46A and 48 of the Senior Courts Act 1981 (see Arrangement) plus any related commentary see paragraphs 9A-160+ to 9A-167+ on White Book on Westlaw UK or the Civil Procedure CD.



GENERAL PROVISIONS

LAW AND EQUITY

Concurrent administration of law and equity

49.—(1) Subject to the provisions of this or any other Act every

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court exercising jurisdiction in England and Wales in any civil cause or matter shall continue to administer law and equity on the basis that, wherever there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail.

(2) Every court shall give the same effect as hitherto—

(a) to all equitable estates, titles, rights, reliefs, defences and counterclaims, and to all equitable duties and liabilities; and

(b) subject thereto, to all legal claims and demands and all estates, titles, rights, duties, obligations and liabilities existing by the common law or by any custom or created by any statute,

and, subject to the provisions of this or any other Act, shall so exercise its jurisdiction in every cause or matter before it as to secure that, as far as possible, all matters in dispute between the parties are completely and finally determined, and all multiplicity of legal proceedings with respect to any of those matters is avoided.

(3) Nothing in this Act shall affect the power of the Court of Appeal or the High Court to stay any proceedings before it, where it thinks fit to do so, either of its own motion or on the application of any person, whether or not a party to the proceedings.

9A-169 Note —Derived from the JA 1925 ss.36-44.

Effect of section

9A-170 This section is derived from the JA 1925 ss.36- 44. It lies at the heart of the administration of civil justice in England and Wales, since it embodies, in a concentrated form, the fundamental objectives of the Judicature Acts 1873-1875 (see *C.E. Heath Plc v Ceram Holding Co* [1988] 1 W.L.R. 1219, CA, at 1229, per Neill L.J.), namely:

(a) to bring about the concurrent jurisdiction of law and equity in all civil causes and matters in all civil courts on the basis that in any matter where there is a conflict or variance between the rules of equity and the rules of the common law, the rules of equity shall prevail; and at the same time;

(b) to secure that the Court will be empowered to determine finally all matters in dispute between the parties and to avoid all multiplicity of proceedings.

The three subsections of this section deal with three different aspects of the concurrent administration of law and equity:

(a) rules of equity to prevail where conflict or variance (subs.(1)) (see paras 9A-172 to 9A-174 below).

(b) final determination and avoidance of multiplicity of proceedings (subs.(2)) (see paras 9A-175).

(c) stay of proceedings (subs.(3)) (paras 9A-176 to 9A-194).

Notes on these aspects of the three subsections, taken in turn, are set out below (see paras 9A-172 et seq.).

CPR Pt 20 claims (counterclaims and third party proceedings)

9A-171 Section 49(2) is derived, in part, from the Judicature Act 1925 s.39, which in turn was derived from the Judicature Act 1873 s.24(3). Those earlier provisions had the effect of empowering the court to hear, in the same action (1) a counterclaim of any kind by the defendant against the plaintiff; (2) a counterclaim by the defendant against the plaintiff along with any other persons, claiming relief relating to or connected with the original subject-matter; (3) third party proceedings; (4) a counterclaim by the third party, brought in by third party proceedings, against the party bringing him in; (5) a

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counterclaim by the plaintiff to the defendant's counterclaim, in so far as it is merely intended as a protection against it. The legislative basis for these proceedings is now found in s.49(2). The significance of s.49(2) in this respect for the jurisdiction of the courts goes without notice. Very occasionally, cases arise in which the effect of the subsection, in the light of its history, falls for consideration; a recent example is *Coca Cola Financial Corp v Finsat International Ltd* [1998] Q.B. 43; [1996] 2 Lloyd's Rep. 274, CA.

Rules of court relating to counterclaims and third party proceedings are now found in Pt 20 of the CPR and are compendiously described as "Part 20 claims".

CPR r.16.6 (Defence of set-off)

In the case of *Re Kaupthing Singer and Friedlander Ltd* [2009] EWHC 740 (Ch); [2009] 2 Lloyd's Rep. 154, Sir Andrew Morritt C. explained that the effects of pre-1873 legislation creating legal set-off rights was continued by subsequent legislation and are now enshrined in s.49(2)(a) of the 1981 Act and CPR r.16.6 (Defence of set-off) and surveyed relevant authorities.

9A-171.1

A. Section 49(1)

Rules of equity to prevail where conflict or variance

The Judicature Acts of 1873 and 1875 did not in any way alter the nature of legal and equitable rights. These Acts did not "fuse" law and equity. They did not abolish the distinctions between law and equity, nor between legal and equitable principles nor between legal and equitable interests or estates (see per Cotton L.J. in *Joseph v Lyons* (1884-85) L.R. 15 Q.B.D. 280 at 286, and see *Manchester Brewery Co v Coombs* [1901] 2 Ch. 608 at 617). The distinct identity of the two systems of law was preserved and this has remained the case. However, the legislation did achieve the union of the administration of the two systems of law.

9A-172

Section 49(1) states that, subject to the provisions of the 1981 Act itself or any other Act, every court exercising jurisdiction "in any civil cause or matter" shall administer law and equity on the basis that, wherever there is any conflict or variance between the rules of equity and the rules of the common law "with reference to the same matter", the rules of equity shall prevail. If there is no "conflict or variance" the subsection does not apply (*The Bernina* (1887) 12 P.D. 58 at 95; *Manners v Mew* (1885) L.R. 29 Ch.D. 725 at 735; *Re Terry* (1886) 32 Ch.D. 14 at 23).

Section 49(1) may be traced to the Judicature Act 1873 s.25. That section endeavoured to remove a number of cases of conflict between law and equity which had occasioned difficulty beforehand. Subsections (1) to (10) dealt with ten particular matters of difficulty and then came subs.(11) which stated: "Generally in all matters not hereinbefore particularly mentioned in which there is any conflict or variance between the rules of equity and the rules of common law with reference to the same matter, the rules of equity shall prevail". Section 25(11) was re-enacted as s.44 of the Judicature Act 1925, and again as s.49(1) of the 1981 Act.

It may be noted that s.49(1) and its statutory ancestors, refers to "rules" of equity and "rules" of common law and it may be concluded from this that its effect is confined to matters of substantive law and does not extend to rules of practice, though equitable practice should be followed when it results from the adoption of equitable doctrines (*La Grange v McAndrew* (1878-79) L.R. 4 Q.B.D. 210; *Poyser v Minors* (1880-81) L.R. 7 Q.B.D. 329, at 335 per Lush J.; *Dalrymple v Leslie* (1881-82) L.R. 8 Q.B.D. 5; *Harrison v Rutland* [1893] 1 Q.B. 142 at 149). At an early date the Court of Appeal said that, in cases where no rule of practice was laid down by the rules of court enacted with the Judicature Acts, and there was a variance in the old practice of the Chancery and Common Law courts, "that practice is to prevail which is considered by the Court most convenient" (*Newbiggin-by-the-Sea Gas Co v Armstrong* (1879) 13 Ch.D. 310, CA).

Particular illustrations of conflict or variance — Editions of the Supreme Court Practice and the Annual Practice made reference to many of the late nineteenth century and early twentieth century cases in which issues concerning conflict or variance between particular rules of equity and rules of common law were determined. Virtually all of these cases were concerned with matters of substantive law. A few of them had implications for procedural law. For example, some of them established the rule of equity that

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children and patients cannot make binding admissions (at common law it seems to have been otherwise as to children). One consequence of this was the practice of not allowing interrogatories to be administered to a minor (*Mayor v Collins* (1890) L.R. 24 Q.B.D. 361; *Curtis v Mundy* [1892] 2 Q.B. 178). In the light of the rule derived from equity, admissions, discovery and interrogatories by minors and patients came to be regulated by rules of court, and that remains the case. The rule of equity that children and patients cannot make binding admissions is now reflected in CPR r.14.1(3).

Other illustrations of the consequences for practice and procedure of rules of equity prevailing over rules of common law which were in conflict or at variance could be given.

9A–174 *Giving effect to all equitable and legal rights and duties etc.* —Section 49(2) of the Act provides (in part) that every court shall give the same effect as hitherto to each of the matters specified in sub-paras (a) and (b). In this respect, the subsection replaced, in shortened and simplified form, the following provisions of the Judicature Act 1925:

- s.37 (Equities of plaintiff)
- s.38 (Equitable defences)
- s.39 (Counterclaims and third parties)
- s.40 (Equities appearing incidentally)
- s.42 (Common law and statutory rights and duties).

In the process of shortening and simplifying these provisions of the 1925 Act, much that throws light on what those provisions (and their predecessors in the 1873 legislation) were designed to effect was lost. However, it would seem that no change in the law was intended.

B. Section 49(2)

Final determination and avoidance of multiplicity of proceedings

9A–175 Section 49(2) of Act provides (in part) that, subject to the provisions of the 1981 Act itself or any other Act, every court shall so exercise its jurisdiction in every cause or matter before it as to secure that:

- (a) as far as possible, all matters in dispute between the parties are completely and finally determined, and
- (b) as far as possible, all multiplicity of legal proceedings with respect to any of those matters is avoided.

In this respect, the subsection replaced s.43 of the 1925 Act. However, it may be noted that s.43 was primarily concerned with remedies. The section said that the court, in exercising its jurisdiction in every cause or matter pending before it, shall grant, whether absolutely or on such terms and conditions as it thinks just, “all such remedies whatsoever as any the parties thereto may appear to be entitled in respect of any legal or equitable claim properly brought forward by them in the cause or matter”. The section went on to state that the court shall grant all remedies (legal or equitable) to which the parties were entitled so that, as far as possible, all matters in controversy between the parties “may be completely and finally determined, and all multiplicity of legal proceedings concerning any of those matters is avoided”. The section was to be read as subject to any other Act (see s.36 of the 1925 Act).

Before the concurrent administration of law and equity was fully achieved by the Judicature Acts of 1873 and 1875, there was a risk that parties bringing proceedings before a superior court might find that, in the event, the court was restricted in the remedies it could grant, and, therefore, could not grant remedies in relation to all of the matters in dispute between the parties. Consequently, in order to obtain full relief parties faced the prospect of having to bring separate proceedings in separate courts. The Judicature Acts solved this problem. The statutory provision under discussion here reinforced the solution by enjoining courts to exercise their power to grant all remedies whether legal or equitable to which parties appeared to be entitled and to do so for the purpose of ensuring that, as far as possible, all matters in dispute between the parties are completely and finally determined, and all multiplicity of legal proceedings with respect to any of those matters is avoided. In early cases it was said of this provision that “every remedy necessary for doing complete justice in an action in any division of the High Court” is provided for by it (*Serrao v Noel* (1884–85) L.R. 15

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Q.B.D. 549, CA, per Baggallay L.J.) and that it was in the spirit of the “whole tenor of the Judicature Acts” which was “to require all proceedings as far as possible to be taken in one action” (*Searle v Choat* (1884) L.R. 25 Ch.D. 723 at 727 per Cotton L.J.; see also *Harmer v Armstrong* [1934] Ch. 65).

The principles (1) that all matters in dispute should be completely and finally determined, and (2) that multiplicity of legal proceedings should be avoided are deeply embedded in the law and s.49(2) is but one manifestation of them. In most instances, finality and avoidance of multiplicity will be compatible goals. However, they can be in conflict; for example, where case management rules require swift movement to finality at the expense of the uncovering of, and further development of, matters in dispute between the parties. It may be noted that the principle that all matters in dispute should be completely and finally determined is not the same as the principle that there should be finality in litigation. In some instances, the application of the latter principle will involve a violation of the former (e.g. where proceedings are brought to an end in the knowledge that some matters remain in dispute, at least in the opinion of one party). It may also be noted that there is a relationship between the principles stated in s.49(2) and the rule in *Henderson v Henderson* (1843) 3 Hare 100 which holds that a party may be estopped from pursuing in subsequent proceedings issues that ought to have been pursued and determined in former proceedings; the link is illustrated by *Beoco Ltd v Alfa Laval Co Ltd* [1995] Q.B. 137; [1994] 4 All E.R. 464, CA. The relationship between the rule in *Henderson v Henderson* and the court’s inherent jurisdiction to protect its processes from abuse was examined in *Johnson v Gore Wood & Co (No.1)* [2002] 2 A.C. 1, HL. See further Vol.1, paras 1.4.15 and 3.4.3 above.

The application of the principles, stated in s.49(2), (1) that all matters in dispute should be completely and finally determined, and (2) that multiplicity of legal proceedings should be avoided, may be seen at work in various parts of the law of procedure. A good example is provided by the rules relating to the amendment of statements of case (formerly pleadings). Traditionally, these rules have been generously applied for the purpose of ensuring that the real matters in dispute between the parties are reached and dealt with completely and finally, thereby avoiding further proceedings (assuming they are not statute barred). In some amendment cases, express reference has been made to s.49(2); see e.g. *Easton v Ford Motor Co Ltd* [1993] 1 W.L.R. 1511, CA; [1993] 4 All E.R. 257, CA; in *Re Therm-a-Stor Ltd* [1996] 3 All E.R. 228. Under the case management principles implemented by the CPR this generosity is unlikely to extend to the granting of amendments where the consequence will be that a trial date will have to be abandoned.

Other aspects of practice and procedure in which the principles stated in s.49(2) may be seen at work include: the transfer of proceedings from one court to another, the consolidation of proceedings, the trial of two or more claims on the same occasion, the addition and substitution of parties, the joinder of claims, and counterclaims and other additional claims (see CPR serialim and note, in particular, r.19.3 (provisions applicable where two or more persons are jointly entitled to a remedy), and r.20.9 (whether a Pt 20 claim should be separate from main claim). In *Dadourian Group International Inc v Simms (Practice Note)* [2006] EWCA Civ 399; [2006] 1 W.L.R. 2459, CA, the Court of Appeal stated that a major reason for requiring an applicant for a worldwide freezing order to undertake not to enforce it in another jurisdiction without the court’s permission is to protect the defendant from a multiplicity of suits. In *Knauf UK GmbH v British Gypsum Ltd* [2001] EWCA Civ 1570, *The Times*, November 15, 2001, CA, the claimants were granted permission to serve their claim form out of the jurisdiction on a second defendant under CPR r.6.8, partly for the purpose of ensuring that all disputes between all parties were determined in the same set of proceedings. The Court of Appeal found that the claimant’s main objective was to render their claim immune from jurisdictional attack under the Brussels Convention and set aside service on the second defendants.

The terms of s.49(2) indicate that the court is to exercise its jurisdiction in a manner designed to secure the two principles discussed above “in every cause or matter”. In former versions of the subsection the court was enjoined to secure the application of the principles “in every pending cause or matter”. In the early cases the question of the point at which a cause or matter ceased to be “pending” and the court’s duty to ensure that all matters in dispute between the parties were completely and finally

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determined no longer obtained. The question remains important (*Charlesworth v Relay Roads Ltd (No.2)* [2000] 1 W.L.R. 230).

In various ways procedures under the CPR seek to avoid a multiplicity of proceedings. An example is provided by the particular aspect of the court's duty to manage cases that requires the court to deal with as many aspects of the case as it can on the same occasion (CPR r.1.4); see Vol.1, para.1.4.15 (final determination and avoidance of multiplicity of proceedings).

C. Section 49(3)

Stay of proceedings

9A-176

Section 49(3) states that nothing in the 1981 Act shall affect the power of either the Court of Appeal or the High Court "to stay any proceedings before it". The subsection suggests that provisions may be found in the 1981 Act which give the Court of Appeal and the High Court power to restrain pending proceedings and that it is necessary for it to be made clear that any such provisions do not affect the power of those courts to exercise their inherent jurisdiction to stay proceedings. The need for such a saving was apparent in 1873, when conflicts between common law and equity powers to restrain proceedings had to be ameliorated, and was found in s.24(5) of the Judicature Act 1873. The saving was re-enacted in the Judicature Act 1925 s.41. In its original form the section forbade the pre-1873 practice of restraint of actions by prohibition or injunction subject to the saving that any person who would formerly have been entitled to apply to any court to restrain the prosecution of any action could apply to the High Court for a stay of proceedings in the action (*Gore v Van Der Lann* [1967] 2 Q.B. 31, CA, at 43 per Harman L.J.). The manner in which the saving is preserved in s.49(3) of the 1981 Act is confusing and may be regarded as an excess of caution.

In terms, s.49(3) takes the form, not of conferring a power on the Court of Appeal and High Court to order a stay of proceedings, but of statutorily recognising an inherent power which the courts already possess and exercise, and which it is said they exercised from "the earlier times" (*Metropolitan Bank v Pooley* (1884-1885) L.R. 10 App. Cas. 210 at 220-221 per Lord Blackburn). It has been said that the subsection applies to county court proceedings by virtue of the County Courts Act 1984 s.76 (*Gore v Van Der Lann* [1967] 2 Q.B. 31, CA).

This subsection needs to be read in parallel with s.49 of the Civil Jurisdiction and Judgments Act 1982, which also provides for the saving of the powers of the Court to stay, strike out or dismiss any proceedings before it on the ground of forum non conveniens or otherwise, where to do so is not inconsistent with the 1968 Convention, i.e. the EEC Convention on Jurisdiction and the Enforcement of Judgments.

The extent of the court's inherent jurisdiction to stay proceedings cannot be stated exactly, certainly not in a short compass. Perhaps the best known manifestation of the jurisdiction is the court's power stay proceedings to prevent its procedures being abused. This jurisdiction is said to be extensive (*Ebert v Birch* [2000] Ch. 484, CA). As there is a public interest in the finality of litigation, proceedings may be stayed on the grounds that they are an abuse of process to prevent a defendant from being vexed twice in the same matter (*Johnson v Gore Wood & Co (No.1)* [2002] 2 A.C. 1, HL); but whether an action should be stayed on this basis should be judged broadly on the merits, taking account of all public and private interests involved and all the facts of the case, the crucial question being whether the claimant was in all the circumstances misusing or abusing the process of the court (*ibid.*). See also, *Stevens v School of Oriental and African Studies*, *The Times*, February 2, 2001 (Pumfrey J.) (a stay to prevent, what was in substance, a re-litigation of earlier proceedings, was, in the circumstances, a reasonable exercise of the court's inherent jurisdiction and did not infringe the Human Rights Act 1998 Sch.1 art.6). Another common circumstance in which a stay of proceedings may be ordered is where a party has not complied with an order for security for costs (e.g. *CIBC Mellon Trust Co v Mora Hotel Corp NV* [2002] EWCA Civ 1688, CA; *Aoun v Bahri* [2002] EWCA Civ 1141, July 31, 2002, CA). See further para.9A-178 below.

As to court's power under its inherent jurisdiction or statute to stay proceedings where parties have agreed to arbitrate their dispute, see para.9A-177 below.

As to whether court has inherent jurisdiction, and if so whether it should exercise it, to stay legal proceedings where there is an agreement between the parties to negoti-

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ate or mediate (albeit an agreement that is lacking in the certainty traditionally regarded as necessary for enforceability and perhaps even non-binding), see *Cable & Wireless Plc v IBM United Kingdom Ltd* [2002] EWHC 2059 (Colman J.) and authorities referred to there; cf., *Halifax Financial Services Ltd v Intuitive Systems Ltd* [1999] 1 All E.R. (Comm) 303 (McKinnon J.). See also Vol.1, para.1.4.11 above.

Where a civil proceedings order is made against a person under the Senior Courts Act 1981 s.42, or where a civil restraint order is made against a person (see CPR r.3.11), depending on the circumstances the effects may include imposing a stay of proceedings.

A distinction is to be drawn between the situation (a) where no progress is made in proceedings because they have been stayed, and (b) where no progress is made because the court has made an order absolving the parties from the duty to take further steps in the proceedings (being steps that they would otherwise be required to take in accordance with rules, directions or orders) (*Simms v The Law Society* [2005] EWCA Civ 849, July 12, 2005, unrep., CA).

Stay under particular statutes —Further powers to stay proceedings or execution are conferred by particular statutes, e.g. to stay an action brought contrary to agreement to arbitrate (Arbitration Act 1950 s.4, Arbitration Act 1996 s.9); to stay proceedings against a debtor after presentation of bankruptcy petition (Insolvency Act 1986 s.285); to stay actions or proceedings against a company after the presentation of winding-up petition or in a voluntary winding up (Insolvency Act 1986 s.126); to prevent institution or continuance of proceedings by vexatious litigant (SCA 1981 s.42); to stay execution of judgment for delivery of possession of mortgaged property (Administration of Justice Act 1970 s.36(2)(b)); to stay execution of possession orders in certain proceedings (Housing Act 1985 s.85(2)). Sometimes a clause in a statute conferring jurisdiction to grant a stay of proceedings in particular circumstances is intended to be, and takes effect as, a complete bar to proceedings (e.g. the Lunacy Act section considered in *Shackleton v Swift* [1913] 2 K.B. 304, CA). In effect, such provisions are substantive and not procedural and, where applied, should lead to the dismissal of the claim.

For the stay of proceedings to which the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters applies, see para.9A–186 below.

The question whether an action should be stayed under some special Act “is a very different thing ... to the case of a question under the Judicature Act and the Rules whether an action ought to be stayed or not” (per Vaughan Williams L.J. in *Shackleton v Swift* [1913] 2 K.B. 304 at 312, a case decided under the Lunacy Act 1890 s.330, and see the Mental Health Act 1983 s.139).

The court has, in addition to the power granted under the Arbitration Act 1996 s.9 (see para.2E–104 above), an inherent jurisdiction to stay proceedings, and this jurisdiction may be exercised if good sense and litigation management make it desirable for the matter to be referred to arbitration (*Al-Naimi v Islamic Press Agency Inc* [2000] 1 Lloyd’s Rep. 522, CA).

Domestic insolvency law does not apply to foreign insolvency proceedings and accordingly does not give the court power to stay English proceedings against a company on the ground that it is subject to insolvency proceedings in Germany (*Mazur Media Ltd v Mazur Media GmbH* [2004] EWHC 1566 (Ch); [2004] 1 W.L.R. 2966 (Lawrence Collins J.)).

The Housing Act 1990 s.89 states that an order for possession must take effect not later than 14 days after the making of the order and six weeks from the order in cases of exceptional hardship (see para. 3A–292 above). In *Admiral Taverns (Cygnets) Ltd v Daniel* [2008] EWCA Civ 1501; [2009] 3 All E.R. 71, CA, the landlord’s submission that the court’s power to stay under r.3.1(2)(f) and under its inherent jurisdiction are subject to this section was rejected on their appeal to the High Court (see [2008] EWHC 1688 (QB)) and, on a second appeal, to the Court of Appeal. It was held (1) generally, that a court has an inherent jurisdiction (not changed by the CPR) to arrange its appeal business, and when so doing to suspend an order if necessary, and (2) particularly that s.89(1)(a) is to be read as restricting the jurisdiction of the court granting the order, and not as directed to an appellate court considering the exercise of its inherent jurisdiction to stay execution pending an appeal, and (b) does not restrict the exercise of that inherent jurisdiction (though in considering whether to grant a stay, an appeal court will have in mind the purposes of that provision). Consequently,

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an appellate court that had either granted permission to appeal from an order for possession, or was still considering permission, could stay the order pending determination of the appeal or application for permission to appeal.

9A-178 *Stay under the CPR* —The rules of court found in the CPR apply to proceedings in the Court of Appeal, in the High Court, and also to proceedings in the county courts.

In r.3.1(2)(f) the power to “stay the whole or part of any proceedings either generally or until a specified event or date” is listed among the court’s “general powers of case management” which may be exercised except where the CPR provide otherwise. The several powers listed in r.3.1(2) are in addition to any powers (including powers to stay proceedings) given to the court by any other rule or practice direction or by any other enactment or any power it may otherwise have (e.g. the inherent power to stay proceedings). The discretion to stay granted by r.3.1(2)(f) is only available for a procedural reason and should not be exercised where (1) a stay under a particular statutory provision (e.g. Administration of Justice Act 1970 s.36(2)(a)) is refused and (2) such reason does not exist (*State Bank of New South Wales v Harrison* [2002] EWCA Civ 363; March 8, 2002, unrep., CA).

In the Glossary attached to the CPR it is stated as follows: “A stay imposes a halt on proceedings, apart from taking any steps allowed by the Rules or the terms of the stay. Proceedings can be continued if the stay is lifted.”

Specific provisions found in the “core” provisions in the CPR to stay orders, claims or proceedings include:

- r.3.3(5) (Application by party to stay order made by court of its own initiative without hearing parties or giving opportunity for representations)
- r.3.4(4) (Staying second claim until costs of first claim paid)
- r.11(6)(d) (Staying proceedings where court declaring it has no jurisdiction)
- r.14.5(5) (Where admission of part of claim for a specified amount money, claim stayed if claimant does not file notice)
- r.15.10(3)(4) (Where defence is that money claim has been paid, claim stayed if claimant does not file notice) [specific reference to application to lift in r.15.10(4)]
- r.15.11(1) (Claim stayed where claimant has not applied for default judgment or summary judgment after specified time) [specific reference to application to lift in r.15.11(2)]
- r.26.4 (Stay to allow for settlement of the case) (see also r.26.5(1)(b))
- r.36.11(1) (Stay where Pt 36 offer accepted) (see also r.36.13(3))
- r.38.8 (Stay of remainder of partly discontinued proceedings where costs not paid)
- r.40.6 (Consent judgments to stay proceedings or enforcement of a judgment)
- r.52.7 (Appeals to Court of Appeal - stay of order of lower court)
- r.52.9 (Stay pending discharge of conditions imposed on appeal to Court of Appeal)
- r.54.10 (Stay of judicial review claim)
- r.68.4 (Stay where reference to European Court for preliminary ruling)
- r.74.33 (Stay under art.23 of EEO Regulation)

Existing proceedings that did not come before a judge between April 26, 1999, and April 25, 2000, were stayed by operation of CPR r.51.1 and Practice Direction (Transitional Arrangements), para.19(1). Any party to those proceedings may apply for the stay to be lifted (para.19(2) (see Vol.1, paras 51.1.2 and 51PD.19)).

Practice Direction (Case Management-Preliminary Stage: Allocation and Re-allocation), para.12.2 states that where the court, in certain circumstances, has given a judgment or made an order requiring an amount of money, to be decided by the court, to be paid by one party to another, the court will give directions. The circumstances include such judgment or order obtained, for example, by default or on a summary judgment application. It is expressly provided that the directions which the court may give include a direction staying the claim while the parties try to settle the case by alternative dispute resolution or other means (para.12.2(1)(d)).

In the former RSC and CCR rules now re-enacted in, respectively, Schs 1 and 2 of the CPR, references to the stay of proceedings (by order or by rule) are found in a

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number of places (especially in provisions concerned with enforcement of judgments and execution). Such references include (the list is not exhaustive):

RSC O.17 (Interpleader), r.5 (Power to stay proceedings)

RSC O.47 r.1 (Power to stay execution by writ of *fiery facias*)

RSC O.45 (Enforcement of judgments and orders: general), r.11 (Matters occurring after judgment: stay of execution, etc.)

The court has power to stay an action where a party is funded by a non-party who would not or could not satisfactorily accept liability to pay a successful opponent's costs (*Abraham v Thompson* [1997] 4 All E.R. 362, CA; *StoczniaSA v Latvian Shipping Co (No.2)* [1999] 3 All E.R. 822).

A defendant may be entitled to a stay of proceedings against him until the claimant satisfies an order for costs made against him and in favour of the defendant in previous proceedings (*Hines v Birbeck College (No.2)* [1991] 3 W.L.R. 557; [1991] 4 All E.R. 450, CA).

The court's power referred to in CPR r.3.4(4) to stay subsequent proceedings pending payment of costs, ordered when a statement of case (which, as defined, does not include a winding-up petition) was struck out in previous proceedings, does not have the effect of limiting the court's general power to stay proceedings (see para.9A-161) or its inherent jurisdiction (see para.9A-59) to stay proceedings to prevent abuse of its process (*Investment Invoice Financing Ltd v Limehouse Board Mills* [2006] EWCA Civ 9; [2006] 1 W.L.R. 985, CA).

Modern examples of instances in which proceedings have been stayed until the claimant complied with procedural rules or orders include the following cases: *Dunn v British Coal Corp*, *The Times*, March 5, 1993, CA (disclosure of medical records), *Jackson v Mirror Group Newspapers Ltd*, *The Times*, March 29, 1994, CA (submission to medical examination), *Jackson v Pinchbeck* [1998] 3 All E.R. 97, CA ("unless" order requiring filing of statement of special damages). See also *Westminster City Council v Porter* [2002] EWHC 1589 (Ch), July 16, 2002, unrep. (Hart J.) (judgment debtor's application for stay of execution of judgment pending application to European Court of Human Rights refused). See further para.9A-176 above.

As to stay of judicial review claim, see CPR r.54.10 and Vol.1, paras 54.10.2 et seq.

As to circumstances relevant to question whether a stay may be ordered for the purpose of enabling parties to comply with, or to complete, pre-action protocol procedures, see *Alfred McAlpine Capital Projects Ltd v SIAC Construction (UK) Ltd* [2005] EWHC 3139 (TCC); [2006] B.L.R. 139 (Jackson J.); *Orange Personal Communications Services Limited v Hoare Lea* [2008] EWHC 223 (TCC), February 12, 2008, unrep. (Akenhead J.).

As to stay of order or decision of lower court pending appeal to the Court of Appeal, see CPR r.52.7 and commentary thereto (Vol.1, para.52.7.1).

Stay pending arbitration or ADR —Even before the Arbitration Act 1996 s.9 (Stay of legal proceedings) (see para 2E-104 above) came into effect it was clear that the court has an inherent, albeit discretionary power to stay proceedings brought before it in breach of an agreement to decide a dispute by arbitration (*Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] A.C. 334, HL). In reliance on this inherent power it has been held that the court may stay legal proceedings pending adjudication under the Housing Grants, Construction and Regeneration Act 1996 (*DGT Steel and Cladding Limited v Cubitt Building and Interiors Limited* [2007] EWHC 1584 (TCC) (Judge Coulson Q.C.)), and pending reference of dispute to an expert for determination as provided by contract between the parties (*Cott (UK) Limited v F.E. Barber Ltd* [1997] 3 All E.R. 540).

As to the court's power to stay proceedings pending the determination of arbitration proceedings elsewhere in circumstances where no issue of forum non conveniens arises (that is to say, purely on case management grounds), see *Reichhold Norway ASA v Goldman Sachs International* [2000] 1 W.L.R.173, CA and *Equitas Limited v Allstate Insurance Company* [2008] EWHC 1671 (Comm), July 17, 2008, unrep. (Beatson J.).

Court staying proceedings of its own motion —Section 49(3) recognises that the court's power to stay proceedings is exercisable, either (a) of its own motion or (b) on the application of any person, whether (i) a party to the proceedings or (ii) not a party

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to the proceedings. In CPR r.3.3 it is expressly provided that, subject to conditions, the court may exercise its power to stay the whole or part of any proceedings (see r.3.1(2)(f)) on an application or of its own initiative. Where the court stays proceedings by an order made of its own initiative, without hearing the parties or giving them an opportunity to make representations, a party affected by the order may apply to have it set aside, varied or stayed (r.3.3(5)).

9A–180 *Nature or effect of a stay of proceedings* —In *Cohens v Virginia* (1871) 6 Wheat. 264, Marshall C.J. said (at p.404, speaking for the United States Supreme Court): “We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given”. When, for whatever reason, proceedings are stayed, in effect the court is declining to exercise its jurisdiction. That is a strong thing (*Shackleton v Swift* [1913] 2 K.B. 304, CA, at 312 per Vaughan Williams L.J.). Obviously, jurisdiction should not be declined except for very good reason. In *Abraham v Thompson* [1997] 4 All E.R. 363, CA, Potter L.J. said (at p.374) that, “where a stay is sought in circumstances which are not provided for by statute or rules of court, the starting point is the fundamental rule that an individual who is not under a disability, a bankrupt or a vexatious litigant, is entitled to untrammelled access to a court of first instance in respect of a bona fide claim based on a properly pleaded cause of action”.

With the emergence of modern case management practices (exemplified by many of the provisions of the CPR), the jurisdiction to stay proceedings has become a useful procedural sanction, available to ensure compliance by parties with rules of court, practice directions, and procedural orders. Nowadays, more than ever before, “good reason” justifying the exercise of the jurisdiction to stay proceedings includes the achievement of case management goals in individual cases (see, further, “Stay under the CPR”, para.9A–178 above).

For considerations relevant to the question whether a stay should take effect forthwith or at a later stage in the development of the proceedings (e.g. after the disclosure of documents and exchange of witness statements had been completed), see *Synstar Computer Service (UK) Ltd v I.C.L. (Sorbus) Ltd*, *The Times*, May 1, 2001 (Lightman J.).

In giving the opinion of the Judicial Committee in *Minister of Foreign Affairs, Trade & Industry v Vehicles and Supplies Ltd* [1991] 1 W.L.R. 550, PC, [1991] 4 All E.R. 65, PC, Lord Oliver said (at p.556 and p.71): “A stay of proceedings is an order which puts a stop to the further conduct of proceedings in court or before a tribunal at the stage which they have reached, the object being to avoid the hearing or trial taking place”. Whilst the stay endures, “the relevant court or tribunal cannot ... effectively entertain any further proceedings except for the purpose of lifting the stay”. In general, “anything done prior to the lifting of the stay will be ineffective, although such an order would not, if imposed to enforce the performance of a condition by a plaintiff (e.g. to provide security for costs), prevent a defendant from applying to dismiss the action if the condition is not fulfilled”. His lordship further explained that a stay order is not an order enforceable by proceedings for contempt because it is not, in its nature, capable of being “breached” by a party to the proceedings or anyone else.

By definition, a stay takes effect on proceedings which are on foot; that is to say, on claims (or other proceedings) within which some proceedings may still be taken. Section 49(3) speaks of the jurisdiction of the court to stay proceedings “before it”, and earlier legislation spoke of “pending” proceedings. Thus, a stay may be imposed after judgment as well as before, and execution proceedings may be stayed.

The early authorities as to the nature and effect of a stay of proceedings were reviewed by Neill L.J. in *Rofa Sport Management A.G. v D.H.L. International (UK) Ltd* [1989] 1 W.L.R. 902; [1989] 2 All E.R. 743, CA. His lordship noted that, historically speaking, it was possible to draw a distinction between an “absolute” order to stay, which was equivalent to a discontinuance or dismissal, and a “conditional” order to stay, which by its terms contemplated the continuance of the action if the condition was fulfilled. However, his lordship concluded that, nowadays, it would not be satisfactory to seek to draw a line between the two and to equate “absolute” stays with orders for dismissal or discontinuance. In his lordship’s judgment, for the sake of clarity and certainty the word “stay” in an order should not be treated as a possible equivalent of a dismissal or a discontinuance, no matter how unlikely it is that the stay will be lifted by an order of the court enabling the case to “resume its active life”; e.g. where the proceedings are stayed by consent following a compromise (*Cooper v Williams* [1963] 2

Q.B. 567; [1963] 2 All E.R. 282, CA; *Green v Rozen* [1955] 1 W.L.R. 741; [1955] 2 All E.R. 797). It is submitted that the same result should follow (unless expressly provided otherwise) where proceedings are stayed, not by court order, but by operation of legislation (including rules of court).

Where proceedings are settled by agreement and stayed by a Tomlin order, the stay does not operate to deny the court jurisdiction to determine an application by the claimant for a wasted costs order against the defendant's solicitors (such an application being wholly tangential to the stayed proceedings and not affecting the defendant's rights in any way) (*Wagstaff v Colls* [2003] EWCA Civ 469; *The Times*, April 17, 2003, CA).

The question whether costs incurred during a stay are allowable depends upon whether the work in respect of which they are charged was premature (*Pécherries Ostendaises v Merchant's Marine Insurance Co* [1928] 1 K.B. 750).

Costs, stay pending payment or security for —The court has jurisdiction to stay proceedings until payment of costs in an interlocutory matter which have been ordered to be paid. In the early cases, such a stay was ordered where the party in default was acting vexatiously in withholding payment (*Re Wickham* (1887) L.R. 35 Ch.D. 272; *Graham v Sutton, Carden & Co* [1897] 2 Ch. 367). A second application for the same relief as in a previous application which had been dismissed with costs will be stayed unless and until those costs are paid or a reasonable sum to cover those costs is paid into court, if the costs are unquantified (*Thames Investment and Securities v Benjamin* [1984] 1 W.L.R. 1381; [1984] 3 All E.R. 393). Where an order is made requiring a party to provide security for costs, it may be further ordered that proceedings be stayed pending the provision of security (e.g. *Clive Brooks & Co Ltd v Baynard, The Times*, April 30, 1998, CA). As to stay of second claim where order for costs of first claim not paid, see CPR r.3.4(4). See further CPR Pt 25, Sect.II (Security for costs).

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Stay pending changes in law —It is possible that, after proceedings have been commenced, but before they are tried, legislative changes in the law affecting the respective positions of the parties to the proceedings may come into effect. Judges trying cases apply the law as it stands at the time of trial. It is also conceivable that, before proceedings are tried, it will become apparent that legislative changes in the law are to be anticipated. In those circumstances it may be argued that the proceedings should be stayed so as to ensure that they are not tried before the changes come into effect. In *Willow Wren Canal Carrying Co Ltd v British Transport Commission* [1956] 1 W.L.R. 213; [1956] 1 All E.R. 567, legislation which would have given the defendants immunity from the plaintiff's claim was going through Parliament. The defendants applied to stay the proceedings long enough to gain the benefit of the legislation. If granted, the stay would have had the effect of preventing the case from going to trial. The application was refused. (See also *Wilson v Dagnall* [1972] 1 Q.B. 509, CA.) In *Sparks v Harland* [1997] 1 W.L.R. 143, the plaintiff's action was brought outside the limitation period and the defendant applied to have them dismissed on that ground. There was a prospect (depending on the likely response of the legislature to the outcome of other proceedings pending in the European Court of Human Rights) of retrospective legislation being enacted which would have the effect of removing the time bar from the plaintiff's claim. It was held that, in the circumstances, the plaintiff's action should not be struck out, but should be stayed.

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It is conceivable that, in the course of the hearing of a case, it may become apparent that issues of law arising in the proceedings have arisen in other cases and are presently subject to appellate proceedings or references to the E.C.J. in those cases in which it is expected that the issues of law will be authoritatively determined. In those circumstances it may be argued that the hearing should be adjourned pending the outcome of the appeal or the reference (see *Re Yates' Settlement Trusts* [1954] 1 All E.R. 619, CA; *Sprote v Commissioner of Police of the Metropolis, The Times*, August 6, 1991, EAT; *Green v Skandia Life Assurance Co Ltd* [2006] EWHC 1626 (Ch); July 7, 2006, unrep. (Mr. Edward Nugee Q.C.)). An adjournment of a hearing is not the same as a stay of proceedings. The question whether proceedings which have not reached the point of trial should be stayed (whether by consent or otherwise) where it has become apparent that issues of law arising in the proceedings have arisen in other cases which are presently subject to appellate proceedings or references to the E.C.J. raises differ-

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ent considerations. At trial a first instance judge is bound by the doctrine of precedent to apply the law as laid down in a decision of the Court of Appeal, even if there is a possibility that that decision may be reversed. But the same is not necessarily the case where a judge is dealing with an application to strike out a claim or to give summary judgment before a trial. Then the judge can take into account the possibility that the Court of Appeal's decision may be reversed on appeal and may dispose of the application by refusing to strike it out or to give summary judgment accordingly, especially where it is known that in other proceedings the Court of Appeal's decision is to be tested in a pending appeal to the House of Lords (*Derby v Weldon (No.5)* [1989] 1 W.L.R. 1244). But in such circumstances it may be a more proportionate use of the parties' and the court's resources to stay the application pending the determination of the appeal instead of dismissing it (*Green v Skandia Life Assurance Co Ltd*, op. cit.).

In *Johns v Solent SD Ltd* [2008] EWCA Civ 790; *The Times* June 27, 2008, CA, the facts were that a particular regulation included in UK Regulations implementing an EU Directive provided the defendant employers with a complete defence to an age discrimination claim brought against them in an employment tribunal by a former employee. On the ground that in reference proceedings pending in the ECJ, and arising in another jurisdiction, the validity of a similar provision was being tested, the EAT ordered that the employee's claim should not be struck out but should be stayed pending the outcome of that reference. The Court of Appeal held that the balance of prejudice weighed heavily in favour of staying the claim and dismissed the employers' appeal.

The question whether, in the handling of a claim, either at trial or before trial, the further pursuit of, or the determination of, a particular matter disputed by the parties should be stayed (or otherwise put aside) pending the expected clarification by the Court of Appeal of the relevant law has arisen in cases where the court was required to consider whether the damages awarded for future pecuniary loss to a claimant in a personal injuries claim should be awarded in the form of periodical payments (as provided by the Damages Act 1996 s.2 and CPR r.41.8). In these cases, the particular point on which clarification was awaited was the correct approach to be adopted by the judge as to the selection of the appropriate form of indexation, should a periodical payments order be made (a matter likely to have a significant impact on the total amount recovered by the claimant). In the event, clarification was provided by the Court of Appeal in *Thompstone v Tameside & Glossop Acute Services NHS Trust* [2008] EWCA Civ 5; [2008] 1 W.L.R. 2207; [2008] 2 All E.R. 553, CA; see further Vol.1, para. 41.8.2.1.

9A-183 *Concurrent civil proceedings* —When civil proceedings are commenced, they proceed according to rules of practice and procedure, including case management rules designed to ensure that cases proceed with despatch.

Circumstances can arise in which it becomes apparent that two (or possibly more) separate sets of proceedings (perhaps in the same court, perhaps in different courts) are related in some material way and that it is just and convenient that one (or some) should be stayed pending the final determination of the other (or others). One set of proceedings may be "the senior of the two" in the sense that it was commenced before, or had reached a later stage of pre-trial development than, the other (*J. Bollinger SA v Goldwell Ltd* [1971] R.P.C. 412 at 423 per Megarry J.). All of the parties involved may agree that one set of proceedings (not necessarily "the senior") should be stayed by consent pending the outcome of the other. The court may readily agree to the stay. However, despite the agreement amongst the parties, in the interests of effective case management the court may refuse to order a stay by consent and, instead, order (for example) that the claims should be consolidated, tried together, or one tried immediately after the other.

In the absence of agreement amongst the parties to the effect that one set of proceedings should be stayed whilst another proceeds, the question may arise whether, on the application of a party (or parties) or of its own initiative, the court should order such a stay. The question may arise in many different circumstances and procedural settings. Consequently, it is not possible to state general principles as to the exercise of the discretionary jurisdiction to stay proceedings in this context. Further, special considerations may arise in particular jurisdictions (especially in arbitration, bankruptcy, insolvency, and patents). Where a company is placed in the hands of receivers,

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concurrent proceedings may arise in the form of (1) proceedings against a director under the Company Directors Disqualification Act 1986, and (2) a claim challenging the receivership, leading to an application by the director for a stay of the disqualification proceedings. The authorities on the exercise of the discretion to stay proceedings in these circumstances were examined in *Secretary of State for Trade and Industry v Woolf* [2005] EWHC 3074 (Ch), November 29, 2005, unrep.

The concurrent (or “parallel”) proceedings may be disciplinary proceedings against one of the parties to the civil proceedings in which the stay is sought (e.g. *Wakefield v Channel Four Television Corporation* [2005] EWHC 2410 (QB), November 4, 2005, unrep. (Eady J.)). The burden lies upon the applicant seeking a stay to demonstrate, through cogent evidence, that there are sound reasons for a stay (*ibid.*).

Perhaps the clearest example of a situation in which the court might be persuaded to order a stay would be where the several sets of proceedings involve the same parties and raise the same issues (*Slough Estates Ltd v Slough BC* [1968] Ch. 299; [1967] 2 All E.R. 270). The advantages to be gained in avoiding a duplication of proceedings are obvious; they include the avoidance of unnecessary costs and delays and of a party being vexed more than once with, in effect, the same claim. (It may be noted that the need to avoid “all multiplicity of legal proceedings” with respect to all matters in dispute between the same parties is referred to in s.49(2); see para.9A–175 above.) The case for a stay is less strong where there is merely a considerable degree of common ground between the two claims (*J. Bollinger SA v Goldwell Ltd*, *op. cit.*).

Some of the early authorities suggest a stay will not be granted if the issues in the several proceedings are not the same (*Adamson v Tuff* (1881) 44 L.T. 420; *Higgins v Woodhall* (1890) 6 T.L.R. 1; *Perry v Croydon BC* [1938] 3 All E.R. 670) but this cannot be stated as a strict rule. If there are two courts faced with substantially the same question or issue, it is desirable that the question or issue should be determined in only one of those two courts if by that means justice can be done, and the court will if necessary stay one of the actions (*Royal Bank of Scotland Ltd v Citrusdal Investments Ltd* [1971] 1 W.L.R. 1469; [1971] 3 All E.R. 558, applying *Thames Launches Ltd v Trinity House Corp (Deptford Strond)* [1961] Ch. 197; [1961] 1 All E.R. 26). A second action dealing with the same events as in the first action but alleging a different contract with different terms will not be stayed (*Hardy v Elphick* [1974] Ch. 65; [1973] 2 All E.R. 914, CA).

Where there are multiple sets of proceedings against the same defendant raising the same issues one may be selected as a “test” case and the other proceedings stayed pending the outcome of that case (*Ashmore v British Coal Corp* [1990] 2 W.L.R. 1437; [1990] 2 All E.R. 981, CA).

Where an action founded on a certain cause of action is in existence, albeit stayed, it is an abuse of process to bring new proceedings founded upon that same cause of action; the second action will be struck out and the proper course would be to apply for the stay to be removed in respect of the first action (*Buckland v Palmer* [1984] 1 W.L.R. 1109; [1984] 3 All E.R. 554, CA). See further CPR rr.19.11(ii) and 19.15.

Where one set of proceedings has been stayed but another set has proceeded to final determination, the question may then arise as to whether the stay on the former proceedings should be lifted. The considerations relevant to this question need not be considered here. However, it may be noted that, depending on the circumstances, as a result of the determination of the latter proceedings, pleas of *res judicata* or issue estoppel may become relevant in the former proceedings and affect the question whether the stay should be lifted. Further, the rule stated in *Henderson v Henderson* (1843) 3 Hare 100 (which holds that a party may be estopped from pursuing in subsequent proceedings issues that ought to have been pursued and determined in former proceedings) may also become relevant.

Many of the earlier authorities were referred to in editions of the Supreme Court Practice; see SCP 1991, Vol.2, paras 20A–357 (Concurrent actions), 20A–363 (Cross actions in respect of same subject-matter), 20A–389 (Test actions), and 20A–394 (Two actions or proceedings for same matter).

Recent authorities on the matters referred to above include: *Re B (Minors: Abduction)*, *The Times*, November 6, 1992; *Chorion Plc v Lane*, *The Times*, April 7, 1999; *Steans Fashions Ltd v Legal and General Assurance Society Ltd*, *The Times*, December 31, 1994, CA. See further authorities referred to in para.9A–176 above.

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SECTION 9A: MAIN STATUTES

Where several proceedings “give rise to common or related issues of fact or law”, for purposes of case management they may be made subject to a Group Litigation Order (GLO) under the rules of court found in CPR Pt 19 Section III and the practice direction supplementing those rules. The authorities referred to above are relevant to the exercise of the court’s jurisdiction to stay cases subject to a GLO, but as the CPR provisions are to be applied in accordance with the overriding objective (stated in r.1.1) they perhaps cannot be regarded as binding.

9A-184 *Concurrent civil and criminal proceedings* —Where there are concurrent civil and criminal proceedings against the same defendant arising out of the same subject-matter, there is no principle of law that the claimant in the civil proceedings is to be debarred from pursuing the action in accordance with the normal rules merely because so to do would or might result in the defendant, if he wished to defend the action, having to disclose his defence by taking some necessary procedural step, and so give an indication of what his defence was likely to be in contemporaneous criminal proceedings, but the civil court has a discretion to stay the proceedings if it appeared to the Court that justice between the parties so required having regard to concurrent criminal proceedings arising out of the same subject matter and taking into account the defendant’s “right of silence” in the criminal proceedings (*Jefferson Ltd v Bhetcha* [1979] 1 W.L.R. 898; [1979] 2 All E.R. 1108, CA). In *Barnet London BC v Hurst* [2002] EWCA Civ 1009; [2002] 4 All E.R. 457, CA, upon the defendant giving undertakings, the judge adjourned the hearing of a local authority’s application to commit the defendant for breach of anti-social behaviour injunction pending the completion of criminal proceedings against the defendant.

The discretion to stay civil proceedings until criminal proceedings have been determined is a power which has to be exercised with great care and only where there is a real risk of serious prejudice which may lead to injustice (*R. v Panel on Takeovers and Mergers Ex p. Fayed* [1992] B.C.C. 524, CA). What has to be shown is the causing of unjust prejudice by the continuance of the civil proceedings (*Panton v Financial Institutions Services Ltd* [2003] UKPC 86, December 12, 2003, unrep., PC). See also *Zambia v Meer Care & Desai* [2006] EWCA Civ 390, March 7, 2006, CA, unrep. (where a stay of English civil proceedings pending the completion of foreign criminal proceedings was refused).

There is no overriding right based on the privilege against self incrimination, to have a civil action stayed pending the conclusion of criminal proceedings. It is for a defendant to seek to avail himself of the privilege to take specific objection on an application at some point in the interlocutory stages of a civil action (*Guinness plc v Saunders*, *The Times*, October 18, 1988, CA). See also the comments of Millett J. in *Re D.P.R. Futures Ltd* [1989] 1 W.L.R. 778, CA.

Where civil proceedings in the form of an application under the Directors Disqualification Act 1986 were stayed pending the outcome of a related criminal proceedings, and, after the completion of the criminal proceedings, the Secretary of State applied to restore the application, the civil proceedings were not barred by the doctrine of double recovery, and the continuation of the civil proceedings was not an abuse of process (*Re Cedarwood Productions Ltd*, *The Times*, July 12, 2001, CA). See also *Secretary of State for Trade and Industry v Crane*, *The Times* June 4, 2001 (Ferris J.), and note *R. v Panel on Takeovers and Mergers Ex p. Fayed* [1992] B.C.C. 524.

9A-185 *Lis alibi pendens, forum non conveniens and foreign jurisdiction clauses* —The court has an inherent jurisdiction to stay proceedings in England, or to restrain by injunction the institution or continuation of proceedings in a foreign court, whenever it is necessary to do so in order to prevent injustice.

Thus, where simultaneous proceedings are pending in England and in a foreign country between the same parties and involving the same or similar issues (*lis alibi pendens*), the English proceedings may be stayed. Further, in certain circumstances, although there is no *lis alibi pendens* English proceedings may be stayed on *forum non conveniens* grounds where there is a foreign forum to whose jurisdiction the defendant is amenable.

Also, pending English proceedings may be stayed where the parties have agreed by contract that all disputes between them shall be referred to the jurisdiction of a foreign tribunal (foreign jurisdiction clause).

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The jurisdiction to grant stays of English proceedings in the circumstances mentioned above is highly discretionary and is exercised with extreme caution. The relevant law is complicated and extensive and need not be explained here.

The jurisdiction to stay proceedings on forum *non conveniens* grounds or otherwise is recognised by the Civil Jurisdiction and Judgments Act 1982 s.49).

For the stay of proceedings to which the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters applies, see para.9A–186 below.

EC Convention actions —An action brought in an English court which is within the scope of the EC Conventions on Jurisdiction and the Enforcement of Judgments, which have been given the force of law by s.2 of the Civil Jurisdiction and Judgments Act 1982 set out in s.7 may be stayed and in some instances must be stayed or dismissed in the following classes or cases: **9A–186**

(i) *Exclusive jurisdiction* —(a) where the claim is principally concerned with a matter over which the courts of another Member State of the EC have exclusive jurisdiction under art.16, the English Court must declare of its own motion that it has no jurisdiction (see art.19), and presumably for this purpose the Court will make an order staying or dismissing the action; (b) where the English Court is not the court first seised of an action which comes within the exclusive jurisdiction of several Courts, it must decline jurisdiction in favour of the Court first seised (art.23). **9A–187**

(ii) *Agreement conferring jurisdiction* —(a) where an agreement is concluded between parties one or more of whom is domiciled in a Member State of the EC, that a Court or the Courts of a specified Member State are to have jurisdiction to settle disputes between them, that Court will have exclusive jurisdiction and presumably the Courts of another Member State must decline jurisdiction; (b) where such agreement is concluded between parties, one of whom is domiciled in a Member State of the EEC, the Courts of the contracting states will have no jurisdiction over their disputes, unless the Courts chosen have declined jurisdiction; (c) if a trust instrument has conferred jurisdiction on the Court or Courts of a Member State, that Court or Courts will have exclusive jurisdiction in proceedings brought against a settlor, trustee or beneficiary (see art.17). **9A–188**

(iii) *Default of acknowledgment of service* —where a defendant is domiciled in another Member State of the EC but is sued in England and does not acknowledge service of process, the English Court must declare of its own motion that it has no jurisdiction, unless its jurisdiction is derived from other provisions of the EC Conventions (art.20) and in any event, in such case, the Court must stay the proceedings so long as it is not shown that the defendant had been able to receive the originating document or its equivalent in sufficient time to arrange for his defence or that all necessary steps have been taken to this end (art.20). **9A–189**

(iv) *Lis pendens* —where the English Court is not the Court first seised of proceedings involving the same cause of action between the same parties which are brought in the Courts of different Member States of the EC, it must of its own motion declare jurisdiction in favour of the Court first seised (art.21), although if the jurisdiction of that Court is contested, it may stay the proceedings pending the outcome of that contest (art.21). **9A–190**

(v) *Related actions* —where the English Court is not the Court first seised of related actions which are brought in the Courts of different Member States of the EC, it may stay the proceedings while the actions are pending at first instance (art.22). It may also, on the application of one of the parties decline jurisdiction if the law of the court first seised permits the consolidation of related actions and that Court has jurisdiction over both actions (art.22). For this purpose, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings (art.22). **9A–191**

EC Jurisdiction Regulation —Council Regulation 44/2001 was implemented by the **9A–192**

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SECTION 9A: MAIN STATUTES

Civil Jurisdiction Order 2001 (SI 2001/3929) (see para. 5–200 above). In this Regulation, arts 23 to 29 correspond, respectively, with arts 17 to 23 of the Brussels Convention. Under the Regulation, where (a) proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States (lis pendens), or (b) where related actions are pending in the courts of different Member States (related actions), or (b) where actions come within the exclusive jurisdiction of several courts, and the English court has to determine whether it should stay proceedings because another court was first seised of the proceedings, reference has to be made to art.30 (see para. 5–278 above). That article has no counterpart on the Brussels Convention and is designed to overcome certain difficulties that have arisen under the Convention (e.g. *Dresser UK Ltd v Falcongate Freight Management Ltd (The Duke of Yare)* [1992] Q.B. 502, CA.)

9A–193 *European Commission investigations and decisions* —In *Masterfoods Ltd v HB Ice Cream Ltd* (C-344/98) [2001] 4 C.M.L.R. 14, ECJ, the Court of Justice stated that, in order not to breach the general principle of legal certainty, national courts must, when ruling on agreements or practices which may subsequently be the subject of a decision by the Commission, avoid giving decisions which would conflict with a decision contemplated by the Commission in the implementation of provisions of the EC Treaty. In a given case, compliance with this ruling may make it appropriate for a national court to stay proceedings pending before it (a “Masterfoods stay”) pending a decision of the Commission, or the completion of an appeal to the Court of First Instance against such decision (see *National Grid Electricity Transmission plc. v ABB Ltd* [2009] EWHC 1326 (Ch); [2009] U.K.C.L.R. 838 (Sir Andrew Morritt C.); *Cooper Tire and Rubber Company Europe Ltd v Dow Deutschland Inc* [2010] EWCA Civ 864 July 23, 2010, CA, unrep.. Where a defendant alleges that he has a defence by reason of a breach of the Rome Treaty and makes a complaint to the EC Commission the Court may order a stay pending investigation by the Commission of the plaintiff’s action upon terms providing some protection as to costs and damages (*British Leyland Motor Corp Ltd v Wyatt Interpart Co Ltd* [1979] F.S.R. 583; [1979] 3 C.M.L.R. 77 and further hearing [1980] F.S.R. 18). Paragraph 5.3 of Practice Direction (Competition Law, Etc) provides that, where the court is seised of competition claim and is aware that the Commission is contemplating adopting a decision in relation to proceedings that it has initiated, the court shall consider whether to stay the claim pending the Commission’s decision (see Vol.1, para.B9–005+).

9A–194 *Cases illustrating exercise of jurisdiction to stay proceedings* —In successive editions of the Supreme Court Practice, many cases illustrating the exercise of jurisdiction to stay proceedings in particular contexts were given; see SCP 1999, Vol.2, paras 20A–337 et seq. In the above paragraphs, no effort is made to reproduce all of the information formerly found in the Supreme Court Practice. Significant omissions include the information found in the following paragraphs of Vol.2 of the 1999 edition: para.20A–251 (Bankruptcy), paras 20A–53 and 20A–354 (Company winding-up), para.20A–355 (Company—stay of petition and order).

9A–195 *Parallel EPO patent proceedings* —In *Glaxo Group Limited v Genentech Inc* [2008] EWCA Civ 23; [2008] F.S.R. 83, CA, a pharmaceutical company (D) was granted a patent by the European Patent Office (EPO). Another company brought opposition proceedings in the EPO, and, in addition, brought an action in the Patents Court for revocation. The judge refused D’s application for a stay of the English proceedings. In dismissing D’s appeal the Court of Appeal stated that the traditional approach of the court to the stay of proceedings where there are concurrent proceedings in commercial cases is not appropriate in these circumstances and gave guidance on the exercise of the discretion to stay in this context. See also *Interdigital Technology Corporation v Nokia Corporation* [2008] EWHC 736 (Pat), April 8, 2008, unrep. (Floyd J.) and *GlaxoSmithKline Biologicals SA v Sanofi Pasteur SA* [2006] EWHC 2333 (Pat), July 28, 2006, unrep. (Kitchin J.).

Power to award damages as well as, or in substitution for, injunction or specific performance

9A–196 **50.** Where the Court of Appeal or the High Court has jurisdiction

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

to entertain an application for an injunction or specific performance, it may award damages in addition to, or in substitution for, an injunction or specific performance.

Note—Derived from the Chancery Amendment Act 1858 s.2; and the JA 1925 ss.18 and 26. **9A-197**

Effect of this section

The purpose of this section was to make it possible for a claimant to claim both damages and an injunction in the same proceedings, whether those proceedings were brought in the Queen's Bench Division or the Chancery Division. **9A-198**

CPR r.16.2(1) states that the claim form must (amongst other things) specify the remedy which the claimant seeks. Accordingly, if the claimant seeks damages in addition to an injunction or specific performance the claim form should state accordingly.

Since s.50 was enacted (initially in Lord Cairn's Act 1858), most of the case law on the provision has been concerned with the question whether the claimant should be required (as contended by the defendant) to make do with damages as a remedy in substitution for an injunction against the continuation of a wrongful act. The leading modern cases on the matter are *Jaggard v Sawyer* [1995] 1 W.L.R. 269, CA; *Regan v Paul Properties Ltd* [2006] EWCA Civ 1391; [2007] Ch. 135, CA (both reviewing and largely confirming propositions stated in *Shelfer v City of London Electric Lighting Co.* [1895] 1 Ch. 287, CA); see also *Chiron Corp v Organon Teknika Ltd (No.10)* [1995] F.S.R. 325 (Aldous J.); *Watson v Croft Promo-Sport Ltd* [2009] EWCA Civ 15; [2009] 3 All E.R. 249, CA (where the relevant authorities are reviewed).

In the *Jaggard* case, Sir Thomas Bingham M.R. stated (at p.288):

"Reported cases are merely illustrations of circumstances in which particular judges have exercised their discretion, in some cases by granting an injunction, and in others by awarding damages instead. Since they are all cases on the exercise of discretion, none of them is binding authority on how the discretion should be exercised."

It has been held at first instance that, since the coming into effect of the Human Rights Act 1998 Sch.1 Pt 1, damages for future infringements of a claimant's rights may be awarded under s.50 in lieu of an injunction (*Marcic v Thames Water Utilities Ltd* [2001] 3 All E.R. 698 (Judge Richard Havery Q.C.)).

COSTS

Costs in civil division of Court of Appeal, High Court and county courts

51.—(1) Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings in— **9A-199**

- (a) the civil division of the Court of Appeal;
- (b) the High Court, and
- (c) any county court,

shall be in the discretion of the court.

(2) Without prejudice to any general power to make rules of court, such rules may make provision for regulating matters relating to the costs of those proceedings including, in particular, prescribing scales of costs to be paid to legal or other representatives or for securing that the amount awarded to a party in respect of the costs to be paid by him to such representatives is not limited to what would have been payable by him to them if he had not been awarded costs.

(3) The court shall have full power to determine by whom and to what extent the costs are to be paid.

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

SECTION 9A: MAIN STATUTES

(4) In subsections (1) and (2) “proceedings” includes the administration of estates and trusts.

(5) Nothing in subsection (1) shall alter the practice in any criminal cause, or in bankruptcy.

(6) In any proceedings mentioned in subsection (1), the court may disallow, or (as the case may be) order the legal or other representative concerned to meet, the whole of any wasted costs or such part of them as may be determined in accordance with rules of court.

(7) In subsection (6), “wasted costs” means any costs incurred by a party—

- (a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative; or
- (b) which, in the light of any such act or omission occurring after they were incurred, the court considers it is unreasonable to expect that party to pay.

(8) Where—

- (a) a person has commenced proceedings in the High Court; but
- (b) those proceedings should, in the opinion of the court, have been commenced in a county court in accordance with any provision made under section 1 of the Courts and Legal Services Act 1990 or by or under any other enactment,

the person responsible for determining the amount which is to be awarded to that person by way of costs shall have regard to those circumstances.

(9) Where, in complying with subsection (8), the responsible person reduces the amount which would otherwise be awarded to the person in question—

- (a) the amount of that reduction shall not exceed 25 per cent; and
- (b) on any taxation of the costs payable by that person to his legal representative, regard shall be had to the amount of the reduction.

(10) The Lord Chancellor may by order amend subsection (9)(a) by substituting, for the percentage for the time being mentioned there, a different percentage.

(11) Any such order shall be made by statutory instrument and may make such transitional or incidental provision as the Lord Chancellor considers expedient.

(12) No such statutory instrument shall be made unless a draft of the instrument has been approved by both Houses of Parliament.

(13) In this section “legal or other representative”, in relation to a party to proceedings, means any person exercising a right of audience or right to conduct litigation on his behalf.

9A–200 *Note* —Substituted by the Courts and Legal Services Act 1990 s.4. Amended by the Access to Justice Act 1999 s.31.

Effect of this section

9A–201 This section came into its present form as a result of the Courts and Legal Services

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

Act 1990 s.4(1). In its amended form the section implemented recommendations made in the Report of the Review Body on Civil Justice (Cm. 394, 1988), including the recommendation that there should be a single costs regime for the High Court and the county courts, subject to an exception for county court cases below £3,000. As amended, the section provides statutory bases for awarding costs, not only for proceedings in the Court of Appeal (Civil Division) and the High Court, but for the county courts also. Rules of court relating to costs are found in the CPR made by the rule committee established under the Civil Procedure Act 1997 s.2. Section 51 is referred to specifically in CPR rr.48.2 and 48.7. In s.51(2), the words “or for securing” onwards were added by the Access to Justice Act 1999. This addition makes it possible for rules of court to provide that a successful party may recover by way of inter partes costs a sum in excess of his liability to his own legal representative (cf. *Gundry v Sainsbury* [1910] 1 K.B. 645). This addition was brought into effect on June 2, 2003, by the Access to Justice Act 1999 (Commencement No.10) Order 2002 (SI 2003/1241), making possible amendments to CPR r.43.2 brought about by the Civil Procedure (Amendment No.2) Rules 2003 (SI 2003/1242) and coming into effect on the same date. Note also, Access to Justice Act 1999 s.29 (recovery of insurance premium by way of costs) (see para.9A–826+).

“costs ... shall be in the discretion of the court”

Subject to the provisions of the 1981 Act or any other enactment and to rules of court, the costs of and incidental to all proceedings shall be in the discretion of the court and the court shall have full power to determine by whom and to what extent the costs are to be paid (subss.(1) and (3)). This general principle applies in all forums. It is re-stated in CPR r.44.3 and the exercise of the discretion is regulated by the many detailed provisions found in Pts 44 to 48 of the CPR and supplementing practice directions.

9A–202

Section 52(1) states that the court’s discretion is as to “the costs of” proceedings and extends to “the costs ... incidental to” proceedings. For guidance as to the proper approach to the application of the latter aspect of this expression, see discussion in *ENE Kos v Petroleo Brasileiro SA (The “Kos”)* [2009] EWHC 1843 (Comm); [2010] 1 Lloyd’s Rep. 87 at [63] et seq (Andrew Smith J.) and authorities referred to there (expenses incurred by ship-owner in obtaining and servicing bank guarantee as security against threatened future claims by charterer for withdrawing vessel held costs “incidental to” claim brought by ship-owner for non-payment of hire).

The breadth of the discretion was emphasised by the House of Lords in *Aiden Shipping Co Ltd v Interbulk Ltd* [1986] A.C. 965, HL, where it was held that it includes a power to award costs against a person who is not a party to the proceedings. In modern times, the jurisdiction to order that costs should be paid by a person who, though not actually a party to the proceedings, is sufficiently involved in them in support of a losing party for it to be appropriate for the court to order that they should bear at least some or a proportion of the winning party’s costs (see further para.9A–203 below), has been explained and developed in a number of cases. Significant authorities include the following: *Symphony Group Plc v Hodgson* [1994] Q.B. 179, CA; *Tharros Shipping Co Ltd v Bias Shipping Ltd (The Griparion)* (No.3) [1995] 1 Lloyd’s Rep. 541; *Murphy v Young & Co’s Brewery Plc* [1997] 1 W.L.R. 1591, CA; *Faryab v Smyth (Stay of Appeal: Champerty)* [1998] C.L.Y. 411; *Pendennis Shipyard Ltd v Magrathea (Pendennis) Ltd* [1998] 1 Lloyd’s Rep. 315; *TGA Chapman Ltd v Christopher* [1998] 1 W.L.R. 12, CA; *Gloucestershire HA v MA Torpy & Partners Ltd (t/a Torpy & Partners)* (No.2) [1999] Lloyd’s Rep. I.R. 303; *Globe Equities Ltd v Globe Legal Services Ltd, The Times*, April 14, 1999, unrep., CA; *Fulton Motors Ltd v Toyota (G.B.) Ltd* July 23, 1999, unrep., CA; *Stocznia Gdanska SA v Latreefers Inc.*, [1999] 1 B.C.L.C. 271, CA; *Cormack v Washbourne* (formerly t/a Washbourne & Co), [1999] Lloyd’s Rep. P.N. 389, CA; *Secretary of State for Trade and Industry v Aurum Marketing Ltd*, [1999] 2 B.C.L.C. 498, CA; *North West Holdings Plc (In Liquidation) (Costs)*, Re, [2001] EWCA Civ 67, CA; *Hamilton v Al Fayed* (No.2) [2002] EWCA Civ 665; [2002] 3 All E.R. 641, CA; *Gulf Azov Shipping Co Ltd v Idisi (Costs)* [2004] EWCA Civ 292; March 15, 2004, CA.

The approach of the courts to the making of an award of costs against a non-party has had to accommodate the change in public policy which has recognised that access to justice can properly be procured by giving those who provide legal services an interest in the outcome of litigation through conditional fee agreements (*Gulf Azov Shipping Co Ltd v Idisi (Costs)*, op cit.).

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

SECTION 9A: MAIN STATUTES

The courts' general discretion as to costs referred to in s.51 includes a power to order that one order for costs should be set-off against another. In *R. (Burkett) v London Borough of Hammersmith and Fulham* [2004] EWCA Civ 1342; *The Times* October 20, 2004, CA, where the Court of Appeal was concerned with the set-off of costs against costs (and not against damages) in the same proceedings (and not in different proceedings) the law as to set-off in this context and its history were explained in detailed (see para.38 et seq).

Normally, orders made by the court in the exercise of the discretion to award costs referred to in s.51(1) are made at the end of the proceedings to which they relate (whether interlocutory, final or appeal). However the discretion is wide enough to enable the court to make an order for costs in advance, based on assumptions as to the possible outcomes (and, therefore, the possible costs liabilities) of the proceedings. Depending on the circumstances, such orders may be aptly described as "prospective", "pre-emptive" or "protective" costs orders. The clearest example is where the court makes an order that a party involved in legal proceedings in the capacity of trustee should be entitled to his own costs out of the fund and should be indemnified by the fund against any award for costs which may be made against him (*Re Beddoe, Downes v Cottam* [1893] 1 Ch. 547, CA) (CPR r. 64.2 and Practice Direction (Estates, Trusts and Charities) para.6.1; see Vol.1 paras 48.1.5 and 64APD.6). In certain circumstances the costs protection enjoyed by trustees may be extended to beneficiaries (*Re Buckton, Buckton v Buckton* [1907] 2 Ch. 406; *D'Abo v Paget (No.1)*, [2002] B.C.C. 31). The protection has also been extended to minority shareholders (*Wallersteiner v Moir (No.2)* [1975] Q.B. 373), to beneficiaries under pension funds (*McDonald v Horn* [1995] 1 All E.R. 961, CA; *Machin v National Power Plc*, July 31, 1998, unrep. (Carnwarth J.)), and to insurance policy-holders (*AXA Equity & Law Life Assurance Society Plc (No.1)*, *Re*, [2001] 2 B.C.L.C. 447 (Evans-Lombe J.)). In modern times, pre-emptive costs orders have been sought in circumstances quite different to the trust and trust-related circumstances noted above, in particular in judicial review applications where organisations acting in the public interest are involved. It has been held that, in exceptional circumstances, pre-emptive costs orders may be granted in such "public interest challenge" cases; see *R. v Lord Chancellor Ex p. Child Poverty Action Group*, [1999] 1 W.L.R. 347 (Dyson J.); *R. v Hammersmith and Fulham LBC Ex p. CPRE London Branch*, October 26, 1999, unrep. (Richards J.); *R. v Secretary of State for the Environment, Transport and the Regions Ex p. O'Byrne (Application for Jo)*, [2000] C.P. Rep. 9 (Hooper J.); cf. *Hodgson v Imperial Tobacco Ltd* [1998] 1 W.L.R. 1056, CA. In giving the judgment of the Court of Appeal in *Gulf Azov Shipping Co Ltd v Idisi (Costs)* [2004] EWCA Civ 292, CA March 15, 2004, unrep., Lord Phillips M.R. said (at para.34) it was unfortunate that the application for costs against a non-party funder was heard, not by the judge who had dealt with the principal proceedings giving rise to the application, or by any other judge of the Commercial Court who had been involved with the litigation, but by a deputy High Court judge who had had no previous connection with the proceedings.

Costs order in favour of or against non—parties

9A–203

The procedure to be followed where the court is considering whether to exercise its discretion under s.51 to make a costs order in favour or against a person who is not a party to the proceedings is stated in CPR r.48.2. For information on the exercise of the discretion in this manner, see commentary following that rule (Vol 1, para.48.2.1).

"court may disallow, or ... order ... wasted costs"

9A–204

Subsections (6) and (7) deal with liability for "wasted costs". The court may disallow such costs, or it may make the the legal or other representatives (see subs.(11)) concerned personally liable for such costs. Subsection (6) applies, not only in the Court of Appeal (Civil Division), the High Court and county courts, but also in relation to any civil proceedings in the Crown Court (s.52(1A)). The definition of "wasted costs" given in subs.(7) does not require a showing of misconduct or gross neglect, but is, at its lowest, a negligence test. The provisions and the rules of court elaborating on them were designed to deal with doubts which had arisen under former legislation and rules of court (for background, see White Paper on Legal Services Cm 740, 1989). The inherent jurisdiction to penalise in costs remains. Relevant rules of court are found in CPR r.44.14 (Court's powers in relation to misconduct) (see Vol.1, para.44.14) and r.48.7 (Personal liability of legal representative for costs) (see Vol.1, para.48.7). For explanation, see commentaries following those rules.

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

Costs sanction for bringing proceedings in High Court

In its amended form, the section introduced a modified costs sanction to discourage litigants from bringing in the High Court proceedings that could have been brought in a county court (subss.(8) to (12)). The statutory provisions which formerly provided the basis for this costs sanction were repealed. The power to impose such sanction is reflected in provisions found in the CPR and supplementing practice directions.

9A-205

For s.52 of the Senior Courts Act 1981 (see Arrangement) plus any related commentary see paragraphs 9A-206+ to 9A-207+ on White Book on Westlaw UK or the Civil Procedure CD.



PART III

PRACTICE AND PROCEDURE

THE COURT OF APPEAL

DISTRIBUTION OF BUSINESS

Distribution of business between civil and criminal divisions

53.—(1) Rules of court may provide for the distribution of business in the Court of Appeal between the civil and criminal divisions, but subject to any such rules business shall be distributed in accordance with the following provisions of this section.

9A-208

- (2) The criminal division of the Court of Appeal shall exercise—
- (a) all jurisdiction of the Court of Appeal under Parts I and II of the Criminal Appeal Act 1968;
 - (b) the jurisdiction of the Court of Appeal under section 13 of the Administration of Justice Act 1960 (appeals in cases of contempt of court) in relation to appeals from orders and decisions of the Crown Court;
 - (c) all other jurisdiction expressly conferred on that division by this or any other Act; and
 - (d) the jurisdiction to order the issue of writs of venire de novo.

(3) The civil division of the Court of Appeal shall exercise the whole of the jurisdiction of that court not exercisable by the criminal division.

(4) Where any class of proceedings in the Court of Appeal is by any statutory provision assigned to the criminal division of that court, rules of court may provide for any enactment relating to—

- (a) appeals to the Court of Appeal under Part I of the Criminal Appeal Act 1968; or
- (b) any matter connected with or arising out of such appeals,

to apply in relation to proceedings of that class or, as the case may be, to any corresponding matter connected with or arising out of such proceedings, as it applies in relation to such appeals or, as the case may be, to the relevant matter within paragraph (b), with or without prescribed modifications in either case.

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9A-209 *Note*—The effect of ss.18 and 53 is that the Civil Division of the Court of Appeal has no jurisdiction to hear appeals in any criminal cause or matter.

COMPOSITION OF COURT

Court of civil division

9A-210 **54.**—(1) This section relates to the civil division of the Court of Appeal; and in this section “court”, except where the context otherwise requires, means a court of that division.

(2) Subject as follows, a court shall be duly constituted for the purpose of exercising any of its jurisdiction if it consists of one or more judges.

(3) The Master of the Rolls may, with the concurrence of the Lord Chancellor, give (or vary or revoke) directions about the minimum number of judges of which a court must consist if it is to be duly constituted for the purpose of any description of proceedings.

(4) The Master of the Rolls, or any Lord Justice designated by him, may (subject to any directions under subsection (3)) determine the number of judges of which a court is to consist for the purpose of any particular proceedings.

(4A) The Master of the Rolls may give directions as to what is to happen in any particular case where one or more members of a court which has partly heard proceedings are unable to continue.

(5) Where—

(a) an appeal has been heard by a court consisting of an even number of judges; and

(b) the members of the court are equally divided,

the case shall, on the application of any party to the appeal, be re-argued before and determined by an uneven number of judges not less than three, before any appeal to the Supreme Court.

(6) [...]

(7) [...]

(8) Subsections (1) and (2) of section 70 (assessors in the High Court) shall apply in relation to causes and matters before the civil division of the Court of Appeal as they apply in relation to causes and matters before the High Court.

(9) Subsections (3) and (4) of section 60 (scientific advisers to assist the Patents Court in proceedings under the Patents Act 1949 and the Patents Act 1977) shall apply in relation to the civil division of the Court of Appeal and proceedings on appeal from any decision of the Patents Court in proceedings under those Acts as they apply in relation to the Patents Court and proceedings under those Acts.

(10) [...]

9A-211 *Note*—Amended by the Courts and Legal Services Act 1990 s.7 and the Access to Justice Act 1999 ss.59, 106 and Sch.15 Pt III. See para.9A-4 above. Further amended by the Constitutional Reform Act 2005 Sch.9 para.36 with effect from October 1, 2009 (SI 2009/1604).

Composition of the Court of Appeal

9A-212 By operation of the Access to Justice 1999, s.59, subss.(2) to (4A) were substituted

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for subs.(2) to (4) and subss.(6), (7) and (10) were repealed. Previously, the basic rule was that, in order to be properly constituted, a court of the Division had to consist of “an uneven number of judges not less than three”.

In exceptional cases, provided for in s.54 and regulations, a court of the Division was duly constituted for certain purposes if it consisted of two judges. In its amended form, subs.(2) states the basic rule that a court shall be duly constituted “for the purpose of exercising any of its jurisdiction if it consists of one or more judges”. The circumstances in which a court of the Division should consist of two or more judges is provided for by directions given under subss.(3) and (4). Subsections (4A) states that the Master of the Rolls may give directions as to what is to happen in any particular case where one or more members of a court which has partly heard proceedings are unable to continue. This replaces former subs.(3) which stated that a court would remain duly constituted so long as the number of judges was not reduced to less than three. Where an appeal has been heard by a court consisting of an even number of judges, and the members of the court are equally divided, subs.(5) applies. As a consequence of the amendments made by the 1999 Act, the Court of Appeal (Civil Division) Order 1982 (SI 1982/543) will be repealed.

Assessors and scientific advisers

Subsections (8) and (9) extend to the Court of Appeal the provisions of s.70 concerning assessors and scientific advisers (see para.9A–261 below). **9A–213**

For s.55 of the Senior Courts Act 1981 (see Arrangement) plus any related commentary see paragraphs 9A–214+ to 9A–215+ on White Book on Westlaw UK or the Civil Procedure CD.



Judges not to sit on appeal from their own judgments, etc.

56.—(1) No judge shall sit as a member of the civil division of the Court of Appeal on the hearing of, or shall determine any application in proceedings incidental or preliminary to, an appeal for a judgment or order made in any case by himself or by any court of which he was a member. **9A–216**

(2) No judge shall sit as a member of the criminal division of the Court of Appeal on the hearing of, or shall determine any application in proceedings incidental or preliminary to, an appeal against—

- (a) a conviction before himself or a court of which he was a member; or
- (b) a sentence passed by himself or such a court.

Note —The fact that a judge in the Court of Appeal is a judge of the Division of the High Court in which the proceedings under appeal were brought does not preclude him from being a member of the Court of Appeal hearing the appeal, provided of course that he has himself taken no part in the making of the order appealed against (*Fisher v Val de Travers Asphalte Co* (1875) 1 C.P.D. 259). **9A–217**

For s.56B of the Senior Courts Act 1981 (see Arrangement) plus any related commentary see paragraphs 9A–218+ to 9A–219+ on White Book on Westlaw UK or the Civil Procedure CD.



SITTINGS AND VACATIONS

Sittings and vacations

57.—(1) Sittings of the Court of Appeal may be held, and any other business of the Court of Appeal may be conducted, at any place in England or Wales. **9A–220**

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- (2) Subject to rules of court—
 - (a) the places at which the Court of Appeal sits outside the Royal Courts of Justice; and
 - (b) the days and times at which the Court of Appeal sits at any place outside the Royal Courts of Justice,
 shall be determined in accordance with directions given by the Lord Chancellor after consulting the Lord Chief Justice.
- (3) Rules of court may make provision for regulating the vacations to be observed by the Court of Appeal and in the offices of that court.
- (4) Rules of Court—
 - (a) may provide for securing such sittings of the civil division of the Court of Appeal during vacation as the Master of the Rolls may with the concurrence of the Lord Chancellor determine;
 - (b) without prejudice to paragraph (a), shall provide for the transaction during vacation by judges of the Court of Appeal of all such business in the civil division of that court as may require to be immediately or promptly transacted; and
 - (c) shall providing for securing sittings of the criminal division of that court during vacation if necessary.
- (5) The Lord Chief Justice may nominate a judicial office holder (as defined in section 109(4) of the Constitutional Reform Act 2005) to exercise his functions under this section.

9A-221 *Note*—Amended by the Constitutional Reform Act 2005 s.15(1), Sch.4 para.128 (see para.9A-4 above).

Directions as to sittings

9A-222 Paragraph 10.8 of *Practice Direction (Court of Appeal (Civil Division))*, [1999] 1 W.L.R. 1027, CA (sub nom *Practice Note (Court of Appeal: Procedure)* [1999] 2 All E.R. 490, CA) states that the Court of Appeal will sit in vacation on such days as the Master of the Rolls may direct and may hear such appeals and applications as the Court may direct. Details of the number of courts sitting in August and September will be published each year, normally before Easter. See further, *Practice Direction (Court Sittings)*, supplementing CPR Pt 39.

OTHER PROVISIONS

Calling into question of incidental decisions in civil division

- 9A-223** 58.—(1) Rules of court may provide that decisions of the Court of Appeal which—
- (a) are taken by a single judge or any officer or member of staff of that court in proceedings incidental to any cause or matter pending before the civil division of that court; and
 - (b) do not involve the determination of an appeal or of an application for permission to appeal,
- may be called into question in such manner as may be prescribed.
- (2) No appeal shall lie to the Supreme Court from a decision

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which may be called into question pursuant to rules under subsection (1).

Note —Amended by the Access to Justice Act 1999 s.60. See para.9A–4 above. Further amended by the Constitutional Reform Act 2005 Sch.9 para.36 with effect from October 1, 2009 (SI 2009/1604).

9A–224

Jurisdiction of a single judge or any officer or member of court staff to hear incidental applications

Subsection (1) makes provision for any application incidental to any cause or matter pending before the Civil Division of the Court of Appeal to be heard by a single judge, or of any officer or member of court staff, so far as provided in rules of court. (The office of Registrar of Civil Appeals, formerly referred to in s.58, was abolished by the Access to Justice 1999, s.70.)

9A–225

See CPR Pt 52 Section II. In *Perotti v Watson*, February 2, 2000, unrep., CA, it was held that by operation of s.58 and former RSC O.59 r.2B (see now CPR r.52.16) a single Lord Justice may vary a procedural order for the conduct and management of a substantive appeal previously made by the Court constituted by two Lord Justices.

Form of judgment of court of criminal division

59. Any judgment of a court of the criminal division of the Court of Appeal on any question shall, except where the judge presiding over the court states that in his opinion the question is one of law on which it is convenient that separate judgments should be pronounced by the members of the court, be pronounced by the judge presiding over the court or by such other member of the court as he directs and, except as aforesaid, no judgment shall be separately pronounced on any question by any member of the court.

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Rules of court, and decisions of Court of Appeal, as to whether judgment or order is final or interlocutory

60.—(1) Rules of court may provide for orders or judgments of any prescribed description to be treated for any prescribed purpose connected with appeals to the Court of Appeal as final or as interlocutory.

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(2) No appeal shall lie from a decision of the Court of Appeal as to whether a judgment or order is, for any purpose connected with an appeal to that court, final or interlocutory.

Note —The significance of the distinction between final and interlocutory orders in relation to the jurisdiction and procedure of the Court of Appeal (Civil Division) is not as important as it was. Former RSC O.59 r.1A elaborated on the distinction, principally for the purpose of distinguishing between those cases where leave to appeal was required under O.59 r.1B and where not. See now CPR Pt 52 Sect.II.

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THE HIGH COURT

DISTRIBUTION OF BUSINESS

Distribution of business among Divisions

61.—(1) Subject to any provision made by or under this or any other Act (and in particular to any rules of court made in pursuance of subsection (2) and any order under subsection (3)), business in the

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SECTION 9A: MAIN STATUTES

High Court of any description mentioned in Schedule 1, as for the time being in force, shall be distributed among the Divisions in accordance with that Schedule.

(2) Rules of court may provide for the distribution of business in the High Court among the Divisions; but any rules made in pursuance of this subsection shall have effect subject to any orders for the time being in force under subsection (3).

(3) Subject to subsection (5), the Lord Chief Justice may, with the concurrence of the Lord Chancellor, by order—

- (a) direct that any business in the High Court which is not for the time being assigned by or under this or any other Act to any Division be assigned to such Division as may be specified in the order;
- (b) if at any time it appears to the Lord Chief Justice and the Lord Chancellor desirable to do so with a view to the more convenient administration of justice, direct that any business for the time being assigned by or under this or any other Act to any Division be assigned to such other Division as may be specified in the order; and
- (c) amend Schedule 1 so far as may be necessary in consequence of provision made by order under paragraph (a) or (b).

(4) The powers conferred by subsection (2) and subsection (3) include power to assign business of any description to two or more Divisions concurrently.

(5) No order under subsection (3)(b) relating to any business shall be made without the concurrence of the senior judge of—

- (a) the Division or each of the Divisions to which the business is for the time being assigned; and
- (b) the Division or each of the Divisions to which the business is to be assigned by the order.

(6) Subject to rules of court, the fact that a cause or matter commenced in the High Court falls within a class of business assigned by or under this Act to a particular Division does not make it obligatory for it to be allocated or transferred to that Division.

(7) Without prejudice to subsections (1) to (5) and section 63, rules of court may provide for the distribution of the business (other than business required to be heard by a divisional court) in any Division of the High Court among the judges of that Division.

(8) Any order under subsection (3) shall be made by statutory instrument, which shall be laid before Parliament after being made.

(9) The Lord Chief Justice may nominate a judicial office holder (as defined in section 109(4) of the Constitutional Reform Act 2005) to exercise his functions under subsection (3).

9A–230 *Note* —Derived from the JA 1925 ss.55–57, and the AJA 1970 s.1, Sch.1; amended by the Constitutional Reform Act 2005 s.15(1), Sch.4 para.129 (see para.9A–4 above).

Effect of section

9A–231 This section should be read closely with s.5, which provides for the constitution of three Divisions of the High Court, and with Sch.1 which provides for the distribution

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of the business of the High Court among the three Divisions. Such distribution of the business is intended to achieve a more convenient system of the administration of civil justice and a more effective machinery for the despatch of business. It reflects the high degree of specialisation which exists among the members of the legal profession, as well as to some extent of the judiciary. It is not intended to create, and does not have the effect of creating separate or self-contained Courts nor of distributing among the Divisions the jurisdiction and power of the High Court, which in spite of appearing to be fragmented into Divisions still remains a single, integrated Court. This section should also be read in conjunction with s.19(2)(b) which empowers the High Court to exercise all such other jurisdiction as was exercisable by it before the commencement of the Act.

The Admiralty, Commercial, and Administrative Courts are not separate Divisions within the High Court but are designated as courts within the Queen's Bench Division of the High Court, in the case of the first two mentioned, by s.6 of this Act (see para.9A–23+ above), and in the case of the last-mentioned, by *Practice Direction (Administrative Court: Establishment)* [2000] 1 W.L.R. 1654. The Patents Court is designated as a court within the Chancery Division of the High Court by s.6. See further s.62 below.

For considerations relevant to the proper distribution of business between the Administrative Court, on the one hand, and the Family Division of the High Court on the other, see *DC v B MBC* [2002] EWHC 1438 (Fam), (Butler-Sloss P.); *R. (on the application of P) v Secretary of State for the Home Department*, [2001] EWHC Admin 357, and *A v A Health Authority* [2002] EWHC 866 (Admin); [2002] 3 W.L.R. 24 (Munby J.).

Jurisdiction exercisable by all Divisions

“There is but one High Court” (*Re Hastings (No.3)* [1959] Ch. 368, at 379, per Vaisey J.). Section 5(5) expressly provides that all jurisdiction vested in the High Court under the Act belongs to all Divisions alike. This principle is further underscored by the direction issued by the Lord Chancellor that any Division of the High Court to which a cause or matter is assigned has jurisdiction to grant any remedy or relief arising out of or related to or connected with any claim made in that cause or matter notwithstanding that proceedings for such remedy or relief are assigned to another Division of the Court (*Practice Direction (High Court: Division)* [1973] 1 W.L.R. 627; [1973] 2 All E.R. 233).

A judge of one Division may decline to exercise his jurisdiction over a matter which is properly assignable to another Division, to which he may transfer the matter (see s.65 below). Equally, however, the judge may, in his discretion, decide to retain a matter which is properly assignable to another Division (*Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd* [1921] 2 A.C. 438; *Midland Bank Ltd v Stamps* [1978] 1 W.L.R. 635; [1978] 3 All E.R. 1).

As to transfer of proceedings from one Division to another, see s.65 below.

Various CPR provisions stipulate that certain proceedings should be commenced, or applications made, in particular Divisions of the High Court. See e.g. r.7.1 and Practice Direction How to Start Proceedings—The Claim Form, paras 2.1 et seq. (see Vol.1, para.7PD.2), and Practice Direction (Interim Injunctions), para.8.5 (all applications in intellectual property cases to be made in Chancery Division).

Re-distribution of business

The distribution of business among the Divisions of the High Court in accordance with Sch.1 to the Act is not fixed or unalterable but is capable of addition, amendment or variation by orders made by the Lord Chancellor under s.61(3) and (5), under which he may direct that any business in the High Court not already assigned by the Act of 1981 or any other Act to any Division be assigned to a specified Division, and that any business already assigned by the Act of 1981 or any other Act to any Division be assigned to another specified Division, and for these purposes, he may amend Sch.1 to the Act under s.61(3)(c); and the Lord Chancellor has power to assign any business to two or more Divisions concurrently (s.61(4)). Such orders must be made with the concurrence of the senior Judge of the Division or Divisions concerned, and they must be made by statutory instrument (see s.61(8)). Amendments were made to Sch.1 of the Act concerning the distribution of business to the Family Division by the High Court (Distribution of Business) Order 1991 (SI 1991/1210) and High Court (Distribution of Business) Order 1993 (SI 1993/622).

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Business of Patents, Admiralty and Commercial Courts

9A-234 62.—(1) The Patents Court shall take such proceedings relating to patents as are within the jurisdiction conferred on it by the Patents Act 1977, and such other proceedings relating to patents or other matters as may be prescribed.

(2) The Admiralty Court shall take Admiralty business, that is to say causes and matters assigned to the Queen's Bench Division and involving the exercise of the High Court's Admiralty jurisdiction or its jurisdiction as a prize court.

(3) The Commercial Court shall take such causes and matters as may in accordance with rules of court be entered in the commercial list.

9A-235 *Note* —Derived from the AJA 1970 ss.2 and 3; and the Patents Act 1977 s.96. See also s.6.

Procedure

9A-236 Procedure before these specialised courts within the High Court is governed by the CPR. However, the procedures for each of the courts mentioned in s.62 is subject to considerable elaboration and variation in Parts of the CPR specially dedicated to them; see Pt 58 (Commercial Court), Pt 61 (Admiralty Claims), Pt 63 (Patents and Other Intellectual Property Claims) and the practice directions supplementing those Parts.

Business assigned to specially nominated judges

9A-237 63.—(1) Any business assigned, in accordance with this or any other Act or rules of court, to one or more specially nominated judges of the High Court may—

- (a) during vacation; or
- (b) during the illness or absence of that judge or any of those judges; or
- (c) for any other reasonable cause,

be dealt with by any judge of the High Court named for that purpose by the Lord Chief Justice after consulting the Lord Chancellor.

(2) If at any time it appears to the Lord Chief Justice, after consulting the Lord Chancellor, desirable to do so with a view to the more convenient administration of justice, he may by order direct that business of any description which is for the time being assigned, in accordance with this or any other Act or rules of court, to one or more specially nominated judges of the High Court shall cease to be so assigned and may be dealt with by any one or more judges of the High Court.

(3) An order under subsection (2) shall not be made in respect of any business without the concurrence of the senior judge of the Division to which the business is for the time being assigned.

(4) The Lord Chief Justice may nominate a judicial office holder (as defined in section 109(4) of the Constitutional Reform Act 2005) to exercise his functions under subsection (1) or (2).

9A-238 *Note* —Derived from the JA 1925 s.60A. See also s.61(7). Amended by the Constitutional Reform Act 2005 s.15(1), Sch.4 para.130 (see para.9A-4 above).

Choice of Division by plaintiff

9A-239 64.—(1) Without prejudice to the power of transfer under section

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65, the person by whom any cause or matter is commenced in the High Court shall in the prescribed manner allocate it to whichever Division he thinks fit.

(2) Where a cause or matter is commenced in the High Court, all subsequent interlocutory or other steps or proceedings in the High Court in that cause or matter shall be taken in the Division to which the cause or matter is for the time being allocated (whether under subsection (1) or in consequence of its transfer under section 65).

Note —Derived from the JA 1925 s.58.

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Choice of Division

This section confers on the plaintiff the initiative to choose the Division in which he thinks fit to commence his proceedings. However, this is subject to the power of the Court to order the transfer of proceedings from one Division to another, or to or from a specialist list (see s.65 and CPR r.30.5). The choice of the Division in which an action is commenced has the consequence that all subsequent interlocutory or other steps or proceedings must be taken in that Division. If the action is subsequently transferred to another Division, all further interlocutory or other steps or proceedings must be taken in the Division to which it has been transferred (s.64(2)), but the validity of the interlocutory or other steps or proceedings taken in the Division originally chosen will not be affected by the transfer (s.65(2)).

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Power of transfer

65.—(1) Any cause or matter may at any time and at any stage thereof, and either with or without application from any of the parties, be transferred, by such authority and in such manner as rules of court may direct, from one Division or judge of the High Court to another Division or judge thereof.

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(2) The transfer of a cause or matter under subsection (1) to a different Division or judge of the High Court shall not affect the validity of any steps or proceedings taken or order made in that cause or matter before the transfer.

Note —Derived from the JA 1925 s.59.

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Transfer to another Division

This section should be read with s.64. For rules of court as to transfer, see CPR r.30.5. The power of transfer from one Division or Judge of the High Court to another Division or Judge may be exercised either on the application of a party or by the Court of its own motion, s.65(1). A party bringing his action in the wrong Division may be ordered to pay all costs incurred thereby (see *Re Pollard* (1888) L.R. 20 Q.B.D. 656, CA).

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The Judge has an absolute discretion whether to transfer to the appropriate Division a matter assigned to his Division or to deal with it. In *DBS Management Plc v Excess Insurance Co Ltd*, April 25, 1994, unrep., CA, it was said that the test for transfer from one Division to another is whether it is inappropriate for the case to be tried in the Division in which it was begun because that Division lacked a special expertise needed for the just and expeditious disposal of the case; the same test applies for transfers from the QB general list and the commercial list. Other modern authorities include: *Boobyer v David Holman & Co Ltd* [1992] 2 Lloyd's Rep. 436; *Deeny v Littlejohn & Co (A Firm)*, *The Times*, January 19, 1995; *O'Brien v Hughes-Gibb & Co Ltd*, *The Times*, October 20, 1993.

See further, CPR r.30.5 and notes following (see Vol.1, para.30.5).

DIVISIONAL COURTS

Divisional courts of the High Court

66.—(1) Divisional courts may be held for the transaction of any **9A-245**

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SECTION 9A: MAIN STATUTES

business in the High Court which is, by or by virtue of rules of court or any other statutory provisions, required to be heard by a divisional court.

(2) Any number of divisional courts may sit at the same time.

(3) A divisional court shall be constituted of not less than two judges.

(4) Every judge of the High Court shall be qualified to sit in any divisional court.

(5) The judge who is, according to the order of precedence under this Act, the senior of the judges constituting a divisional court shall be the president of the court.

9A-246 Note —Derived from the JA 1925 s.63; and the AJA 1977 s.9.

Disagreement between two judges

9A-247 There is authority for the proposition that whenever there is an appeal to two judges in a Divisional Court who differ, the judgment appealed from should stand (*Metropolitan Water Board v Johnson & Co* [1913] 3 K.B. 900 at 904 per Channel J.; see also *Bradford Corp v Myers* [1916] 1 A.C. 242; *Barron v Potter* [1915] 3 K.B. 593; *Cheater v Cater* [1918] 1 K.B. 247). As to disagreement between equal numbers of the members of the Court of Appeal, see s.54(5) and notes following s.54 above (para.9A-212). It is thought that, wherever possible, the provisions relating to disagreement between members of the Court of Appeal will be applied, by analogy, to disagreement between two judges in a Divisional Court.

MODE OF CONDUCTING BUSINESS

Proceedings in court and in chambers

9A-248 67. Business in the High Court shall be heard and disposed of in court except in so far as it may, under this or any other Act, under rules of court or in accordance with the practice of the court, be dealt with in chambers.

9A-249 Note —Derived from the JA 1925 s.61.

Business to be conducted “in court” and “in public”

9A-250 In this section, the expression “in court” means in open court, in open view, in public, in a court to which the public and the press are entitled to be admitted (see as to the meaning of “open court” *R. v Lewes Prison (Governor) Ex p. Doyle* [1917] 2 K.B. 254 at 271 per Lord Reading C.J.).

Article 6 of the European Convention on Human Rights, incorporated in the Human Rights Act 1998 Sch.1, states that in the determining of his civil rights “everyone is entitled to a fair and public hearing”. Article 6 further states that, in certain circumstances, the press and public may be excluded “from all or part of the trial”, for example, where publicity would prejudice the interests of justice.

CPR r.39.2(1) states that the general rule is that “a hearing must be in public”. Further, r.32.2(1) states that, where any facts needs to be proved by the evidence of witnesses at trial, it is to be proved “by their oral evidence given in public”.

In early cases it was said that the obligation of the Court to hear and determine any proceeding in public is a mere matter of procedure, the departure from which is a mere irregularity and does not render the proceedings or the decision null and void (see *McPherson v McPherson* [1936] A.C. 177, PC, applying *Dimes v Proprietors of the Grand Junction Canal* (1852) 3 H.L.C. 750).

Business may be dealt with “in chambers” and “in private”

9A-251 The expression “in chambers” used in this section in contrast to “in court”, means in

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private, for example, in the judge's private room. The parties and their advisers are entitled to be present. Formerly, it was the practice that the public or the press were automatically excluded, unless invited to be present with the consent of the parties or the court. However, in *Hodgson v Imperial Tobacco Ltd* [1998] 1 W.L.R. 1056, CA; [1998] 2 All E.R. 673, CA, the Master of the Rolls said, generally, the public has no right to attend hearings in chambers because of the nature of the work transacted and because of the physical restrictions on the room available, but if requested permission to attend may be granted if this is practical. Disclosure of proceedings in chambers is not a breach of confidence or amount to contempt so long as comment thereon does not substantially prejudice the administration of justice (for circumstances in which publication of information relating to proceedings before any court sitting in private may be contempt, see Administration of Justice Act 1960 s.12, see para.9B–15). Proceedings in chambers are not confidential and any judgment or order will be made available on request (*ibid.*, see also *Forbes v Smith* [1998] 1 All E.R. 973).

Section 67 states that business in the High Court may be dealt with in chambers, to the extent that this is permitted by the 1981 Act, any other Act, or rules of court. Whereas the expression “in chambers” was used throughout the RSC, in the CPR it is not used. After stating the general rule that a hearing is to be in public, r.39.2 goes on to state that, in certain circumstances, a hearing, or any part of it, may be “in private”. Numerous provisions in the CPR state that particular proceedings shall be “in private”. The result is that, nowadays, hearings “in chambers” (in so far as that expression is still apt) are not ipso facto hearings in private. See further, commentary on r.39.2 (Vol 1, paras 39.2.1 et seq.).

Business conducted in camera

Section 67 does not have the effect of derogating from the inherent jurisdiction of the Court to order that the hearing of the proceedings should be in camera, that is, in private, so that the court, when sitting in circumstances in which normally the press and public ought to be admitted, may be closed or cleared and the public and the press excluded (see *Scott v Scott* [1913] A.C. 417, HL). The underlying principle that the public should be excluded is “that the administration of justice would be rendered impracticable by their presence” (*ibid.* at 446 per Earl Loreburn; see also *R. v Lewes Prison (Governor) Ex p. Doyle* [1917] 2 K.B. 254, at 271 per Lord Reading C.J., and *R. v Chief Registrar of Friendly Building Societies Ex p. New Cross Building Society* [1984] Q.B. 227; [1984] 2 All E.R. 27, CA). (See also authorities referred to in S.C.P. 1999, Vol.1, para.33/4/6.) This power may be exercised in relation to the whole or only part of the proceedings, or to the whole or part of the evidence (e.g. *Hallam-Eames v Merrett Syndicates Ltd*, *The Times*, June 16, 1995), even perhaps the evidence of one witness. The limits of this power, perhaps wisely have not been precisely defined. Most, if not all, of the circumstances justifying the Court's sitting in camera are covered by CPR r.39.2. The exercise of the inherent jurisdiction is subject to art.6 of the Convention (see above).

Hearings in camera may be authorised by statute, see e.g. Matrimonial Causes Act 1973 s.48(2)).

Exercise of High Court jurisdiction otherwise than by judges of that court

68.—(1) Provision may be made by rules of court as to the cases in which jurisdiction of the High Court may be exercised by—

- (a) such Circuit judges, deputy Circuit judges or Recorders as the Lord Chief Justice may, with the concurrence of the Lord Chancellor, from time to time nominate to deal with official referees' business; or
- (b) special referees.

(2) Without prejudice to the generality of subsection (1), rules of court may in particular—

- (a) [...]
- (b) authorise any question arising in any cause or matter to be referred to a special referee for inquiry and report.

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(3) Rules of court shall not authorise the exercise of power of attachment and committal by a special referee or any officer or other staff of the court.

(4) Subject to subsection (5), the decision of—

(a) any such person as is mentioned in subsection (1); or

(b) any officer or other staff of the court,

may be called in question in such manner as may be prescribed by rules of court, whether by appeal to the Court of Appeal, or by an appeal or application to a divisional court or a judge in court or a judge in chambers, or by an adjournment to a judge in court or a judge in chambers.

(5) Rules of court may provide either generally or to a limited extent for decisions of persons nominated under subsection (1)(a) being called in question only by appeal on a question of law.

(6) The cases in which jurisdiction of the High Court may be exercised by person nominated under subsection (1)(a) shall be known as “official referees’ business”; and, subject to rules of court, the distribution of official referees’ business among persons so nominated shall be determined in accordance with directions given by the Lord Chief Justice after consulting the Lord Chancellor.

(7) Any reference to an official referee in any enactment, whenever passed, or in rules of court of any other instrument or document, whenever made, shall, unless the context otherwise requires, be construed as, or (where the context requires) as including, a reference to a person nominated under subsection (1)(a).

(8) The Lord Chief Justice may nominate a judicial office holder (as defined in section 109(4) of the Constitutional Reform Act 2005) to exercise his functions under subsection (1)(a) and (6).

9A–254 *Note* —Derived from the AJA 1956 s.15, and the Courts Act 1971 s.25. Amended by the AJA 1982 s.59; the Civil Procedure Act 1997 Sch.2; and the Constitutional Reform Act 2005 s.15(1), Sch.4 para.131 (see para.9A–4 above).

Effect of section

9A–255 Paragraph 2 of Sch.1 to the Civil Procedure Act 1997 states that Civil Procedure Rules may provide for the exercise of the jurisdiction of the High Court by officers of the Court or other staff of the Court. CPR r.2.4 states that, where those Rules provide for the court “to perform any act” provided for by the CPR (an important qualification) then, except where an enactment, rule or practice direction provides otherwise, the act may be performed, in relation to proceedings in the High Court, by any judge, Master or district judge of that Court. The circumstances in which jurisdiction may be exercised only by a judge need not be listed here. However, it may be noted that s.68(3) states that rules of court shall not authorise the exercise of power of attachment and committal by any officer of the court or other staff of the court. Further, s.68(4) provides that the decision of any officer or other staff of the court may be called in question (e.g. by appeal) in such manner as may be prescribed by rules of court. The rules so prescribing need not be listed here.

Section 68 is principally concerned with the nomination of judges to deal with official referees’ business and the handling of such business. Under the CPR, this business is described as Technology and Construction Court business; see CPR Pt 60 (Technology and Construction Court Claims) (see CPR Pt 60 para.2C–1 above).

The section also preserves the exercise of High Court jurisdiction, in accordance with rules of court, by “special referees”. Trial by a special referee was provided for by former RSC O.36 r.10 but no comparable provision appears in the CPR. The former rules made no provision for the appointment of special referees; nor do the CPR.

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Under s.9 of this Act (see para.9A–30 above) certain persons who are not judges of the High Court may act as judges of the Court on request.

Trial by jury

69.—(1) Where, on the application of any party to an action to be tried in the Queen’s Bench Division, the court is satisfied that there is in issue— **9A–256**

- (a) a charge of fraud against that party; or
- (b) a claim in respect of libel, slander, malicious prosecution or false imprisonment; or
- (c) any question or issue of a kind prescribed for the purposes of this paragraph,

the action shall be tried with a jury, unless the court is of opinion that the trial requires any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury.

(2) An application under subsection (1) must be made not later than such time before the trial as may be prescribed.

(3) An action to be tried in the Queen’s Bench Division which does not by virtue of subsection (1) fall to be tried with a jury shall be tried without a jury unless the court in its discretion orders it to be tried with a jury.

(4) Nothing in subsections (1) to (3) shall affect the power of the court to order, in accordance with rules of court, that different questions of fact arising in any action be tried by different modes of trial; and where any such order is made, subsection (1) shall have effect only as respects questions relating to any such charge, claim, question or issue as is mentioned in that subsection.

(5) Where for the purpose of disposing of any action or other matter which is being tried in the High Court by a judge with a jury it is necessary to ascertain the law of any other country which is applicable to the facts of the case, any question as to the effect of the evidence given with respect to that law shall, instead of being submitted to the jury, be decided by the judge alone.

Note —Derived from the A.J.(M.P.) A. 1938 s.6; and the JA 1925 s.102.

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“application ... not later than such time before trial as may be prescribed”

For an account of the matters to be considered by the court in determining whether an action to which this section relates should not be tried with a jury, see *Aitken v Preston* [1997] E.M.L.R. 415, CA, and *Fiddes v Channel 4 Television Corporation* (Practice Note) [2010] EWCA Civ 730; [2010] 1 W.L.R. 2245, CA; see also *Gentoo Group Ltd v Hanratty* [2008] EWHC 2328 (QB), October 8, 2008, unrep. (Eady J.).

Since the coming into effect of the CPR, the meaning of “in accordance with rules of court” in s.69(4) is not clear (*Armstrong v Times Newspapers Ltd* [2005] EWHC 2816 (QB), December 7, 2005, unrep. (Eady J.)).

CPR r.26.11 states that an application for a claim to be tried with a jury must be made within 28 days of the defence. In *Oliver v Calderdale MBC, The Times*, July 7, 1999, CA, a case decided under the old rules, it was held that an application made wholly out of time could be rejected on the grounds that it was unreasonable.

It is necessary to be wary of any tension between case management powers under the CPR (e.g. r.3.1(2)(m)) and statutory issues of jurisdiction arising under statute (e.g. s.69). If there is no jurisdiction by virtue of s.69 such a gap cannot readily be filled by case management powers (*Armstrong v Times Newspapers Ltd*, op cit.).

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Subject to the terms of s.69(l), either party to a defamation action has a right to trial by jury, and the power to make procedural rules under Civil Procedure Act 1997 s.4 does not permit the restriction of that fundamental right; consequently, although in terms CPR r.24.2 makes no exception for defamation cases, summary judgment should not be granted where one party was entitled to exercise his right to jury trial and wished to do so (*Safeway Stores Plc v Tate* [2001] 2 W.L.R. 1377, CA; see also *Elite Model Management Corp v British Broadcasting Corp* March 14, 2001, unrep., Eady J.).

If there is a material issue of fact in a libel case, s.69(l) entitles a party to have that issue determined by a jury; however it is for the judge to decide whether there really is such an issue (*Alexander v Arts Council of Wales, The Times*, April 27, 2001, CA). Where the judge comes to the conclusion that the evidence, taken at its highest, is such that a jury properly directed could not properly reach a necessary factual conclusion, it is his duty, upon a submission being made, to withdraw that issue from the jury; but where there is a risk that the judge's view on a particular issue might be overturned on appeal it is desirable that it should be left to the jury (*ibid.*).

Where appropriate, in the same proceedings the court may in the exercise of powers listed in CPR r.3.1(2) order that certain issues be tried by judge alone and others by judge and jury (s.69(4)). However, where it is clear that some issues could not conveniently be tried with a jury it may be more appropriate for the whole case to be tried by judge alone (e.g. where questions of credibility are universally relevant) (*Phillips v Commissioner of Police of the Metropolis* [2003] EWCA Civ 382; *The Times*, April 2, 2003, CA; *Armstrong v Times Newspapers Ltd*, *op cit.*).

In defamation proceedings it may be appropriate for certain issues to be tried by the judge sitting with a jury and others by the judge sitting alone (*Gregson v Channel Four Television Corp* [2002] EWCA Civ 941). Where a libel action is to be tried by a judge without a jury, the first part of s.69(4) taken alone gives the court a discretion to order that the issue of meaning, being a question of fact, is to be tried with a jury. That conclusion is not affected or moderated by the second part of s.69(4). The discretion is an open discretion which does not start with any leaning towards any particular mode of trial (*Armstrong v The Times Newspapers Ltd (No.2)* [2006] EWCA Civ 519; [2006] 1 W.L.R. 2462, CA (judge's decision (over defendant's objection) to try issue of meaning without jury where parties had agreed that action should be tried by judge alone upheld)).

It is axiomatic that, in defamation proceedings, questions of law are for the judge and questions of fact for the jury and the court should not presume to make decisions dependent on issues of fact which ought to be left to the jury. However, that does not mean that a claimant can secure a full jury trial simply by asserting that there are issues of fact (*Khader v Aziz* [2010] EWHC 716, June 23, 2010, unrep., CA, at [23] per Sir Anthony May P.Q.B.).

Questions of foreign law to be decided by judge

9A–259 As to evidence of foreign law, see Civil Evidence Act 1972 s.4 (see para.9B–1063 below).

The trial judge is entitled to construe a statutory provision of foreign law put in evidence by an expert in that law (*Sharif v Azad* [1967] 1 Q.B. 605; [1966] 3 All E.R. 785, CA). This is especially so where there is a conflict in the evidence between the expert witnesses as to the foreign law (*Parkasho v Singh* [1968] P. 233; [1967] 1 All E.R. 737, DC).

Discharge of jury or of juror

9A–260 The trial judge has a discretion to continue the trial where a juror has to be discharged (e.g. by reason of ill health), thereby reducing the number of jurors to eleven (*Hamilton v Al-Fayed (Costs)*, *The Times*, July 25, 2001). Where the interests of justice make it appropriate for him to do so, a judge in civil proceedings may allow a discharged jury to make alterations to its verdict (*Igwemma v Chief Constable of Greater Manchester Police* [2001] EWCA Civ 953; [2001] 4 All E.R. 751, CA).

Assessors and scientific advisers

9A–261 **70.**—(1) In any cause or matter before the High Court the court may, if it thinks it expedient to do so, call in the aid of one or more

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assessors specially qualified, and hear and dispose of the cause or matter wholly or partially with their assistance.

(2) The remuneration, if any, to be paid to an assessor for his services under subsection (1) in connection with any proceedings shall be determined by the court, and shall form part of the costs of the proceedings.

(3) Rules of court shall make provision for the appointment of scientific advisers to assist the Patents Court in proceedings under the Patents Act 1949 and Patents Act 1977 and for regulating the functions of such advisers.

(4) The remuneration of any such adviser shall be determined by the Lord Chancellor with the concurrence of the Minister for the Civil Service and shall be defrayed out of money provided by Parliament.

Note—Derived from the JA 1925 s.98; and the Patents Act 1977 s.96(4).

9A–262

Assessors and scientific advisers

Where assessors are called in aid to assist the court in hearing and disposing of any cause or matter, the provisions of CPR r.35.15 apply.

9A–263

As to nautical assessors in Admiralty proceedings, see CPR r.61.13 (para.2D–83 above).

As to appointment of scientific advisers in patent actions, see CPR r.35.15 (replacing former O.114 r.15).

As to assessors in the Court of Appeal, see s.54(8) above.

As to assessors in proceedings in a county court, including certain proceedings under the Equality Act 2010, see the County Courts Act 1984 s.60 and commentary thereon (para.9A–539).

In *Esso Petroleum Co Ltd v Southport Corp* [1956] A.C. 218, Devlin J. said that he had appointed assessors to advise him after the hearing and stated that, in future, especially having regard to his earlier experience in *Waddle v Wallsend Shipping Co Ltd* [1925] 2 Lloyd's Rep. 105, he would, if necessary, adjourn the court so that an assessor might be present during the hearing.

In *Ahmed v University of Oxford* [2002] EWCA Civ 1907; [2003] 1 All E.R. 915, unrep., CA, the Court of Appeal examined the role of assessors appointed in various contexts, including under s.70 of this Act and the County Courts Act 1984 s.63 (see para.9A–537 below), but particularly under the Race Relations Act 1976 s.67(4) (now revoked). Note also *Sutton v Tesco Stores Plc*, July 30, 2002, unrep. (Mr Michael Yelton Q.C.) (at directions hearing the judge making order under s.70 appointing an assessor to assist the court on the psychiatric evidence in the case). In *Bow Spring (Owners) v Manzanillo II (Owners)* (Note) [2004] EWCA Civ 1007; [2004] 4 All E.R. 899, CA, the Court of Appeal held (partly on art.6 grounds) that the practice of the Admiralty judge putting questions to assessors after discussion with counsel should be complemented by a practice of disclosing their answers to counsel in order that any appropriate submission could be made as to whether the judge should accept their advice. In *Appiah v. Bishop Douglas Roman Catholic High School* [2007] EWCA Civ 10, January 26, 2007, CA, the Court of Appeal found in a Race Relations Act 1976 case that judge had fallen into error in treating the assessors “as part of the decision making team” but held that, in the circumstances, this was not a material error. In proceedings on a claim within the Equality Act 2010 s.114(1), the power under s.63(1) must be exercised unless the judge is satisfied that there are good reasons for not doing so (s.114(7)). See further CPR r.35.15, and commentary following that rule.

The principles relevant to appointment of assessors in TCC building disputes were explained in *Balcombe Group Plc v London Development Agency* [2008] EWHC 1392 (TCC), June 24, 2008, unrep. (Coulson J.) (application to call in aid assessor specially qualified in relation to relevant compensation code for trial of quantum refused).

On appointing assessors to assist court under s.70 as alternative to practice of refer-

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ring of fixing of remuneration of provisional liquidators to costs judge, see *Re Independent Insurance Company Limited* [2002] EWHC 1577 (Ch), July 25, 2002, unrep. (Ferris J.).

SITTINGS AND VACATIONS

Sittings and vacations

9A-264 71.—(1) Sittings of the High Court may be held, and any other business of the High Court may be conducted, at any place in England or Wales.

(2) Subject to rules of court—

(a) the places at which the High Court sits outside the Royal Courts of Justice; and

(b) the days and times when the High Court sits at any place outside the Royal Courts of Justice,

shall be determined in accordance with directions given by the Lord Chancellor after consulting the Lord Chief Justice.

(3) Rules of court may make provision for regulating the vacations to be observed by the High Court and in the offices of that court.

(4) Rules of court—

(a) may provide for securing such sittings of any Division of the High Court during vacation as the senior judge of that Division may with the concurrence of the Lord Chancellor determine; and

(b) without prejudice to paragraph (a), shall provide for the transaction during vacation by judges of the High Court of all such business in the High Court as may require to be immediately or promptly transacted.

(5) Different provision may be made in pursuance of subsection (3) for different parts of the country.

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

9A-265 *Note*—Derived as to subss.(1) and (2) from the Courts Act 1971 s.2 and as to subs.(3) and (4) from the JA 1925 ss.53– 54; amended by the Constitutional Reform Act 2005 s.15(1), Sch.4 para.132 (see para.9A-4 above).

Sittings of High Court

9A-266 Directions as to the location of sittings of the High Court under the power now found in s.71(2) were first given by the Lord Chancellor in 1971 when the “court centres” system recommended by the Beeching Commission was implemented within a revised system of court circuits. Within each of the six circuits, court centres were classified as first-, second- or third-tier centres, and High Court business was taken at first-tier centres. These directions, indicating the places outside the Royal Courts of Justice at which the Lord Chancellor has directed sittings of the High Court shall be held, have been modified from time to time. There are four sittings in every year (see para.1.1 of Practice Direction (Court Sittings), supplementing CPR Pt 39 above).

For sitting outside London of Chancery Division, see Chancery Guide para.12.1 and practice direction referred to there (see para.1-91).

For provisions about where a claim for judicial review may be started, administered

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and heard, see Practice Direction 54D (Administrative Court (Venue)) (Vol.1, para 54DPD.1).

For power of Lord Chancellor to direct places at which district registries of the High Court shall be located, see s.99 below.

Vacations of High Court

Provisions as to sittings of the High Court in vacations are found in paras 3.1 to 3.3 of Practice Direction (Court Sittings), the practice direction supplementing CPR Pt 39 (see Vol.1, para.39BPD.1). **9A-267**

“at any place in England and Wales”

The taking of evidence abroad under procedures that enable that to be done in cases proceeding in the High Court does not constitute a sitting of the High Court outside England and Wales. Accordingly, s.71(1) does not prevent a High Court judge from appointing himself to be a special examiner under CPR r.34.13(4) for the purpose of taking a deposition from a person out of the jurisdiction (*Peer International Corp v Termidor Music Publishers Ltd* [2005] EWHC 1048 (Ch), May 25, 2005, unrep. (Lindsay J.)). **9A-268**

OTHER PROVISIONS

Withdrawal of privilege against incrimination of self or spouse in certain proceedings

72.—(1) In any proceedings to which this subsection applies a person shall not be excused, by reason that to do so would tend to expose that person, or his or her spouse or civil partner, to proceedings for a related offence for the recovery of a related penalty— **9A-269**

- (a) from answering any question put to that person in the first-mentioned proceedings; or
- (b) from complying with any order made in those proceedings.

(2) Subsection (1) applies to the following civil proceedings in High Court, namely—

- (a) proceedings for infringement of rights pertaining to any intellectual property or for passing off;
- (b) proceedings brought to obtain disclosure of information relating to any infringement of such rights or to any passing off; and
- (c) proceedings brought to prevent any apprehended infringement of such rights or any apprehended passing off.

(3) Subject to subsection (4), no statement or admission made by a person—

- (a) in answering a question put to him in any proceedings to which subsection (1) applies; or
- (b) in complying with any order made in any such proceedings,

shall, in proceedings for any related offence or for the recovery of any related penalty, be admissible in evidence against that person (unless they married or became civil partners after the making of the statement or admission) against the spouse or civil partner of that person.

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(4) Nothing in subsection (3) shall render any statement or admission made by a person as there mentioned inadmissible in evidence against that person in proceedings for perjury or contempt of court.

(5) In this section—

“intellectual property” means any patent, trade mark, copyright, design rights, registered design, technical or commercial information or other intellectual property;

“related offence”, in relation to any proceedings to which subsection (1) applies, means—

(a) in the case of proceedings within subsection (2)(a) or (b)—

(i) any offence committed by or in the course of the infringement or passing off to which those proceedings relate; or

(ii) any offence committed by or in the course of the infringement or passing off to which those proceedings relate; or

(b) in the case of proceedings within subsection (2)(c), any offence revealed by the facts on which the plaintiff relies in those proceedings;

“related penalty”, in relation to any proceedings to which subsection (1) applies means—

(a) in the case of proceedings within subsection (2)(a) or (b), any penalty incurred in respect of anything done or omitted in connection with the infringement or passing off to which those proceedings relate;

(b) in the case of proceedings within subsection (2)(c), any penalty incurred in respect of any act or omission revealed by the facts on which the plaintiff relies in those proceedings.

(6) Any reference in this section to civil proceedings in the High Court of any description includes a reference to proceedings on appeal arising in the High Court of that description.

9A-270 *Note* —Amended by the Copyright, Designs and Patents Act 1988 Sch.7 para.28; and the Civil Partnership Act 2004 s.261(1), Sch.27 para.69.

Effect of section

9A-271 In legal proceedings, a person (or that person's spouse) may refuse to answer any question or produce any document or thing if to do so would tend to expose that person to proceedings for an offence or for the recovery of a penalty (*Rank Film Distributors Ltd v Video Information Centre* [1982] A.C. 380, HL). By operation of the Civil Evidence Act 1968 s.14, in legal proceedings other than criminal proceedings, that privilege is confined to the risk of exposure to proceedings and penalties under the law of any part of the UK. The privilege may be withdrawn by statute (*ibid.*, s.14(3)).

This section withdraws the privilege in proceedings relating to the infringement of industrial property rights. It provides that it does not excuse a person (or that person's spouse) (a) from answering any question in such proceedings, or (b) from complying with any order made in those proceedings, for example, an order to disclose documents, a freezing injunction (formerly a Mareva injunction) or a search order (formerly Anton Piller order). The section is not limited to a case where criminal proceedings have not yet been commenced (*Charles of the Ritz Group Ltd v Jory* [1986] F.S.R. 14).

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In *C. Plc v P.* [2007] EWCA Civ 493; [2007] 3 W.L.R. 437, CA, the question of the extent of the privilege arose where the respondent to a search order asserted it in relation to material stored electronically. In the course of executing the order, the applicant's independent computer expert discovered material (highly objectionable images of children) which he believed incriminated the respondent. On the expert's application the judge directed that the material be passed to the police, and in doing so held that, as a result of the coming into effect of the Human Rights Act 1998, it is open to the court to modify the privilege to provide that it does not extend to disclosed documents and other material evidence in civil proceedings in addition to those provided for by s.72 ([2006] EWHC 1226 (Ch); [2006] Ch. 549). The Court of Appeal dismissed the respondent's appeal, the majority holding (1) that although, by virtue of the orders made by the judge, the offending material had to be disclosed to the solicitor supervising the search and to the expert, there was no privilege in that material itself, (2) the material existed independently of the order, (3) the privilege can be invoked to refuse to disclose matters (including documents or other things) which are ordinarily discoverable, (4) but independent matters coming to light in the course of executing a proper order of the court are in an altogether different category.

In Practice Direction (Interim Injunctions) para.9, in the context of provisions dealing with applications for search orders, the proceedings in which by statute (including s.72) the privilege against self-incrimination is withdrawn are listed (see Vol.1, para.23APD.7).

For ss.73 to 82, 84, 86 to 93, 95 to 100, 102, 104 to 135 of the Senior Courts Act 1981 (see Arrangement) plus any related commentary see paragraphs 9A-272+ to 9A-378+ on White Book on Westlaw UK or the Civil Procedure CD.



Production of documents filed in, or in custody of, Senior Courts

136.—(1) Rules may be made in accordance with Part 1 of Schedule 1 to the Constitutional Reform Act 2005 for providing that, in any case where a document filed in, or in the custody of, any office of the Senior Courts is required to be produced to any court or tribunal (including an umpire or arbitrator) sitting elsewhere than at the Royal Courts of Justice— **9A-379**

- (a) it shall not be necessary for any officer, whether served with a subpoena in that behalf or not, to attend for the purpose of producing the document; but
- (b) the document may be produced to the court or tribunal by sending it to the court or tribunal, in the manner prescribed in the rules, together with a certificate, in the form so prescribed, to the effect that the document has been filed in, or is in the custody of, the office;

and any such certificate shall be prima facie evidence of the facts stated in it.

(2) Rules under this section may contain—

- (a) provisions for securing the safe custody and return to the proper office of the Senior Courts of any document sent to a court or tribunal in pursuance of the rules; and
- (b) such incidental and supplementary provisions as appear to the person making the rules to be necessary or expedient.

Note —Derived from the JA 1925 s.220 as amended by the A.J.(M.P.) A. 1938. Amended by the Constitutional Reform Act 2005 s.59(5), Sch.11 para.26 (see para.9A-4 above). Subsections (1) and (2) amended and subs.(3) repealed by the Constitutional **9A-380**

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SECTION 9A: MAIN STATUTES

Reform Act 2005 ss.12(2) and 146 and Sch.1 Pt 2 para.13 and Sch.18 Pt 1 and, with effect from October 1, 2009, by s.59 and Sch.11 para.26 (SI 2009/1604).

“sending ... in the manner prescribed”

9A-381

The principal purpose behind the granting to the Lord Chancellor of power to make rules prescribing the manner in which court documents are to be produced to any court or tribunal is to facilitate production by post. The rule-making power as contained in JA 1925 s.220, the predecessor of s.136, insofar as it applied to production by post was confined to the making of rules permitting production by registered post. Rules to this effect were found in the Supreme Court Documents (Production) Rules 1926 (S.R. & 0) No.461). After the coming into force of the Recorded Delivery Service Act 1962 those Rules, insofar as they permitted production by registered post, were to be read as also permitting production by recorded delivery service. The 1926 Rules were superseded by Practice Direction (Court Documents), para.5.6 (see Vol.1, para.5PD.5). In terms, sub-para.(4) of para.5.6 follows the 1926 Rules and permits production by the court by registered post. However, by virtue of the 1962 Act (referred to above) production by recorded delivery service is permitted. See further, Vol.1, para.5.1.4.



For ss.137 and 139 of the Senior Courts Act 1981 (see Arrangement) plus any related commentary see paragraphs 9A-382+ to 9A-385+ on White Book on Westlaw UK or the Civil Procedure CD.

Enforcement of fines and forfeited recognizances

9A-386

140.—(1) Payment of a fine imposed, or sum due under a recognizance forfeited, by the High Court or the civil division of the Court of Appeal may be enforced upon the order of the court—

- (a) in like manner as a judgment of the High Court for the payment of money; or
- (b) in like manner as a fine imposed by the Crown Court.

(2) Where payment of a fine or other sum falls to be enforced as mentioned in paragraph (a) of subsection (1) upon an order of the High Court or the civil division of the Court of Appeal under that subsection—

- (a) the court shall, if the fine or other sum is not paid in full forthwith or within such time as the court may allow, certify to Her Majesty’s Remembrancer the sum payable; and
- (b) Her Majesty’s Remembrancer shall thereupon proceed to enforce payment of that sum as if it were due to him as a judgment debt.

(3) Where payment of a fine or other sum falls to be enforced as mentioned in paragraph (b) of subsection (1) upon an order of the High Court or the civil division of the Court of Appeal under that subsection, the provisions of sections 139 and 140 of the Powers of Criminal (Sentencing) Act 2000 shall apply to that fine or other sum as they apply to a fine imposed by the Crown Court.

(4) Where payment of a fine or other sum has become enforceable by Her Majesty’s Remembrancer by virtue of this section or section 16 of the Contempt of Court Act 1981, any payment received by him in respect of that fine or other sum shall be dealt with by him in such manner as the Lord Chancellor may direct.

(5) In this section, and in sections 139 and 140 of the Powers of Criminal Courts (Sentencing) Act 2000 as extended by this section, “fine” includes a penalty imposed in civil proceedings.

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Note —Amended by the Powers of Criminal Courts (Sentencing) Act 2000 (c.6) s.165, Sch.9, para.88. See para.9A–4 above. **9A–387**

Admiralty jurisdiction (supplementary provisions)

For text of s.150 of the Senior Courts Act 1981 (Supplementary: Admiralty jurisdiction), and commentary thereon, see para.2D–200 above. **9A–387.1**

For ss.142 and 150 of the Senior Courts Act 1981 (see Arrangement) plus any related commentary see paragraphs 9A–388+ to 9A–390+ on White Book on West-law UK or the Civil Procedure CD.



Interpretation of this Act, and rules of construction for other Acts and documents

151.—(1) In this Act, unless the context otherwise requires— **9A–391**

“action” means any civil proceedings commenced by writ or in any other manner prescribed by rules of court;
“appeal”, in the context of appeals to the civil division of the Court of Appeal, includes—

- (a) an application for a new trial, and
- (b) an application to set aside a verdict, finding or judgment in any cause or matter in the High Court which has been tried, or in which any issue has been tried, by a jury;
“arbitration agreement” has the same meaning as it has in Part I of the Arbitration Act 1996;
“cause” means any action or any criminal proceedings;
“Division”, where it appears with a capital letter, means a division of the High Court;
“judgment” includes a decree;
“jurisdiction” includes powers;
“matter” means any proceedings in court not in a cause;
“party”, in relation to any proceedings, includes any person who pursuant to or by virtue of rules of court or any other statutory provision has been served with notice of, or has intervened in, those proceedings;
“prescribed” means—

- (a) except in relation to fees, prescribed by rules of court;
- (b) [...]
 - “senior judge”, where the reference is to the senior judge of a Division, means—
 - (a) in the case of the Chancery Division, the Vice-Chancellor;
 - (b) in any other case, the president of the Division in question;
 - “senior judge”, where the reference is to the senior judge of a Division, means the president of that Division;
 - “solicitor” means a solicitor of the Senior Courts;
 - “statutory provision” means any enactment, whenever passed, or any provision contained in subordinate legislation (as defined in section 21(1) of the Interpretation Act 1978), whenever made;
 - “this or any other Act” includes an Act passed after this Act.

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(2) Section 128 contains definitions of expressions used in Part V and in the other provisions of this Act relating to probate causes and matters.

(3) Any reference in this Act to rules of court under section 84 includes a reference to rules of court in relation to the Senior Courts under any provision of this or any other Act which confers on the Civil Procedure Rule Committee or the Crown Court Rule Committee power to make rules of court.

(4) Except where the context otherwise requires, in this or any other Act—

“divisional court” (with or without capital letters) means a divisional court constituted under section 66;

“judge of the Senior Courts” means—

(a) a judge of the Court of Appeal other than an ex-officio judge within paragraph (b) or (c) of section 2(2), or

(b) a judge of the High Court, and accordingly does not include, as such, a judge of the Crown Court “official referees’ business” has the meaning given by section 68(6);

“official referees’ business” has the meaning given by section 68(6);

(5) The provisions of Schedule 4 (construction of references to superseded courts and officers) shall have effect.

9A–392 *Note*—Derived from the JA 1925 s.225. Amended by the Courts and Legal Services Act 1990 Sch.18; the Arbitration Act 1996 Sch.3; the Civil Procedure Act 1997 Sch.2; SI 2004/2035; the Constitutional Reform Act 2005 s.15(1) and Sch.4 para.146 and with effect from October 1, 2009 the 2005 Act s.59 and Sch.11 para.1 (SI 2009/1604).

“Action” “Cause” “Matter”

9A–393 These words are terms of art. They were used throughout the Rules of the Supreme Court in their technical senses. Their meanings and the differences between them were important and, in some respects, of practical significance. However, in the Civil Procedure Rules they are not used. The result is that there is now a lack of consistency between the language of the primary legislation governing the jurisdiction, practice and procedure of the High Court and the Court of Appeal and the language of the rules of court applicable in those Courts and some distinctions which had a practical usefulness have been lost.

Judgment

9A–394 The definition of “judgment” as including a “decree” is not a general definition, but one for the purposes of the SCA 1981 only, per Chitty J. *Burrows v Holley* (1887) L.R. 35 Ch.D. 123; per M.R., *Re Binstead* [1893] 1 Q.B. 199 at 203, in which case it was held that a decree made in a suit for divorce was not a final judgment within s.4(1)(g) of the B.A. 1883.

Judgments and orders are kept distinct by the SCA 1981 (as they were under the JA 1925), although they may be enforced in the same manner (*Ex p. Chinery* (1884) 12 Q.B.D. 342 at 345; see Vol.1, para.40.2.3, “Orders Enforceable like Judgments”). In *Joyne v MacCabe* [1899] 1 Ir.R. 104, it was held that a consent order staying proceedings could not be registered as a “judgment”; and cf. *Shaw v Hertford CC* [1899] 2 Q.B. 282.

For the purposes of an appeal a judgment means a decision obtained in an action, and every other decision is an order (*Onslow v Commissioners etc.* (1890) 25 Q.B.D. 465 at 466, adopting judgment in *Ex p. Chinery*; *Austin Friars, etc. Co v Strack* [1906] 2 K.B. 499, CA). And see *Tata Co v Bombay C.R.A.* (1923) 39 T.L.R. 268.



For ss.152 and 153 of the Senior Courts Act 1981 (see Arrangement) plus any related commentary see paragraphs 9A–395+ to 9A–397+ on White Book on Westlaw UK or the Civil Procedure CD.

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SCHEDULE 1

DISTRIBUTION OF BUSINESS IN HIGH COURT

Chancery Division

1. To the Chancery Division are assigned all causes and matters relating to—
 - (a) the sale, exchange or partition of land, or the raising of charges on land;
 - (b) the redemption of foreclosure of mortgages;
 - (c) the execution of trusts;
 - (d) the administration of the estates of deceased persons;
 - (e) bankruptcy;
 - (f) the dissolution of partnership or the taking of partnership or other accounts;
 - (g) the rectification, setting aside or cancellation of deeds or other instruments in writing;
 - (h) probate business, other than non-contentious or common form business;
 - (i) patents, trade marks, registered designs, copyright or design right;
 - (j) the appointment of a guardian of a minor's estate, and all causes and matters involving the exercise of the High Court's jurisdiction under the enactments relating to companies.

9A-398

Queen's Bench Division

2. To the Queen's Bench Division are assigned—
 - (a) applications for writs of habeas corpus, except applications made by a parent or guardian of a minor for such a writ concerning the custody of the minor;
 - (b) applications for judicial review;
 - (ba) all control order proceedings (within the meaning of the Prevention of Terrorism Act 2005);
 - (bb) all financial restrictions proceedings within the meaning of Chapter 2 of Part 6 of the Counter-Terrorism Act 2008 (see section 65 of that Act);
 - (bc) all proceedings —
 - (i) on appeal under section 26, or an application under section 27, of the Terrorist Asset-Freezing etc Act 2010 (appeals and reviews by the court) or,
 - (ii) on a claim arising from any matter to which such an appeal or application relates, or any proceedings arising out of such proceedings;
 - (c) all causes and matters involving the exercise of the High Court's Admiralty jurisdiction or its jurisdiction as a prize court; and
 - (d) all causes and matters entered in the commercial list.

9A-399

Family Division

3. To the Family Division are assigned—
 - (a) all matrimonial causes and matters (whether at first instance or on appeal);
 - (b) all causes and matters (whether at first instance or on appeal) relating to—
 - (i) legitimacy;
 - (ii) the exercise of the inherent jurisdiction of the High Court with respect to minors, the maintenance of minors and any proceedings under the Children Act 1989, except proceedings solely for the appointment of a guardian of a minor's estate;
 - (iii) adoption;
 - (iv) non-contentious or common form probate business;
 - (c) applications for consent to the marriage of a minor or for a declaration under section 27B(5) of the Marriage Act 1949;
 - (d) proceedings on appeal under section 13 of the Administration of Justice Act 1960 from an order or decision made under section 63(3) of the Magistrates' Courts Act 1980 to enforce an order of a magistrates' court made in matrimonial proceedings or proceedings under Part IV of the Family Law Act 1996 or with respect to guardianship of a minor.
 - (e) proceedings under the Children Act 1989;
 - (ea) proceedings under section 79 of the Childcare Act 2006;

9A-400

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SECTION 9A: MAIN STATUTES

- (f) all proceedings under:—
 - (i) Part IV or 4A of the Family Law Act 1996;
 - (ii) the Child Abduction and Custody Act 1985;
 - (iii) the Family Law Act 1986;
 - (iv) section 30 of the Human Fertilisation and Embryology Act 1990;
 - (v) Council Regulation (EC) No 2201/2003 of 27th November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, so far as that Regulation relates to jurisdiction, recognition and enforcement in parental responsibility matters;
- (fa) all proceedings relating to a debit or credit under section 29(1) or 49(1) of the Welfare Reform and Pensions Act 1999;
- (g) all proceedings for the purpose of enforcing an order made in any proceedings of a type described in this paragraph.
- (h) all proceedings under the Child Support Act 1991.
 - (i) all proceedings under section 6 and 8 of the Gender Recognition Act 2004.
 - (i) all civil partnership causes and matters (whether at first instance or on appeal);
 - (j) applications for consent to the formation of a civil partnership by a minor or for a declaration under paragraph 7 of Schedule 1 to the Civil Partnership Act 2004;
- (k) applications under section 58 of that Act (declarations relating to civil partnerships).

9A-401 *Note*—Amended by the Marriage (Prohibited Degrees of Relationship) Act 1986 s.5; the Family Law Reform Act 1987 Sch.4; the Children Act 1989 Schs 11 and 13; SI 1991/1210; SI 1993/622; the Family Law Act 1986 s.68(1), Sch.1; the Copyright, Designs and Patents Act 1988 s.303(1), Sch.7; the Family Law Act 1996 Sch.8 para.51; SI 2004/3418; SI 2005/265; the Civil Partnership Act 2004 s.261(1), Sch.27, para.70 (for certain purposes only: see SI 2005/1112); the Prevention of Terrorism Act 2005 s.11, Sch.1 para.10; the Childcare Act 2006 Sch.2 para.3; Forced Marriage (Civil Protection) Act 2007 Sch.2 para.1; and the Counter-Terrorism Act 2008 s.71.



For Schs 2 and 6 to the Senior Courts Act 1981 (see Arrangement) plus any related commentary see paragraphs 9A-402+ to 9A-407+ on White Book on Westlaw UK or the Civil Procedure CD.

County Courts Act 1984

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(1984 c.28)

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Paragraph numbers marked with a “+” denote content that is available on White Book on Westlaw UK or the Civil Procedure CD.

Introductory note

9A-409 The County Courts Act 1984 replaced the County Courts Act 1959 and a number of other provisions set out in Sch.4 to the Act. By operation of the Civil Procedure Act 1997 s.10 and Sch.2 para.2(2) throughout this Act, for “county court rules”, wherever occurring, there is substituted “rules of court” and for “rule committee” there is substituted “Civil Procedure Rule Committee”.

Jurisdiction of county courts

9A-410 Formerly, in many sections in Pt II of this Act the jurisdiction of the county courts was determined by reference to “the county court limit” as defined in s.147(1). Since the coming into effect of Courts and Legal Services Act 1990 and the High Court and County Courts Jurisdiction Order 1991 the significance of this limit is very much reduced. Where it remains relevant in the sections printed below, e.g. s.23 (equity jurisdiction), the applicable “county court limit” has been inserted in brackets in the printed text. The effect of the 1990 Act and 1991 Order was to increase greatly the jurisdiction of the county courts. In relation to some proceedings, the Order places financial restrictions on the county court jurisdiction.

A county court has no jurisdiction to hear any action in which the title to any toll, fair, market or franchise is in question or any action for libel or slander (s.15(2)) and no action shall be brought in a county court on any judgment of the High Court (s.36). Further, a county court has no jurisdiction to hear any application for judicial review (Courts and Legal Services Act 1990 s.1(10)) (see para.9B-102 below), or to grant relief prescribed by the County Court Remedies Regulations 1991 reg.2 (see para.9B-78 below). In relation to certain proceedings, the county court jurisdiction is restricted by, for example, provisions in High Court and County Courts Jurisdiction Order 1991 and by “the county court limit” where it remains operative. In some instances exclusions and restrictions on jurisdiction may be overridden by agreement of the parties under s.18. Note also s.17 (Abandonment of part of claim to give court jurisdiction).

A county court claim commenced by a single plaintiff is a single action, irrespective of the number of plaintiffs to the claim, and the total amount to be recovered by all the plaintiffs in such action cannot exceed the relevant county court limit; a failure expressly to limit a county court claim to such limit is an irregularity, but does not deprive the county court of jurisdiction to hear and determine the claim and to award judgment up to such limit (*Doyle v Talbot Motor Co Ltd* [1988] 1 W.L.R. 980, CA).

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

For ss.1 to 6, 8 to 9, and 11 to 13 of the County Courts Act 1984 (see Arrangement) plus any related commentary see paragraphs 9A-411+ to 9A-434+ on White Book on Westlaw UK or the Civil Procedure CD.



Penalty for assaulting officers

14.—(1) If any person assaults an officer of a court while in the execution of his duty, he shall be liable— **9A-435**

- (a) on summary conviction, to imprisonment for a term not exceeding 3 months or to a fine of an amount not exceeding level 5 on the standard scale, or both; or
- (b) on an order made by the judge in that behalf, to be committed for a specified period not exceeding 3 months to prison or to such a fine as aforesaid, or to be so committed and to such a fine,

and a bailiff of the court may take the offender into custody, with or without warrant, and bring him before the judge.

(2) The judge may at any time revoke an order committing a person to prison under this section and, if he is already in custody, order his discharge.

(3) A district judge, assistant district judge or deputy district judge shall have the same powers under this section as a judge.

Note —Amended by the Statute Law (Repeals) Act 1986; and the Courts and Legal Services Act 1990 s.74. **9A-436**

PART II

JURISDICTION AND TRANSFER OF PROCEEDINGS

ACTIONS OF CONTRACT AND TORT

General jurisdiction in actions of contract and tort

15.—(1) Subject to subsection (2), a county court shall have jurisdiction to hear and determine any action founded on contract or tort. **9A-437**

(2) A county court shall not, except as in this Act provided, have jurisdiction to hear and determine—

- (a) [...]
- (b) any action in which the title to any toll, fair, market or franchise is in question; or
- (c) any action for libel or slander.

Note —Amended by the High Court and County Courts Jurisdiction Order (SI 1991/724) art.2(8) and Sch. Pt I. **9A-438**

“any action founded on contract or tort”

Before the High Court and County Courts Jurisdiction Order 1991 came into force on July 1, 1991, this general jurisdiction was limited to £5,000. Now the jurisdiction of county courts in claims for money is governed by the 1991 Order (para.9B-928 below). As to whether a particular claim is an action “founded on contract”, see *Hutchings v Islington LBC* [1998] 3 All E.R. 445, CA. **9A-439**

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Money recoverable by statute

9A-440 16. A county court shall have jurisdiction to hear and determine an action for the recovery of a sum recoverable by virtue of any enactment for the time being in force, if—

(a) it is not provided by that or any other enactment that such sums shall only be recoverable in the High Court or shall only be recoverable summarily;

(b) [...]

9A-441 *Note* —Amended by the High Court and County Courts Jurisdiction Order (SI 1991/724) art.2(8) and Sch. Pt 1.

Abandonment of part of claim to give court jurisdiction

9A-442 17.—(1) Where a plaintiff has a cause of action for more than a county court limit in which, if it were not for more than the county court limit, a county court would have jurisdiction, the plaintiff may abandon the excess, and thereupon a county court shall have jurisdiction to hear and determine the action, but the plaintiff shall not recover in the action an amount exceeding the county court limit.

(2) Where the court has jurisdiction to hear and determine an action by virtue of this section, the judgment of the court in the action shall be in full discharge of all demands in respect of the cause of action, and entry of the judgment shall be made accordingly.

Jurisdiction by agreement in certain actions

9A-443 18. If the parties to any action, other than an action which, if commenced in the High Court, would have been assigned to the Chancery Division or to the Family Division or have involved the exercise of the High Court's Admiralty jurisdiction, agree, by a memorandum signed by them or by their respective legal representatives, that a county court specified in the memorandum shall have jurisdiction in the action, that court shall have jurisdiction to hear and determine the action accordingly.

9A-444 *Note* —Amended by the Courts and Legal Services Act 1990 Sch.18, para.49(3).

The exclusions mentioned in s.15(2) may be overridden by an agreement under this section. This section applies only to actions which could be brought in the QBD. See s.24, para.9A-453 for a similar provision relating to certain equity proceedings.

RECOVERY OF LAND AND CASES WHERE TITLE IN QUESTION

Actions for recovery of land and actions where title is in question

9A-445 21.—(1) A county court shall have jurisdiction to hear and determine any action for the recovery of land.

(2) A county court shall have jurisdiction to hear and determine any action in which the title to any hereditament comes into question.

(3) Where a mortgage of land consists of or includes a dwelling-house and no part of the land is situated in Greater London then, subject to subsection (4), if a county court has jurisdiction by virtue of

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this section to hear and determine an action in which the mortgagee under that mortgage claims possession of the mortgaged property, no court other than a county court shall have jurisdiction to hear and determine that action.

(4) Subsection (3) shall not apply to an action for foreclosure or sale in which a claim for possession of the mortgaged property is also made.

(5) [...]

(6) [...]

(7) In this section—

“dwelling-house” includes any building or part of a building which is used as a dwelling;

“mortgage” includes a charge and “mortgagor” and “mortgagee” shall be construed accordingly;

“mortgagor” and “mortgagee” includes any person deriving title under the original mortgagor or mortgagee.

(8) The fact that part of the premises comprised in a dwelling-house is used as a shop or office for business, trade or professional purposes shall not prevent the dwelling-house from being a dwelling-house for the purposes of this section.

(9) This section does not apply to a mortgage securing an agreement which is a regulated agreement within the meaning of the Consumer Credit Act 1974.

Note —Amended by the High Court and County Courts Jurisdiction Order (SI 1991/724) art.2(8) and Sch. Pt I. **9A-446**

“title to any hereditament”

Section 147 (Interpretation) states that “hereditament” includes both a corporeal and an incorporeal hereditament. **9A-447**

EQUITY PROCEEDINGS

Equity jurisdiction

23. A county court shall have all jurisdiction of the High Court to hear and determine— **9A-448**

(a) proceedings for the administration of the estate of a deceased person, where the estate does not exceed in amount or value the county court limit £30,000,

(b) proceedings—

(i) for the execution of any trust, or

(ii) for a declaration that a trust subsists, or

(iii) under section 1 of the Variation of Trusts Act 1958,

where the estate or fund subject, or alleged to be subject, to the trust does not exceed in amount or value the county court limit £30,000;

(c) proceedings for foreclosure or redemption of any mortgage or for enforcing any charge or lien, where the amount owing in respect of the mortgage charge or lien does not exceed the county court limit £30,000;

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

- (d) proceedings for the specific performance, or for the rectification, delivery up or cancellation, of any agreement for the sale, purchase or lease of any property, where, in the case of a sale or purchase, the purchase money, or in the case of a lease, the value of the property, does not exceed the county court limit £30,000;
- (e) proceedings relating to the maintenance or advancement of a minor, where the property of the minor does not exceed in amount or value the county court limit £30,000;
- (f) proceedings for the dissolution or winding-up of any partnership (whether or not the existence of the partnership is in dispute), where the whole assets of the partnership do not exceed in amount or value the county court limit £30,000;
- (g) proceedings for relief against fraud or mistake, where the damage sustained or the estate or fund in respect of which relief is sought does not exceed in amount or value the county court limit £30,000.

9A-449 *Note* —The text of this section has been amended so as to indicate that, for the purposes of the equity jurisdiction, the County Court limit is £30,000 (see County Courts Jurisdiction Order 1981).

9A-449.1 “*proceedings for foreclosure*” —Although county courts have an unlimited jurisdiction to make charging orders, their jurisdiction to enforce them by orders for sale is restricted by s.23(c) to proceedings in which the amount owing does not exceed the county court limit (see further Vol.1 para. 73.10.1). However, the High Court’s power to transfer proceedings to a county court as provided for by s.40 of this Act includes power to transfer an application for an order for sale to enforce a final charging order for a sum in excess of that limit (*National Westminster Bank plc v King* [2008] EWHC 280 (Ch); *The Times* April 14, 2008, (David Richards J.)).

Jurisdiction by agreement in certain equity proceedings

9A-450 **24.**—(1) If, as respects any proceedings to which this section applies, the parties agree, by a memorandum signed by them or by their respective legal representatives or agents, that a county court specified in the memorandum shall have jurisdiction in the proceedings, that court shall, notwithstanding anything in any enactment, have jurisdiction to hear and determine the proceedings accordingly.

(2) Subject to subsection (3), this section applies to any proceedings in which a county court would have jurisdiction by virtue of—

- (a) section 113(3) of the Settled Land Act 1925,
- (b) section 63A of the Trustee Act 1925,
- (c) sections 3(7), 49(4), 66(4), 89(7), 90(3), 91(8), 92(2), 136(3), 181(2), 188(2) of, and paragraph 3A of Part III and paragraph 1(3A) and (4A) of Part IV of Schedule 1 to, the Law of Property Act 1925,
- (d) sections 17(2), 38(4), 41(1A) and 43(4) of the Administration of Estates Act 1925,
- (e) section 6(1) of the Leasehold Property (Repairs) Act 1938,

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

(f) sections 1(6A) and 5(11) of the Land Charges Act 1972, and

(g) section 23 of this Act,

but for the limits of the jurisdiction of the court provided in those enactments.

(3) This section does not apply to proceedings under section 1 of the Variation of Trusts Act 1958.


Note —Amended by the Courts and Legal Services Act 1990 Sch.18 para.49(3); the High Court and County Courts Jurisdiction Order (SI 1991/724) art.2(8) and Sch. Pt I and the Statute Law (Repeals) Act 2004 Sch.1, Pt 1, Group 4. **9A-451**

FAMILY PROVISION PROCEEDINGS

Jurisdiction under Inheritance (Provisions for Family and Dependants) Act 1975

25. A county court shall have jurisdiction to hear and determine any application for an order under section 2 of the Inheritance (Provision for Family and Dependants) Act 1975 (including any application for permission to apply for such an order and any application made, in the proceedings on an application for such an order under any other provision of that Act). **9A-452**

Note —Amended by the High Court and County Courts Jurisdiction Order (SI 1991/724) art.2(8) and Sch. Pt I. **9A-453**

For ss.26 to 28, 30 to 33, 35 to 37 of the County Courts Act 1984 (see Arrangement) plus any related commentary see paragraphs 9A-454+ to 9A-467+ on White Book on Westlaw UK or the Civil Procedure CD. 

Remedies available in county courts

38.—(1) Subject to what follows, in any proceedings in a county court the court may make any order which could be made by the High Court if the proceedings were in the High Court. **9A-468**

(2) Any order made by a county court may be—

(a) absolute or conditional;

(b) final or interlocutory.

(3) A county court shall not have power—

(a) to order mandamus, certiorari or prohibition; or

(b) to make any order of a prescribed kind.

(4) Regulations under subsection (3)—

(a) may provide for any of their provisions not to apply in such circumstances or descriptions of case as may be specified in the regulations;

(b) may provide for the transfer of the proceedings to the High Court for the purpose of enabling an order of a kind prescribed under subsection (3) to be made;

(4A) If regulations are made under subsection (3), rules may be made in accordance with Part 1 of Schedule 1 to the Constitutional Reform Act 2005 about procedure relevant to the matters prescribed in the regulations.

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

SECTION 9A: MAIN STATUTES

(5) In this section “prescribed” means prescribed by regulations made under this section by the Lord Chancellor after consulting the Lord Chief Justice.

(6) The power to make regulations under this section shall be exercised by statutory instrument.

(7) No such statutory instrument shall be made unless a draft of the instrument has been approved by both Houses of Parliament.

9A-469 *Note* —Substituted by the Courts and Legal Services Act 1990 s.3, for old ss.38 and 39 of the County Court Act 1984; amended by the Constitutional Reform Act 2005 ss.12(2), 15(1), 146, Sch.1 para.17, Sch.4 para.167 and Sch.18 (see para.9A-4.1 above).

“Regulations”

9A-470 See County Court Remedies Regulations 1991 (SI 1991/1222) as amended by the County Court Remedies (Amendment) Regulations 1995 (SI 1995/206) printed below at para.9B-81.

“any order which could be made by the High Court”

9A-471 The County Court Remedies Regulations 1991 (SI 1991/1222) restrict the grant of seizing orders and freezing injunctions by county courts, but otherwise the power of the county court to grant an interlocutory injunction is the same as that of the High Court (see SCA 1981 s.37 above, paras 9A-109 and 9A-111). Further, art.3 of the High Court and County Courts Jurisdiction Order 1991 provides that the High Court shall have jurisdiction to hear an application for an injunction made in the course of, or in anticipation of, proceedings in a county court where a county court may not, by virtue of s.38(3)(b) or otherwise, grant such an injunction (see para.9B-143 below). It is not necessary for a party seeking to invoke this jurisdiction to arrange for the county court proceedings to be transferred to the High Court or to initiate originating proceedings in that Court (*Schmidt v Wong (Practice Note)* [2005] EWCA Civ 1506; [2005] 1 W.L.R. 561, CA). In *Burris v Azadani* [1995] 1 W.L.R. 1372, CA, [1995] 4 All E.R. 802, CA, it was held that a county court had power to grant an interlocutory injunction restraining A from molesting B containing a term excluding him from vicinity of B’s home where such term was reasonably regarded as necessary for the protection of B’s legitimate interest; it could not be objected that the conduct to be restrained by the term was not in itself tortious or otherwise unlawful. See also *C v K (Ouster Order: Non-Parent)* [1996] 2 F.L.R. 506 (Wall J.) (molestation and ouster injunctions as injunctive relief). Article 3 of the High Court and County Courts Jurisdiction Order 1991 provides that the High Court shall have jurisdiction to hear an application for an injunction (including a freezing injunction) made in the course of or in anticipation of proceedings in a county court where a county court may not, by virtue of regulations under s.38(3)(b) or otherwise, grant an injunction. See further Vol.1, para.25.1.27.

* * * *

TRANSFER OF PROCEEDINGS

Transfer of proceedings to county court

9A-472 **40.**—(1) Where the High Court is satisfied that any proceedings before it are required by any provision of a kind mentioned in subsection (8) to be in a county court it shall—

- (a) order the transfer of the proceedings to a county court;
or
- (b) if the court is satisfied that the person bringing the proceedings knew, or ought to have known, of that requirement, order that they be struck out.

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

(2) Subject to any such provision, the High Court may order the transfer of any proceedings before it to a county court.

(3) An order under this section may be made either on the motion of the High Court itself or on the application of any party to the proceedings.

(4) Proceedings transferred under this section shall be transferred to such county court as the High Court considers appropriate, having taken into account the convenience of the parties and that of any other persons likely to be affected and the state of business in the courts concerned.

(5) The transfer of any proceedings under this section shall not affect any right of appeal from the order directing the transfer.

(6) Where proceedings for the enforcement of any judgment or order of the High Court are transferred under this section—

(a) the judgment or order may be enforced as if it were a judgment or order of a county court; and

(b) subject to subsection (7), it shall be treated as a judgment or order of that court for all purposes.

(7) Where proceedings for the enforcement of any judgment or order of the High Court are transferred under this section—

(a) the powers of any court to set aside, correct, vary or quash a judgment or order of the High Court, and the enactments relating to appeals from such a judgment or order, shall continue to apply; and

(b) the powers of any court to set aside, correct, vary or quash a judgment or order of a county court, and the enactments relating to appeals from such a judgment or order, shall not apply.

(8) The provisions referred to in subsection (1) are any made—

(a) under section 1 of the Courts and Legal Services Act 1990; or

(b) by or under any other enactment.

(9) This section does not apply to family proceedings within the meaning of Part V of the Matrimonial and Family Proceedings Act 1984.

Note —Substituted by the Courts and Legal Services Act 1990 s.2(1).

9A-473

“Transfer of the proceedings”

For the practice in relation to transfer, see CPR Pt 30, Vol.1, para.30.0.1. For procedure for appeal against order of transfer, see Practice Direction (Transfer), para.5.1, Vol.1, para.30PD.5. For transfer of Chancery work from the High Court to a county court and patents county court, see Chancery Guide Chs 13 and 23 (paras 1A-128 and 1A-174 above). For observations on time when transfer takes effect, see *Kings Quality Homes Ltd v AJ Paints Ltd* [1998] 1 W.L.R. 124, CA (jurisdiction of county court judge to hear appeal from order made by district judge before proceedings transferred from High Court to a county court).

9A-474

“order that they be struck out”

Where, under s.40(1), the Court is satisfied that any proceedings before it are required to be in a county court the Court is not required to strike out the proceedings but may, and should normally, order their transfer to a county court (*Restick v*

9A-475

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SECTION 9A: MAIN STATUTES

Crickmore [1994] 1 W.L.R. 420; [1994] 2 All E.R. 112, CA. Presumably the same construction should be applied to s.42(1).

“provisions ... made”

- 9A-476** The provision made under s.1 of the 1990 Act is the High Court and County Courts Jurisdiction Order 1991 (see para.9B-928 below).

Second application for transfer

- 9A-477** An order refusing the transfer of an action can never be final because circumstances can change. Nevertheless, if a party attempts but fails to obtain a transfer, and does not appeal against the refusal to transfer, but thereafter makes a second application, he will ordinarily be held to be guilty of an abuse of process unless there has been a material change of circumstances, or new grounds have arisen or new evidence has come to light; for to do otherwise would be oppressive or unjust to the party opposing the first application (*Habib Bank AG Zurich v Mindi Investment Ltd* (1987) 131 S.J. 1455; *The Times*, October 9, 1987, CA). See further Vol.1, para.23.0.14 “Successive applications for same relief”. See Vol.1, paras 23.0.14 and 23.0.15

Subsection (8), Courts and Legal Services Act 1990 s.1

- 9A-478** Provisions made under this section are found in the High Court and County Courts Jurisdiction Order 1991 (SI 1991/724) (see para.9B-928 below).

For transfer of proceedings under the Arbitration Act 1996, see the High Court and County Courts (Allocation of Arbitration Proceedings) Order 1996 art.5 (see para.2E-379).

Transfer to High Court by order of High Court

- 9A-479** **41.—**(1) If at any stage in proceedings commenced in a county court or transferred to a county court under section 40, the High Court thinks it desirable that the proceedings, or any part of them, should be heard and determined in the High Court, it may order the transfer to the High Court of the proceedings or, as the case may be, of that part of them.

(2) The power conferred by subsection (1) is without prejudice to section 29 of the Senior Courts Act 1981 (power of High Court to issue prerogative orders) but shall be exercised in relation to family proceedings (within the meaning of Part V of the Matrimonial and Family Proceedings Act 1984) in accordance with any direction given under section 37 of that Act (directions as to distribution and transfer of family business and proceedings).

(3) The power conferred by subsection (1) shall be exercised subject to any provision made—

- (a) under section 1 of the Courts and Legal Services Act 1990; or
- (b) by or under any other enactment.

- 9A-480** *Note*—Subsection (2) was amended by the Matrimonial and Family Proceedings Act 1984 Sch.1 para.31; subs.(3) was added by the Courts and Legal Services Act 1990 s.2(2). Amended by the Constitutional Reform Act 2005 s.59 and Sch.11 para.1 with effect from October 1, 2009 (SI 2009/1604).

Subsection (3), Courts and Legal Services Act 1990 s.1

- 9A-481** Provisions made under this section are found in the High Court and County Courts Jurisdiction Order 1991 (SI 1991/724) (see para.9B-928). In *McLaughlin v British Coal Corp*, *The Times*, December 16, 1992, CA, the defendants applied to a county court judge to have proceedings transferred to the High Court where other proceedings raising similar issues were pending. It was held the plaintiffs were entitled to have

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their action treated separately and that the judge applied art.7 of the 1991 Order correctly in refusing to transfer the proceedings.

For transfer of proceedings under the Arbitration Act 1996, see the High Court and County Courts (Allocation of Arbitration Proceedings) Order 1996 art.5, see para.2E-379 above.

For rules of court, see CPR Pt 30, Vol.1, para.30.0.1.

For transfer of proceedings from a county court to the High Court in insolvency proceedings, see *Bullard & Taplin Ltd, Re* [1996] B.C.C. 973 (Knox J.), *Licence Holder, Re* [1997] B.C.C. 666 (Carnwath J.), *Debtors (No.13-MISC-2000 and No.14-MISC-2000), Re, The Times*, April 10, 2000 (Neuberger J.); *Hall v Van der Heiden* [2010] EWHC 537 (TCC), March 15, 2010, unrep. (Coulson J.), and the Insolvency Rules 1986 rr.7.11 to 7.15.

Transfer to High Court by order of a county court

42.—(1) Where a county court is satisfied that any proceedings **9A-482** before it are required by any provision of a kind mentioned in subsection (7) to be in the High Court, it shall—

- (a) order the transfer of the proceedings to the High Court; or
- (b) if the court is satisfied that the person bringing the proceedings knew, or ought to have known, of that requirement, order that they be struck out.

(2) Subject to any such provision, a county court may order the transfer of any proceedings before it to the High Court.

(3) An order under this section may be made either on the motion of the court itself or on the application of any party to the proceedings.

(4) The transfer of any proceedings under this section shall not affect any right of appeal from the order directing the transfer.

(5) Where the proceedings for the enforcement of any judgment or order of a county court are transferred under this section—

- (a) the judgment or order may be enforced as if it were a judgment or order of the High Court; and
- (b) subject to subsection (6), it shall be treated as a judgment or order of that court for all purposes.

(6) Where proceedings for the enforcement of any judgment or order of a county court are transferred under this section—

- (a) the powers of any court to set aside, correct, vary or quash a judgment or order of a county court, and the enactments relating to appeals from a judgment or order, shall continue to apply; and
- (b) the powers of any court to set aside, correct, vary or quash a judgment or order of the High Court, and the enactments relating to appeals from such a judgment or order, shall not apply.

(7) The provisions referred to in subsection (1) are any made—

- (a) under section 1 of the Courts and Legal Services Act 1990; or
- (b) by or under any other enactment.

(8) This section does not apply to family proceedings within the

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SECTION 9A: MAIN STATUTES

meaning of Part V of the Matrimonial and Family Proceedings Act 1984.

9A-483 *Note* —Substituted by the Courts and Legal Services Act 1990 s.2(3).

Subsection (7), Courts and Legal Services Act 1990 s.1

9A-484 The provision made under s.1 of the 1990 Act is the High Court and County Courts Jurisdiction Order 1991 (see para.9B-928). An example of “any other enactment” concerning transfer to the High Court by order of a county court is the Copyright, Designs and Patents Act 1988 s.289, discussed in *Chaplin Patents Holdings Company Plc v Group Lotus Plc*, *The Times*, January 12, 1994, CA.

Transfer of proceedings to High Court

9A-485 Under this section, depending on the circumstances, county court proceedings may or must be transferred to the High Court. The jurisdiction of the county courts to deal with freezing orders is restricted (see para.9A-471+ above). Where an application for a freezing order is wrongly issued in a county court in connection with a claim properly brought in that court, that application (as distinct from the claim to which it is incidental) does not constitute free-standing “proceedings” within the meaning of s.42. Consequently, a county court judge has no power or duty under sub-s.(1) or (2) of s.42 to transfer the application to the High Court (*Schmidt v Wong (Practice Note)* [2005] EWCA Civ 1506; [2005] 1 W.L.R. 561, CA).

For transfer of proceedings under the Arbitration Act 1996, see the High Court and County Courts (Allocation of Arbitration Proceedings) Order 1996 art.5, see para.2E-379 above.

For rules of court, see CPR Pt 30.

* * * *

Costs in transferred cases

9A-486 45.—(1) Where an action, counterclaim or matter is ordered to be transferred—

- (a) from the High Court to a county court; or
- (b) from a county court to the High Court; or
- (c) from one county court to another county court,

the costs of the whole proceedings both before and after the transfer shall, subject to any order of the court which ordered the transfer, be in the discretion of the court to which the proceedings are transferred; and that court shall have power to make orders with respect to the costs, and the costs of the whole proceedings shall be taxed in that court.

(2) [...]

9A-487 *Note* —Amended by the Courts and Legal Services Act 1990 Sch.20.

PART III

PROCEDURE

PARTIES

Proceedings by the Crown

9A-488 46.—(1) Subject to the provisions of any enactment limiting the jurisdiction of a county court, whether by reference to the subject mat-

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ter of the proceedings to be brought or the amount sought to be recovered in the proceedings or otherwise, proceedings by the Crown may be instituted in a county court.

(2) Subject to section 40(5), all rules of law and enactments regulating the removal or transfer of proceedings from a county court to the High Court and the transfer of proceedings in the High Court to a county court shall apply respectively to the removal or transfer of proceedings in the High Court to a county court shall apply respectively to the removal or transfer of proceedings by the Crown in a county court and to the transfer of proceedings by the Crown in the High Court.

(3) Nothing in this section shall apply to proceedings affecting Her Majesty in Her private capacity.

Proceedings by the Crown

Subsection (1) states that proceedings may be instituted *by the Crown* in a county court. For statutory basis for proceedings *against the Crown* in a county court, see the Crown Proceedings Act 1947 s.15 (para.9B–1125+). Rules of court for proceedings by and against the Crown whether in a county court of High Court are found in CPR Pt 66 (Crown proceedings).

9A–489

Subsection (2) is expressed as being “subject to section 40(5)”. Section 40 (Transfer of proceedings to county court) was substituted by the Courts and Legal Services Act 1990 s.2(1). Before the substitution, s.40(5) stated that an order for the transfer to a county court of any proceedings by or against the Crown in the High Court “shall not be made without the consent of the Crown”. No such provision appears in s.40 as substituted by the 1990 Act (see paras 9A–475 above). However, the High Court and County Courts Jurisdiction Order 1991 art.11 stated (see para.9B–928) that, for a period of two years from the date upon which the Order came into force (i.e. until July 1, 1993), no order should be made transferring proceedings in the High Court to which the Crown is a party to a county court except (a) when the proceedings are set down to be tried or heard, or (b) with the consent of the Crown. Section 20(1) of the Crown Proceedings Act 1947, which gave the Attorney General power to require that proceedings against the Crown instituted in a county court be transferred to the High Court, was revoked when Pt 66 was inserted in the CPR by the Civil Procedure (Amendment No.3) Rules 2005 (SI 2005/2292). (At the same time, s.19 of the 1947 Act (Venue and related matters) was also revoked.) For provisions as to transfer of proceedings involving the Crown, whether from a county to the High Court or vice versa, insofar as they differ from provisions applying to proceedings where the Crown is not involved, see Pt 66 and the practice direction supplementing that Part.

* * * *

Persons jointly liable

48.—(1) Where a plaintiff has a demand recoverable under this Act against two or more persons jointly liable, it shall be sufficient to serve any of those persons with process, and judgment may be obtained and execution issued against any person so served, notwithstanding that others jointly liable may not have been served or sued or may not be within the jurisdiction of the court.

9A–490

(2) Where judgment is so obtained against any person by virtue of subsection (1) and is satisfied by that person, he shall be entitled to recover in the court contribution from any other person jointly liable with him.

Persons jointly liable

Two or more persons may be joined together in one action as defendants see CPR

9A–491

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r.7.3 (see Vol.1, para.7.3). Formerly, it was expressly provided by rules of court that no action or matter shall be defeated by reason of the non-joinder of any party as defendant (see CCR O.5 r.4 and note RSC O.15 r.6(1)); but no comparable provision is included in the CPR. At common law, where two (or more) persons were jointly liable for the payment of a debt or damages and the plaintiff proceeded to judgment against one only, the other was released from his obligations ("release by judgment"), even if the judgment remained unsatisfied. The result was that the plaintiff could not proceed against the other person. Further, the judgment debtor could not bring proceedings against him for a contribution. The "release by judgment" rule was removed by the Law Reform (Married Women and Tortfeasors) Act 1935 and the Civil Liability (Contribution) Act 1978. Section 48 also alters the effect of the rule but this provision has a much earlier provenance as it first appeared as the County Courts Act 1846 s.68. The section makes it clear that a defendant with a right to contribution from another person is not entitled, for the purpose of protecting that right, to a stay of proceedings until that other is joined as a defendant by the plaintiff. The plaintiff may proceed to judgment and the defendant's right to recover contribution against the other person is preserved. Whilst "demands recoverable under this Act" were limited to cases involving small sums, the impact on the release by judgment rule of the legislation now found in s.48 was slight. By the time those limits were significantly altered the rule had been abolished by the legislation referred to above.

Bankruptcy of plaintiff

9A-492 49.—(1) The bankruptcy of the plaintiff in any action in a county court which the trustee might maintain for the benefit of the creditors shall not cause the action to abate if, within such reasonable time as the court orders, the trustee elects to continue the action and to give security for the costs of the action.

(2) The hearing of the action may be adjourned until such an election is made.

(3) Where the trustee does not elect to continue the action and to give such security as is mentioned in subsection (1) within the time limited by the order, the defendant may avail himself of the bankruptcy as a defence to the action.

Bankruptcy of plaintiff

9A-493 In proceedings in the High Court, the implications of the bankruptcy of a plaintiff are dealt with by CPR r.19.2. The most significant feature of s.49 is that it states that, upon the bankruptcy of the plaintiff, his cause of action shall not abate provided, within such reasonable time as the court orders, the trustee elects to continue the action "and to give security for the costs thereof". Generally, a plaintiff, whether bringing proceedings as a trustee or not, and whether bankrupt or not, cannot be required to give security for costs (CPR r.25.13). Section 49 creates an exception in county court proceedings. It would seem that where proceedings are transferred from the High Court to a county court and, before the transfer takes effect, by order made in the High Court under CPR r.19.2 a trustee becomes plaintiff, the county court has no jurisdiction under this section to require the trustee to give security for costs (*Hemming v Davies* [1898] 1 Q.B. 660).

INTERIM PAYMENTS IN PENDING PROCEEDINGS

Orders for interim payment

9A-494 50.—(1) Provision may be made by rules of court for enabling the court, in such circumstances as may be prescribed, to make an order requiring a party to the proceedings to make an interim payment of such amount as may be specified in the order, with provision for the payment to be made to such other party to the proceedings as may be so specified or, if the order so provides, by paying it into court.

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

(2) Any rules of court which make provision in accordance with subsection (1) may include provision for enabling a party to any proceedings who, in pursuance of such an order, has made an interim payment to recover the whole or part of the amount of the payment in such circumstances, and from such other party to the proceedings, as may be determined in accordance with the rules.

(3) Any rules made by virtue of this section may include such incidental, supplementary and consequential provisions as the rule committee may consider necessary or expedient.

(4) Nothing in this section shall be construed as affecting the exercise of any power relating to costs, including any power to make rules of court relating to costs.

(5) In this section “interim payment”, in relation to a party to any proceedings, means a payment on account of any damages, debt or other sum (excluding any costs) which that party may be held liable to pay to or for the benefit of another party to the proceedings if a final judgment or order of the court in the proceedings is given or made in favour of that other party; and any reference to a party to any proceedings includes a reference to any person who for the purposes of the proceedings acts as next friend or guardian of a party to the proceedings.

Note —Amended by the Civil Procedure Act 1997 Sch.2 para.2(2).

9A-495

Orders for interim payment

The jurisdictions of the High Court and the county courts to order interim payments may be traced to the Administration of Justice Act 1969 s.20. The Senior Courts Act 1981 s.32 is in similar terms to s.50.

For rules of court, see CPR rr.25.6 et seq.

9A-496

PROVISIONAL DAMAGES FOR PERSONAL INJURIES

Orders for provisional damages for personal injuries

51.—(1) This section applies to an action for damages for personal injuries in which there is proved or admitted to be a chance that at some definite or indefinite time in the future the injured person will, as a result of the act or omission which gave rise to the cause of action, develop some serious disease or suffer some serious deterioration in his physical or mental condition.

9A-497

(2) Subject to subsection (4), as regards any action for damages to which this section applies in which a judgment is given in the county court, provision may be made by rules of court for enabling the court, in such circumstances as may be prescribed, to award the injured person—

- (a) damages assessed on the assumption that the injured person will not develop the disease or suffer the deterioration in his condition; and
- (b) further damages at a future date if he develops the disease or suffers the deterioration.

(3) Any rules made by virtue of this section may include such incidental, supplementary and consequential provisions as the rule committee may consider necessary or expedient.

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- (4) Nothing in this section shall be construed—
- (a) as affecting the exercise of any power relating to costs, including any power to make rules of court relating to costs; or
 - (b) as prejudicing any duty of the court under any enactment or rule of law to reduce or limit the total damages which would have been recoverable apart from any such duty.

(5) In this section “personal injuries” includes any disease and any impairment of a person’s physical or mental condition.

9A-498 *Note* —Amended by the Civil Procedure Act 1997 Sch.2 para.2(2). See also the Senior Courts Act 1981 s.32A (para.9A-107 above).

Orders for provisional damages for personal injuries

9A-499 The jurisdictions of the High Court and the county courts to order provisional damages may be traced to the Administration of Justice Act 1968. The Senior Courts Act 1981 s.32A (para.9A-107) is in similar terms to s.51.

For rules of court, see CPR Pt 41.

As to appeal against a “certificate of total benefit” given by the Secretary of State in accordance with the Social Security Administration Act 1992 Pt IV, where an award of provisional damages has been made under s.51(2)(a) (or under the Senior Courts Act 1981 s.32A(2)), see s.98(3) of the 1992 Act. See also the Damages Act 1996 s.3; the Social Security (Recovery of Benefits) Act 1997; and *Willson v Ministry of Defence* [1991] 1 All E.R. 638; [1991] I.C.R. 595; and *Curi v Colina*, *The Times*, October 14, 1998, CA.

DISCOVERY AND RELATED PROCEDURES

Powers of court exercisable before commencement of action

9A-500 52.—(1) On the application of any person in accordance with rules of court, a county court shall, in such circumstances as may be prescribed, have power to make an order providing for any one or more of the following matters, that is to say—

- (a) the inspection, photographing, preservation, custody and detention of property which appears to the court to be property which may become the subject-matter of subsequent proceedings in the court, or as to which any question may arise in any such proceedings; and
- (b) the taking of samples of any such property as is mentioned in paragraph (a) and the carrying out of any experiment on or with any such property.

(2) On the application, in accordance with rules of court, of a person who appears to a county court to be likely to be a party to subsequent proceedings in that court, the county court shall in such circumstances as may be prescribed, have power to order a person who appears to the court to be likely to be a party to the proceedings and to be likely to have or to have had in his possession, custody or power any documents which are relevant to an issue arising or likely to arise out of that claim—

- (a) to disclose whether those documents are in his possession, custody or power; and
- (b) to produce such of those documents as are in his possession,

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sion, custody or power to the applicant or, on such conditions as may be specified in the order—

- (i) to the applicant's legal advisers; or
- (ii) to the applicant's legal advisers and any medical or other professional adviser of the applicant; or
- (iii) if the applicant has no legal adviser, to any medical or other professional adviser of the applicant.

(3) This section is subject to any provision made under section 38.

Note —Subsection (3) added by the Courts and Legal Services Act 1990 s.125(3), Sch.18 para.43. Amended by the Civil Procedure (Modification of Enactments) Order 1998 (SI 1998/2940) art.6(b) and by the Civil Procedure Act 1997 Sch.2 para.2(2). **9A-501**

Powers of court exercisable before commencement of action

By order made under the Civil Procedure Act 1997 s.8, the Lord Chancellor may amend subs.(2) of this section for the purposes mentioned there (see para.9A-753). By the Civil Procedure (Modification of Enactments) Order 1998 (SI 1998/2940) para.6(b), subs.(2) was amended with the effect that the court's power to make an order under this section is no longer restricted to proceedings in which a claim in respect of personal injuries to a person, or in respect of a person's death, is likely to be made. It may be noted that the 1998 Order was made, not under s.8 of the 1997 Act, but under s.4(2) of that Act.

The comparable provision to s.52(2) in the Senior Courts Act 1981 is s.33(3), which was also amended by the 1998 Order (see para.9A-110).

subs.(1) —The powers of the High Court and the county courts to order inspection, etc., and taking of samples, etc., before commencement of action may be traced to the Administration of Justice Act 1969 s.21. The Senior Courts Act 1981 s.33(1) (para.9A-110) is in similar terms to s.52(1).

subs.(2) —The powers of the High Court and the county courts to order disclosure and inspection of documents before commencement of action may be traced to the Administration of Justice Act 1970 s.31. The Senior Courts Act 1981 s.33(2) (para.9A-110) is in similar, terms to s.52(2). **9A-503**

subs.(3) —Generally, s.52 gives the county court the same powers as those enjoyed by the High Court in relation to the matters dealt with in subs.(1) and (2). Section 38 states that, subject to that section and regulations made under it, in any in a county court the court may make any order which could be made in the High Court if the proceedings were in the High Court. Any restrictions so imposed apply to the powers granted by this section. **9A-504**

Rules of court

The orders that a court may make under s.52 are listed among the interim remedies referred to in CPR r.25.1; see further Vol.1, paras 25.1.26 and 25.1.27. **9A-505**

Power of court to order disclosure of documents, inspection of property, etc., in proceedings for personal injuries or death

53.—(1) [...]

(2) On the application, in accordance with county court rules, of a party to any proceedings, a county court shall, in such circumstances as may be prescribed, have power to order a person who is not a party to the proceedings and who appears to the court to be likely to have in his possession, custody or power any documents which are relevant to an issue arising out of the said claim—

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- (a) to disclose whether those documents are in his possession, custody or power; and
- (b) to produce such of those documents as are in his possession, custody or power to the applicant or, on such conditions as may be specified in the order—
 - (i) to the applicant's legal advisers; or
 - (ii) to the applicant's legal advisers and any medical or other professional adviser of the applicant; or
 - (iii) if the applicant has no legal adviser, to any medical or other professional adviser of the applicant.
- (3) On the application, in accordance with county court rules, of a party to any proceedings, a county court shall, in such instances as may be prescribed, have power to make an order providing for any one or more of the following matters, that is to say—
 - (a) the inspection, photographing, preservation, custody and detention of property which is not the property of, or in the possession of, any party to the proceedings but which is the subject-matter of the proceedings or as to which any question arises in the proceedings;
 - (b) the taking of samples of any such property as is mentioned in paragraph (a) and the carrying out of any experiment on or with any such property.
- (4) The preceding provisions of this section are without prejudice to the exercise by a county court of any power to make orders which is exercisable apart from those provisions.
- (5) This section is subject to any provision made under section 38.

9A-507 *Note* —Subsection (5) was added by the Courts and Legal Services Act 1990 s.125(3) and Sch.18 para.44. Subsection (1), (2) and (3) were amended by the Civil Procedure (Modification of Enactments) Order 1998 (SI 1998/2940) art.6(b).

Power of court to order disclosure of documents, inspection of property, etc., in proceedings for personal injuries or death

9A-508 The powers of the High Court and the county courts to order, what could be called, “third party discovery” may be traced to the Administration of Justice Act 1970 s.32.

This section was amended by the Civil Procedure (Modification of Enactments) Order 1998 (SI 1998/2940) para.6(c), made under the Civil Procedure Act 1997 s.4(2), with the effect that the court's power to make an order under this section is no longer restricted to proceedings in which a claim in respect of personal injuries to a person, or in respect of a person's death, is likely to be made. In terms, the 1998 Order did not amend the title to s.53 which reads “Power of court to order disclosure of documents, inspection of property, etc., *in proceedings for personal injuries or death*”. Obviously, the words in italics are no longer apposite.

The comparable provision to s.53 in the Senior Courts Act 1981 is s.34, which was also amended by the 1998 Order (see para.9A-115).

This section is subject to s.38 (see commentary to s.52(3), above).

Rules of Court

9A-509 The orders that a court may make under section 53 are listed among the interim remedies referred to in CPR r.25.1; see further Vol.1, paras 25.1.28 and 25.1.29. Note also CPR rr.25.5, 31.17 and 48.1.

Provisions supplementary to sections 52 and 53

9A-510 **54.**—(1) A county court shall not make an order under section 52

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or 53 if it considers that compliance with the order, if made, would be likely to be injurious to the public interest.

(2) Rules of court may make provision as to the circumstances in which an order under section 52 or 53 can be made; and any rules making such provision may include such incidental, supplementary and consequential provisions as the Civil Procedure Rule Committee may consider necessary or expedient.

(3) Without prejudice to the generality of subsection (2), rules of court shall be made for the purpose of ensuring that the costs of and incidental to proceedings for an order under section 52(2) or 53 incurred by the person against whom the order is sought shall be awarded to that person unless the court otherwise directs.

(4) Sections 52(2) and 53 and this section bind the Crown; and section 52(1) binds the Crown so far as it relates to property as to which it appears to the court that it may become the subject-matter of subsequent proceedings involving a claim in respect of personal injuries to a person or in respect of a person's death.

In this subsection references to the Crown do not include references to Her Majesty in Her private capacity or to Her Majesty in right of Her Duchy of Lancaster or to the Duke of Cornwall.

(5) In sections 52 and 53 and this section—

“property” includes any land, chattel or other corporeal property of any description;

“personal injuries” includes any disease and any impairment of a person's physical or mental condition.

(6) This section is subject to any provision made under section 38.

Note —Subsection (6) added by the Courts and Legal Services Act 1990 s.125(3), Sch.18 para.45. Amended by the Civil Procedure Act 1997 Sch.2 para.2(2). **9A-511**

Provisions supplementary to sections 52 and 53

This section is in similar terms to the Senior Courts Act 1981 s.35 (para.9A-118). This section is subject to s.38 (see commentary to s.52(3), above). **9A-512**

WITNESSES AND EVIDENCE

Penalty for neglecting or refusing to give evidence

55.—(1) Subject to subsections (2) and (3), any person who—

9A-513

(a) having been summoned in pursuance of rules of court as a witness in a county court refuses or neglects, without sufficient cause, to appear or to produce any documents required by the summons to be produced; or

(b) having been so summoned or being present in court and being required to give evidence, refuses to be sworn or give evidence,

shall forfeit such fine as the judge may direct.

(2) A judge shall not have power under subsection (1) to direct that a person shall forfeit a fine of an amount exceeding £1000.

(3) No person summoned in pursuance of rules of court as a wit-

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ness in a county court shall forfeit a fine under this section unless there has been paid or tendered to him at the time of the service of the summons such sum in respect of his expenses (including, in such cases as may be prescribed, compensation for loss of time) as may be prescribed for the purposes of this section.

(4) The judge may at his discretion direct that the whole or any part of any such fine, after deducting the costs, shall be applicable towards indemnifying the party injured by the refusal or neglect.

(4A) A district judge, assistant district judge or deputy district judge shall have the same powers under this section as a judge.

(5) This section does not apply to a debtor summoned to attend by a judgment summons.

9A-514 *Note* —Amended by the Courts and Legal Services Act 1990 s.74; and the Criminal Justice Act 1991 s.17(3), Sch.4. Amended by the Civil Procedure Act 1997 Sch.2 para.2(2).

Penalty for neglecting or refusing to give evidence

9A-515 For procedure for summoning witnesses, see CPR Pt 34. Notice to show cause why a fine should not be imposed (or should not have been imposed) under this section may be served on the witness (CPR Sch.2; CCR O.34 r.2). The limit of £1,000 in subs.(2) was set by the Criminal Justice Act 1991 s.17(3)(a), Sch.4 Pt I, and this figure may be altered by order made under the Magistrates' Courts Act 1980 s.143(1).

Examination of witnesses abroad

9A-516 **56.** The High Court shall have the same power to issue a commission, request or order to examine witnesses abroad for the purpose of proceedings in a county court as it has for the purpose of an action or matter in the High Court.

Examination of witnesses abroad

9A-517 For powers of High Court, see CPR r.34.13. The power conferred on the High Court by this section is exercised by the Senior Master of the Queen's Bench Division (Practice Direction Depositions and Attendance by Witnesses), para.5.5 (see Vol.1, para.34APD.6).

Evidence of prisoners

9A-518 **57.**—(1) Subject to subsection (2), in any proceedings pending before a county court, the judge may, if he thinks fit, upon application on affidavit by any party, issue an order under his hand for bringing up before the court any person (in this section referred to as a "prisoner") confined in any place under any sentence or following the transfer of proceedings against him for trial or otherwise, to be examined as a witness in the proceedings.

(2) No such order shall be made with respect to a person confined under process in any civil action or matter.

(3) Subject to subsection (4), the prisoner mentioned in any such order shall be brought before the court under the same custody, and shall be dealt with in the same manner in all respects, as a prisoner required by a writ of habeas corpus to be brought before the High Court and examined there as a witness.

(4) The person having the custody of the prisoner shall not be bound to obey the order unless there is tendered to him a reasonable

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

sum for the conveyance and maintenance of a proper officer or officers and of the prisoner in going to, remaining at, and returning from, the court.

Note —Amended by the Criminal Justice and Public Order Act 1994 s.44, Sch.4.

9A-519

Evidence of prisoners

For procedure for application for habeas corpus to bring up a prisoner to give evidence in the High Court, see CPR Sch.1; RSC O.54 r.9. Provisions in the Criminal Justice and Public Order Act 1994 amending this section (see s.44(3) Sch.4 Pt II para.57) were never brought into force and those provisions were omitted from the 1994 Act by the Criminal Procedure and Investigations Act 1996 s.44.

9A-520

Persons who may take affidavits for use in county courts

58.—(1) An affidavit to be used in a county court may be sworn before—

9A-521

- (a) the judge or registrar of any court; or
- (b) any justice of the peace; or
- (c) an officer of any court appointed by the judge of that court for the purpose,

as well as before a commissioner for oaths or any other person authorised to take affidavits under the Commissioners for Oaths Acts 1889 and 1891 [...].

(2) An affidavit sworn before a judge or registrar or before any such officer may be sworn without the payment of any fee.

Note —Amended by the Administration of Justice Act 1985 s.67, Schs 7 and 8.

9A-522

Persons who may take affidavits for use in county courts

The Family Proceedings Rules 1991 r.10.13 provides that in relation to family proceedings pending or treated as pending in a divorce county court an affidavit may be sworn before certain other persons in addition to those listed in s.58(1).

9A-523

For s.59 of the County Courts Act 1984 (see Arrangement) plus any related commentary see paragraphs 9A-524+ to 9A-526+ on White Book on Westlaw UK or the Civil Procedure CD.



RIGHT OF AUDIENCE

Right of audience

60.—(1) [...]

9A-527

(2) Where an action is brought in a county court by a local authority for either or both of the following—

- (a) the recovery of possession of a house belonging to the authority;
- (b) the recovery of any rent, mesne profits, damages or other sum claimed by the authority in respect of the occupation by any person of such a house,

then, in so far as the proceedings in the action are heard by the registrar, any officer of the authority authorised by the authority in that behalf, not being a person entitled to address the court by virtue of subsection (1), may address the registrar as if he were a person so entitled.

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(3) In this section—

“local authority” means a county council, a district council, the Broads Authority, any National Park Authority, a London borough council, a Police authority established under section 3 of the Police Act 1996, the Metropolitan Police Authority, a joint authority established by Part IV of the Local Government Act 1985, an economic prosperity board established under section 88 of the Local Democracy, Economic Development and Construction Act 2009, a combined authority established under section 103 of that Act, an authority established for an area in England by an order under section 207 of the Local Government and Public Involvement in Health Act 2007 (joint waste authorities), the London Fire and Emergency Planning Authority, or the Common Council of the City of London; and

“local authority” means a county council, a district council, the Broads Authority, any National Park Authority, a London borough council, a Police authority established under section 3 of the Police Act 1996, the Metropolitan Police Authority, a joint authority established by Part IV of the Local Government Act 1985, an authority established for an area in England by an order under section 207 of the Local Government and Public Involvement in Health Act 2007 (joint waste authorities), the London Fire and Emergency Planning Authority, or the Common Council of the City of London; and

“house” includes a part of a house, a flat or any other dwelling and also includes any yard, garden, outhouse or appurtenance occupied with a house or part of a house or with a flat or other dwelling; and

any reference to the occupation of a house by a person includes a reference to anything done by that person, or caused or permitted by him to be done, in relation to the house as occupier of the house, whether under a tenancy or licence or otherwise.

9A-528 *Note*—Amended by the Local Government Act 1985 ss.82 and 102 and Schs 14 and 17; the Norfolk and Suffolk Broads Act 1988 s.21 and Sch.6; the Education Reform Act 1988 s.237 and Sch.13; the Courts and Legal Services Act 1990 s.125(7) and Sch.20; the Police and Magistrates’ Courts Act 1994 s.43 and Sch.4; the Environment Act 1995 s.78 and Sch.10; the Police Act 1996 s.103 and Sch.7 Pt I para.1, the Police Act 1997 s.134 and Sch.9 para.45. The definition of “local authority” in subs.(3) was amended by the Criminal Justice and Police Act 2001 (c.16), s.128 and Sch.6 para.66 and s.137 and Sch.7 Pt 5; the Local Government and Public Involvement in Health Act 2007 s.209, Sch.13 Pt 2 para.40, with effect from April 1, 2008 (SI 2008/917); and the Local Democracy, Economic Development and Construction Act 2009 Sch.6 para.58, with effect from December 17, 2009 (SI 2009/3318). The references in this section to “registrar” should be construed as references to “district judge”: the Courts and Legal Services Act 1990 s.74.

Right of audience

9A-529 See commentary to s.61, below.

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Rights of audience etc of employees of housing management bodies

60A.—(1) An employee of a housing management body who is authorised by that body for the purposes of this section has— **9A-530**

- (a) a right of audience in relation to any proceedings to which this section applies, and
- (b) a right to conduct litigation in relation to any such proceedings.

(2) This section applies to relevant housing proceedings in a county court before a district judge which are brought—

- (a) in the name of a local housing authority, and
- (b) by the housing management body in the exercise of functions of that local housing authority delegated to that body under a housing management agreement.

(3) “Relevant housing proceedings” are—

- (a) proceedings under section 82A of the Housing Act 1985 (demotion because of anti-social behaviour);
- (b) proceedings for possession of a dwelling-house subject to a secure tenancy, where possession is sought on ground 2 in Part 1 of Schedule 2 to that Act (anti-social behaviour);
- (c) proceedings for possession of a dwelling-house subject to a demoted tenancy;
- (d) proceedings for a suspension order under section 121A of the Housing Act 1985 (suspension of right to buy);
- (e) proceedings under section 153A, 153B or 153D of the Housing Act 1996 (injunctions against anti-social behaviour);
- (f) proceedings for the attachment of a power of arrest to an injunction by virtue of section 91(2) of the Anti-social Behaviour Act 2003 or section 27(2) of the Police and Justice Act 2006 (proceedings under section 222 of the Local Government Act 1972: power of arrest attached to injunction);
- (g) at a hearing at which a decision is made in relation to proceedings within paragraphs (a) to (f), proceedings for permission to appeal against that decision;
- (h) such other proceedings as the Lord Chancellor may prescribe by order.

(4) An authorisation for the purposes of this section must be in writing.

(5) The power to make an order under subsection (3)(h) is exercisable by statutory instrument subject to annulment by resolution of either House of Parliament.

(6) In subsection (3)(e) the reference to section 153A of the Housing Act 1996 is a reference to that section—

- (a) as inserted by section 13 of the Anti-social Behaviour Act 2003, or
- (b) as substituted by section 26 of the Police and Justice Act 2006.

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

- (7) In this section—
- “dwelling-house” has the same meaning as in Part 4 of the Housing Act 1985;
 - “housing management agreement” means an agreement under section 27 of the Housing Act 1985 (including an agreement to which section 27B(2) or (3) of that Act applies);
 - “housing management body” means a person who exercises management functions of a local housing authority by virtue of a housing management agreement;
 - “local housing authority” has the same meaning as in section 27 of the Housing Act 1985;
 - “right of audience” means the right to appear before and address a court, including the right to call and examine witnesses;
 - “right to conduct litigation” means the right—
 - (a) to issue proceedings before any court in England and Wales,
 - (b) to commence, prosecute and defend such proceedings, and
 - (c) to perform any ancillary functions in relation to such proceedings (such as entering appearances to actions);
 - “secure tenancy” has the same meaning as in Part 4 of the Housing Act 1985.

9A-531 *Note* —Inserted by the Legal Services Act 2007 s.191. For commentary on effect of this provision, see Section 13 (Rights of Audience) para.13-6, below.

Right of audience by direction of Lord Chancellor

9A-532 **61.**—(1) The Lord Chancellor may, with the concurrence of the Lord Chief Justice, at any time direct that such categories of persons in relevant legal employment as may be specified in the direction may address the court in any proceedings in a county court, or in proceedings in a county court of such description as may be so specified.

(2) In subsection (1), “relevant legal employment” means employment which consists of or includes giving assistance in the conduct of litigation to a legal representative whether in private practice or not.

(3) A direction under this section may be given subject to such conditions and restrictions as appear to the Lord Chancellor to be necessary or expedient, and may be expressed to have effect as respects every county court or as respects a specified county court or as respects one or more specified places where a county court sits.

(4) The power to give directions conferred by this section includes a power to vary or rescind any direction given under this section.

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

9A-533 *Note* —Amended by the Courts and Legal Services Act 1990 s.125(3) and Sch.18 para.49; and the Constitutional Reform Act 2005 s.15(1) and Sch.4 para.168 (see para.9A-4 above).

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

Right of audience by direction of Lord Chancellor

Under various statutory provisions, including this section, rights of audience before county courts and other courts may be granted; see further Section 13 (Rights of Audience) para.13–6, below.). **9A–534**

MODE OF TRIAL

General power of judge to determine questions of law and fact

62. Subject to the provisions of this Act and of county court rules, the judge of a county court shall be the sole judge in all proceedings brought in the court, and shall determine all questions of fact as well as of law. **9A–535**

Judge to determine all questions of law and fact

Other “provisions of the Act” includes the sections immediately following. Where the rules found in the CPR provide for a county court to “perform any act”, that act may be performed, not only by any judge, but also by any district judge. In terms, r.3.4 is subject to any enactment, rule or practice direction that provides otherwise. What is meant in this context by “perform any act” provided for by the CPR is not free from doubt. Practice Direction (Allocation of Cases to Levels of Judiciary) sets out the matters over which district judges do not have jurisdiction or which they may deal with only on certain conditions (see Vol.1, 2BPD.1). Circuit judges and district judges have concurrent jurisdiction to hear trials of cases allocated to the fast track. For the jurisdiction of district judges to deal with trials and assessments of damages in multi-track cases, see Practice Direction (Allocation of Cases to Levels of Judiciary), para.4.1. **9A–536**

Assessors

63.—(1) In any proceedings the judge may, if he thinks fit, summon to his assistance, in such manner as may be prescribed, one or more persons of skill and experience in the matter to which the proceedings relate who may be willing to sit with the judge and act as assessors. **9A–537**

(2) [...]

(3) Subject to subsection (4), the remuneration of assessors for sitting under this section shall be determined by the judge and shall be costs in the proceedings unless otherwise ordered by the judge.

(4) Where one or more assessors are summoned for the purposes of assisting the judge in reviewing the taxation by the district judge of the costs of any proceedings the remuneration of any such assessor—

- (a) shall be at such rate as may be determined by the Lord Chancellor with the approval of the Treasury; and
- (b) shall be payable out of moneys provided by Parliament.

(5) Where any person is proposed to be summoned as an assessor, objection to him, either personally or in respect of his qualification, may be taken by any party in the prescribed manner.

Note —Subsections (1), (3) and (4) were amended by, and subs.(2) omitted by, the Civil Procedure (Modification of Enactments) Order 1998 (SI 1998/2940) art.6(d). Amendments previously made to s.63 by the Courts and Legal Services Act 1990 s.14 were never brought into force. **9A–538**

Assessors summoned to assist judge

The comparable provision in the Senior Courts Act 1981 is s.70 (see para.9A–328). For rules of court relevant to the use of assessors generally see CPR r.35.15 (this rule **9A–539**

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SECTION 9A: MAIN STATUTES

does not apply to proceedings allocated to the small claims track, see r.27.2(1)(e)); see also Practice Direction (Experts and Assessors), para.6 (see Vol.1, para.35PD.6). For provisions as to the use of assessors in certain landlord and tenant proceedings, see Landlord and Tenant Act 1954 s.63, and CPR Sch.2, CCR O.43 r.13 (see Vol.1, para.cc43.13).

In *Ahmed v University of Oxford* [2002] EWCA Civ 1907; [2003] 1 W.L.R. 995; [2003] 1 All E.R. 915, CA, unrep., the Court of Appeal examined the role of assessors appointed in various contexts, including under s.63 of this Act and the Senior Courts Act 1981 s.70 (see para.9A–261 above), but particularly under the Race Relations Act 1976 s.67(4) (now revoked). In proceedings on a claim within the Equality Act 2010 s.114(1), the power under s.63(1) must be exercised unless the judge is satisfied that there are good reasons for not doing so (s.114(7)). In *Deman v Commission for Equality and Human Rights* [2010] EWCA Civ 1279, November 16, 2010, unrep., CA, where a judge sitting alone upheld the defendant's application to strike out a claim against them for racial discrimination, in dismissing the claimant's appeal the Court of Appeal explained that s.67(4) (see now the Equality Act 2010 s.114(7)) stipulated how a court is to act in determining certain issues (adjudicative jurisdiction), and was not merely concerned with stipulating when a court is and is not duly constituted (constitutive jurisdiction), and held that, as the determination of the application was a judicial function involving (in the circumstances of the case) no evaluation of factual issues to which assessors could contribute, the judge was not required by law to sit with assessors. See further CPR r.35.15, and commentary following that rule.

Reference to arbitration

9A–540 64.—(1) Rules of court—

- (a) may prescribe cases in which proceedings are (without any order of the court) to be referred to arbitration, and
- (b) may prescribe the manner in which and the terms on which cases are to be so referred, and
- (c) may, where cases are so referred, require other matters within the jurisdiction of the court in dispute between the parties also to be referred to arbitration.

(2) Rules of court—

- (a) may prescribe cases in which proceedings may be referred to arbitration by order of the court, and
- (b) may authorise the court also to order other matters in dispute between the parties and within the jurisdiction of the court to be so referred.

(2A) Rules of court may prescribe the procedures and rules of evidence to be followed on any reference under subsection (1) or (2).

(2B) Rules made under subsection (2A) may, in particular, make provision with respect to the manner of taking and questioning evidence.

(3) On a reference under subsection (1) or (2) the award of the arbitrator, arbitrators or umpire shall be entered as the judgment in the proceedings and shall be as binding and effectual to all intents, subject to subsection (4), as if it had been given by the judge.

(4) The judge may, if he thinks fit, on application made to him within such time as may be prescribed, set aside the award, or may, with the consent of the parties, revoke the reference or order another reference to be made in the manner specified in this section.

(5) In this section “award” includes an interim award.

9A–541 *Note* —Subsections (2A) and (2B) added by the Courts and Legal Services Act 1990 s.6. Amended by the Civil Procedure Act 1997 Sch.2 para.2(2).

Rules of court prescribing reference to arbitration

9A–542 Before the CPR came into force, rules of court found in CCR O.19, Pt I and made

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under s.64 provided for two forms of reference to arbitration by the court. They were (1) reference on application by a party to proceedings, and (2) automatic reference by rule of proceedings falling within the “small claims” jurisdiction of the court. Under the CPR, the second form of reference has been replaced by the procedure for the allocation to the small claims track of minor claims. The relevant rules of court are found in CPR Pts 26 and 27. In these provisions, no use is made of the word “arbitration” for the purpose of describing the summary procedures used by the court for the handling and trial of small claims. It would seem that it would not be appropriate to describe the allocation of a claim to the small claims track as a reference to a form of statutory arbitration. Consequently, the significance of the Arbitration Act 1996 s.92, which states that nothing in Pt I of that Act applies to arbitrations under s.64 is diminished.

There are no express provisions in the CPR comparable to those formerly found in CCR O.19, Pt I for the first form of reference of county court proceedings to arbitration mentioned above, that is to say, a reference on the application of a party. However, r.1.4(2)(e) states that the court’s duty to manage cases includes encouraging the parties “to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure”. (In the Glossary attached to the CPR, “alternative dispute resolution” is described in terms sufficiently wide to include arbitration.) Further, r.26.4 states that, in certain circumstances, the court may stay proceedings whilst parties try to settle the case “by alternative dispute resolution or other means”. It would seem, therefore, that the court has power under the CPR to refer proceedings to arbitration on the application of a party. However, it is doubtful whether the rules from which such power may be derived are rules of court of the express type envisaged by s.64. Further, it is doubtful whether a reference to arbitration on the application of a party (if it is permissible) could be described as a reference under s.64 (see above observations on the Arbitration Act 1996 s.92).

Power of judge to refer to district judge or referee

65.—(1) Subject to rules of court, the judge may refer to the registrar or a referee for inquiry and report— **9A-543**

- (a) any proceedings which require any prolonged examination of documents or any scientific or local investigation which cannot, in the opinion of the judge, conveniently be made before him;
- (b) any proceedings where the question in dispute consists wholly or in part of matters of account;
- (c) with the consent of the parties, any other proceedings;
- (d) subject to any right to have particular cases tried with a jury, any question arising in any proceedings.

(2) In such cases as may be prescribed by, and subject to, rules of court the registrar may refer to a referee for inquiry and report any question arising in any proceedings.

(3) Where any proceedings or question are referred under subsection (1) or (2), the judge or, as the case may be, the registrar may direct how the reference shall be conducted, and may remit any report for further inquiry and report, and on consideration of any report or further report may give such judgment or make such order in the proceedings as may be just.

(4) The judge may, after deciding or reserving any question of liability, refer to the registrar any mere matter of account which is in dispute between the parties and, after deciding the question of liability, may give judgment on the registrar’s report.

Note —Amended by Civil Procedure Act 1997 Sch.2 para.2(2). The Courts and **9A-544**

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

SECTION 9A: MAIN STATUTES

Legal Services Act 1990 s.74 states that any reference in any enactment to the offices of registrar, etc., shall be construed as a reference to the office of district judge.

Reference for inquiry and report

- 9A-545** This section is comparable to the Senior Courts Act 1981 s.68, the provision upon which what was once called “official referees’ business” was based. Before the CPR came into force, rules of court made in pursuance of s.65 were found in CCR O.19, Pt II (reference for inquiry and report). Initially, no comparable rules were found in the CPR, but official referees’ business, now known as “Technology and Construction Court Business” was treated as a form of “specialist proceedings” under CPR Pt 49. This ceased to be the case when, subsequently, provisions dealing with such Business (whether arising in the High Court or in a county court) were inserted in the CPR as Pt 60 (Proceedings in the Technology and Construction Court) (see para.2C-1 above).

JURIES

Trial by jury

- 9A-546** **66.**—(1) In the following proceedings in a county court the trial shall be without a jury—
- (a) Admiralty proceedings;
 - (b) proceedings arising—
 - (i) under Part I of the Rent (Agriculture) Act 1976, or
 - (ii) under any provision of the Rent Act 1977 other than a provision contained in Part V, sections 103 to 106 or Part IX, or
 - (iii) under Part I of the Protection from Eviction Act 1977; or
 - (iv) under Part I of the Housing Act 1988.
 - (c) any appeal to the county court under the Housing Act 1985;
- (2) In all other proceedings in a county court the trial shall be without a jury unless the court otherwise orders on an application made in that behalf by any party to the proceedings in such manner and within such time before the trial as may be prescribed.
- (3) Where, on any such application, the court is satisfied that there is in issue—
- (a) a charge of fraud against the party making the application; or
 - (b) a claim in respect of libel, slander, malicious prosecution or false imprisonment; or
 - (c) any question or issue of a kind prescribed for the purposes of this paragraph,
- the action shall be tried with a jury, unless the court is of the opinion that the trial requires any prolonged examination of documents or accounts of any scientific or local investigation which cannot conveniently be made with a jury.
- (4) There shall be payable, in respect of the trial with a jury of proceedings in a county court, such fees as may be prescribed by an order under section 92 of the Courts Act 2003 (fees).

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

Note —Amended by the Housing (Consequential Provisions) Act 1985 Sch.2 para.57; and the Housing Act 1988 Sch.17 para.35; subs.(4) amended by the Courts Act 2003 s.109(1) and Sch.8, para.271(a).

9A-547

Trial by jury

The general rule is that the judge shall determine all questions of fact as well as of law (s.62). The circumstances in which proceedings may be tried with a jury are stated in this section. (The section may be contrasted with the Senior Courts Act 1981 s.69). As to impanelling of jury, see s.67.

9A-548

The structure of this section may be stated as follows. (1) The proceedings listed in subs.(1) may not be tried with a jury. (2) All other proceedings shall be without a jury unless the court, in the exercise of discretion, otherwise orders on application (subs.(2)). However, (3) on such application the court shall order jury trial if it is satisfied that an issue of the type listed in subs.(3) exists, unless (4) such trial would be inconvenient for any of the reasons stated in that subsection.

The discretion to grant jury trial is rarely exercised; the circumstances must be wholly exceptional (*H. v Ministry of Defence* [1991] 2 W.L.R. 1192, CA).

Where a “charge of fraud” is an issue in the proceedings the party against whom it is made (but no other party) has a right to jury trial (subject to any inconvenience). A mere allegation of fraud does not raise a “charge of fraud” as an issue; such an issue must involve an allegation of actionable deceit (*Grant v Travellers Cheque Associates Ltd*, *The Times*, April 19, 1995, CA, applying *Barclays Bank Ltd v Cole* [1967] 2 Q.B. 738, CA; see also *Parsons v Provincial Insurance Plc*, February 20, 1988, unrep., CA).

Where a claim in respect of libel, slander, malicious prosecution or false imprisonment is an issue in the proceedings a right to jury trial arises (subject to any inconvenience). In these circumstances, any application for jury trial is likely to be made by the party making the claim. An action against police for damages for assault and battery does not raise an issue of a claim for false imprisonment although the facts pleaded might bear the inference that the plaintiff was briefly falsely imprisoned (*Hendry v Chief Constable of Lancashire Constabulary*, December 7, 1993, unrep., CA).

Where an issue of the type listed in subs.(3) exists, nevertheless, jury trial may be refused where the court is of opinion that the trial requires “prolonged examination of documents, etc.” which cannot conveniently be made with a jury. For principles to be applied and relevant considerations in these circumstances, see *Aitken v Preston*, *The Times*, May 21, 1997, CA, and *Taylor v Anderton* [1995] 1 W.L.R. 447, CA. See further notes following Senior Courts Act 1981 s.69 (para.9A-256 above).

Application made in such manner and within such time “as may be prescribed”

Section 66(2) states that the trial of certain proceedings shall be without jury and that in all other proceedings trial should be without a jury unless the court otherwise orders “on an application made in that behalf by any party to the proceedings in such manner and within such time before the trial *as may be prescribed*”, which means, as prescribed by rules of court (see County Courts Act 1984 s.147(1)) (see also Senior Courts Act 1981 s.69(2)). CPR r.26.11 states that an application for a claim to be tried by a jury must be made within 28 days of service of the defence. This rule was inserted in the CPR by the Civil Procedure (Amendment No.4) Rules 2000 (SI 2000/2092). In *Oliver v Calderdale Metropolitan BC*, *The Times*, July 7, 1999, CA, a case decided under the old rules, it was held that an application made wholly out of time could be rejected on the ground that it was unreasonable.

9A-549

Impanelling and swearing of jury

67. At any county court where proceedings are to be tried with a jury, eight jurymen shall be impanelled and sworn as occasion requires to give their verdicts in the proceedings brought before them, and being once sworn need not be re-sworn in each trial.

9A-550

Impanelling and swearing of jury

By tradition, a jury consists of twelve persons, but the number may be reduced by statute. By virtue of this provision juries in county court proceedings consist of eight

9A-551

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

persons. Any party to county court proceedings to be tried by jury has the same right of challenge to all or some of the jurors as he would in the High Court (Juries Act 1974 s.12(2)). Challenge in the High Court is governed by the common law as modified statute (see *ibid.*, s.12). A jury's verdict need not be unanimous if seven agree on it. However, a court should only accept a majority verdict if it is satisfied that the jury had such period of time for deliberation as the court thinks reasonable having regard to the nature and complexity of the case (*ibid.*, s.17(2), (4)). As to majority verdict in High Court cases, see *ibid.*, s.17(1).

Duty of judge to determine foreign law in jury trials

- 9A-552** 68. Where, for the purpose of disposing of any proceedings which are being tried in a county court by the judge with a jury, it is necessary to ascertain the law of any other country which is applicable to the facts of the case, any question as to the effect of the evidence given with respect to that law shall, instead of being submitted to the jury, be decided by the judge alone.

Duty of judge to determine foreign law in jury trials

- 9A-553** This section is in same terms of the Senior Courts Act 1981 s.69(5) (para.9A-256). As to evidence of foreign law, see the Civil Evidence Act 1972 s.4 (para.9B-1063).

INTEREST ON DEBTS AND DAMAGES

Power to award interest on debts and damages

- 9A-554** 69.—(1) Subject to rules of court, in proceedings (whenever instituted) before a county court for the recovery of a debt or damages there may be included in any sum for which judgment is given simple interest, at such rate as the court thinks fit or as may be prescribed, on all or any part of the debt or damages in respect of which judgment is given, or payment is made before judgment, for all or any part of the period between the date when the cause of action arose and—
- (a) in the case of any sum paid before judgment, the date of the payment; and
 - (b) in the case of the sum for which judgment is given, the date of the judgment.
- (2) In relation to a judgment given for damages for personal injuries or death which exceed £200 subsection (1) shall have effect—
- (a) with the substitution of “shall be included” for “may be included”; and
 - (b) with the addition of “unless the court is satisfied that there are special reasons to the contrary” after “given”, where first occurring.
- (3) Subject to rules of court, where—
- (a) there are proceedings (whenever instituted) before a county court for the recovery of a debt; and
 - (b) the defendant pays the whole debt to the plaintiff (otherwise than in pursuance of a judgment in the proceedings),
- the defendant shall be liable to pay the plaintiff simple interest, at such rate as the court thinks fit or as may be prescribed, on all or any

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part of the debt for all or any part of the period between the date when the cause of action arose and the date of the payment.

(4) Interest in respect of a debt shall not be awarded under this section for a period during which, for whatever reason, interest on the debt already runs.

(5) Interest under this section may be calculated at different rates in respect of different periods.

(6) In this section “plaintiff” means the person seeking the debt or damages and “defendant” means the person from whom the plaintiff seeks the debt or damages and “personal injuries” includes any disease and any impairment of a person’s physical or mental condition.

(7) Nothing in this section affects the damages recoverable for the dishonour of a bill of exchange.

(8) In determining whether the amount of any debt or damages exceeds that prescribed by or under any enactment, no account shall be taken of any interest payable by virtue of this section except where express provision to the contrary is made by or under that or any other enactment.

Note —Subsection (8) was substituted by the Courts and Legal Services Act 1990 s.125(3) and Sch.18 para.46. **9A-555**

Power to award interest on debts and damages

With the exception of subs.(8), this section is in similar terms to the Senior Courts Act 1981 s.35A (para.9A-122 and commentary thereto). A claim for interest under this section should be included in the particulars of claim (CPR r.16.4(2)). Judgment by default in a claim for a specified amount of money may include interest claimed under this section in the circumstances provided by CPR r.12.6. For interest on judgment under CPR r.14.4 (admission of whole of claim for specified amount of money) where interest claimed under s.69, see CPR r.14.14. Subsection (8) was substituted by the Courts and Legal Services Act 1990 Sch.18 para.46. Some of the provisions for the allocation of business for commencement and trial between the High Court and the county courts found in the High Court and County Court Jurisdiction Order 1991 and in Practice Direction (How to Start Proceedings—The Claim Form), paras 2.1 et seq. turn on the “value” of the action. art.9 of the Order states that in determining the value of an action for these purposes claims for interest shall be disregarded (see para.9B-164+ below). In the exercise of its discretion, the court may reduce the rate at which interest on an award of damages is payable or reduce the period for which interest is payable. Since the coming into effect of the CPR, this power has been increasingly used by the courts as a sanction where parties fail to comply with procedural rules, practice directions and case management orders. The Court of Appeal has encouraged the use of this sanction as an alternative to more serious sanctions (e.g. striking out); see, e.g. *Biguzzi v Rank Leisure Plc* [1999] 1 W.L.R. 1926, CA; *Baron v Lovell*, *The Times*, September 14, 1999, CA; *Abbahall Ltd v Smea* [2002] EWCA Civ 1831; January 24, 2000, unrep., CA; *Walsh v Misseldine*, February 29, 2000, unrep., CA; *UYB Ltd v British Railways Board*, *The Times*, November 15, 2000, CA; *Adcock v Co-operative Insurance Society Ltd* [2000] Lloyd’s Rep. I.R. 657, CA; note also Practice Direction (Protocols), para.2.3 (see Vol.1, para.C1-002). **9A-556**

JUDGMENTS AND ORDERS

Finality of judgments and orders

70. Every judgment and order of a county court shall, except as provided by this or any other Act or as may be prescribed, be final and conclusive between the parties. **9A-557**

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Finality of judgments and orders**9A-558**

Originally, this section formed the first part of the County Courts Act 1846 s.93. A later part of the old provision went on to state that the judge should have a discretionary power to order a new trial in every case. The relationship between the two parts created difficulties and was subject to a considerable amount of case law. Subsequently, the power to order a new trial was removed from primary legislation, put into rules of court and substantially altered. Until it was revoked by the Civil Procedure (Amendment No.4) Rules 2002 (SI 2002/2058) the relevant rule was CPR Sch.2, RSC O.37, r.1. Consequently, since 1934 this section has stated the simple general proposition that, except as provided by legislation or as may be prescribed, “every judgment and order of a county court shall be final and conclusive between the parties”. The general proposition is unimpeachable. When considering s.93 of the 1846 Act, Willes J. said: “The very object of instituting courts of justice is that litigation should be decided, and decided finally” (*Great Northern Railway Co v Mossop* (1855) 17 C.B. 130 at 1022).

The exceptions to the general proposition are important and inherently difficult; the power to order a rehearing is but one. Another example is the power to set aside a judgment given in a party’s absence (CPR r.39.3(3)). Obviously, the various provisions as to appeals from particular judgments and orders must also be regarded as exceptions.

Under some statutes it is expressly provided that the decision of a court shall be “final” in the sense that no appeal shall lie. This is recognised by the County Courts Act 1984 s.79(1) (and by the Senior Courts Act 1981 s.18(1)(c)). Before CPR Pt 52 (Appeals) came into effect, the distinction between “final” and “interlocutory” appeals was important in appeal procedure (see Senior Courts Act 1981 s.60 and notes following, para.9A-227 above). In s.70, the word “final” is used in a different sense. A judgment or order takes effect from the day when it is given or made, or such later date as the court may specify (CPR r.40.7). In any system of adjudication there must come a point when a judgment or order rendered (particularly at the end of a trial) is final in the sense that it will not be reconsidered by the court or other tribunal pronouncing it. The authorities show that a judgment becomes final in this sense, not when it is pronounced, but when the order giving it effect has been drawn up, registered or perfected (*R. v Cripps Ex p. Muldoon* [1984] Q.B. 686, CA, at p.695 Sir John Donaldson M.R.; see also *Preston Banking Co v William Allsupp & Sons* [1895] 1 Ch. 141, CA, at p.145 per A.L. Smith L.J.). After this point, a party’s remedy lies, not in attempting to persuade the court which rendered the judgment to change its mind, but in challenging the judgment on appeal. Before this point, the court has jurisdiction in limited circumstances to recall the judgment for further consideration. Authority for this is provided by *Barrell Enterprises, Re* [1973] 1 W.L.R. 19, CA, where it was said that the jurisdiction should not be exercised “save in the most exceptional circumstances” (see also *Pittalis v Sherefettin* [1986] Q.B. 868, CA, at p.882 Dillon L.J. and authorities referred to there). In modern times, pressures to reduce costs and delays in civil proceedings, coupled with the desire to discourage parties from mounting appeals and the new restrictions on access to appellate courts, have focussed attention on the circumstances in which the Barrell jurisdiction may and should be exercised (see further Vol.1, para.40.2.2 and cases referred to there). Since the coming into effect of the CPR, the extent of the jurisdiction has been considered at first instance in the High Court (see *Charlesworth v Relay Road Ltd*, [2000] 1 W.L.R. 230, [1999] 4 All E.R. 397, Neuberger J.; *Spice Girls Ltd v Aprilia World Service BV (Permission to Appeal)*, *The Times*, September 12, 2000, Arden J.; *Mamidoil-Jetoil Greek Petroleum SA v Otkra Crude Oil Refinery AD (No.2)* [2001] 1 Lloyd’s Rep. 591, Thomas J.; *Compagnie Noga d’Importation et d’Exportation SA v Abacha* [2001] 3 All E.R. 513, Rix L.J.) and by the Court of Appeal in *Stewart v Engel* [2000] 1 W.L.R. 2268; [2000] 3 All E.R. 518, CA, where their lordships were agreed that the Barrell jurisdiction has survived the CPR, but were not agreed on the question whether the jurisdiction remains subject to the “exceptional circumstances” requirement as understood before the CPR came into effect; see also *Royal Brompton Hospital NHS Trust v Hammond* [2001] EWCA Civ 778.

In *Roche v Chief Constable of Greater Manchester Police* [2005] EWCA Civ 1454; *The Times*, November 10, 2005, CA, the Court of Appeal held that, where an order carrying into effect a judgment is perfected, in dealing with an appeal made on the basis that the judge failed to make findings on particular issues, the circumstances may be such as to make it appropriate for the appeal court to take into consideration a

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subsequent supplementary judgment by the judge dealing with those issues where that judgment did not in any way alter the perfected order, rather than to remit the matter for further consideration by the trial court (see Vol.1, para.40.2.1 above). In so holding that Court said that neither s.70, nor the general provisions about finality of judgment, precluded the Court from considering the second judgment in the course of this appeal.

Under rules of court which, on occasion, have been rather generously applied, clerical mistakes in judgments or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the court (CPR r.40.12 and Practice Direction (Judgments and Orders), paras 4.1 et seq., Vol.1, para.40BPD.4).

Satisfaction of judgments and orders for payment of money

71.—(1) Where a judgment is given or an order is made by a county court under which a sum of money of any amount is payable, whether by way of satisfaction of the claim or counterclaim in the proceedings or by way of costs or otherwise, the court may, as it thinks fit, order the money to be paid either— **9A-559**

- (a) in one sum, whether forthwith or within such period as the court may fix; or
- (b) by such instalments payable at such times as the court may fix.

(2) If at any time it appears to the satisfaction of the court that any party to any proceedings is unable from any cause to pay any sum recovered against him (whether by way of satisfaction of the claim or counterclaim in the proceedings or by way of costs or otherwise) or any instalment of such a sum, the court may, in its discretion, suspend or stay any judgment or order given or made in the proceedings for such time and on such terms as the court thinks fit, and so from time to time until it appears that the cause of inability has ceased.

Satisfaction of judgments and orders for payment of money

The general rule is that where judgment is given or an order is made for the payment of money, including costs, the money shall be payable at the expiration of 14 days from the date of the judgment or order (CPR r.40.11). Obviously, if a day for payment is specified in the judgment or order, then the money shall be payable on that date. The significance of subs.(1) is that it makes it clear that the court has power to order that a money judgment or order should be paid, not in a lump sum in 14 days or on a particular date, but by instalments. Subsection (2) gives the court power to suspend or stay a money judgment or order against a party, whether requiring payment in a lump sum or by instalments, where the court is satisfied that the party is unable to pay. For practice where payment by instalments is ordered, see Practice Direction (Judgments and Orders), para.12. **9A-560**

Set-off in cases of cross judgments in county courts and High Court

72.—(1) Where one person has obtained a judgment or order in a county court against another person, and that other person has obtained a judgment or order against the first-mentioned person in the same or in another county court or in the High Court, either such person may, in accordance with rules of court, give notice in writing to the court or the several courts as the case may be, and may apply to the court or any of the said courts in accordance with rules of court for leave to set off any sums, including costs, payable under several judgments or orders. **9A-561**

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

(2) Upon any such application, the set-off may be allowed in accordance with the practice for the time being in force in the High Court as to the allowance of set-off and in particular in relation to any solicitor's lien for costs.

(3) Where the cross judgments or orders have not been obtained in the same court, a copy of the order made on any such application shall be sent by the proper officer of the court to which the application is made to the proper officer of the other court.

Set-off in cases of cross judgments in county courts and High Court

9A-562

A set-off is a monetary cross-claim which is also a defence to the claim made in the action. The right of a party to plead a set-off avoids the need to commence a separate action for the purpose of asserting the claim. A party may plead a previous judgment as a set-off. (In these circumstances, unless the previous judgment is a foreign judgment, the alternative course of commencing a separate action does not exist). This section is concerned, not with the setting off of a previous judgment as a defence to a claim (see CPR r.16.6), but with such set-off against a judgment debt.

The section states that where, in the High Court or a county court, X has obtained judgment against Y and Y has obtained judgment against X in other proceedings, either in the same or a different county court or in the High Court, for a lesser sum, Y may apply for permission to set-off his judgment against X's judgment. The section requires Y to make application "to the court or any of the said courts in accordance with rules of court". It is necessary to be clear as to what these rules of court might be.

An order of the Supreme Court Costs Office requiring the Revenue to pay costs awarded to a duty payer by the VAT and Duties Tribunal is an order in the High Court to which s.72 applies; accordingly, it was open to the High Court to order that the Revenue's costs liability should be set off against the duty payer's liability to the Revenue under a county court judgment for unpaid tax and insurance contributions (*Revenue & Customs Commissioners v Xicom Systems Ltd* [2008] EWHC 1945 (Ch), September 4, 2008, unrep.).

Where the several judgments have been obtained in a county court, or several county courts, CPR Sch.2, O.22 r.11 applies and Y should make application to one of the relevant county courts in accordance with the provisions of that rule. That rule states that where X's judgment was obtained in one county court and Y's in another, Y may make application to either county court on notice (with notice also being given to the proper officer of the other county court) (r.11(3)). Where the several judgments were obtained in the same county court application should be made on notice to that court; however, if the application is made "on the day when the last judgment or order is obtained" notice is not required provided both parties are present (r.11(2)).

Where the several judgments have been obtained in the High Court it would seem that application must be made to the High Court but rules of court expressly dedicated to such applications are contained in the CPR. Accordingly, it seems that an application on notice pursuant to CPR Pt 23 is required (though by analogy with CPR Sch.2, CCR O.22 r.11(2), perhaps an application could be made without notice to the court "on the day when the last judgment or order is obtained" if both parties are present).

An anomaly still remains. Where X has obtained judgment against Y in a county court and Y has obtained judgment against X in the High Court for a lesser sum and Y wishes to apply for permission to set-off his High Court judgment against X's county court judgment, the provisions of CPR Sch.2, CCR O.22 r.11 do not apply. Prior to the CPR such applications were made to the High Court and were governed by RSC O.107 r.4. Order 107 is not replicated in the CPR. Consequently, the proper procedure is now a matter for doubt. As CPR Sch.2, CCR O.22 r.11 clearly does not apply it is submitted that application should be made to the High Court on notice pursuant to CPR Pt 23. CPR Sch.2, CCR O.22 r.11(8) clearly envisages such order being made in the High Court and directs the county court officer as to how he should proceed.

The section does not give a right to set-off (the application is for "leave" to do so). Section 72(2) expressly requires a county court to approach the application in accordance with the practice for the time being in force in the High Court and "in particular in relation to any solicitor's lien for costs".

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An order of the Supreme Court Costs Office for the Revenue and Customs Commissioners to pay costs awarded to a taxpayer by the VAT and Duties Tribunal is an order in the High Court to which s.72 applies and it was open to the High Court to set-off the commissioners' liability to the taxpayer under the costs order against the taxpayer's liability to the commissioners under a county court judgment (*Revenue and Customs Commissioners v Ximon Systems Ltd* [2008] EWHC 1945 (Ch)).

* * * *

Interest on judgment debts, etc.

74.—(1) The Lord Chancellor may by order made with the concurrence of the Treasury provide that any sums to which this subsection applies shall carry interest at such rate and between such times as may be prescribed by the order. **9A-563**

(2) The sums to which subsection (1) applies are—

- (a) sums payable under judgments or orders given or made in a county court, including sums payable by instalments; and
- (b) sums which by virtue of any enactment are, if the county court so orders, recoverable as if payable under an order of that court, and in respect of which the county court has so ordered.

(3) The payment of interest due under subsection (1) shall be enforceable as a sum payable under the judgment or order.

(4) The power conferred by subsection (1) includes power—

- (a) to specify the descriptions of judgment or order in respect of which interest shall be payable;
- (b) to provide that interest shall be payable only on sums exceeding a specified amount;
- (c) to make provision for the manner in which and the periods by reference to which the interest is to be calculated and paid;
- (d) to provide that any enactment shall or shall not apply in relation to interest payable under subsection (1) or shall apply to it with such modifications as may be specified in the order; and
- (e) to make such incidental or supplementary provisions as the Lord Chancellor considers appropriate.

(5) Without prejudice to the generality of subsection (4), an order under subsection (1) may provide that the rate of interest shall be the rate specified in section 17 of the Judgments Act 1838 as that enactment has effect from time to time.

(5A) The power conferred by subsection (1) includes power to make provision enabling a county court to order that the rate of interest applicable to a sum expressed in a currency other than sterling shall be such rate as the court thinks fit (instead of the rate otherwise applicable).

(6) The power to make an order under subsection (1) shall be exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

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SECTION 9A: MAIN STATUTES

9A-564 *Note* —Subsection (5A) added by the Private International Law (Miscellaneous Provisions) Act 1995 s.2.

Interest on judgment debts, etc.

9A-565 The County Court (Interest on Judgment Debts) Order 1991 (SI 1991/1184) (as amended) was made by the Lord Chancellor in exercise of powers conferred by this section. For rate of interest specified from time to time under the Judgments Act 1838 s.17; see further Vol.1, para.40.8.1, and note CPR rr.40.8, 44.12, 47.8 and 47.14.

Subsection (5A) was added by the Private International Law (Miscellaneous Provisions) Act 1995 s.2 and the additional powers granted by it were exercised in the 1996 amendment to the 1991 Order. For comparable provision to subs.(5A) applicable to High Court judgments, see the Administration of Justice Act 1970 s.44A (inserted by s.1 of the 1974 Act) (see para.9B-49+).

* * * *

Application of practice of High Court

9A-566 76. In any case not expressly provided for by or in pursuance of this Act, the general principles of practice in the High Court may be adopted and applied to proceedings in a county court.

Application of practice of High Court

9A-567 This section says that the general principles of High Court practice may be adopted and applied to proceedings in a county court where there is, as it were, a “gap” in county court practice and procedure because the matter is “not expressly provided for by or in pursuance of this Act”, that is to say, provided for by sections in the Act or in delegated legislation made under the Act, including, principally, rules of court. Before the CPR came into force, the CCR were made under s.75 of the Act (now omitted) and the rules found therein were significantly different in many respects to those found in the RSC and, generally, much simpler. In these circumstances, s.76 was occasionally brought into play to deal with “gaps” apparent in the CCR. CCR O.1 r.6 said that where by virtue of s.76 provisions of the RSC were applied in relation to proceedings in a county court, that provision “shall have effect with the necessary modifications”. The CPR govern county court and High Court proceedings and, in the main, the procedures for both levels of court are the same. Nevertheless, some differences do remain and this leaves open the possibility that “gaps” in county court practice will continue to emerge and that s.76 may still have a role to play (e.g. *Ager v Ager* [1998] 1 W.L.R. 1074, CA, where it was held that the jurisdiction conferred on the High Court by the Senior Courts Act 1981 s.15(4) could be conferred on county courts by operation of s.76). Further, there remains the possibility that, in county court proceedings to which rules in Sch.2 of the CPR apply (viz., former CCR rules), rules in Sch.1 (viz., former RSC rules) may be applied by operation of s.76. This prospect is specifically acknowledged by CCR O.1 r.6 (referred to above) which has survived in the CPR as one of the “schedule rules” (see Vol.1, para.cc1.6) (see *Jephson Homes Housing Association Ltd v Moisejevs* [2001] 2 All E.R. 901, CA, application to set aside warrant for possession).

PART IV

APPEALS ETC.

APPEALS

Appeals: general provisions

9A-568 77.—(1) Subject to the provisions of this section and the following provisions of this Part of this Act, and to any order made by the Lord

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Chancellor under section 56(1) of the Access to Justice Act 1999, if any party to any proceedings in a county court is dissatisfied with the determination of the judge or jury, he may appeal from it to the Court of Appeal in such manner and subject to such conditions as may be provided by Civil Procedure Rules.

(1A) Without prejudice to the generality of the power to make rules of court under section 75, such rules may make provision for any appeal from the exercise by a district judge, assistant district judge or deputy district judge of any power given to him by virtue of any enactment to be to a judge of a county court.

(2) [...]

(3) [...]

(4) [...]

(5) Subject to the provision of this section and the following provisions of this Part of this Act, where an appeal is brought under subsection (1) in any action, an appeal may be brought under that subsection in respect of any claim or counterclaim in the action notwithstanding that there could have been no such appeal if that claim had been the subject of a separate action.

(6) In proceedings in which either the plaintiff or the defendant is claiming possession of any premises this section shall not confer any right of appeal on any question of fact if by virtue of—

- (a) section 13(4) of the Landlord and Tenant Act 1954; or
- (b) Cases III to IX in Schedule 4 to the Rent (Agriculture) Act 1976; or
- (c) section 98 of the Rent Act 1977, as it applies to Cases 1 to 6 and 8 and 9 and Schedule 15 to that Act, or that section as extended or applied by any other enactment; or
- (d) section 69 of the Rent Act 1977, as it applies to Cases 1 to 6 and 9 in Schedule 15 to that Act; or
- (e) section 84(2)(a) of the Housing Act 1985; or
- (ee) section 7 of the Housing Act 1988, as it applies to the grounds in Part II of Schedule 2 to that Act; or
- (f) any other enactment,

the court can only grant possession on being satisfied that it is reasonable to do so.

(7) This section shall not—

- (a) confer any right of appeal from any judgment or order where a right of appeal is conferred by some other enactment; or
 - (b) take away any right of appeal from any judgment or order where a right of appeal is so conferred,
- and shall have effect subject to any enactment other than this Act.

(8) In this section—

“enactment” means an enactment whenever passed;

Note —Amended the by Housing (Consequential Provisions) Act 1985 Sch.2 para.57(2); the Housing Act 1988 Sch.17 para.35(2); the Civil Procedure Act 1997 Sch.2.; the Access to Justice (Destination of Appeals) Order 2000 (SI 2000/1071). **9A-569**

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Subsection (1A) added by the Courts and Legal Services Act 1990 Sch.17 para.15. Subsections (2) to (4) repealed by, and subs.(8) was amended by, the Access to Justice Act 1999 Sch.15 Pt III. Section 75, referred to in subs.(1A) of this section, was repealed by the Civil Procedure Act 1997 Sch.2 para.2(6).

Appeal from county court determination to Court of Appeal

9A–570

The procedural rules relating to the proper routes for appeals from decisions made in proceedings in a county court, whether to the Court of Appeal or to some other forum, are complicated. In Sect.I of Practice Direction (Appeals), supplementing CPR Pt 52, an effort is made to summarise the position in tabular form.

The Court of Appeal has all such jurisdiction as is conferred on it by the Senior Courts Act 1981 or any other Act, including the County Courts Act 1984 (Senior Courts Act 1981 s.15(2), see para.9A–49 above). Section 77(1) of the 1984 Act states that the general rule is that any party to any proceedings in a county court who is “dissatisfied with the determination of the judge or jury” may appeal from it to the Court of Appeal (see para.9A–568 below). This general rule is subject to the provisions of paras (1A) et seq. of s.77 (which, amongst other things, provide for appeals from a district judge to a judge of a county court) and other provisions in Pt IV of the 1984 Act. The general rule is further qualified by the Access to Justice Act 1999. Section 56(1) of that Act states that the Lord Chancellor may by order provide that appeals “which would otherwise lie to the Court of Appeal”, for example, appeals falling within the general rule stated above, shall lie instead to the High Court or to a county court (see para.9A–845 below). Accordingly, the power of the Lord Chancellor by order to affect the jurisdiction of the Court of Appeal in relation to appeals from the High Court was added to s.77(1) by the Access to Justice Act 1999 (Destination of Appeals) Order 2000 (SI 2000/1071) art.7. Provisions exercising this power in relation to appeals to the Court of Appeal from a county court are found in arts 3, 4 and 5 of that statutory instrument. art.3(1) states that, subject to two exceptions, an appeal from a decision of a county court shall not go according to the general rule (i.e. from a county court to the Court of Appeal) but shall go to the High Court. And art.3(2) states that, subject to the same exceptions, where the decision to be appealed is a decision made by a district judge, the appeal shall go to a judge of a county court. In this context, “decision” includes any judgment, order or direction. The two exceptions are (1) where the decision is a final decision made in a mercantile claim dealt with in a county court (art.4(b), note also the exception provided for by 4(a)); and (2) where the decision appealed was itself a decision made on appeal (other than from the decision of an officer of the court authorised to assess costs) (so-called “second appeals”) (see art.5). In this context, “final decision” means any decision that would finally determine (subject to any possible appeal or detailed assessment of costs) the entire proceedings whichever way the court decided the issues before it (ibid. art.(2)(c)).

No appeal shall lie to the Court of Appeal: (1) from any order, judgment or decision of a county court which is final, or (2) from any order of a county court allowing an extension of time for appealing from a judgment or order (paras (b) and (c) of s.18(1); see para.9A–62 below).

For rules of court affecting appeals from a county court to the Court of Appeal, see CPR Pt 52, and for further information as to the jurisdiction of the Court of Appeal in relation to appeals from a county court, see notes on the rules in Pt 52 (Vol.1, paras 52.0.1 et seq.).



For s.78 of the County Courts Act 1984 (see Arrangement) plus any related commentary see paragraph 9A–571+ on White Book on Westlaw UK or the Civil Procedure CD.

Agreement not to appeal

9A–572

79.—(1) No appeal shall lie from any judgment, direction, decision or order of a judge of county courts if, before the judgment, direction, decision or order is given or made, the parties agree, in writing signed by themselves or their legal representatives or agents, that it shall be final.

(2) [...]

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

Note —Amended by the Courts and Legal Services Act 1990 s.125(3) and Sch.18 para.49(3); and the Statute Law (Repeals) Act 1986 Sch.1. **9A-573**

Judge's note on appeal

80.—(1) At the hearing of any proceedings in a county court in which there is a right of appeal or from which an appeal may be brought with leave, the judge shall, at the request of any party, make a note— **9A-574**

- (a) of any question of law raised at the hearing; and
- (b) of the facts in evidence in relation to any such question; and
- (c) of his decision on any such question and of his determination of the proceedings.

(2) Where such a note has been taken, the judge shall (whether notice of appeal has been served or not), on the application of any party to the proceedings, and on payment by that party of such fee as may be prescribed by an order under section 92 of the Courts Act 2003 (fees), furnish him with a copy of the note, and shall sign the copy, and the copy so signed shall be used at the hearing of the appeal.

Note —Subsection (2) was amended by the Courts Act 2003 s.109(1) and Sch.8 para.271(b). **9A-575**

Judge's note in small claim

Practice Direction (Small Claims Track), para.5.1 et seq. provides for the recording of evidence and the giving of reasons. Nothing in that direction affects the duty of the judge under s.80 (*ibid.* para.5.8, see Vol.1, para.27PD.5). **9A-576**

Powers of Court of Appeal on appeal from county court

81.—(1) On the hearing of an appeal, the Court of Appeal may draw any inference of fact and either— **9A-577**

- (a) order a new trial on such terms as the court thinks just; or
- (b) order judgment to be entered for any party; or
- (c) make a final or other order on such terms as the court thinks proper to ensure the determination on the merits of the real question in controversy between the parties.

(2) Subject to Civil Procedure Rules on any appeal from a county court the Court of Appeal may reverse or vary, in favour of a party seeking to support the judgment or order of the county court in whole or in part, any determinations made in the county court on questions of fact, notwithstanding that the appeal is an appeal on a point of law only, or any such determinations on points of law, notwithstanding that the appeal is an appeal on a question of fact only.

(3) Subsection (2) shall not enable the Court of Appeal to reverse or vary any determination, unless the party dissatisfied with the determination would have been entitled to appeal in respect of it if aggrieved by the judgment or order.

Note —Amended by the Civil Procedure Act 1997 Sch.2.

9A-578

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

Decision of Court of Appeal on probate appeals to be final

- 9A-579** 82. No appeal shall lie from the decision of the Court of Appeal on any appeal from a county court in any probate proceedings.

CERTIORARI AND PROHIBITION

Stay of proceedings in case of certiorari or prohibition

- 9A-580** 83.—(1) The grant by the High Court of leave to make an application for an order of certiorari or prohibition to a county court shall, if the High Court so directs, operate as a stay of the proceedings in question until the determination of the application, or until the High Court otherwise orders.

(2) Where any proceedings are so stayed, the judge of the county court shall from time to time adjourn the hearing of the proceedings to such day as he thinks fit.

Prohibition

- 9A-581** 84.—(1) Where an application is made to the High Court for an order or prohibition addressed to any county court, the matter shall be finally disposed of by order.

(2) Upon any such application, the judge of the county court shall not be served with notice of it, and shall not, except by the order of a judge of the High Court—

- (a) be required to appear or be heard; or
- (b) be liable to any order for the payment of the costs of the application;

but the application shall be proceeded with and heard in the same manner in all respects as an appeal duly brought from a decision of the judge, and notice of the application shall be given to or served upon the same parties as in the case of an order made or refused by a judge in a matter within his jurisdiction.

PART V

ENFORCEMENT OF JUDGMENTS AND ORDERS

EXECUTION AGAINST GOODS

Execution of judgments or orders for payment of money

- 9A-582** 85.—(1) Subject to Article 8 of the High Court and County Courts Jurisdiction Order 1991, any sum of money payable under a judgment or order of a county court may be recovered, in case of default or failure of payment, forthwith or at the time or times and in the manner thereby directed, by execution against the goods of the party against whom the judgment or order was obtained.

(2) The district judge, on the application of the party prosecuting any such judgment or order, shall issue a warrant of execution in the nature of a writ of *fieri facias* whereby the district judge shall be

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empowered to levy or cause to be levied by distress and sale of the goods, wherever they may be found within the district of the court, the money payable under the judgment or order and the costs of the execution.

(3) The precise time of the making of the application to the district judge to issue such a warrant shall be entered by him in the record prescribed for the purpose under section 12 and on the warrant.

(4) It shall be the duty of every constable within his jurisdiction to assist in the execution of every such warrant.

Execution of judgments or orders for payment of money

Execution by means of a warrant of execution is one of the principal means of enforcing a judgment. Important procedural rules are contained in CPR Sch.2, CCR O.25 and O.26. Broadly speaking, a warrant of execution in a county court is the equivalent of a writ of *fiery facias* in the High Court. Warrants in the county court are executed by county court bailiffs.

Section 85 imposes certain functions on the “registrar”, an office now abolished by s.74 of the Courts and Legal Services Act 1990 and replaced by the district judge. By CPR Sch.2, CCR O.26 r.1(1A) these functions are now discharged by the “court officer”.

The “precise time” referred to in s.85(3) is important for establishing priority of warrants (see also s.99, below).

Article 8 of the 1991 Order imposes restrictions on the circumstances in which a judgment or order of a county court for the payment of a sum of money which it is sought to enforce wholly or partly by execution against goods may be enforced in the High Court (see para. 9B–939 below). Coinciding with the substitution of CPR r.70.5 (Enforcement of decisions of bodies other than the High Court and county courts and compromises enforceable by enactment) by SI 2008/3327, significant amendments to art.8 were made by SI 2009/577.

Execution of orders for payment by instalments

86.—(1) Where the court has made an order for payment of any sum of money by instalments, execution on the order shall not be issued until after default in payment of some instalment according to the order.

(2) Rules of court may prescribe the cases in which execution is to issue if there is any such default and limit the amounts for which and the times at which execution may issue.

(3) Except so far as may be otherwise provided by county court rules made for those purposes, execution or successive executions may issue if there is any such default for the whole of the said sum of money and costs then remaining unpaid or for such part as the court may order either at the time of the original order or at any subsequent time; but except so far as may be otherwise provided by such rules, no execution shall issue unless at the time when it issues the whole or some part of an instalment which has already become due remains unpaid.

Note —Amended by the Civil Procedure Act 1997 Sch.2 para.2(2).

Execution of orders for payment by instalments

A county court has power under s.71 to order a sum of money payable under a judgment to be paid by instalments. In such cases warrants of execution may only be granted on default of the instalment order. The judgment creditor can issue a warrant for the whole or part of the debt (CPR Sch.2, CCR O.26 r.1(2)). The minimum sum

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9A–583

9A–584

9A–585

9A–586

for which a warrant may be issued is £50, or the amount of one monthly instalment or four weekly instalments, whichever is greater. See generally, CPR Sch.2, CCR O.26 and commentary to CPR Sch.2, CCR O.26 r.11 on suspension of part warrants.

In *Ropaigealach v Allied Irish Bank Plc* [2001] EWCA Civ 1790; November 12, 2001, CA, unrep., an instalment order had been made and the Court held that, for the purposes of s.86, “execution” by charging order is “issued” when it is issued nisi. As, in this case, the order nisi had been obtained before the instalment order was made, the court had jurisdiction to make the charging order absolute. The Court explained that the existence of an instalment order is one of the circumstances to be considered by the court in exercising its discretion. In many circumstances it may be entirely sensible and satisfactory from both parties’ points of view for an instalment order and an order absolute to co-exist, particularly where a long-running instalment order is made.

Execution to be superseded on payment

9A-587 87.—(1) In or upon every warrant of execution issued from a county court against the goods of any person, the district judge shall cause to be inserted or indorsed the total amount to be levied, inclusive of the fee for issuing the warrant but exclusive of the fees for its execution.

(2) If the person against whom the execution is issued, before the actual sale of the goods, pays or causes to be paid or tendered to the district judge of the court from which the warrant is issued, or to the bailiff holding the warrant, the amount inserted in, or indorsed upon, the warrant under subsection (1), or such part as the person entitled agrees to accept in full satisfaction, together with the amount stated by the officer of the court to whom the payment or tender is made to be the amount of the fees for the execution of the warrant, the execution shall be superseded, and the goods shall be discharged and set at liberty.

Execution to be superseded on payment

9A-588 This section states the obvious rule that the warrant of execution is to be superseded on payment of the amount for which the warrant is issued or such other sum as the judgment creditor accepts in full satisfaction of the warrant. Indeed sales under warrants of execution (see ss.93—98) follow only a small proportion of warrants issued.

Power to stay execution

9A-589 88. If at any time it appears to the satisfaction of the court that any party to any proceedings is unable from any cause to pay any sum recovered against him (whether by way of satisfaction of the claim or counterclaim in the proceedings or by way of costs or otherwise), or any instalment of such a sum, the court may, in its discretion, stay any execution issued in the proceedings for such time and on such terms as the court thinks fit and so from time to time it appears that the cause of inability has ceased.

Power to stay execution

9A-590 The district judge exercises the jurisdiction to stay execution of warrants (CPR Sch.2, CCR O.25 r.8). See also s.71(2) for a similar provision on suspension and stay of judgments.

SEIZURE AND CUSTODY OF GOODS, ETC.

Goods which may be seized

9A-591 89.—(1) Every bailiff or officer executing any warrant of execution

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issued from a county court against the goods of any person may by virtue of it seize—

- (a) any of that person's goods except—
 - (i) such tools, books, vehicles and other items of equipment as are necessary to that person for use personally by him in his employment, business or vocation;
 - (ii) such clothing, bedding, furniture, household equipment and provisions as are necessary for satisfying the basic domestic needs of that person and his family;
- (b) any money, banknotes, bills of exchange, promissory notes, bonds, specialties or securities for money belonging to that person.

(2) Any reference to the goods of an execution debtor in this Part of this Act includes a reference to anything else of his that may lawfully be seized in execution.

Note —Amended by the Courts and Legal Services Act 1990 ss.15 and 125(7), and Sch.20. **9A-592**

Goods which may be seized

This section permits execution against the judgment debtor's "goods" and money, etc., but exempts certain goods from subjection to execution. See the detailed commentary to CPR Sch.1, RSC O.45. **9A-593**

For the device of "walking possession" see commentary to s.90, below.

Custody of goods seized

90. Goods seized in execution under process of a county court shall, until sale— **9A-594**

- (a) be deposited by the bailiff in some fit place; or
- (b) remain in the custody of a fit person approved by the district judge to be put in possession by the bailiff; or
- (c) be safeguarded in such other manner as the district judge directs.

Custody of goods seized

If goods are actually removed they must be deposited in a "fit place" such as a warehouse or compound. An inventory must be made and notice of the time and place of the sale served on the judgment debtor (CPR Sch.2, CCR O.26 r.12). **9A-595**

To avoid some of the administrative inconvenience of actual removal, the device of "walking possession" is frequently used whereby the judgment debtor signs an agreement that in consideration of the bailiff not removing the goods, the judgment debtor undertakes not to remove the goods and agrees that the bailiff may re-enter, using force if necessary, at any time to seize the goods.

Disposal of bills of exchange, etc., seized

91. The district judge shall hold any bills of exchange, promissory notes, bonds, specialties or other securities for money seized in execution under process of a county court as security for the amount directed to be levied by the execution, or for so much of that amount as has not been otherwise levied or raised, for the benefit of the plaintiff, and the plaintiff may sue in the name of the defendant, or **9A-596**

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in the name of any person in whose name the defendant might have sued, for the recovery of the sum secured or made payable thereby, when the time of payment arrives.

Disposal of bills of exchange, etc., seized

9A-597 A “bill of exchange” includes a cheque (see the Bills of Exchange Act 1882 s.73).

Penalty for rescuing goods seized

9A-598 92.—(1) If any person rescues or attempts to rescue any goods seized in execution under process of a county court, he shall be liable—

- (a) on summary conviction, to imprisonment for a term not exceeding one month or to a fine of an amount not exceeding level 4 on the standard scale, or both; or
- (b) on an order made by the judge in that behalf, to be committed for a specified period not exceeding one month to prison or to a fine of an amount not exceeding level 4 on the standard scale or to be so committed and to such a fine,

and a bailiff of the court may take the offender into custody, with or without warrant, and bring him before the judge.

(2) The judge may at any time revoke an order committing a person to prison under this section and, if he is already in custody, order his discharge.

9A-599 *Note* —Amended by the Statute Law (Repeals) Act 1986.

Penalty for rescuing goods seized

9A-600 This section enables the county court to punish any person who rescues or attempts to rescue goods seized in execution. Compare s.14. The procedure is the same under ss.14 and 92 (see CPR Sch.2, CCR O.34 r.1).

The “standard scale” is provided for by s.37 of the Criminal Justice Act 1982. Level 4 is currently £2,500.

SALE OF GOODS SEIZED

Period to elapse before sale

9A-601 93. No goods seized in execution under process of a county court shall be sold for the purpose of satisfying the warrant of execution until the expiration of a period of at least 5 days next following the day on which the goods have been so seized unless—

- (a) the goods are of a perishable nature; or
- (b) the person whose goods have been seized so requests in writing.

Goods not to be sold except by brokers or appraisers

9A-602 94. No goods seized in execution under process of a county court shall be sold for the purpose of satisfying the warrant of execution except by one of the brokers or appraisers appointed under this Part of this Act.

Appointment of brokers, appraisers, etc.

9A-603 95.—(1) The registrar may from time to time as he thinks fit ap-

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point such number of persons for keeping possession, and such number of brokers and appraisers for the purpose of selling or valuing any goods seized in execution under process of the court, as appears to him to be necessary.

(2) The registrar may direct security to be taken from any broker, appraiser or other person so appointed for such sum and in such manner as he thinks fit for the faithful performance of his duties without injury or oppression.

(3) The judge or registrar may dismiss any broker, appraiser or other person so appointed.

(4) There shall be payable to brokers and appraisers so appointed in respect of their duties, out of the produce of goods distrained or sold, such fees as may be prescribed by an order under section 92 of the Courts Act 2003 (fees).

Note —Subsection (4) was amended by the Courts Act 2003 s.109(1) and Sch.8, para.271(c). **9A-604**

Registrar

By the Courts and Legal Services Act 1990 s.74, the office of registrar became that of district judge and references in any enactment to “registrar” are to be construed as a reference to that office in its new name. **9A-605**

Power to appoint bailiffs to act as brokers and appraisers

96.—(1) The judge may appoint in writing any bailiff of the court to act as a broker or appraiser for the purpose of selling or valuing any goods seized in execution under process of the court. **9A-606**

(2) A bailiff so appointed may, without other licence in that behalf, perform all the duties which brokers or appraisers appointed under section 95 may perform under this Act.

Sales under executions to be public unless otherwise ordered

97.—(1) Where any goods are to be sold under execution for a sum exceeding £20 (including legal incidental expenses), the sale shall, unless the court from which the warrant of execution issued otherwise orders, be made by public auction and not by bill of sale or private contract, and shall be publicly advertised by the registrar on, and during 3 days next preceding, the day of sale. **9A-607**

(2) Where any goods are seized in execution and the registrar has notice of another execution or other executions, the court shall not consider an application for leave to sell privately until the prescribed notice has been given to the other execution creditor or creditors, who may appear before the court and be heard upon the application.

Sales under executions to be public unless otherwise ordered

See generally CPR Sch.2, CCR O.26, and in particular, rr.12, 13 and 15. Where goods are sold under an execution, the proper officer shall furnish the debtor with a detailed account in writing of the sale and of the application of the proceeds (see CPR Sch.2, CCR O.26, r.13). **9A-608**

A sale not in conformity with s.97 will be voidable rather than void (*Crawshaw v Harrison* [1894] 1 Q.B. 79; (1893) L.J.Q.B. 94).

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Protection of district judge selling goods under execution without notice of claim by third party

9A-609 98.—(1) Where any goods in the possession of an execution debtor at the time of seizure by a district judge or other officer charged with the enforcement of a warrant or other process of execution issued from a county court are sold by that district judge or other officer without any claims having been made to them—

- (a) the purchaser of the goods so sold shall acquire a good title to those goods; and
- (b) no person shall be entitled to recover against the district judge or other officer, or anyone lawfully acting under his authority—
 - (i) for any sale of the goods, or
 - (ii) for paying over the proceeds prior to the receipt of a claim to the goods,

unless it is proved that the person from whom recovery is sought had notice, or might by making reasonable inquiry have ascertained, that the goods were not the property of the execution debtor.

(2) Nothing in this section shall affect the right of any claimant, who may prove that at the time of sale he had a title to any goods so seized and sold, to any remedy to which he may be entitled against any person other than the district judge or other officer.

(3) The provisions of this section have effect subject to those of sections 183, 184 and 346 of the Insolvency Act 1986.

9A-610 *Note* —Subsection (3) was substituted by the Insolvency Act 1986 s.439(2) and Sch.14; subs.(1)(b) was substituted by the Courts Act 2003 s.109(1) and Sch.8, para.273.

Protection of district judge selling goods under execution without notice of claim by third party

9A-611 For the anomalous position of the district judge in relation to execution, see the commentary to s.123, below. In the county court the “high bailiff” (i.e. nowadays, the district judge) has the same liabilities as the sheriff in the High Court.

Section 98 protects the district judge in the same way as s.138B of the SCA 1981 protects the sheriff.

CLAIMS IN RESPECT OF GOODS SEIZED

Effects of warrants of execution

9A-612 99.—(1) Subject

- (a) to subsection (2); and
- (b) to section 103(2),

a warrant of execution against goods issued from a county court shall bind the property in the goods of the execution debtor as from the time at which application for the warrant was made to the district judge of the county court.

(2) Such a warrant shall not prejudice the title to any goods of the execution debtor acquired by a person in good faith and for valuable consideration unless he had at the time when he acquired his title—

- (a) notice that an application for the issue of a warrant of execution against the goods of the execution debtor had

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been made to the district judge or a county court and that the warrant issued on the application either—

- (i) remained unexecuted in the hands of the district judge of the court from which it was issued; or
- (ii) had been sent for execution to, and received by, the district judge of another county court, and remained unexecuted in the hands of the district judge of that court; or
- (b) notice that a writ of fieri facias or other writ of execution by virtue of which the goods of the execution debtor might be seized or attached had been delivered to an enforcement officer or other officer charged with the execution of the writ and remained unexecuted in the hands of that person.

(3) It shall be the duty of the district judge (without fee) on application for a warrant of execution being made to him to endorse on its back the hour, day, month and year when he received the application.

(4) For the purposes of this section—

- (za) “enforcement officer” means an individual who is authorised to act as an enforcement officer under the Courts Act 2003;
- (a) “property” means the general property in goods, and not merely a special property;
- (b) [...]
- (c) a thing shall be treated as done in good faith if it is in fact done honestly whether it is done negligently or not.

Effects of warrants of execution

This section corresponds with s.138 of the SCA 1981 (see commentary thereto) which replaced the only section in the Sale of Goods Act 1893 not consolidated into the Sale of Goods Act 1979 because it belonged in a statute concerned with the administration of justice.

In *Woodland v Fuller* (1840) 11 Ad. & El. 859; [1835–42] All E.R. Rep. 343, it was held that where goods are sold, the phrase “binds the property in goods” does not prevent the property from passing but constitutes the execution of a charge on the goods.

See also s.103(2) which deals with execution of warrants outside the jurisdiction of the issuing court.

With effect from March 15, 2004, subsections (2)(b) and (4) were amended by the Courts Act 2003 s.109(1) and Sch.8 para.274(3)(a).

Sale of goods to which claim is made

100.—(1) Where a claim is made to or in respect of any goods seized in execution under process of a county court, the claimant may—

- (a) deposit with the bailiff either—
 - (i) the amount of the value of the goods claimed; or
 - (ii) the sum which the bailiff is allowed to charge as costs for keeping possession of the goods until the decision of the judge can be obtained on the claim;
- or

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(b) give the bailiff in the prescribed manner security for the value of the goods claimed.

(2) For the purpose of this section, the amount of the value of the goods claimed shall, in the case of dispute, be fixed by appraisal, and where that amount is deposited it shall be paid by the bailiff into court to abide the decision of the judge upon the claim.

(3) Subject to subsection (4), in default of the claimant's complying with this section, the bailiff shall sell the goods as if no such claim had been made, and shall pay into court the proceeds of the sale to abide the decision of the judge.

(4) The goods shall not be sold if the district judge decides that, in all the circumstances, the decision of the judge on the claim made to or in respect of them ought to be awaited.

Sale of goods to which claim is made

9A-615 This section is concerned with situations where there is a dispute as to title to the goods and spells out the action required of the person claiming the goods. Disputes will usually be resolved by interpleader proceedings. See generally CPR Sch.2, CCR O.33 and commentary thereto and s.101, below.

Interpleader by district judge

9A-616 **101.**—(1) If a claim is made to or in respect of any goods seized in execution under process of a county court, or in respect of the proceeds or value of any such goods, the district judge may, as well before as after any action brought against him, issue a summons calling before the court the party at whose instance the process issued and the party making the claim.

(2) Upon the issue of the summons, any action brought in any county court or other court in respect of the claim or of any damage arising out of the execution of the warrant shall be stayed.

(3) On the hearing of the summons, the judge shall adjudicate upon the claim, and shall also adjudicate between the parties or either of them and the district judge upon any claim to damages arising or capable of arising out of the execution of the warrant by the district judge, and shall make such order in respect of any such claim and the costs of the proceedings as he thinks fit.

Interpleader by district judge

9A-617 Interpleader is a process for determining rival claims to goods. This section enables the circuit judge (not the district judge) to adjudicate upon the rival claims where the goods have been seized in execution. The procedure is governed by CPR Sch.2, CCR O.33 (see commentary thereto). The district judge cannot determine an interpleader relating to execution in the county court (cf. the High Court; see CPR Sch.1, RSC O.17) because of his anomalous position as “high bailiff” (see commentary to s.123, below).

Claims for rent where goods seized in execution

9A-618 **102.**—(1) Section 1 of the Landlord and Tenant Act 1709 shall not apply to goods seized in execution under process of a county court, but the following provisions of this section shall apply in substitution.

(2) The landlord of any tenement in which any goods are seized may claim the rent of the tenement in arrear at the date of the

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seizure, at any time within the 5 days next following that date, or before the removal of the goods, by delivering to the bailiff or officer making the levy a claim in writing, signed by himself or his agent, stating—

- (a) the amount of rent claimed to be in arrear; and
- (b) the period in respect of which the rent is due.

(3) Where such a claim is made, the bailiff or officer making the levy shall in addition distrain for the rent so claimed and the cost of the distress, and shall not, within 5 days next after the distress, sell any part of the goods seized, unless—

- (a) the goods are of a perishable nature; or
- (b) the person whose goods have been seized so requests in writing.

(4) The bailiff shall afterwards sell under the execution and distress such of the goods as will satisfy—

- (a) first, the costs of and incidental to the sale;
- (b) next, the claim of the landlord not exceeding—
 - (i) in a case where the tenement is let by the week, 4 weeks' rent;
 - (ii) in a case where the tenement is let for any other term less than a year, the rent of two terms of payment;
 - (iii) in any other case, one year's rent; and

(5) If any replevin is made of the goods seized, the bailiff shall nevertheless sell such portion of them as will satisfy the costs of and incidental to the sale under the execution and the amount for which the warrant of execution issued.

(6) In any event the surplus of the sale, if any, and the residue of the goods shall be returned to the execution debtor.

(7) The fees of the district judge and broker for keeping possession, appraisal and sale under any such distress shall be the same as would have been payable if the distress had been an execution of the court, and no other fees shall be demanded or taken in respect thereof.

(8) Nothing in this section affects section 346 of the Insolvency Act 1986.

Note —Subsection (8) was substituted by the Insolvency Act 1986 s.439(2) and Sch.14. **9A-619**

Claims for rent where goods seized in execution

Subsection (8) of this section refers to s.346 of the Insolvency Act 1986 but this is clearly an error and should be a reference to s.347 which is titled "Distress, etc.". **9A-620**

Sections 6 and 7 of the Landlord and Tenant Act 1709 should be distinguished from s.1 of that Act. The former apply only to cases *between* landlord and tenant, whereas s.1 applies in other cases. Section 102(2) to (8) of the County Courts Act 1984 applies only in substitution for s.1 of the 1709 Act.

On replevin see s.144 and Sch.1, below.

EXECUTION OUT OF JURISDICTION OF COURT

Execution out of jurisdiction of court

103.—(1) Where a warrant of execution has been issued from a **9A-621**

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

SECTION 9A: MAIN STATUTES

county court (hereafter in this section referred to as a “home court”) against the goods of any person and the goods are out of the jurisdiction of that court, the district judge of that court may send the warrant of execution to the district judge of any other county court within the jurisdiction of which the goods are or are believed to be, with a warrant endorsed on it or annexed to it requiring execution of the original warrant.

(2) The original warrant shall bind the property in goods of the execution debtor which are within the jurisdiction of the court to which it is sent as from the time when it is received by the district judge of that court.

(3) It shall be the duty of the district judge of the court to which the warrant is sent (without fee) on receipt of the warrant to endorse on its back the hour, day, month and year when he received it.

(4) On the receipt of the warrant, the district judge of the other county court shall act in all respects as if the original warrant of execution had been issued by the court of which he is district judge and shall within the prescribed time—

- (a) report to the district judge of the home court what he has done in the execution of the warrant; and
- (b) pay over all moneys received in pursuance of the warrant.

(5) Where a warrant of execution is sent by the district judge of a home court to the district judge of another court for execution under this section, that other court shall have the same power as the home court of staying the execution under section 88 as respects any goods within the jurisdiction of that other court.

(6) Rules of court may make provision for the suspension of any judgment or order, on terms, in connection with any warrant issued with respect to any instalment payable under the judgment or order.

9A-622 *Note* —Subsection (6) added by the Courts and Legal Services Act 1990 s.125(2), Sch.17 para.16. Amended by the Civil Procedure Act 1997 Sch.2 para.2(2).

Execution out of jurisdiction of court

9A-623 The judge of one county court has no authority to order execution in the area of another county court because the jurisdiction of county courts is limited geographically. This section overcomes the difficulties this presents by adopting a procedure of reciprocal enforcement between county courts.

The functions of the district judge under s.103 are discharged by the “court officer” pursuant to CPR Sch.2, CCR O.26 r.1(1A).

Information as to writs and warrants of execution

9A-624 **104.**—(1) Where a writ against the goods of any person issued from the High Court is delivered to an enforcement officer who is under a duty to execute the writ or to a sheriff, then on demand from the district judge of a county court that person shall—

- (a) in the case of an enforcement officer, by writing signed by that officer or a person acting under his authority, and
- (b) in the case of a sheriff, by writing signed by any clerk in the officer of the under-sheriff,

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inform the district judge of the precise time the writ was delivered to him.

(2) A bailiff of a county court shall on demand show his warrant to any enforcement officer, any person acting under the authority of an enforcement officer and any sheriff's officer.

(3) Any writing purporting to be signed as mentioned in subsection (1) and the endorsement on any warrant issued from a county court shall respectively be sufficient justification to any district judge, or enforcement officer or sheriff, acting on it.

(4) In this section "enforcement officer" means an individual who is authorised to act as an enforcement officer under the Courts Act 2003.

Information as to writs and warrants of execution

The purpose of this section is to facilitate the exchange of information concerning the enforcement of judgments between county courts and the High Court. This section was substituted by the Courts Act 2003 s.109(1) and Sch.8 para.275, with effect from March 15, 2004.

9A-625

* * * *

RECEIVERS AND ATTACHMENT OF DEBTS

Receivers

107.—(1) The power of the county court to appoint a receiver by way of equitable execution shall operate in relation to all legal estates and interests in land.

9A-626

(2) The said power may be exercised in relation to an estate or interest in land whether or not a charge has been imposed on that land under section 1 of the Charging Orders Act 1979 for the purpose of enforcing the judgment, decree, order or award in question, and the said power shall be in addition to and not in derogation of any power of any court to appoint a receiver in proceedings for enforcing such a charge.

(3) Where an order under section 1 of the Charging Orders Act 1979 imposing a charge for the purpose of enforcing a judgment, decree, order or award has been registered under section 6 of the Land Charges Act 1972, subsection (4) of that section (which provides that, amongst other things, an order appointing a receiver and any proceedings pursuant to the order or in obedience to it, shall be void against a purchaser unless the order is for the time being registered under that section) shall not apply to an order appointing a receiver made either in proceedings for enforcing the charge or by way of equitable execution of the judgment, decree, order or award or, as the case may be, of so much of it as requires payment of moneys secured by the charge.

Receivers

The procedure for the appointment of a receiver is governed by CPR Pt 69 (Court's Power to Appoint Receiver).

9A-627

Attachment of debts

108.—(1) Subject to any order for the time being in force under

9A-628

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

subsection (4), this section applies to any deposit account, and any withdrawable share account, with a deposit-taker.

(2) In determining whether, for the purposes of the jurisdiction of the county court to attach debts for the purpose of satisfying judgments or orders for the payment of money, a sum standing to the credit of a person in an account to which this section applies is a sum due or accruing to that person and, as such, attachable in accordance with rules of court, any condition mentioned in subsection (3) which applies to the account shall be disregarded.

(3) Those conditions are—

- (a) any condition that notice is required before any money or share is withdrawn;
- (b) any condition that a personal application must be made before any money or share is withdrawn;
- (c) any condition that a deposit book or share-account book must be produced before any money or share is withdrawn; or
- (d) any other prescribed condition.

(4) The Lord Chancellor may by order make such provision as he thinks fit, by way of amendment of this section or otherwise, for all or any of the following purposes, namely—

- (a) including in, or excluding from, the accounts to which this section applies accounts of any description specified in the order;
- (b) excluding from the accounts to which this section applies all accounts with any particular deposit-taker so specified or with any deposit-taker of a description so specified.

(5) An order under subsection (4) shall be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

9A-629 *Note* —Amended by the Civil Procedure Act 1997 Sch.2 para.2(2). Subsections (1) and (4)(b) were amended by the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001 (SI 2001/3649) art.294.

Attachment of debts

9A-630 This section re-enacts amendments made to the CCA. 1959 by the SCA. 1981. The purpose of the section is to enable attachment of any deposit account or withdrawable share account of any deposit-taking institution. Deposit-taking institutions include banks, the National Savings Bank, building societies, trustee savings banks, and even credit unions. Proceedings for orders for the attachment of debts, formerly known as “garnishee orders” but now known as “third party debt orders”, are governed by CPR Pt 72.

Note the provisions for amendment in subss.(4) and (5). The section can be compared with s.40 of the SCA 1981.

It is not possible under this section to attach wages or salary but see instead the Attachment of Earnings Act 1971 and CPR Sch.2, CCR O.27.

Administrative and clerical expenses of garnishees

9A-631 **109.**—(1) Where an interim third party debt order made in the exercise of the jurisdiction mentioned in subsection (2) of the preceding section is served on a deposit-taker, it may, subject to the provi-

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sions of this section, deduct from the relevant debt or debts an amount not exceeding the prescribed sum towards its administrative and clerical expenses in complying with the order; and the right to make a deduction under this subsection shall be exercisable as from the time the interim third party debt order is served on it.

(1A) In subsection (1) “the relevant debt or debts”, in relation to an interim third party debt order served on a deposit-taker, means the amount, as at the time the order is served on it, of the debt or debts of which the whole or a part is expressed to be attached by the order.

(1B) A deduction may be made under subsection (1) in a case where the amount referred to in subsection (1A) is insufficient to cover both the amount of the deduction and the amount of the judgment debt and costs in respect of which the attachment was made, notwithstanding that the benefit of the attachment to the creditor is reduced as a result of the deduction.

(2) An amount may not in pursuance of subsection (1) be deducted or, as the case may be, retained in a case where by virtue of section 346 of the Insolvency Act 1986 or section 325 of the Companies Act 1948 or otherwise, the creditor is not entitled to retain the benefit of the attachment.

(3) In this section “prescribed” means prescribed by an order made by the Lord Chancellor.

(4) An order under this section—

- (a) may make different provision for different cases;
- (b) without prejudice to the generality of paragraph (a) may prescribe sums differing according to the amount due under the judgment or order to be satisfied;
- (c) may provide for this section not to apply to deposit-taker of any prescribed description.

(5) Any such order shall be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

Note —Amended by the Administration of Justice Act 1985 ss.52 and 67(2) and Sch.8; and the Insolvency Act 1986 s.439(2) and Sch.14. Subsections (1), (1A) and (4)(c) were amended by the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001 (SI 2001/3649) art.295. In subss.(1) and (1A), with effect from March 23, 2002, “interim third party debt order” was substituted for “order nisi” by the Civil Procedure (Modification of Enactments) Order 2002 (SI 2002/439); see further CPR Pt 72 (Third Party Debt Orders).

9A-632

Administrative and clerical expenses of garnishees

The purpose of this section is to enable the “deposit-taking institution” (see s.108) to recover, from the judgment debtor’s account, a “prescribed sum” towards its expenses of complying with the garnishee order. The “prescribed sum” is varied from time to time by statutory instrument and is currently £55 (see Attachment of Debts (Expenses) Order (SI 1996/3098)).

9A-633

MISCELLANEOUS PROVISIONS AS TO ENFORCEMENT OF JUDGMENTS AND ORDERS

Penalty for non-attendance on judgment summons

110.—(1) If a debtor summoned to attend a county court by a **9A-634**

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judgment summons fails to attend on the day and at the time fixed for any hearing of the summons, the judge may adjourn or further adjourn the summons to a specified time on a specified day and order the debtor to attend at that time on that day.

(2) If—

(a) a debtor, having been ordered under subsection (1) to attend at a specified time on a specified day, fails to do so;

(b) [...]

the judge may make an order committing him to prison for a period not exceeding 14 days in respect of the failure or refusal.

(3) In any case where the judge has power to make an order of committal under subsection (2) for failure to attend, he may in lieu of or in addition to making that order, order the debtor to be arrested and brought before the court either forthwith or at such time as the judge may direct.

(4) A debtor shall not be committed to prison under subsection (2) for having failed to attend as required by an order under subsection (1) unless there was paid to him at the time of the service of the judgment summons, or paid or tendered to him at the time of the service of the order, such sum in respect of his expenses as may be prescribed for the purposes of this section.

(5) The judge may at any time revoke an order committing a person to prison under this section and, if he is already in custody, order his discharge.

Penalty for non-attendance on judgment summons

9A-635 “Judgment summons” is defined in s.147. Under s.5 of the Debtors Act 1869, a judge, sitting in open court, can commit to prison, for a term not exceeding six weeks, where it is proved that the judgment debtor has, or has had since the date of the judgment, the means to pay and has refused or neglected to do so. The procedure is governed by CPR Sch.2, CCR O.28 (see generally the commentary thereto). The judgment summons was once a very common method of enforcement but its availability was restricted by s.11 of the AJA 1970.

This section deals not with committal for failure to pay the judgment debt but with committal for failure to attend the hearing of the judgment summons. As to securing the debtor’s attendance, see CPR Sch.2, CCR O.28 r.4.

On travelling expenses (see s.110(4)) the sum prescribed is “a sum reasonably sufficient to cover [the judgment debtor’s] expenses” (see CPR Sch.2, CCR O.28 r.2(4) on tendering such expenses on service of the judgment summons, and CPR Sch.2, CCR O.28 r.10(2) on recovery of the sum).

Paragraph (b) was omitted from subs.(2) by the Civil Procedure (Modification of Enactments) Order 2002 (SI 2002/439) with effect from March 23, 2002.

Provisions as to warrants of possession

9A-636 **111.**—(1) For the purpose of executing a warrant to give possession of any premises, it shall not be necessary to remove any goods from those premises.

(2) The duration of any warrant of possession issued by a county court to enforce a judgment or order for the recovery of land or for the delivery of possession of land shall be such as may be fixed by or in accordance with rules of court.

9A-637 *Note* —Amended by the Civil Procedure Act 1997 Sch.2 para.2(2).

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

Provisions as to warrants of possession

The procedure on warrants of possession is prescribed by CPR Sch.2, CCR O.26 r.17. **9A-638**

PART VI

ADMINISTRATION ORDERS

Power to make administration order

112.—(1) Where a debtor— **9A-639**

- (a) is unable to pay forthwith the amount of a judgment obtained against him, and
- (b) alleges that his whole indebtedness amounts to a sum not exceeding the county court limit, inclusive of the debt for which the judgment was obtained;

a county court may make an order providing for the administration of his estate.

(2) In this Part of this Act

“administration order” means an order under this section; and
 “the appropriate court”, in relation to an administration order, means the court which has the power to make the order.

(3) Before an administration order is made, the appropriate court shall, in accordance with rules of court, send to every person whose name the debtor has notified to the appropriate court as being a creditor of his, a notice that that person’s name has been so notified.

(4) So long as an administration order is in force, a creditor whose name is included in the schedule to the order shall not, without the leave of the appropriate court, be entitled to present, or join in, a bankruptcy petition against the debtor unless—

- (a) his name was so notified; and
- (b) the debt by virtue of which he presents, or joins in, the petition, exceeds £1,500; and
- (c) the notice given under subsection (3) was received by the creditor within 28 days immediately preceding the day on which the petition is presented.

(5) An administration order shall not be invalid by reason only that the total amount of the debts is found at any time to exceed the county court limit, but in that case the court may, if it thinks fit, set aside the order.

(6) An administration order may provide for the payment of the debts of the debtor by instalments or otherwise, and either in full or to such extent as appears practicable to the court under the circumstances of the case, and subject to any conditions as to his future earnings or income which the court may think just.

(7) The Secretary of State may by regulations increase or reduce the sum for the time being specified in subsection (4)(b); but no such increase in the sum so specified shall affect any case in which the bankruptcy petition was presented before the coming into force of the increase.

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(8) The power to make regulations under subsection (7) shall be exercisable by statutory instrument; and no such regulations shall be made unless a draft of them has been approved by resolution of each House of Parliament.

9A-640 *Note* —Amended by the Insolvency Act 1985 s.220 and by the Civil Procedure Act 1997 Sch.2 para.2(2).

Power to make administration order

9A-641 Substantial amendments were made to s.112 by s.13 of the Courts and Legal Services Act 1990. In addition to amending s.112, new ss.112A and 112B were inserted into the CCA 1984. However, these amendments have not yet been brought into force and it is now uncertain whether they ever will be. Accordingly, the text is reproduced here in its unamended form as currently in force.

Detailed rules on administration orders are in CPR Sch.2, CCR O.39.

Administration orders are a means of consolidating debts where there are multiple debt problems. The effect of an order is to release the debtor from the burden of dealing with the debts (and arrangements with creditors) on an individual basis. The debtor under an administration order makes regular payments to the court which are then distributed among the scheduled creditors. The total debts must not exceed £5,000.

Notice of order and proof of debts

9A-642 **113.** Where an administration order has been made—

- (a) notice of the order—
 - (i) [...]
 - (ii) shall be posted in the office of the county court for the district in which the debtor resides, and
 - (iii) shall be sent to every person whose name the debtor has notified to the appropriate court as being a creditor of his or who has proved;
- (b) any creditor of the debtor, on proof of his debt before the district judge, shall be entitled to be scheduled as a creditor of the debtor for the amount of his proof;
- (c) any creditor may object in the prescribed manner to any debt scheduled, or to the manner in which payment is directed to be made by instalments;
- (d) any person who, after the date of the order, becomes a creditor of the debtor shall, on proof of his debt before the district judge, be scheduled as a creditor of the debtor for the amount of his proof, but shall not be entitled to any dividend under the order until the creditors who are scheduled as having been creditors before the date of the order have been paid to the extent provided by the order.

9A-643 *Note* —Amended by the Administration of Justice Act 1985 s.67(2), Sch.8.

Notice of order and proof of debts

9A-644 “Dividend” is the term used for the sums distributed to scheduled creditors. The practice is to wait until a sufficient sum has been paid into court to justify payment of dividends (see CPR Sch.2, CCR O.39 r.17).

Objection by a creditor before the order is made is governed by CPR Sch.2, CCR O.39 r.6, and objection after the order by CPR Sch.2, CCR O.39 r.10.

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

Effect of administration order

114.—(1) Subject to sections 115 and 116, when an administration order is made, no creditor shall have any remedy against the person or property of the debtor in respect of any debt— **9A-645**

(a) of which the debtor notified the appropriate court before the administration order was made; or

(b) which has been scheduled to the order,

except with the leave of the appropriate court, and on such terms as that court may impose.

(2) Subject to subsection (3), any county court in which proceedings are pending against the debtor in respect of any debt so notified or scheduled shall, on receiving notice of the administration order, stay the proceedings, but may allow costs already incurred by the creditor, and such costs may, on application, be added to the debt.

(3) The requirement to stay proceedings shall not operate as a requirement that a county court in which proceedings in bankruptcy against the debtor are pending shall stay those proceedings.

Note —Amended by the Civil Procedure Act 1997 Sch.2 para.2(2).

9A-646

Effect of administration order

See commentary to s.116, below.

9A-647

Execution by district judge

115.—(1) Where it appears to the district judge of the appropriate court at any time while an administration order is in force that property of the debtor exceeds in value the minimum amount, he shall, at the request of any creditor, and without fee, issue execution against the debtor's goods. **9A-648**

(1A) In subsection (1) above “the minimum amount” means £50 or such other amount as the Lord Chancellor may by order specify instead of that amount or the amount for the time being specified in such an order; and an order under this subsection shall be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

(2) Section 89 applies on an execution under this section as it applies on an execution under Part V.

Note —Amended by the Insolvency Act 1985 s.22.

9A-649

Execution by district judge

See commentary to s.116, below.

9A-650

Right of landlord to distrain notwithstanding order

116. A landlord or other person to whom any rent is due from a debtor in respect of whom an administration order is made, may at any time, either before or after the date of the order, distrain upon the goods or effects of the debtor for the rent due to him from the debtor, with this limitation, that if the distress for rent is levied after the date of the order, it shall be available only for six months' rent accrued due prior to the date of the order and shall not be available **9A-651**

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for rent payable in respect of any period subsequent to the date when the distress was levied, but the landlord or other person to whom the rent be due from the debtor may prove under the order for the surplus due for which the distress may not have been available.

Right of landlord to distrain notwithstanding order

9A-652 An important protection afforded to the judgment debtor by an administration order is that no creditor may, without leave of the court and on conditions imposed by the court, take any enforcement action against the debtor. Unless the administration order is revoked under CPR Sch.2, O.39 r.14, a creditor will not get leave to issue execution for the purpose of the order is to secure equal treatment of creditors and proportionate distribution among them (*Re Frank* [1894] 1 Q.B. 9).

Two important exceptions to the non-execution rule are:

- (1) that a district judge, who considers that the judgment debtor has goods exceeding £50 in value (after discounting protected goods—see s.89) must, at the request of a creditor and without fee, levy execution and distribute the proceeds among all the scheduled creditors, and
- (2) a landlord may distrain for rent in accordance with s.116.

Appropriation of money paid under order and discharge of order

9A-653 **117.**—(1) Money paid into court under an administration order shall be appropriated—

- (a) first in satisfaction of the costs of administration (which shall not exceed 10 pence in the pound on the total amount of the debts); and
- (b) then in liquidation of debts in accordance with the order.

(2) Where the amount received is sufficient to pay—

- (a) each creditor scheduled to the order to the extent provided by the order;
- (b) the costs of the plaintiff in the action in respect of which the order was made; and
- (c) the costs of the administration,

the order shall be superseded, and the debtor shall be discharged from his debts to the scheduled creditors.

PART VII

COMMITTALS

Power to commit for contempt

9A-654 **118.**—(1) If any person—

- (a) wilfully insults the judge of a county court, or any juror or witness, or any officer of the court during his sitting or attendance in court, or in going to or returning from the court; or
- (b) wilfully interrupts the proceedings of a county court or otherwise misbehaves in court;

any officer of the court, with or without the assistance of any other person, may, by order of the judge, take the offender into

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

custody and detain him until the rising of the court, and the judge may, if he thinks fit,—

- (i) make an order committing the offender for a specified period not exceeding one month to prison; or
- (ii) impose upon the offender, for every offence, a fine of an amount not exceeding £2,500, or may both make such an order and impose such a fine.

(2) The judge may at any time revoke an order committing a person to prison under this section, and if he is already in custody, order his discharge.

(3) A district judge, assistant district judge or deputy district judge shall have the same powers under this section in relation to proceedings before him as a judge.

Note —Amended by the Statute Law (Repeals) Act 1986; the Courts and Legal Services Act 1990 s.74; and the Criminal Justice Act 1991 s.17(3), Sch.4. **9A-655**

Power to commit for contempt

Section 118 is concerned with contempt “in the face of the court” and does not apply, for example, to committal for breach of an order or undertaking (as to which see CCR O.29). However, the time-honoured expression “in the face of the court” is not literally construed and includes contempt “in going to or returning from the court”. See *Manchester City Council v McCann* [1999] 2 W.L.R. 590, CA. **9A-656**

Generally, a county court can commit for a fixed term not exceeding two years (Contempt of Court Act 1981; County Courts (Penalties for Contempt) Act 1983) but specific statutory provisions (such as s.118) often provide a lesser maximum.

Contempt of court in connection with county court proceedings which was neither contempt in the face of the court nor disobedience of an order of a county court is punishable only by an order of committal made in the Queen’s Bench Division (*In Re G (A Child)* (*Contempt: Committal*), *The Times*, May 5, 2003, CA).

The procedure for dealing with a contempt in the face of the court is set out in Part II of Practice Direction—Committal Applications which can be found in Vol.1 at scpd52.7. This PD is clearly distilled from a series of Court of Appeal decisions and should be regarded as authoritative. It is not a breach of art.6 of the ECHR for a judge to deal with a contempt of his own court (*Wilkinson v S* [2003] 1 W.L.R. 1254) provided it is dealt with pursuant to the PD.

Issue and execution of orders of committal

119.—(1) Whenever any order or warrant for the committal of any person to prison is made or issued by a county court (whether in pursuance of this or any other Act or of rules of court), the order or warrant shall be directed to the district judge of the court, who shall thereby be empowered to take the body of the person against whom the order is made or warrant issued. **9A-657**

(2) It shall be the duty of every constable within his jurisdiction to assist in the execution of every such order or warrant.

(3) The governor of the prison mentioned in any such order or warrant shall be bound to receive and keep the person mentioned in it until he is lawfully discharged.

Note —Amended by the Civil Procedure Act 1997 Sch.2 para.2(2). **9A-658**

Issue and execution of orders of committal

This section is of general application and covers all situations in which committal to prison is a remedy available in the county court (see further CPR Sch.2, CCR O.29). **9A-659**

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

Prisons to which committals may be made

9A-660 **120.** Any person committed to prison by the judge of any county court, in pursuance of this or any other Act or of rules of court, shall be committed to such prison as may from time to time be directed in the case of that court by order of the Secretary of State.

9A-661 *Note* —Amended by the Civil Procedure Act 1997 Sch.2 para.2(2).

Power of judge to order discharge

9A-662 **121.** If at any time it appears to the satisfaction of a judge of a county court that any debtor arrested or confined in prison by order of the court is unable from any cause to pay any sum recovered against him (whether by way of satisfaction of a claim or counterclaim or by way of costs or otherwise), or any instalments thereof, and ought to be discharged, the judge may order his discharge upon such terms (including liability to re-arrest if the terms are not complied with) as the judge thinks fit.

Execution of committal orders out of jurisdiction of court

9A-663 **122.**—(1) Where any order or warrant for the committal of any person to prison has been made or issued (whether in pursuance of this or any other Act or of county court rules) by a county court (hereafter in this section referred to as a “home court”) and that person is out of the jurisdiction of that court, the district judge may send the order or warrant to the district judge of any other county court within the jurisdiction of which that person is or is believed to be, with a warrant endorsed on it or annexed to it requiring execution of the original order or warrant.

(2) On receipt of the warrant, the district judge of the other county court shall act in all respects as if the original order or warrant had been issued by the court of which he is district judge and shall within the prescribed time—

- (a) report to the district judge of the home court what he has done in the execution of the order or warrant; and
- (b) pay over all moneys received in pursuance of the order or warrant.

(3) Where a person is apprehended under the order or warrant, he shall be forthwith conveyed, in custody of the officer apprehending him, to the prison of the court within the jurisdiction of which he was apprehended and kept there, unless sooner discharged by law, until the expiration of the period mentioned in the order or warrant.

(4) It shall be the duty of every constable within his jurisdiction to assist in the execution of every such order or warrant.

(5) Where an order of committal—

- (a) under the Debtors Act 1869; or
- (b) under section 110,

is sent by the district judge of a home court to the district judge of another court for execution under this section, the judge of that other court shall have the same powers to order the debtor’s discharge as the judge of the home court would have under section 110 or 121.

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

Execution of committal orders out of jurisdiction of court

The jurisdiction of a county court is limited geographically. This section overcomes the difficulties this presents by adopting a procedure of reciprocal execution of committal orders between county courts. This section parallels the power of execution out of the jurisdiction of a county court contained in s.103.

9A-664

PART VIII

RESPONSIBILITY AND PROTECTION OF OFFICERS

District judge to have same responsibilities as sheriff

123. Every district judge shall be responsible for the acts and defaults of himself and of the bailiffs appointed to assist him in like manner as the sheriff of any county in England or Wales is responsible for the acts and defaults of himself and his officers.

9A-665

District judge to have same responsibilities as sheriff

Section 123 in its present form (March 1998) is an historical anomaly and is due for repeal. Under the County Courts Act 1846 the “high bailiff” was responsible for the acts and defaults of bailiffs in the same way as, in the High Court, the sheriff is responsible for the acts and defaults of sheriff’s officers. Subsequently, the office of high bailiff was merged with that of the county court registrar. The office of “registrar” was abolished by s.74 of the Courts and Legal Services Act 1990 and replaced by the “district judge”. Hence the anomaly that the district judge is now liable for the acts and defaults of county court bailiffs (see also s.124). For the duties of the sheriff, see Vol.1, para.sc45.1.10.

9A-666

For discussion of the liabilities of the “high bailiff” (see above) see *Smith v Pritchard* (1849) 8 K.B. 565; (1849) L.J.C.P. 53; and *Burton v Le Gros* (1864) 34 L.J.Q.B. 91.

Liability of bailiff for neglect to levy execution

124.—(1) Where a bailiff of a county court, being employed to levy any execution against goods, loses the opportunity of levying the execution by reason of neglect, connivance or omission, any party aggrieved thereby may complain to the judge of that court.

9A-667

(2) On any such complaint the judge, if the neglect, connivance or omission is proved to his satisfaction, shall order the bailiff to pay such damages as it appears that the complainant has sustained by reason of it, not exceeding in any case the sum for which the execution issued.

Liability of bailiff for neglect to levy execution

The purpose and terms of this section are self-explanatory. For the procedure see CPR Sch.2, CCR O.34 r.1.

9A-668

Irregularity in executing warrants

125.—(1) No officer of a county court in executing any warrant of a court, and no person at whose instance any such warrant is executed, shall be deemed a trespasser by reason of any irregularity or informality—

9A-669

- (a) in any proceeding on the validity of which the warrant depends; or
- (b) in the form of the warrant or in the mode of executing it;

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

but any person aggrieved may bring an action for any special damage sustained by him by reason of the irregularity or informality against the person guilty of it.

(2) No costs shall be recovered in such an action unless the damages awarded exceed £2.

Actions against bailiffs acting under warrants

9A-670 126.—(1) No action shall be commenced against any bailiff for anything done in obedience to a warrant issued by the district judge, unless—

- (a) a demand for inspection of the warrant and for a copy of it is made or left at the office of the bailiff by the party intending to bring the action, or his legal representative or agent; and
- (b) the bailiff refuses or neglects to comply with the demand within six days after it is made.

(2) The demand must be in writing and signed by the person making it.

(3) If an action is commenced against a bailiff in a case where such a demand has been made and not complied with, judgment shall be given for the bailiff if the warrant is produced or proved at the trial, notwithstanding any defect of jurisdiction or other irregularity in the warrant; but the district judge who issued the warrant may be joined as a defendant in the action, and if the district judge is so joined and judgment is given against him, the costs to be recovered by the plaintiff against the district judge shall include such costs as the plaintiff is liable to pay to the bailiff.

(4) In this section (except in paragraph (a) of subsection (1)) “bailiff” includes any person acting by the order and in aid of a bailiff.

9A-671 *Note* —Amended by the Courts and Legal Services Act 1990 s.125(3), Sch.18.

Actions against bailiffs acting under warrants

9A-672 See commentary to s.123 for an explanation of how the district judge became included in this provision. Section 147 defines “bailiff” to include “registrar” (now to be construed as “district judge” (Courts and Legal Services Act 1990 s.74)). It follows that the district judge is protected by s.126.

Warrants evidence of authority

9A-673 127. In any action commenced against a person for anything done in pursuance of this Act, the production of the warrant of the county court shall be deemed sufficient proof of the authority of the court previous to the issue of the warrant.

* * * *

Enforcement of fines

9A-674 129. Payment of any fine imposed by any court under this Act may be enforced upon the order of the judge in like manner—

- (a) as payment of a debt adjudged by the court to be paid may be enforced under this Act; or

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

- (b) as payment of a sum adjudged to be paid by a conviction of a magistrates' court may be enforced under the Magistrates' Courts Act 1980 (disregarding section 81(1) of that Act).

Payment and application of fees, fines, etc.

130.—(1) Subject to subsection (2), all fees, forfeitures and fines payable under this Act and any penalty payable to an officer of a county court under any other Act shall be paid to officers designated by the Lord Chancellor and dealt with by them in such manner as the Lord Chancellor, after consultation with the Treasury, may direct. **9A-675**

(2) Subsection (1) does not apply to fines imposed on summary conviction or to so much of a fine as is applicable under section 55(4) to indemnify a party injured.

(3) The Lord Chancellor, with the concurrence of the Treasury, shall from time to time make such rules as he thinks fit for securing the balances and other sums of money in the hands of any officers of a county court, and for the due accounting for and application of those balances and sums.

Appointment of auditors and other officers

131. The Lord Chancellor may, subject to the consent of the Treasury as to numbers and salaries, appoint as officers in his department such auditors and other officers as he may consider necessary for the purpose of controlling the accounts of county courts. **9A-676**

Payment of salaries and expenses

132. There shall be paid out of money provided by Parliament— **9A-677**

- (a) all salaries, remuneration and other sums payable under Part I of this Act or under section 131;
- (b) the expenses of supplying the courts and offices with law and office books and stationery and postage stamps;
- (c) expenses incurred in conveying to prison persons committed by the courts; and
- (d) all other expenses arising out of any jurisdiction for the time being conferred on the courts of any officer of the courts.

SUMMONSES AND OTHER DOCUMENTS

Proof of service of summonses, etc.

133.—(1) Where any summons or other process issued from a county court is served by an officer of a court, the service may be proved by a certificate in a prescribed form showing the fact and mode of the service. **9A-678**

(2) Any officer of a court wilfully and corruptly giving a false certificate under subsection (1) in respect of the service of a summons or other process shall be guilty of an offence and on conviction thereof, shall be removed from office and shall be liable—

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

SECTION 9A: MAIN STATUTES

- (a) on conviction on indictment, to imprisonment for any term not exceeding 2 years; or
- (b) on summary conviction, to imprisonment for any term not exceeding 6 months or to a fine not exceeding the statutory maximum or to both such imprisonment and fine.

9A-679 *Note* —Subsection (1) was amended by the Civil Procedure (Modification of Enactments) Order 1998 (SI 1998/2940) art.6(e).

Proof of service of summonses, etc.

9A-680 On service of documents generally, CPR Pt 6. As to certification of service, see CPR r.6.10.

* * * *

Penalty for falsely pretending to act under authority of court

9A-681 **135.** Any person who—

- (a) delivers or causes to be delivered to any other person any paper falsely purporting to be a copy of any summons or other process or a county court, knowing it to be false; or
- (b) acts or professes to act under any false colour or pretence of the process or authority of a county court;

shall be guilty of an offence and shall for each offence be liable on conviction on indictment to imprisonment for a term not exceeding 7 years.

Penalty for falsely representing document to have been issued from county court

9A-682 **136.**—(1) It shall not be lawful to deliver or cause to be delivered to any person any document which was not issued under the authority of a county court but which, by reason of its form or contents or both, has the appearance of having been issued under such authority.

(2) If any person contravenes this section, he shall for each offence be liable on summary conviction to a fine of an amount not exceeding level 3 on the standard scale.

(3) Nothing in this section shall be taken to prejudice section 135.

Lessee to give notice of summons for recovery of land

9A-683 **137.**—(1) Every lessee to whom there is delivered any summons issued from a county court for the recovery of land demised to or held by him, or to whose knowledge any such summons comes, shall forthwith give notice of the summons to his lessor or his bailiff or receiver.

(2) If a lessee fails to give notice as required by subsection (1), he shall be liable to forfeit to the person of whom he holds the land an amount equal to the value of 3 years' improved or rack rent of the land to be recovered by action in any county court or other court having jurisdiction in respect of claims for such an amount.

Forfeiture for non-payment of rent

9A-683.1 For texts of ss.138 to 140 of the County Courts Act 1984 (Forfeiture for non-payment of rent), and commentary thereon, see para.3A-296 et seq above. For the

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

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text of the related provision s.38 of the Senior Courts Act 1981 (Relief against forfeiture for non-payment of rent), and commentary thereon, see para.3A–294 above.

For ss.138 to 140 of the County Courts Act 1984 (see Arrangement) plus any related commentary see paragraphs 9A–684+ to 9A–703+ on White Book on Westlaw UK or the Civil Procedure CD.



* * * *

Power to enforce undertakings of solicitors

142. A county court shall have the same power to enforce an undertaking given by a solicitor in relation to any proceedings in that court as the High Court has to enforce an undertaking so given in relation to any proceedings in the High Court. **9A–704**

Power to enforce undertakings of solicitors

An undertaking is a promise. In the old books “undertaker” means a promisor (1 Salk. 27). “Undertaking” is today usually used in the sense of a promise given in the course of proceedings by a party or his solicitor or counsel. **9A–705**

Where a solicitor gives an undertaking he is bound as a matter of professional etiquette to implement it. Furthermore, a solicitor is, of course, a “solicitor of the Supreme Court” and consequently the High Court may exercise jurisdiction over solicitors (see also s.50 of the Solicitors Act 1974 see para.7C–42).

Section 142 of the CCA. 1984 enables the county court to enforce an undertaking given by a solicitor in that court in the same way as could the High Court. For the powers of the High Court see “*Summary Jurisdiction of the Court over solicitors*” at SCP 1999, Vol.2, para 15G—1, and in particular “Jurisdiction to enforce undertakings given by solicitors” at SCP 1999, Vol.2, para.15G—6.

Prohibition on persons other than solicitors receiving remuneration for business done in county courts

143.—(1) No person other than— **9A–706**

- (a) a legal representative; or
- (b) a person exercising a right of audience or a right to conduct litigation by virtue of an order made under section 11 of the Courts and Legal Services Act 1990 (representation in county courts),

shall be entitled to have or recover any fee or reward for acting on behalf of a party in proceedings in a county court.

(2) [...]

Note —Amended by the Courts and Legal Services Act 1990 s.125(3), (7), Schs 8 and 20. **9A–707**

REPLEVIN

Replevin

144. Schedule 1 to this Act shall have effect. **9A–708**

POWER TO RAISE MONETARY LIMITS

Power to raise monetary limits

145.—(1) If it appears to Her Majesty in Council— **9A–709**

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

- (a) that the county court limit for the purposes of any enactment referring to that limit, or
- (b) that the higher limit or the lower limit referred to in section 20 of this Act,

should be increased, Her Majesty may by Order in Council direct that the limit in question shall be such amount as may be specified in the Order.

(2) An Order under subsection (1) may contain such incidental or transitional provisions as Her Majesty considers appropriate.

(2A) It is for the Lord Chancellor to recommend to Her Majesty the making of an Order under subsection (1).

(3) No recommendation shall be made to Her Majesty in Council to make an Order under this section unless a draft of the Order has been laid before Parliament and approved by resolution of each House of Parliament.

9A-710 *Note* —No Order has been made under this section. See further, commentary to s.147(1). Amended by the Constitutional Reform Act 2005 s.15(1) and Sch.4 para.170 (see para.9A-4 above).



For s.146 of the County Courts Act 1984 (see Arrangement) plus any related commentary see paragraph 9A-711+ on White Book on Westlaw UK or the Civil Procedure CD.

Interpretation

- 9A-712** **147.**—(1) In this Act, unless the context otherwise requires—
- “action” means any proceedings in a county court which may be commenced as prescribed by plaintiff;
 - “Admiralty county court” means a county court appointed to have Admiralty jurisdiction by order under this Act;
 - “Admiralty proceedings” means proceedings in which the claim would not be within the jurisdiction of a county court but for sections 26 and 27;
 - “bailiff” includes a registrar;
 - “the county court limit” means—
 - (a) in relation to any enactment contained in this Act for which a limit for the time being specified by an Order under section 145, that limit,
 - (b) [...]
 - (c) in relation to any enactment contained in this Act and not within paragraph (a), the county court limit for the time being specified by any other Order in Council or order defining the limit of county court jurisdiction for the purposes of that enactment;
 - “court” and “county court” mean a court held for a district under this Act;
 - “deposit-taking institution” means a person who may, in the course of his business, lawfully accept deposits in the United Kingdom;
 - “district” and “county court district” mean a district for which a court is to be held under section 2;

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

“hearing” includes trial, and “hear” and “heard” shall be construed accordingly;

“hereditament” includes both a corporeal and incorporeal hereditament;

“judge”, in relation to a county court, means a judge assigned to the district of that court under subsection (1) of section 5 and any person sitting as a judge for that district under subsection (3) or (4) of that section;

“judgment summons” means a summons issued on the application of a person entitled to enforce a judgment or order under section 5 of the Debtors Act 1869 requiring a person, or where two or more persons are liable under the judgment or order, requiring any one or more of them, to attend court;

“landlord”, in relation to any land, means the person entitled to the immediate reversion or, if the property therein is held in joint tenancy, any of the persons entitled to the immediate reversion;

“legal representative” means an authorised advocate or authorised litigator, as defined by section 119(1) of the Courts and Legal Services Act 1990;

“matter” means every proceeding in a county court which may be commenced as prescribed otherwise than by plaintiff;

“officer”, in relation to a court, means any district judge or deputy district judge assigned to that court and any clerk, bailiff, usher or messenger in the service of that court;

“part-time registrar” and “part-time assistant registrar” have the meaning assigned to them by section 10(3);

“party” includes every person served with notice of, or attending, any proceeding, whether named as a party to that proceeding or not;

“prescribed” means prescribed by rules of court;

“probate proceedings” means proceedings brought in a county court by virtue of section 32 or transferred to that court under section 40;

“proceedings” includes both actions and matters;

“registrar” and “registrar of a county court” mean a registrar appointed for a district under this Act, or in a case where two or more registrars are appointed jointly, either or any of those registrars;

“return day” means the day appointed in any summons or proceeding for the appearance of the defendant or any other day fixed for the hearing of any proceedings;

“ship” includes any description of vessel used in navigation;

“solicitor” means solicitor of the Senior Courts.

(1A) The definition of “deposit-taking institution” in subsection (1) must be read with—

(a) section 22 of the Financial Services and Markets Act 2000;

(b) any relevant order under that section; and

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

SECTION 9A: MAIN STATUTES

(c) Schedule 2 to that Act.

(2) [...]

(3) [...]

9A-713 *Note* —Subsection (1) was amended by the Courts and Legal Services Act 1990 s.125(3) and Sch.18 para.49; the Matrimonial and Family Proceedings Act 1984 s.46(3) and Sch.3; the High Court and County Courts Jurisdiction Order 1991 (SI 1991/724); the Statute Law (Repeals) Act 1993; and the Civil Procedure Act 1997 Sch.2 paras 2(2) and 2(9).

Subsections (2) and (3) of this section were repealed by the Local Government Finance (Repeals, Savings and Consequential Amendments) Order 1990 (SI 1990/776).

The definition of “judgment summons” in s.147(1) was amended by the Civil Procedure (Modification of Enactments) Order 2002 (SI 2002/439) with effect from March 23, 2002.

The definition “deposit-taking institution” in s.147(1) was added by, and subs.(1A) were inserted by, the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001 (SI 2001/3649) art.296.

The definition “solicitor” was amended by the Constitutional Reform Act 2005 Sch.11 para.4 with effect from October 1, 2009 (SI 2009/1604).

The definition “officer” was amended by the Tribunals, Courts and Enforcement Act 2007 s.56 and Sch.11 para.8, with effect from July 19, 2007.

“The county court limit”

9A-714 No order has been made under s.145. See further “Jurisdiction of county courts” para.9A-410 above.

Registrar, etc.

9A-715 By the Courts and Legal Services Act 1990 s.74, the office of registrar became that of district judge and references in any enactment to registrar are to be construed as a reference to that office by its new name.



For ss.148 to 151 of and Sch.1 to 2 to the County Courts Act 1984 (see Arrangement) plus any related commentary see paragraphs 9A-716+ to 9A-722+ on White Book on Westlaw UK or the Civil Procedure CD.

SECTION 148(2)

SCHEDULE 3

TRANSITORY AND TRANSITIONAL PROVISIONS AND SAVINGS

Section 21 of this Act

9A-723 1. [...]

Section 51 of this Act

9A-724 2. [...]

Sections 105(1) and 106 of this Act

9A-725 3. [...]

Administration Orders

9A-726 4.—(1) Any reference in Part VI of this Act to an administration order includes a reference to an administration order made under an enactment repealed by this Act.

2. [...]

County Court

9A-727 5. References in any enactment or document to a county court constituted under the County Courts Act 1888 or the County Courts Act 1934 or the County Courts Act 1959 shall be construed as references to a county court constituted under this Act and anything done or proceedings taken in respect of any action or matter whatsoever before the commencement of this Act in a county court under any of the enactments

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CIVIL PROCEDURE ACT 1997

mentioned above shall be deemed to have been done or taken in a county court constituted under this Act.

Former enactments

6. Any document referring to any former enactment relating to county courts shall be construed as referring to the corresponding enactment in this Act. In this paragraph “former enactment relating to county courts” means any enactment repealed by the County Courts Act 1959, by the County Courts Act 1934 or by the County Courts Act 1888. **9A-728**

High bailiffs

7. References to a high bailiff in any enactment, Order in Council, order, rule, regulation or any document whatsoever shall be construed as a reference to a registrar. **9A-729**

Periods of time

8. Where a period of time specified in an enactment repealed by this Act is current at the coming into force of this Act shall have effect as if the corresponding provision of it had been in force when that period began to run. **9A-730**

Offences

9. Nothing in this Act renders a person liable to punishment by way of fine or imprisonment for an offence committed before the coming into force of this Act which differs from the punishment to which he would have been liable if this Act had not been passed. **9A-731**

Saving for certain provisions of the County Courts Act 1959

10. [...] **9A-732**

General

11. Without prejudice to any express amendment made by this Act, a reference in an enactment or other document, whether express or implied, to an enactment repealed by this Act shall, unless the context otherwise requires, be construed as, or as including, a reference to this Act or to the corresponding provisions of this Act. **9A-733**

12. Nothing in this Schedule shall be taken as prejudicing the operation of the provisions of the Interpretation Act 1978 as respects the effects of repeals.

Note —Schedule 3 repealed in part by the Statute Law (Repeals) Act 1989. **9A-734**

SECTION 148(3)

SCHEDULE 4

REPEALS

[The text of Schedule 4 is not reproduced here.] **9A-735**

Civil Procedure Act 1997

(1997 c.12) **9A-736**

ARRANGEMENT OF SECTIONS

RULES AND DIRECTIONS

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

SECTION 9A: MAIN STATUTES

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Introductory note

9A-737 The provisions in this Act, with the exception of s.7 (which has a different provenance), paved the way for the implementation of the recommendations contained in the Report by Lord Woolf to the Lord Chancellor on the civil justice system in England and Wales: “Access to Justice Final Report” (July 1996).

Section 11 came into effect on February 27, 1997. Sections 1 to 9 and Sch.1 were brought into force on April 27, 1997, by the Civil Procedure Act 1997 (Commencement No.1) Order 1997 (SI 1997/841). That statutory instrument also brought into force on that date some of the minor and consequential amendments contained in Sch.2. The remaining provisions of the Act were brought into force by the Civil Procedure Act 1997 (Commencement No.2) Order 1999 (SI 1999/1009).

For further notes on this Act, see *Current Law Statutes Annotated* (London: Sweet & Maxwell, 1997) Vol.1.

Amendments to the Act were made by the Courts Act 2003 and by the Constitutional Reform Act 2005. Some of the amending provisions in the 2003 Act were in turn amended by the 2005 Act before being brought into force.

RULES AND DIRECTIONS

Civil Procedure Rules

9A-738 1.—(1) There are to be rules of court (to be called “Civil Procedure Rules”) governing the practice and procedure to be followed in—
(a) the civil division of the Court of Appeal,
(b) the High Court, and
(c) county courts.

(2) Schedule 1 (which makes further provision about the extent of the power to make Civil Procedure Rules) is to have effect.

(3) Any power to make Civil Procedure Rules is to be exercised with a view to securing that—

- (a) the system of civil justice is accessible, fair and efficient, and
- (b) the rules are both simple and simply expressed.

Civil Procedure Rules

9A-739 For extended commentary on the process for making Civil Procedure Rules, see Section 12 (CPR: Application, Amendment and Interpretation) paras 12–38 et seq, below.

Rule Committee

9A-740 2.—(1) Civil Procedure Rules are to be made by a committee known

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as the Civil Procedure Rule Committee, which is to consist of the following persons —

- (a) the Head of Civil Justice,
- (b) the Deputy Head of Civil Justice (if there is one),
- (c) the persons currently appointed in accordance with subsections (1A) and (1B).

(1A) The Lord Chief Justice must appoint the persons falling within paragraphs (a) to (d) of subsection (2).

(1B) The Lord Chancellor must appoint the persons falling within paragraphs (e) to (g) of subsection (2).

(2) The persons to be appointed in accordance with subsections (1A) and (1B) are

- (a) either two or three judges of the Senior Courts,
- (b) one Circuit judge,
- (c) either one or two district judges,
- (d) one person who is a Master referred to in Part II of Schedule 2 to the Senior Courts Act 1981,
- (e) three persons who have a Senior Courts qualification (within the meaning of section 71 of the Courts and Legal Services Act 1990), including at least one with particular experience of practice in county courts,
- (f) three persons who have been authorised by a relevant approved regulator to conduct litigation in relation to all proceedings in the Senior Courts, including at least one with particular experience of practice in county courts,
- (g) two persons with experience in and knowledge of the lay advice sector and consumer affairs.

(2A) In subsection (2)(f) “relevant approved regulator” is to be construed in accordance with section 20(3) of the Legal Services Act 2007.

(3) Before appointing a person in accordance with subsection (1A), the Lord Chief Justice must consult the Lord Chancellor.

(4) Before appointing a person in accordance with subsection (1B), the Lord Chancellor must consult the Lord Chief Justice and, if the person falls within paragraph (e) or (f) of subsection (2), must also consult any body which—

- (a) has members who are eligible for appointment under that paragraph, and
- (b) is an authorised body for the purposes of section 27 or 28 of the Courts and Legal Services Act 1990.

(5) The Lord Chancellor may reimburse the members of the Civil Procedure Rule Committee their travelling and out-of-pocket expenses.

(6) [...]

(7) [...]

(8) [...]

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

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

(9) If the Lord Chancellor disallows rules under subsection (8), he must give the Civil Procedure Rule Committee written reasons for doing so.

9A-740.1 *Note* —Amended by the Constitutional Reform Act 2005 s.59 and Sch.11 paras 1 and 4 with effect from October 1, 2009 (SI 2009/1604); and by the Legal Services Act 2007 Sch.21 para.122, with effect from January 1, 2010 (SI 2009/3250).

Effect of rule

9A-741 This section establishes the Civil Procedure Rule Committee and deals with its membership. Provisions in the Senior Courts Act 1981 and the County Courts Act 1984 dealing with the constitution of the former two Rule Committees were repealed when the 1997 Act came into force. In its original form, s.2 dealt with various matters now dealt with in s.3.

Section 2 was substantially amended by the Constitutional Reform Act 2005 Sch.4 para.263. Further, subss.(6), (7) and (8) of the section were to be omitted by the Courts Act 2003 s.85(1). However, s.85(1) was never brought into effect. However, Sch.4 para.385 of the 2005 Act brought into force on April 4, 2006, amendments to several statutory provisions “repealed or amended otherwise than by this Act” and among such statutory provisions was s.85(1) of the 2003 Act. So by this convoluted route, subss.(6), (7) and (8) of the s.2 appear to have been omitted. It seems that this was intended because the roles played by these subsections are now played, respectively, by s.3(1), s.1(3) and s.3(2) and (3). Curiously, other amendments made by the 2005 Act consisted of two sub-sections numbered (9), inserted by paras 263(6) and 385(2) of Sch.4 to the Act. The first of these insertions is subs.(9) as printed above. The second is to the same effect as s.3(4). Presumably this duplication was not intended (and this casts doubt on the legislative effect of para.385 generally, and on the question whether subss.(6), (7) and (8) have in fact been omitted from s.2). Accordingly, this latter version of subs.(9) is omitted from the version of s.2 as printed above. Subsection (2)(c) was amended by the Civil Procedure Act 1997 (Amendment) Order 2006 (SI 2006/1847), increasing to two the number of district judges that may be appointed to the Committee.

Courts Act 2003 s.62 provides for the appointment of the Head and Deputy Head of Civil Justice, referred to in s.2(1).

For the process to be adopted by the Committee in making Rules, see s.3 below. One of the functions of the Civil Justice Council is to refer proposals for changes in the civil justice system to the Committee (see s.6(3)).

Power to change certain requirements relating to Committee

9A-742 **2A.**—(1) The Lord Chancellor may by order—
 (a) amend section 2(2), (3) or (4), and,
 (b) make consequential amendments in any other provision of section 2.

(2) The Lord Chancellor may make an order under this section only with the concurrence of the Lord Chief Justice.

(2A) Before making an order under this section the Lord Chancellor must consult the following persons—

- (a) the Head of Civil Justice,
- (b) the Deputy Head of Civil Justice (if there is one),

(2B) The Lord Chief Justice may nominate a judicial office holder (as defined in section 109(4) of the Constitutional Reform Act 2005) to exercise his functions under this section.

(3) The power to make an order under this section is exercisable by statutory instrument.

(4) A statutory instrument containing such an order is subject to

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annulment in pursuance of a resolution of either House of Parliament.

Note—This section was inserted by the Courts Act 2003 s.84, and came into effect on January 24, 2004, and was amended by the Constitutional Reform Act 2005 Sch.4 para.264 with effect from April 3, 2006. The power given to the Lord Chancellor under the section was exercised by the Civil Procedure Act 1997 (Amendment) Order 2006 (SI 2006/1847) for the purpose of amending s.2(2)(c), see para.9A-741 above. **9A-743**

Process for making Civil Procedure Rules

3.—(1) The Civil Procedure Rule Committee must, before making Civil Procedure Rules— **9A-744**

- (a) consult such persons as they consider appropriate, and
- (b) meet (unless it is inexpedient to do so).

(2) Rules made by the Civil Procedure Rule Committee must be—

- (a) signed by a majority of the members of the Committee, and
- (b) submitted to the Lord Chancellor.

(3) The Lord Chancellor may allow, disallow or alter rules so made.

(4) If the Lord Chancellor disallows Rules he must give the Committee written reasons for doing so.

(5) Rules so made, as allowed or altered by the Lord Chancellor—

- (a) come into force on such day as the Lord Chancellor directs, and
- (b) are to be contained in a statutory instrument to which the Statutory Instruments Act 1946 applies as if the instrument contained rules made by a Minister of the Crown.

(6) A statutory instrument containing Civil Procedure Rules is subject to annulment in pursuance of a resolution of either House of Parliament.

(7) [...]

Note—This section was substituted by the Courts Act 2003 s.85(2), but that provision was not brought into force. However, Constitutional Reform Act 2005 Sch.4 para.265 states that s.3 “as amended by section 85 of the Courts Act 2003” is to be amended in certain respects, and para.265 was brought into effect on April 6, 2006. By this route, s.3 as substituted by the s.85(2) of the 2003 Act, and as further amended by Sch.4 para.265 of the 2005 Act, came into force in the form printed above. The section contains in amended form provisions that were previously found in the former s.3 and in s.2 before it was amended (as is explained in para.9A-741 above). **9A-745**

Rule-making process

The rule-making process is outlined in s.3. For extended commentary on the process for making Civil Procedure Rules, see Section 12 (CPR: Application, Amendment and Interpretation) paras 12-3 and 12-38, below. A significant feature of s.3, when compared with the provisions it replaces, is that it states that, if the Lord Chancellor disallows Rules, he must give the Committee written reasons for doing so (s.3(4)). In practice, the matters considered by the Civil Procedure Rule Committee are matters brought to their attention by the Civil Justice Council (see s.6(3) below) or, more commonly, by the Department for Constitutional Affairs. The Lord Chancellor may give the Rule Committee notice requiring rules to be made to achieve a specified purpose **9A-746**

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SECTION 9A: MAIN STATUTES

(see s.3A below). In *YD (Turkey) v Secretary of State for the Home Department* [2006] EWCA Civ 52; [2006] 1 W.L.R. 1646, CA, Brooke L.J. said (at para.22) that the Civil Procedure Act 1997 and the Civil Procedure Rules 1998 “have changed the landscape” enabling the Court, by case law, to initiate innovative ways of regulating procedure, safe in the knowledge that the Rule Committee would move swiftly to codify or extend the new procedures the judges had so introduced by making appropriate amendments to the CPR. His lordship gave illustrations of desirable changes which would never have been made, or not made so swiftly, “if the judges had not been ready to take the lead” (ibid.). Practice directions are not made by the Rule Committee (see s.5 below and commentary following).

Section 72 of the Counter-Terrorism Act 2008 states that, in certain circumstances and for particular statutory proceedings, Civil Procedure Rules may, in the first instance, be made by the Lord Chancellor by a process which, in effect, by-passes the s.3 process but subject to safeguards enacted in such statutory provisions. In November 2008, in exercise of these powers Pt 79 (Financial Restrictions Proceedings Under the Counter-Terrorism Act 2008) was inserted in the CPR (see further, Vol.2, para.12–3 below, and commentary on CPR Pt 79 in Vol.1).

The Lord Chancellor’s power under this section is a protected function within the Constitutional Reform Act 2005 s.19 and Sch.7.

Rules to be made if required by Lord Chancellor

9A-747 **3A.**—(1) This section applies if the Lord Chancellor gives the Civil Procedure Committee written notice that he thinks it is expedient for Civil Procedure Rules to include provision that would achieve a purpose specified in the notice.

(2) The Committee must make such Rules as it considers necessary to achieve the specified purpose.

(3) Those Rules must be—

- (a) made within a reasonable period after the Lord Chancellor gives notice to the Committee;
- (b) made in accordance with section 3.

9A-748 *Note* —Section 3A was inserted by the Constitutional Reform Act 2005 s.15(1) and Sch.4 para.265, (see para.9A-4 above).

Power to make consequential amendments

9A-749 **4.**—(1) The Lord Chancellor may, after consulting the Lord Chief Justice, by order amend, repeal or revoke any enactment to the extent he considers necessary or desirable in consequence of—

- (a) section 1 or 2, or
- (b) Civil Procedure Rules.

(2) The Lord Chancellor may by order amend, repeal or revoke any enactment passed or made before the commencement of this section to the extent he considers necessary or desirable in order to facilitate the making of Civil Procedure Rules.

(3) Any power to make an order under this section is exercisable by statutory instrument.

(4) A statutory instrument containing an order under subsection (1) shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(5) No order may be made under subsection (2) unless a draft of it has been laid before and approved by resolution of each House of Parliament.

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(6) The Lord Chief Justice may nominate a judicial office holder (as defined in section 109(4) of the Constitutional Reform Act 2005) to exercise his functions under subsection (1) or (2).

Power to make consequential and other amendments to enactments

With effect from April 3, 2006, subs.(6) was added to this section, and the requirement that the Lord Chancellor should consult the Lord Chief Justice was inserted in subss.(1) and (2), by the Constitutional Reform Act 2005 Sch.4 para.267. Curiously, para.267 states that these amendments should be made to s.4 “as amended by s.85 of the Courts Act 2003”; however, s.85 made no amendments at all to s.4.

See further, Section 12 (CPR: Application, Amendment and Interpretation) para.12–42, below.

9A–750

Practice directions

5.—(1) Practice directions may be given in accordance with Part 1 of Schedule 2 to the Constitutional Reform Act 2005. **9A–751**

(2) Practice directions given otherwise than under subsection (1) may not be given without the approval of—

- (a) the Lord Chancellor, and
- (b) the Lord Chief Justice.

(3) Practice directions (whether given under subsection (1) or otherwise) may provide for any matter which, by virtue of paragraph 3 of Schedule 1, may be provided for by Civil Procedure Rules.

(4) The power to give practice directions under subsection (1) includes power—

- (a) to vary or revoke directions given by any person;
- (b) to give directions containing different provision for different cases (including different areas);
- (c) to give directions containing provision for a specific court, for specific proceedings or for a specific jurisdiction.

(5) Subsection (2)(a) does not apply to directions to the extent that they consist of guidance about any of the following—

- (a) the application or interpretation of law;
- (b) the making of judicial decisions.

(6) Subsection (2)(a) does not apply to directions to the extent that they consist of criteria for determining which judges may be allocated to hear particular categories of case; but the directions may, to that extent be given only—

- (a) after consulting the Lord Chancellor, and
- (b) the Lord Chief Justice.

Effect of section

See further, Section 12 (CPR: Application, Amendment and Interpretation) para.12–17, below.

9A–752

CIVIL JUSTICE COUNCIL

Civil Justice Council

6.—(1) The Lord Chancellor is to establish and maintain an advisory body, to be known as the Civil Justice Council. **9A–753**

(2) The Council must include—

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- (a) members of the judiciary,
 - (b) members of the legal professions,
 - (c) civil servants concerned with the administration of the courts,
 - (d) persons with experience in and knowledge of consumer affairs,
 - (e) persons with experience in and knowledge of the lay advice sector, and
 - (f) persons able to represent the interests of particular kinds of litigants (for example, businesses or employees).
- (2A) The Lord Chancellor must decide the following questions, after consulting the Lord Chief Justice—
- (a) how many members of the Council are to be drawn from each of the groups mentioned in subsection (2);
 - (b) how many other members the Council is to have.
- (2B) It is for—
- (a) the Lord Chief Justice to appoint members of the judiciary to the Council, after consulting the Lord Chancellor;
 - (b) the Lord Chancellor to appoint other persons to the Council.
- (3) The functions of the Council are to include—
- (a) keeping the civil justice system under review,
 - (b) considering how to make the civil justice system more accessible, fair and efficient,
 - (c) advising the Lord Chancellor and the judiciary on the development of the civil justice system,
 - (d) referring proposals for changes in the civil justice system to the Lord Chancellor and the Civil Procedure Rule Committee, and
 - (e) making proposals for research.
- (4) The Lord Chancellor may reimburse the members of the Council their travelling and out-of-pocket expenses.
- (5) The Lord Chief Justice may nominate a judicial office holder (as defined in section 109(4) of the Constitutional Reform Act 2005) to exercise his functions under this section.

9A-754 *Note* —Amended by the Constitutional Reform Act 2005 s.15(1), Sch.4 para.268, (see para.9A-4 above).

Civil Justice Council

9A-755 In the report by Lord Woolf to the Lord Chancellor on the civil justice system in England and Wales: “Access to Justice Final Report” (July 1996), it was recommended that a Civil Justice Council should be established as an advisory body to keep the civil justice system under review. This section carries that recommendation into effect. The Council is to include judges, lawyers, Lord Chancellor’s Department staff and others including those representing consumer, advice sector, business and other interests. The Lord Chancellor’s power under this section is a protected function within the Constitutional Reform Act 2005 s.19 and Sch.7.

COURT ORDERS

Power of courts to make orders for preserving evidence, etc.

9A-756 7.—(1) The court may make an order under this section for the

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purpose of securing, in the case of any existing or proposed proceedings in the court—

- (a) the preservation of evidence which is or may be relevant, or
 - (b) the preservation of property which is or may be the subject-matter of the proceedings or as to which any question arises or may arise in the proceedings.
- (2) A person who is, or appears to the court likely to be, a party to proceedings in the court may make an application for such an order.
- (3) Such an order may direct any person to permit any person described in the order, or secure that any person so described is permitted—
- (a) to enter premises in England and Wales, and
 - (b) while on the premises, to take in accordance with the terms of the order any of the following steps.
- (4) Those steps are—
- (a) to carry out a search for or inspection of anything described in the order, and
 - (b) to make or obtain a copy, photograph, sample or other record of anything so described.
- (5) The order may also direct the person concerned—
- (a) to provide any person described in the order, or secure that any person so described is provided, with any information or article described in the order, and
 - (b) to allow any person described in the order, or secure that any person so described is allowed, to retain for safe keeping anything described in the order.
- (6) An order under this section is to have effect subject to such conditions as are specified in the order.
- (7) This section does not affect any right of a person to refuse to do anything on the ground that to do so might tend to expose him or his spouse or civil partner to proceedings for an offence or for the recovery of a penalty.
- (8) In this section—
 “court” means the High Court, and
 “premises” includes any vehicle;
 and an order under this section may describe anything generally, whether by reference to a class or otherwise.

Note —Amended by the Civil Partnership Act 2004 s.261(1), Sch.27 para 154.

9A-757

Effect of section

This section puts on a statutory footing the High Court’s powers to grant orders aimed at securing the preservation of evidence for the purposes of civil proceedings. It does not implement recommendations made in “Access to Justice Final Report” (July 1996), but has a different provenance.

In a report prepared by a committee of judges appointed by the Judges’ Council and published in 1992, the uncertainty of the basis of the Court’s jurisdiction to grant Anton Piller orders was noted. Some judges had suggested that the jurisdiction may be based on the general power to grant injunctions found in the Senior Courts Act 1981

9A-758

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SECTION 9A: MAIN STATUTES

s.37(1); others preferred to say that it is based on the Court's inherent jurisdiction to make interlocutory orders for a securing a just and proper trial of the issues joined between the parties. The committee recommended that the legal basis for the making of these orders should be laid down in primary legislation which should also make provision for covering the principal features of the remedy (see "Anton Piller Orders: A Consultation Paper" (LCD 1992), para.3.2).

Such legislation is now found in this section. The person against whom the order is made is required to comply with the order so as to permit entry to premises, to facilitate inspection of matters specified in the court order and to permit the removal of items for safe keeping. It may be noted that this provision preserves the privilege against self-incrimination. In the 1992 report it was recommended that s.72 of the 1981 Act should be extended so that the privilege should no longer apply to civil proceedings generally. This recommendation raised wider issues which still await official attention. See further para.9A–27 above and para.15–93 below.

For limits on jurisdiction of county courts in relation to grant relief of the type referred to in s.7, see County Court Remedies Regulations (SI 1991/1222) reg.2(a) (para.9B–78).

Disclosure etc. of documents before action begun

9A–759 8.—(1) The Lord Chancellor may by order amend the provisions of section 33(2) of the Senior Courts Act 1981, or section 52(2) of the County Courts Act 1984 (power of court to order disclosure etc. of documents where claim may be made in respect of personal injury or death), so as to extend the provisions—

- (a) to circumstances where other claims may be made, or
- (b) generally.

(2) The power to make an order under this section is exercisable by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

9A–759.1 *Note*—Amended by the Constitutional Reform Act 2005 s.59 and Sch.11 para.1 with effect from October 1, 2009 (SI 2009/1604).

Senior Courts Act 1981 s.33(2) and the County Courts Act 1984 s.52(2)

9A–760 This section provides an order-making power to extend the circumstances in which courts have power to order disclosure of documents before legal proceedings commence. Before 1970, where proceedings had been commenced an order for discovery of documents could be made under rules of court against a party to those proceedings but an order could not be made (1) before proceedings had been commenced, or (2) if they had been commenced, against a person, who was not a party. These two restrictions on, respectively, "pre-action" discovery and "third party" discovery were modified by statute. Nowadays, the power to order "pre-action" discovery is derived from the Senior Courts Act 1981 s.33(2) and the County Courts Act 1984 s.52(2) (see paras 9A–110 and 9A–503). The power to order "third party" discovery is derived from the Senior Courts Act 1981 s.34(2) and the County Courts Act 1984 s.53(2) (see paras 9A–115 and 9A–508).

In the "Access to Justice Final Report" (July 1995), no recommendation was made concerning "third party" discovery, but it was recommended that "pre-action" discovery under s.33(2) of the 1981 Act and s.52(2) of the 1984 Act should be altered in two respects. It was recommended, first, that "pre-action" discovery should no longer be limited to situations in which personal injury and wrongful death proceedings are in prospect (*ibid.*, paras 47 et seq.), and secondly, that it should be possible where a personal injury or wrongful death action is in prospect for an application to be made against a person who is not likely to be a party (*ibid.*, paras 51 et seq.).

Effect of section

9A–761 This section provides legislation necessary for carrying those two recommendations into effect. The Lord Chancellor is given power to amend s.33(2) and s.52(2) by statu-

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tory instrument (subject to negative resolution) so as to extend the provisions of those subsections (a) to circumstances where other claims may be made, or (b) generally. Amendments to s.33(2) and s.52(2), sufficient to carry into effect the first (but not the second) of these recommendations, were made by the Civil Procedure (Modification of Enactments) Order 1998 (SI 1998/2940) paras 5(a) and 6(b). (It may be noted that this Order was made, not under s.8, but under s.4(2) of this Act.) In the “Access to Justice Final Report” it was not specifically recommended that s.33(2) and s.52(2) should be amended so as to enable that courts to grant “pre-action” orders for discovery against third parties where claims for other than personal injury and wrongful death are likely to be made in subsequent proceedings. It may be noted, however, that the powers given to the Lord Chancellor by this section are wide enough to enable him to amend s.33(2) and s.52(2) to accomplish such a change in the law.

As explained above, once proceedings are commenced, the court has power under s.34 of the 1981 Act and s.53 of the 1984 Act, in accordance with rules of court, to make an order requiring a person who is not a party to the proceedings to give disclosure of documents (and to permit inspection of property and the taking of samples). It is convenient to note here that, as a result of amendments to these sections made by the Civil Procedure (Modification of Enactments) Order 1998 (SI 1998/2940) paras 5(b) and 6(c), that power is not restricted to proceedings in respect of personal injuries or wrongful death.

GENERAL

Interpretation

9.—(1) A court the practice and procedure of which is governed by Civil Procedure Rules is referred to in this Act as being “within the scope” of the rules; and references to a court outside the scope of the rules are to be read accordingly. **9A-762**

(2) In this Act—

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

“practice directions” means directions as to the practice and procedure of any court within the scope of Civil Procedure Rules.

Minor and consequential amendments

10. Schedule 2 (which makes minor and consequential amendments) is to have effect. **9A-763**

Short title, commencement and extent

11.—(1) This Act may be cited as the Civil Procedure Act 1997. **9A-764**

(2) Sections 1 to 10 are to come into force on such day as the Lord Chancellor may by order made by statutory instrument appoint, and different days may be appointed for different purposes.

(3) This Act extends to England and Wales only.

SECTION 1

SCHEDULE 1

CIVIL PROCEDURE RULES

Matters dealt with by the former rules

1. Among the matters which Civil Procedure Rules may be made about are any matters which were governed by the former Rules of the Supreme Court or the former **9A-765**

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SECTION 9A: MAIN STATUTES

county court rules (that is, the Rules of the Supreme Court (Revision) 1965 and the County Court Rules 1981).

Exercise of jurisdiction

- 9A-766** 2. Civil Procedure Rules may provide for the exercise of the jurisdiction of any court within the scope of the rules by officers or other staff of the court.

Removal of proceedings

- 9A-767** 3.—(1) Civil Procedure Rules may provide for the removal of proceedings at any stage—
- (a) within the High Court (for example, between different divisions or different district registries), or
 - (b) between county courts.
- (2) In sub-paragraph (1)—
- (a) “provide for the removal of proceedings” means—
 - (i) provide for transfer of proceedings, or
 - (ii) provide for any jurisdiction in any proceedings to be exercised (whether concurrently or not) elsewhere within the High Court or, as the case may be, by another county court without the proceedings being transferred, and
 - (b) “proceedings” includes any part of proceedings.

Evidence

- 9A-768** 4. Civil Procedure Rules may modify the rules of evidence as they apply to proceedings in any court within the scope of the rules.

Application of other rules

- 9A-769** 5.—(1) Civil Procedure Rules may apply any rules of court which relate to a court which is outside the scope of Civil Procedure Rules.
- (2) Any rules of court, not made by the Civil Procedure Rule Committee, which apply to proceedings of a particular kind in a court within the scope of Civil Procedure Rules may be applied by Civil Procedure Rules to other proceedings in such a court.
- (3) In this paragraph “rules of court” includes any provision governing the practice and procedure of a court which is made by or under an enactment.
- (4) Where Civil Procedure Rules may be made by applying other rules, the other rules may be applied—
- (a) to any extent,
 - (b) with or without modification, and
 - (c) as amended from time to time.

Practice directions

- 9A-770** 6. Civil Procedure Rules may, instead of providing for any matter, refer to provision made or to be made about that matter by directions.

Different provision for different cases etc.

- 9A-771** 7. The power to make Civil Procedure Rules includes power to make different provision for different cases or different areas, including different provision—
- (a) for a specific court or specific division of a court, or
 - (b) for specific proceedings, or a specific jurisdiction, specified in the rules.

- 9A-772** *Note* —For explanation of paragraphs in this Schedule, see notes to s.1 above.

SECTION 10

SCHEDULE 2

MINOR AND CONSEQUENTIAL AMENDMENTS

- 9A-773** *Note* —By this Schedule, minor and consequential amendments were made to the Senior Courts Act 1981, the County Courts Act 1984, the Courts and Legal Services

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ACCESS TO JUSTICE ACT 1999

Act 1990, and the Matrimonial and Family Proceedings Act 1984. The first three of these Acts are printed elsewhere in this volume and, where necessary, the amendments made by this Schedule have been incorporated.

Access to Justice Act 1999

(1999 c.22)

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Paragraph numbers marked with a “+” denote content that is available on White Book on Westlaw UK or the Civil Procedure CD.

9A-775 *Note*—The functions of the Secretary of State for Constitutional Affairs under Pts 1 to 3 and Pt 7 of this Act, so far as relating to any provisions of those Parts, were transferred to the Lord Chancellor by The Transfer of Functions (Lord Chancellor and Secretary of State) Order 2005 (SI 2005/3429) with effect from January 12, 2006.



For ss.1 to 30, 44 to 47 and 51 to 53 of the Access to Justice Act 1999 (see Arrangement) plus any related commentary see paragraphs 9A-776+ to 9A-840+ on White Book on Westlaw UK or the Civil Procedure CD.

PART IV

APPEALS, COURTS, JUDGES AND COURT PROCEEDINGS

APPEALS

Permission to appeal

- 9A-841** 54.—(1) Rules of court may provide that any right of appeal to—
- (a) a county court,
 - (b) the High Court, or
 - (c) the Court of Appeal,
- may be exercised only with permission.
- (2) This section does not apply to a right of appeal in a criminal cause or matter.
- (3) For the purposes of subsection (1) rules of court may make provision as to—
- (a) the classes of case in which a right of appeal may be exercised only with permission,
 - (b) the court or courts which may give permission for the purposes of this section,
 - (c) any considerations to be taken into account in deciding whether permission should be given, and
 - (d) any requirements to be satisfied before permission may be given,
- and may make different provision for different circumstances.
- (4) No appeal may be made against a decision of a court under this section to give or refuse permission (but this subsection does not

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affect any right under rules of court to make a further application for permission to the same or another court).

(5) For the purposes of this section a right to make an application to have a case stated for the opinion of the High Court constitutes a right of appeal.

(6) For the purposes of this section a right of appeal to the Court of Appeal includes—

- (a) the right to make an application for a new trial, and
- (b) the right to make an application to set aside a verdict, finding or judgment in any cause or matter in the High Court which has been tried, or in which any issue has been tried, by a jury.

Note—Section 54 paved the way for substantial alterations for the circumstances in which permission (formerly “leave”) is required for the purpose of making appeals in civil proceedings. For relevant rules of court, see CPR Pt 52, especially r.52.3 and r.52.13. The effect of the rule stated in s.54(4) that, generally, no appeal may be made against a decision of a court to give or refuse permission to appeal has been explained by the Court of Appeal; see *Riniker v University College London (Practice Note)* [2001] 1 W.L.R. 13, CA; *Foenander v Bond Lewis & Co* [2001] EWCA Civ 759; [2002] 1 W.L.R. 525, CA; *State Bank of New South Wales v Harrison* [2002] EWCA Civ 363; March 8, 2002, unrep., CA; *Seray-Wurie v Hackney London BC* [2002] EWCA Civ 909; [2003] 1 W.L.R. 257, CA; *Gregory v Turner* [2003] EWCA Civ 183, [2003] 1 W.L.R. 1149, CA, and authorities referred to therein; see also Vol.1, para.52.3.7. Under s.54 and CPR r.52.3 permission to appeal is only required where the appeal is from a judge sitting in the High Court or in a county court. Consequently, there is no need to obtain permission where (for example) the appeal is from the decision of a judge nominated to hear appeals relating to the management of property and affairs of patients under the Mental Health Act 1983 (*In re B. (A Patient)*) (*Court of Protection: Appeal*) [2005] EWCA Civ 1293, November 11, 2005, unrep., CA).

9A-842

Second appeals

55.—(1) Where an appeal is made to a county court or the High Court in relation to any matter, and on hearing the appeal the court makes a decision in relation to that matter, no appeal may be made to the Court of Appeal from that decision unless the Court of Appeal considers that—

9A-843

- (a) the appeal would raise an important point of principle or practice, or
- (b) there is some other compelling reason for the Court of Appeal to hear it.

(2) This section does not apply in relation to an appeal in a criminal cause or matter.

Note—Section 55 implemented the recommendation of the Bowman Report that, generally, an unsuccessful appellant should not be able to make a further (second) appeal to the Court of Appeal. CPR r.52.13 states that a second appeal as provided for by s.55(1) shall not be made without permission of the Court of Appeal itself. The appeal court, from whose decision permission to make a second appeal is sought, may give an indication of its opinion as to whether permission should be given by the Court of Appeal for a second appeal (Practice Direction (Appeals), para.4.3; *R. (Westminster City Council) v Secretary of State for the Environment Transport and the Regions*, April 2, 2001, unrep. (Jackson J.)). Although s.55 is in wide terms, it has not impliedly repealed or amended the Patents Act 1977 s.97(3) or otherwise limited its scope. Consequently, the second appeal provisions in s.55 and CPR r.52.13 do not apply to

9A-844

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

appeals under s.97(3) (*Smith International Inc v Specialised Petroleum Services Group Ltd (Permission to Appeal)* [2005] EWCA Civ 1357).

Power to prescribe alternative destination of appeals

9A-845 56.—(1) The Lord Chancellor may by order provide that appeals which would otherwise lie to—

- (a) a county court,
- (b) the High Court, or
- (c) the Court of Appeal,

shall lie instead to another of those courts, as specified in the order.

(2) This section does not apply to an appeal in a criminal cause or matter.

(3) An order under subsection (1)—

- (a) may make different provision for different classes of proceedings or appeals, and
- (b) may contain consequential amendments or repeals of enactments.

(4) Before making an order under subsection (1) the Lord Chancellor shall consult

- (a) the Lord Chief Justice,
- (b) the Master of the Rolls,
- (c) the President of the Queen’s Bench Division;
- (d) the President of the Family Division; and
- (e) the Chancellor of the High Court;

(5) An order under subsection (1) shall be made by statutory instrument.

(6) No such order may be made unless a draft of it has been laid before and approved by resolution of each House of Parliament.

(7) For the purposes of this section an application to have a case stated for the opinion of the High Court constitutes an appeal.

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

9A-846 *Note* —Subsection (4) was amended and subsection (8) was inserted by the Constitutional Reform Act 2005 s.15(1) and Sch.4 para.280.

9A-847 *Note* —Amended by the Constitutional Reform Act 2005 ss. 15(1), 148(1), Sch.4 para.80, (see para.9A-4 above). Section 56 gives the Lord Chancellor power by Order in Council to direct that appeals of a certain type that would normally go to one court, for example, the Court of Appeal, shall go instead to another court, for example, the High Court. The principal objective of this device is to relieve the Court of Appeal (Civil Division) of work. The Lord Chancellor exercised the powers granted by this provision in the Access to Justice (Destination of Appeals) Order 2000 (SI 2000/1071); see para.9A-896 below.

Assignment of appeals to Court of Appeal

9A-848 57.—(1) Where in any proceedings in a county court or the High Court a person appeals, or seeks permission to appeal, to a court other than the Court of Appeal or the Supreme Court

- (a) the Master of the Rolls, or

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

(b) the court from which or to which the appeal is made, or from which permission to appeal is sought, may direct that the appeal shall be heard instead by the Court of Appeal.

(2) The power conferred by subsection (1)(b) shall be subject to rules of court.

Note —Amended by the Constitutional Reform Act 2005 Sch.9 para.68 with effect from October 1, 2009 (SI 2009/1604). **9A-848.1**

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9A-849

JUDGES ETC.

Judges holding office in European or international courts

68.—(1) A holder of a United Kingdom judicial office may hold office in a relevant international court without being required to relinquish the United Kingdom judicial office.

(2) In this section—

“United Kingdom judicial office” means the office of—

(a) Lord Justice of Appeal, Justice of the High Court or Circuit Judge, in England and Wales,

(b) judge of the Court of Session or sheriff, in Scotland, or

(c) Lord Justice of Appeal, judge of the High Court or county court judge, in Northern Ireland, and

“relevant international court” means—

(a) any court established for any purposes of the European Communities, or

(b) any international court (apart from the European Court of Human Rights) which is designated in relation to the holder of a United Kingdom judicial office by the appropriate Minister.

(3) A holder of a United Kingdom judicial office who also holds office in a relevant international court is not required to perform any duties as the holder of the United Kingdom judicial office but does not count as holding the United Kingdom judicial office—

(a) for the purposes of section 12(1) to (6) of the [1981 c. 54.], Senior Courts Act 1981 section 9(1)(c) or (d) of the [1973 c. 15.] Administration of Justice Act 1973, section 18 of the [1971 c. 23.] Courts Act 1971, section 14 of the [1907 c. 51.] Sheriff Courts (Scotland) Act 1907 or section 106 of the [1959 c. 25(N.I.).] County Courts Act (Northern Ireland) 1959 (judicial salaries),

(b) for the purposes of, or of any scheme established by and in accordance with, the [1993 c. 8.] Judicial Pensions and Retirement Act 1993, the [1981 c. 20.] Judicial Pensions Act 1981, the [1961 c. 42.] Sheriffs’ Pensions (Scotland) Act 1961 or the County Courts Act (Northern Ireland) 1959 (judicial pensions), or

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(c) for the purposes of section 2(1) or 4(1) of the Senior Courts Act 1981 1981, section 1(1) of the [1988 c. 36.] Court of Session Act 1988 or section 2(1) or 3(1) of the [1978 c. 23.] Judicature (Northern Ireland) Act 1978 (judicial numbers).

(4) If the sheriff principal of any sheriffdom also holds office in a relevant international court, section 11(1) of the [1971 c. 58.] Sheriff Courts (Scotland) Act 1971 (temporary appointment of sheriff principal) applies as if the office of sheriff principal of that sheriffdom were vacant.

(5) The appropriate Minister may by order made by statutory instrument make in relation to a holder of a United Kingdom judicial office who has ceased to hold office in a relevant international court such transitional provision (including, in particular, provision for a temporary increase in the maximum number of judges) as he considers appropriate.

(6) In this section “the appropriate Minister” means—

- (a) in relation to any United Kingdom judicial office specified in paragraph (a) or (c) of the definition in subsection (2), the Lord Chancellor, and
- (b) in relation to any United Kingdom judicial office specified in paragraph (b) of that definition, the Secretary of State.

(7) A statutory instrument containing an order made under subsection (5) shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(8) The Lord Chancellor may exercise functions under this section in relation to the holder of a United Kingdom judicial office specified in paragraph (a) of the definition in subsection (2) only after consulting the Lord Chief Justice of England and Wales.

(9) The Lord Chancellor may exercise functions under this section in relation to the holder of a United Kingdom judicial office specified in paragraph (c) of the definition in subsection (2) only after consulting the Lord Chief Justice of Northern Ireland.

(10) The Lord Chief Justice of England and Wales may nominate a judicial office holder (within the meaning of section 109(4) of the Constitutional Reform Act 2005) to exercise his functions under subsection (8).

(11) The Lord Chief Justice of Northern Ireland may nominate any of the following to exercise his functions under subsection (9)—

- (a) the holder of one of the offices listed in Schedule 1 to the Justice (Northern Ireland) Act 2002;
- (b) a Lord Justice of Appeal (as defined in section 88 of that Act).

9A–850 *Note* —Amended by the Constitutional Reform Act 2005 s.15(1), Sch.4 para.281, and s.59 and Sch.11 para.1 with effect from October 1, 2009 (SI 2009/1604).

9A–851

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Vice-president of Queen’s Bench Division.

69.—(1) The Lord Chancellor may appoint one of the ordinary

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

judges of the Court of Appeal as vice-president of the Queen's Bench Division; and any person so appointed shall hold that office in accordance with the terms of his appointment.

(1A) The Lord Chief Justice may nominate a judicial office holder (as defined in section 109(4) of the Constitutional Reform Act 2005) to exercise his functions under subsection (1).

(2) In section 4 of the Senior Courts Act 1981 (composition of High Court)—

(a) in subsection (1) (membership), after the words “the Senior Presiding Judge;” insert—

“(ddd) the vice-president of the Queen's Bench Division;”

, and

(b) in subsection (6) (vacancy in offices not to affect constitution), at the end insert “and whether or not an appointment has been made to the office of vice-president of the Queen's Bench Division”.

(3) In section 5 of that Act (divisions of High Court), in subsection (1)(b) (Queen's Bench Division), after “thereof,” insert “the vice-president of the Queen's Bench Division”.

Note —Amended by the Constitutional Reform Act 2005 s.15(1) and Sch.4 para.282, and with effect from October 1, 2009 by s.59 and Sch.11 para.1 (SI 2009/1604). **9A-852**

SCHEDULES

For Schs 1 to 3A to the Access to Justice Act 1999 (see Arrangement) plus any related commentary see paragraphs 9A-853+ to 9A-895+ on White Book on West-law UK or the Civil Procedure CD.



Access to Justice Act 1999 (Destination of Appeals) Order 2000

(S.I. 2000 No. 1071) (L.10)

9A-896

Introductory note

See also CPR Pt 52.

9A-897

This Order was made under the Access to Justice Act 1999 s.56, and came into effect on May 2, 2000. That section gives the Lord Chancellor power to provide by Order that appeals which would lie to (a) a county court, (b) the High Court, or (c) the Court of Appeal, shall lie instead to another of those courts, as specified in the Order.

The references to CPR Pts 57 to 62 were added to para.(b) of art.4 of this Order by the Civil Procedure (Modification of Enactments) Order 2002 (SI 2002/439) with effect from March 23, 2002. The heading to art.2 is misleading, as it is concerned, not with appeals from, but with appeals to, the High Court. Article 4 was amended by the Civil Procedure (Modification of Enactments) Order 2003 (SI 2003/490) with effect from April 1, 2003.

This Order was made under statutory powers and the terms in it having the effect of limiting the Court of Appeal's jurisdiction cannot be regarded (either before or after an appeal had been lodged) as merely directory (*Chadwick v Hollingsworth* [2010] EWCA Civ 1210, November 2, 2010, CA, unrep.).

Citation, commencement and interpretation

1.—(1) This Order may be cited as the Access to Justice Act 1999 (Destination of Appeals) Order 2000 and shall come into force on 2nd May 2000. **9A-898**

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

- (2) In this Order—
 - (a) “decision” includes any judgment, order or direction of the High Court or a county court;
 - (b) “family proceedings” means proceedings which are business of any description which in the High Court is for the time being assigned to the Family Division and to no other Division by or under section 61 of (and Schedule 1 to) the Senior Courts Act 1981; and
 - (c) “final decision” means a decision of a court that would finally determine (subject to any possible appeal or detailed assessment of costs) the entire proceedings whichever way the court decided the issues before it.
- (3) A decision of a court shall be treated as a final decision where it—
 - (a) is made at the conclusion of part of a hearing or trial which has been split into parts; and
 - (b) would, if made at the conclusion of that hearing or trial, be a final decision under paragraph (2)(c).
- (4) Articles 2 to 6—
 - (a) do not apply to an appeal in family proceedings; and
 - (b) are subject to—
 - (i) any enactment that provides a different route of appeal (other than section 16(1) of the Senior Courts Act 1981 or section 77(1) of the County Courts Act 1984); and
 - (ii) any requirement to obtain permission to appeal.

9A–898.1 *Note* —Amended by the Constitutional Reform Act 2005 s.59 and Sch.11 para.1 with effect from October 1, 2009 (SI 2009/1604).

Appeals from the High Court

- 9A–899** 2. Subject to articles 4 and 5, an appeal shall lie to a judge of the High Court where the decision to be appealed is made by—
- (a) a person holding an office referred to in Part II of Schedule 2 to the Senior Courts Act 1981;
 - (b) a district judge of the High Court; or
 - (c) a person appointed to act as a deputy for any person holding such an office as is referred to in sub-paragraphs (a) and (b) or to act as a temporary additional officer in any such office.

9A–899.1 *Note* —Amended by the Constitutional Reform Act 2005 s.59 and Sch.11 para.1 with effect from October 1, 2009 (SI 2009/1604).

Appeals from a county court

- 9A–900** 3.—(1) Subject to articles 4 and 5 and to paragraph (2), an appeal shall lie from a decision of a county court to the High Court.
- (2) Subject to articles 4 and 5, where the decision to be appealed is made by a district judge or deputy district judge of a county court, an appeal shall lie to a judge of a county court.

Appeals in a claim allocated to the multi-track or in specialist proceedings

- 9A–901** 4. An appeal shall lie to the Court of Appeal where the decision to be appealed is a final decision—

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

(a) in a claim made under Part 7 of the Civil Procedure Rules 1998 and allocated to the multi-track under those Rules, or

(b) made in proceedings under the Companies Act 1985 or the Companies Act 1989 or to which Sections I, II or III of Part 57 or any of Parts 58 to 63 of the Civil Procedure Rules 1998 apply.

Appeals where decision was itself made on appeal

5. Where—

9A-902

(a) an appeal is made to a county court or the High Court (other than from the decision of an officer of the court authorised to assess costs by the Lord Chancellor); and

(b) on hearing the appeal the court makes a decision,
an appeal shall lie from that decision to the Court of Appeal and not to any other court.

Transitional provisions

6. Where a person has filed a notice of appeal or applied for permission to appeal before 2nd May 2000— **9A-903**

(a) this Order shall not apply to the appeal to which that notice or application relates; and

(b) that appeal shall lie to the court to which it would have lain before 2nd May 2000.

Consequential amendments

7. In section 16(1) of the Senior Courts Act 1981, before “the Court of Appeal” the second time it appears, insert “or as provided by any order made by the Lord Chancellor under section 56(1) of the Access to Justice Act 1999”. **9A-904**

Note —Amended by the Constitutional Reform Act 2005 s.59 and Sch.11 para.1 with effect from October 1, 2009 (SI 2009/1604). **9A-904.1**

8. In section 77(1) of the County Courts Act 1984, after “Act” insert “and to any order made by the Lord Chancellor under section 56(1) of the Access to Justice Act 1999”. **9A-905**

Courts Act 2003

(2003 c.39)

9A-906

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Paragraph numbers marked with a “+” denote content that is available on White Book on Westlaw UK or the Civil Procedure CD.



For ss.1 to 109, Sch.1 and Sch.7 paras 1 to 5 of the Courts Act 2003 (see Arrangement) plus any related commentary see paragraphs 9A-907+ to 9A-953.1+ on White Book on Westlaw UK or the Civil Procedure CD.

Writs of execution against goods

Application of paragraphs 7 to 11

9A-954 6. Paragraphs 7 to 11 apply to any writ of execution against goods which is issued from the High Court.

Endorsement of writ with date and time of receipt

9A-955 7.—(1) If the writ is directed to a single enforcement officer under paragraph 3(1)(a) or (c), that officer must endorse it as soon as possible after receiving it.

(2) If the writ is directed to two or more enforcement officers collectively under paragraph 3(1)(b), the individual who, in accordance with approved arrangements, is responsible for allocating its execution to one of those officers, must endorse it as soon as possible after receiving it.

(3) If the writ is directed to a person who is not an enforcement officer but is under a duty to execute it, that person must endorse it as soon as possible after receiving it.

(4) For the purposes of this paragraph, a person endorses a writ by endorsing on the back of it the date and time when he received it.

(5) No fee may be charged for endorsing a writ under this paragraph.

Effect of writ

9A-956 8.—(1) Subject to sub-paragraph (2), the writ binds the property in the goods of the execution debtor from the time when the writ is received by the person who is under a duty to endorse it.

(2) The writ does not prejudice the title to any goods of the execution debtor acquired by a person in good faith and for valuable consideration.

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

(3) Sub-paragraph (2) does not apply if the person acquiring goods of the execution debtor had notice, at the time of the acquisition, that—

- (a) the writ, or
- (b) any other writ by virtue of which the goods of the execution debtor might be seized or attached,

had been received by the person who was under a duty to endorse it but had not been executed.

(4) Sub-paragraph (2) does not apply if the person acquiring goods of the execution debtor had notice, at the time of the acquisition, that—

- (a) an application for the issue of a warrant of execution against the goods of the execution debtor had been made to the district judge of a county court, and
- (b) the warrant issued on the application—
 - (i) remained unexecuted in the hands of the district judge of the court from which it was issued, or
 - (ii) had been sent for execution to, and received by, the district judge of another county court and remained unexecuted in the hands of that district judge.

(5) In sub-paragraph (1) “property” means the general property in goods (and not merely a special property).

(6) For the purposes of sub-paragraph (2) a thing shall be treated as done in good faith if it is in fact done honestly (whether it is done negligently or not).

(7) Any reference in this paragraph to the goods of the execution debtor includes anything else of his that may lawfully be seized in execution.

Seizure of goods

9.—(1) This paragraph applies where an enforcement officer or other person who is under a duty to execute the writ is executing it. **9A-957**

(2) The officer may, by virtue of the writ, seize—

- (a) any goods of the execution debtor that are not exempt goods, and
- (b) any money, banknotes, bills of exchange, promissory notes, bonds, specialties or securities for money belonging to the execution debtor.

(3) “Exempt goods” means—

- (a) such tools, books, vehicles and other items of equipment as are necessary to the execution debtor for use personally by him in his employment, business or vocation;
- (b) such clothing, bedding, furniture, household equipment and provisions as are necessary for satisfying the basic domestic needs of the execution debtor and his family.

Sale of goods seized

10.—(1) This paragraph applies if—

- (a) a writ of execution has been issued from the High Court,

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

- (b) goods are seized under the writ by an enforcement officer or other person under a duty to execute it, and
- (c) the goods are to be sold for a sum which, including legal incidental expenses, exceeds £20.
- (2) The sale must be—
 - (a) made by public auction, and not by bill of sale or private contract, unless the court otherwise orders, and
 - (b) publicly advertised on, and during the three days preceding, the day of sale.
- (3) If the person who seized the goods has notice of another execution or other executions, the court must not consider an application for leave to sell privately until the notice prescribed by Civil Procedure Rules has been given to the other execution creditor or creditors.
- (4) An execution creditor given notice under sub-paragraph (3) is entitled—
 - (a) to appear before the court, and
 - (b) to be heard on the application for the order.

Protection of officers selling seized goods

- 9A-959** 11.—(1) This paragraph applies if—
- (a) a writ of execution has been issued from the High Court,
 - (b) goods in the possession of an execution debtor are seized by an enforcement officer or other person under a duty to execute the writ, and
 - (c) the goods are sold by that officer without any claims having been made to them.
- (2) If this paragraph applies—
- (a) the purchaser of the goods acquires a good title to them, and
 - (b) no person is entitled to recover against the officer or anyone acting under his authority—
 - (i) for any sale of the goods, or
 - (ii) for paying over the proceeds prior to the receipt of a claim to the goods,
- unless it is proved that the person from whom recovery is sought had notice, or might by making reasonable enquiry have ascertained, that the goods were not the property of the execution debtor.
- (3) Nothing in this paragraph affects the right of a lawful claimant to any remedy to which he is entitled against any person other than the enforcement officer or other officer charged with the execution of the writ.
- (4) “Lawful claimant” means a person who proves that at the time of sale he had a title to any goods seized and sold.
- (5) This paragraph is subject to sections 183, 184 and 346 of the Insolvency Act 1986.



For Sch.7 para 12 of the Courts Act 2003 (see Arrangement) plus any related commentary see paragraphs 9A-960+ to 9A-961+ on White Book on Westlaw UK or the Civil Procedure CD.

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

Constitutional Reform Act 2005

(2005 c.4)

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Tribunals, Courts and Enforcement Act 2007

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(2007 c.15)

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For ss.1 to 12 of the Tribunals, Courts and Enforcement Act 2007 (see Arrange-

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ment) plus any related commentary see paragraphs 9A–995+ to 9A–1006+ on White Book on Westlaw UK or the Civil Procedure CD.

Right to appeal to Court of Appeal etc.

9A–1007 13.—(1) For the purposes of subsection (2), the reference to a right of appeal is to a right to appeal to the relevant appellate court on any point of law arising from a decision made by the Upper Tribunal other than an excluded decision.

(2) Any party to a case has a right of appeal, subject to subsection (14).

(3) That right may be exercised only with permission (or, in Northern Ireland, leave).

(4) Permission (or leave) may be given by—

- (a) the Upper Tribunal, or
- (b) the relevant appellate court,

on an application by the party.

(5) An application may be made under subsection (4) to the relevant appellate court only if permission (or leave) has been refused by the Upper Tribunal.

(6) The Lord Chancellor may, as respects an application under subsection (4) that falls within subsection (7) and for which the relevant appellate court is the Court of Appeal in England and Wales or the Court of Appeal in Northern Ireland, by order make provision for permission (or leave) not to be granted on the application unless the Upper Tribunal or (as the case may be) the relevant appellate court considers—

- (a) that the proposed appeal would raise some important point of principle or practice, or
- (b) that there is some other compelling reason for the relevant appellate court to hear the appeal.

(7) An application falls within this subsection if the application is for permission (or leave) to appeal from any decision of the Upper Tribunal on an appeal under section 11.

(8) For the purposes of subsection (1), an “excluded decision” is—

- (a) any decision of the Upper Tribunal on an appeal under section 28(4) or (6) of the Data Protection Act 1998 (c. 29) (appeals against national security certificate),
- (b) any decision of the Upper Tribunal on an appeal under section 60(1) or (4) of the Freedom of Information Act 2000 (c. 36) (appeals against national security certificate),
- (c) any decision of the Upper Tribunal on an application under section 11(4)(b) (application for permission or leave to appeal),
- (d) a decision of the Upper Tribunal under section 10—
 - (i) to review, or not to review, an earlier decision of the tribunal,
 - (ii) to take no action, or not to take any particular action, in the light of a review of an earlier decision of the tribunal, or

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- (iii) to set aside an earlier decision of the tribunal,
 - (e) a decision of the Upper Tribunal that is set aside under section 10 (including a decision set aside after proceedings on an appeal under this section have been begun), or
 - (f) any decision of the Upper Tribunal that is of a description specified in an order made by the Lord Chancellor.
- (9) A description may be specified under subsection (8)(f) only if—
- (a) in the case of a decision of that description, there is a right to appeal to a court from the decision and that right is, or includes, something other than a right (however expressed) to appeal on any point of law arising from the decision, or
 - (b) decisions of that description are made in carrying out a function transferred under section 30 and prior to the transfer of the function under section 30(1) there was no right to appeal from decisions of that description.
- (10) Where—
- (a) an order under subsection (8)(f) specifies a description of decisions, and
 - (b) decisions of that description are made in carrying out a function transferred under section 30,
- the order must be framed so as to come into force no later than the time when the transfer under section 30 of the function takes effect (but power to revoke the order continues to be exercisable after that time, and power to amend the order continues to be exercisable after that time for the purpose of narrowing the description for the time being specified).
- (11) Before the Upper Tribunal decides an application made to it under subsection (4), the Upper Tribunal must specify the court that is to be the relevant appellate court as respects the proposed appeal.
- (12) The court to be specified under subsection (11) in relation to a proposed appeal is whichever of the following courts appears to the Upper Tribunal to be the most appropriate—
- (a) the Court of Appeal in England and Wales;
 - (b) the Court of Session;
 - (c) the Court of Appeal in Northern Ireland.
- (13) In this section except subsection (11), “the relevant appellate court”, as respects an appeal, means the court specified as respects that appeal by the Upper Tribunal under subsection (11).
- (14) The Lord Chancellor may by order make provision for a person to be treated as being, or to be treated as not being, a party to a case for the purposes of subsection (2).
- (15) Rules of court may make provision as to the time within which an application under subsection (4) to the relevant appellate court must be made.

Proceedings on appeal to Court of Appeal etc.

14.—(1) Subsection (2) applies if the relevant appellate court, in **9A–1008**

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deciding an appeal under section 13, finds that the making of the decision concerned involved the making of an error on a point of law.

(2) The relevant appellate court—

(a) may (but need not) set aside the decision of the Upper Tribunal, and

(b) if it does, must either—

(i) remit the case to the Upper Tribunal or, where the decision of the Upper Tribunal was on an appeal or reference from another tribunal or some other person, to the Upper Tribunal or that other tribunal or person, with directions for its reconsideration, or

(ii) re-make the decision.

(3) In acting under subsection (2)(b)(i), the relevant appellate court may also—

(a) direct that the persons who are chosen to reconsider the case are not to be the same as those who—

(i) where the case is remitted to the Upper Tribunal, made the decision of the Upper Tribunal that has been set aside, or

(ii) where the case is remitted to another tribunal or person, made the decision in respect of which the appeal or reference to the Upper Tribunal was made;

(b) give procedural directions in connection with the reconsideration of the case by the Upper Tribunal or other tribunal or person.

(4) In acting under subsection (2)(b)(ii), the relevant appellate court—

(a) may make any decision which the Upper Tribunal could make if the Upper Tribunal were re-making the decision or (as the case may be) which the other tribunal or person could make if that other tribunal or person were re-making the decision, and

(b) may make such findings of fact as it considers appropriate.

(5) Where—

(a) under subsection (2)(b)(i) the relevant appellate court remits a case to the Upper Tribunal, and

(b) the decision set aside under subsection (2)(a) was made by the Upper Tribunal on an appeal or reference from another tribunal or some other person,

the Upper Tribunal may (instead of reconsidering the case itself) remit the case to that other tribunal or person, with the directions given by the relevant appellate court for its reconsideration.

(6) In acting under subsection (5), the Upper Tribunal may also—

(a) direct that the persons who are chosen to reconsider the case are not to be the same as those who made the deci-

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sion in respect of which the appeal or reference to the Upper Tribunal was made;

- (b) give procedural directions in connection with the reconsideration of the case by the other tribunal or person.

(7) In this section “the relevant appellate court”, as respects an appeal under section 13, means the court specified as respects that appeal by the Upper Tribunal under section 13(11).

Upper Tribunal’s “judicial review” jurisdiction

15.—(1) The Upper Tribunal has power, in cases arising under the law of England and Wales or under the law of Northern Ireland, to grant the following kinds of relief— **9A-1009**

- (a) a mandatory order;
- (b) a prohibiting order;
- (c) a quashing order;
- (d) a declaration;
- (e) an injunction.

(2) The power under subsection (1) may be exercised by the Upper Tribunal if—

- (a) certain conditions are met (see section 18), or
- (b) the tribunal is authorised to proceed even though not all of those conditions are met (see section 19(3) and (4)).

(3) Relief under subsection (1) granted by the Upper Tribunal—

- (a) has the same effect as the corresponding relief granted by the High Court on an application for judicial review, and
- (b) is enforceable as if it were relief granted by the High Court on an application for judicial review.

(4) In deciding whether to grant relief under subsection (1)(a), (b) or (c), the Upper Tribunal must apply the principles that the High Court would apply in deciding whether to grant that relief on an application for judicial review.

(5) In deciding whether to grant relief under subsection (1)(d) or (e), the Upper Tribunal must—

- (a) in cases arising under the law of England and Wales apply the principles that the High Court would apply in deciding whether to grant that relief under section 31(2) of the Senior Courts Act 1981 (c. 54) on an application for judicial review, and
- (b) in cases arising under the law of Northern Ireland apply the principles that the High Court would apply in deciding whether to grant that relief on an application for judicial review.

(6) For the purposes of the application of subsection (3)(a) in relation to cases arising under the law of Northern Ireland—

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- (a) a mandatory order under subsection (1)(a) shall be taken to correspond to an order of mandamus,
- (b) a prohibiting order under subsection (1)(b) shall be taken to correspond to an order of prohibition, and
- (c) a quashing order under subsection (1)(c) shall be taken to correspond to an order of certiorari.

Application for relief under section 15(1)

9A-1010 16.—(1) This section applies in relation to an application to the Upper Tribunal for relief under section 15(1).

(2) The application may be made only if permission (or, in a case arising under the law of Northern Ireland, leave) to make it has been obtained from the tribunal.

(3) The tribunal may not grant permission (or leave) to make the application unless it considers that the applicant has a sufficient interest in the matter to which the application relates.

(4) Subsection (5) applies where the tribunal considers—

- (a) that there has been undue delay in making the application, and
- (b) that granting the relief sought on the application would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.

(5) The tribunal may—

- (a) refuse to grant permission (or leave) for the making of the application;
- (b) refuse to grant any relief sought on the application.

(6) The tribunal may award to the applicant damages, restitution or the recovery of a sum due if—

- (a) the application includes a claim for such an award arising from any matter to which the application relates, and
- (b) the tribunal is satisfied that such an award would have been made by the High Court if the claim had been made in an action begun in the High Court by the applicant at the time of making the application.

(7) An award under subsection (6) may be enforced as if it were an award of the High Court.

(8) Where—

- (a) the tribunal refuses to grant permission (or leave) to apply for relief under section 15(1),
- (b) the applicant appeals against that refusal, and
- (c) the Court of Appeal grants the permission (or leave),

the Court of Appeal may go on to decide the application for relief under section 15(1).

(9) Subsections (4) and (5) do not prevent Tribunal Procedure Rules from limiting the time within which applications may be made.

Quashing orders under section 15(1): supplementary provision

9A-1011 17.—(1) If the Upper Tribunal makes a quashing order under section 15(1)(c) in respect of a decision, it may in addition—

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- (a) remit the matter concerned to the court, tribunal or authority that made the decision, with a direction to reconsider the matter and reach a decision in accordance with the findings of the Upper Tribunal, or
 - (b) substitute its own decision for the decision in question.
- (2) The power conferred by subsection (1)(b) is exercisable only if—
- (a) the decision in question was made by a court or tribunal,
 - (b) the decision is quashed on the ground that there has been an error of law, and
 - (c) without the error, there would have been only one decision that the court or tribunal could have reached.
- (3) Unless the Upper Tribunal otherwise directs, a decision substituted by it under subsection (1)(b) has effect as if it were a decision of the relevant court or tribunal.

Limits of jurisdiction under section 15(1)

18.—(1) This section applies where an application made to the Upper Tribunal seeks (whether or not alone)— **9A-1012**

- (a) relief under section 15(1), or
 - (b) permission (or, in a case arising under the law of Northern Ireland, leave) to apply for relief under section 15(1).
- (2) If Conditions 1 to 4 are met, the tribunal has the function of deciding the application.
- (3) If the tribunal does not have the function of deciding the application, it must by order transfer the application to the High Court.
- (4) Condition 1 is that the application does not seek anything other than—
- (a) relief under section 15(1);
 - (b) permission (or, in a case arising under the law of Northern Ireland, leave) to apply for relief under section 15(1);
 - (c) an award under section 16(6);
 - (d) interest;
 - (e) costs.
- (5) Condition 2 is that the application does not call into question anything done by the Crown Court.
- (6) Condition 3 is that the application falls within a class specified for the purposes of this subsection in a direction given in accordance with Part 1 of Schedule 2 to the Constitutional Reform Act 2005 (c. 4).
- (7) The power to give directions under subsection (6) includes—
- (a) power to vary or revoke directions made in exercise of the power, and
 - (b) power to make different provision for different purposes.
- (8) Condition 4 is that the judge presiding at the hearing of the application is either—

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- (a) a judge of the High Court or the Court of Appeal in England and Wales or Northern Ireland, or a judge of the Court of Session, or
 - (b) such other persons as may be agreed from time to time between the Lord Chief Justice, the Lord President, or the Lord Chief Justice of Northern Ireland, as the case may be, and the Senior President of Tribunals.
- (9) Where the application is transferred to the High Court under subsection (3)—
- (a) the application is to be treated for all purposes as if it—
 - (i) had been made to the High Court, and
 - (ii) sought things corresponding to those sought from the tribunal, and
 - (b) any steps taken, permission (or leave) given or orders made by the tribunal in relation to the application are to be treated as taken, given or made by the High Court.
- (10) Rules of court may make provision for the purpose of supplementing subsection (9).
- (11) The provision that may be made by Tribunal Procedure Rules about amendment of an application for relief under section 15(1) includes, in particular, provision about amendments that would cause the application to become transferrable under subsection (3).
- (12) For the purposes of subsection (9)(a)(ii), in relation to an application transferred to the High Court in Northern Ireland—
- (a) an order of mandamus shall be taken to correspond to a mandatory order under section 15(1)(a),
 - (b) an order of prohibition shall be taken to correspond to a prohibiting order under section 15(1)(b), and
 - (c) an order of certiorari shall be taken to correspond to a quashing order under section 15(1)(c).



For ss.20 to 149 and Schs 1 to 23 of the Tribunals, Courts and Enforcement Act 2007 (see Arrangement) plus any related commentary see paragraphs 9A–1014+ to 9A–1232+ on White Book on Westlaw UK or the Civil Procedure CD.

9B OTHER STATUTES AND REGULATIONS

For a list of the statutes and regulations published in Section 9B, see the contents list preceding Section 9A (Main Statutes).

Administration of Justice (Miscellaneous Provisions) Act 1933

(1933 23 & 24 GEO. 5 c.36)

9B-0

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Administration of Justice Act 1925

(1925 15 & 16 GEO. 5 c.28)

9B-6.1

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Administration of Justice Act 1960

(1960 8 & 9 ELIZ. 2 c.65)

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| 17. | Interpretation | 9B-27 |
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CONTEMPT OF COURT, HABEAS CORPUS AND CERTIORARI

Publication of information relating to proceedings in private

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

(a) where the proceedings—

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

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

- (ii) are brought under the Children Act 1989 or the Adoption and Children Act 2002; or
- (iii) otherwise relate wholly or mainly to the maintenance or upbringing of a minor;
- (b) where the proceedings are brought under the Mental Capacity Act 2005 or under any provision of the Mental Health Act 1983, or under any provision of the Act authorising an application or reference to be made to the First-tier Tribunal, the Mental Health Review Tribunal for Wales or to a county court;
- (c) where the court sits in private for reasons of national security during that part of the proceedings about which the information in question is published;
- (d) where the information relates to a secret process, discovery or invention which is in issue in the proceedings;
- (e) where the court (having power to do so) expressly prohibits the publication of all information relating to the proceedings or of information of the description which is published.

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

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

(4) Nothing in this section shall be construed as implying that any publication is punishable as contempt of court which would not be so punishable apart from this section (and in particular where the publication is not so punishable by reason of being authorised by rules of court).

9B-16 *Note* —Part VIII of the Mental Health Act 1959 was replaced by Pt VII of the Mental Health Act 1983. Amended by the Children Act 1989 Sch.13; the Children Act 2004 s.62(2). Amended by the Children Act 1989 Sch.13; the Adoption and Children Act 2002 s.101(2); and the Children Act 2004 s.62(2); the Mental Capacity Act 2005 s.67(1) and Sch.6 para.10; and SI 2008/2833.

“court sitting in private”

9B-17 Traditionally, legal proceedings have been conducted either “in court” or “in chambers” (see Senior Courts Act 1981 s.67). Nowadays, it is common to draw a distinction between courts sitting “in public” or “in private” (see CPR r.39.2). It is expressly provided that, in s.12 references to a court “sitting in private” include a court sitting “in court” but in camera, or a court sitting “in chambers” (s.12(3)). This would suggest that the section was drafted on the assumption that, contrary to the modern position, a court sitting “in chambers” was *ipso facto* a court sitting “in private”. These pairings are not co-terminous; at least, a court sitting “in chambers” is not necessarily a court sitting “in private”. See further paras 9A-315 to 9A-319 above, and Vol.1, para.39.2.1.

When enacted, s.12 was remedial in the sense that it had the effect of making it

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clear that the publication of information relating to proceedings “in private” is not necessarily contempt. The section sets out the circumstances in which, subject to exceptions, it shall be a contempt of court to publish information given in private proceedings. The stated exceptions are not exhaustive. For a recent review of the relevant law, see *Clibbery v Allan* [2002] EWCA Civ 45; [2002] 2 W.L.R. 1511, CA, a case involving specifically the confidentiality of documents disclosed in, and the publication of information relating to, proceedings in the Family Division conducted in private.

Appeal in cases of contempt of court

13.—(1) Subject to the provisions of this section, an appeal shall lie **9B–18** under this section from any order or decision of a court in the exercise of jurisdiction to punish for contempt of court (including criminal contempt); and in relation to any such order or decision the provisions of this section shall have effect in substitution for any other enactment relating to appeals in civil or criminal proceedings.

(2) An appeal under this section shall lie in any case at the instance of the defendant and, in the case of an application for committal or attachment, at the instance of the applicant; and the appeal shall lie—

- (a) from an order or decision of any inferior court not referred to in the next following paragraph, to the High Court;
- (b) from an order or decision of a county court or any other inferior court from which appeals generally lie to the civil division of the Court of Appeal, and from an order or decision (other than a decision on an appeal under this section) of a single judge of the High Court, or of any court having the powers of the High Court or of a judge of that court, to the civil division of the Court of Appeal;
- (bb) from an order or decision of the Crown Court to the Court of Appeal;
- (c) from a decision of a single judge of the High Court on an appeal under this section, from an order or decision of a Divisional Court or the civil division of the Court of Appeal (including a decision of either of those courts on an appeal under this section) and from an order or decision of the criminal division of the Court of Appeal or the Courts-Martial Appeal Court, to the Supreme Court.

(3) The court to which an appeal is brought under this section may reverse or vary the order or decision of the court below, and make such other order as may be just; and without prejudice to the inherent powers of any court referred to in subsection (2) of this section, provision may be made by rules of court for authorising the release on bail of an appellant under this section.

(4) Subsections (2) to (4) of section one and section two of this Act shall apply to an appeal to the Supreme Court under this section as they apply to an appeal to that House under the said section one, except that so much of the said subsection (2) as restricts the grant of leave to appeal shall apply only where the decision of the court below is a decision on appeal to that court under this section.

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

SECTION 9B: OTHER STATUTES AND REGULATIONS

(5) In this section “court” includes any tribunal or person having power to punish for contempt; and references in this section to an order or decision of a court in the exercise of jurisdiction to punish for contempt of court include references—

- (a) to an order or decision of the High Court, the Crown Court or a county court under any enactment enabling that court to deal with an offence as if it were contempt of court;
- (b) to an order or decision of a county court, under section 14, 92 or 118 of the County Courts Act 1984;
- (c) to an order or decision of a magistrates’ court under subsection (3) of section 63 of the Magistrates’ Courts Act 1980, but do not include references to order under section five of the Debtors Act 1869, or under any provision of the Magistrates’ Courts Act 1980, or the County Courts Act 1984, except those referred to in paragraphs (b) and (c) of this subsection and except sections 38 and 142 of the last mentioned Act so far as those sections confer jurisdiction in respect of contempt of court.

(6) This section does not apply to a conviction or sentence in respect of which an appeal lies under Part I of the Criminal Appeal Act 1968, or to a decision of the criminal division of the Court of Appeal under that Part of that Act.

9B–19 *Note* —Amended by the Courts Act 1971 Sch.8, para.40(1) and Sch.11; and the Criminal Appeal Act 1968 Sch.5; the Senior Courts Act 1981 s.152(4) and Sch.7 the County Courts Act 1984 Sch.2, the Access to Justice Act 1999 s.64 and Sch.15, Pt III and the Constitutional Reform Act 2005, s.40 and Sch.9, para.13, with effect from October 1, 2009 (SI 2009/1604).

Destination of appeals against orders punishing for contempt

9B–20 In *Barnett LBC v Hurst* [2002] EWCA Civ 1009; 152 New L.J. 1275 (2002), CA, the Court of Appeal explained the appropriate routes for appeals from decisions made in committal proceedings by judges exercising county court jurisdiction. See further CPR Pt 52.

Procedure on application for habeas corpus

9B–21 **14.—(1)** [...]

(2) Notwithstanding anything in any enactment or rule of law, where a criminal or civil application for habeas corpus has been made by or in respect of any person, no such application shall again be made by or in respect of that person on the same grounds, whether to the same court or judge or to any other court or judge, unless fresh evidence is adduced in support of the application ...

(3) In every case where the person by or in respect of whom an application for habeas corpus is made is restrained as a person liable, or treated by virtue of any enactment as liable, to be detained in pursuance of an order or direction under Part V of the Mental Health Act 1959 (otherwise than by virtue of paragraph (e) or paragraph (f) of subsection (2) of section seventy-three of that Act) the application shall be deemed for the purposes of his section and of

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any appeal in the proceedings to constitute a criminal cause or matter.

Note—In subs.(3) see now the Mental Health Act 1983 s.48. Amended by the Access to Justice Act 1999 Sch.15, Pt III; and the Constitutional Reform Act 2005 ss.15(1) and 146, and Sch.4, para 52, Sch.18 (see para.9A–4.1 above). **9B–22**

Further application for habeas corpus

The applicant for habeas corpus must put forward on his initial application the whole of the case then fairly available to him, and the doctrine of *res judicata*, whereby it is an abuse of the process to raise in subsequent proceedings matters which could have been litigated in earlier proceedings, applies to subsequent proceedings for habeas corpus; and moreover, to constitute “fresh evidence” in support of a subsequent application within the meaning of s.14(2) the evidence must not be merely additional to or different from that which was adduced before the Court on the first application but evidence which the applicant could not have, or could not reasonably have been expected to, put forward on the first application (*Re Tarling* [1979] 1 W.L.R. 1417; [1979] 1 All E.R. 981, DC). **9B–23**

Appeal in habeas corpus proceedings

15.—(1) Subject to the provisions of this section, an appeal shall lie, in any proceedings upon application for habeas corpus, whether civil or criminal, against an order for the release of the person restrained as well as against the refusal of such an order. **9B–24**

(2) [...]

(3) In relation to a decision of the High Court on a criminal application for habeas corpus, section one of this Act shall have effect as if so much of subsection (2) as restricts the grant of leave to appeal were omitted.

(4) Except as provided by section five of this Act in the case of an appeal against an order of the High Court on a criminal application, an appeal brought by virtue of this section shall not affect the right of the person restrained to be discharged in pursuance of the order under appeal and (unless an order under subsection (1) of that section is in force at the determination of the appeal) to remain at large regardless of the decision on appeal.

* * * *

Note—Subsection (2) was repealed by the Access to Justice Act 1999 Sch.15 Pt III. **9B–25**

Release on bail pending appeal

In proceedings on application for habeas corpus in criminal matters, where the prosecutor is granted, or gives notice that he intends to apply for, leave to appeal to the House of Lords from the Divisional Court, the fugitive should not be released unconditionally, but only on bail pending the appeal to the House of Lords (*Government of USA v McCaffery* [1984] 1 W.L.R. 867; [1984] 2 All E.R. 570, HL, applying *DPP v Merriman* [1974] 3 All E.R. 42). **9B–26**

SUPPLEMENTARY

Interpretation

17.—(1) In this Act any reference to the defendant shall be construed— **9B–27**

(a) in relation to proceedings for an offence, and in relation to an application for an order of mandamus, prohibition

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SECTION 9B: OTHER STATUTES AND REGULATIONS

or certiorari in connection with such proceedings, as a reference to the person who was or would have been the defendant in those proceedings;

- (b) in relation to any proceedings or order for or in respect of contempt of court, as a reference to the person against whom the proceedings were brought or the order was made;
- (c) in relation to a criminal application for habeas corpus, as a reference to the person by or in respect of whom that application was made,

and any reference to the prosecutor shall be construed accordingly.

(2) In this Act “application for habeas corpus” means an application for a writ of habeas corpus *ad subjiciendum* and references to a criminal application or civil application shall be construed according as the application does or does not constitute a criminal cause or matter.

(3) In this Act any reference to the court below shall, in relation to any function of a Divisional Court, be construed as a reference to the Divisional Court or to a judge according as the function is by virtue of rules of court exercisable by the Divisional Court or a judge.

(4) An appeal under section one of this Act shall be treated for the purposes of this Act as pending until any application for leave to appeal is disposed of and, if leave to appeal is granted, until the appeal is disposed of; and for the purposes of this Act an application for leave to appeal shall be treated as disposed of at the expiration of the time within which it may be made, if it is not made within that time.

(5) [...]

(6) Any reference in this Act to any other enactment is a reference thereto as amended by or under any other enactment, including this Act.

9B-28 Note —Subsection (5) was repealed by the Criminal Appeal Act 1995 Sch.3.

Administration of Justice Act 1969

9B-29 (1969 c.58)

ARRANGEMENT OF SECTIONS

PART II

APPEAL FROM HIGH COURT TO SUPREME COURT

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| SECT. | | |
| 12. | Grant of certificate by trial Judge | 9B-30 |
| 13. | Leave to appeal to Supreme Court | 9B-33 |
| 14. | Appeal where leave granted | 9B-35 |
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Paragraph numbers marked with a “+” can be found online and on CD.

PART II

APPEAL FROM HIGH COURT TO SUPREME COURT

Grant of certificate by trial Judge

12.—(1) Where on the application of any of the parties to any proceedings to which this section applies the judge is satisfied— **9B-30**

- (a) that the relevant conditions are fulfilled in relation to his decision in those proceedings, and
- (b) that a sufficient case for an appeal to the Supreme Court under this Part of this Act has been made out to justify an application for leave to bring such an appeal, and
- (c) that all the parties to the proceedings consent to the grant of a certificate under this section,

the judge, subject to the following provisions of this Part of this Act, may grant a certificate to that effect.

(2) This section applies to any civil proceedings in the High Court which are either—

- (a) proceedings before a single judge of the High Court, or
- (b) [...]
- (c) proceedings before a Divisional Court.

(3) Subject to any Order in Council made under the following provisions of this section, for the purposes of this section the relevant conditions, in relation to a decision of the judge in any proceedings, are that a point of law of general public importance is involved in that decision and that that point of law either—

- (a) relates wholly or mainly to the construction of an enactment or of a statutory instrument, and has been fully argued in the proceedings and fully considered in the judgment of the judge in the proceedings, or
- (b) is one in respect of which the judge is bound by a decision of the Court of Appeal or of the Supreme Court in previous proceedings, and was fully considered in the judgments given by the Court of Appeal or the Supreme Court (as the case may be) in those previous proceedings.

(4) Any application for a certificate under this section shall be made to the judge immediately after he gives judgment in the proceedings:

Provided that the judge may in any particular case entertain any such application made at any later time before the end of the period of fourteen days beginning with the date on which that judgment is given or such other period as may be prescribed by rules of court.

(5) No appeal shall lie against the grant or refusal of a certificate under this section.

(6) Her Majesty may by Order in Council amend subsection (3) of this section by altering, deleting, or substituting one or more new paragraphs for, either or both of paragraphs (a) and (b) of that subsection, or by adding one or more further paragraphs.

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

(7) Any Order in Council made under this section shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(8) In this Part of this Act “civil proceedings” means any proceedings other than proceedings in a criminal cause or matter, and “the judge,” in relation to any proceedings to which this section applies, means the judge or commissioner referred to in paragraph (a) of subsection (2) of this section, or the Divisional Court referred to in paragraph (c) of that subsection, as the case may be.

9B-31 *Note*—The Pt II heading was amended by the Constitutional Reform Act 2005 s.40 and Sch.9 para.20(2), with effect from October 1, 2009 (SI 2009/1604).

Amended by the Senior Courts Act 1981 s.152(4) and Sch.7; the Courts Act 1971 s.56 and Sch.11 and the Constitutional Reform Act 2005 s.40 and Sch.9 para.20(3), with effect from October 1, 2009 (SI 2009/1604).

Certificate for appeal from High Court to House of Lords

9B-32 For a case where a certificate under this section has been granted, see *Ealing London BC v Race Relations Board* [1970] 1 W.L.R. 1599.

For a review of the general operation of this section, see *Inland Revenue Commissioners v Church Commissioners for England* [1975] 1 W.L.R. 251; [1974] 3 All E.R. 529). Even where the requirements of the section are satisfied, the judge has a discretion whether or not to grant the certificate, as where he considers that the case does not fall within the spirit, as distinct from the letter, of the section (*ibid.*).

In *Gawler v Raettig* [2007] EWCA Civ 1560, December 3, 2007, unrep., CA, a High Court judge granted a defendant in a road accident personal injury case a certificate under this section on the basis that his decision was one in which he was bound by the decision of the Court of Appeal in *Froom v Butcher* [1976] Q.B. 286, CA, where it was held that failure to wear a seat belt was contributory negligence. (The judge refused the defendant's application for permission to appeal to the Court of Appeal, but extended time for the making of such an application to that court pending a petition to the House Lord). A curiosity of this case is that the defendant applicant's submission under s.12 was made, not on the basis that the point of law in *Froom v Butcher* had been wrongly decided, but on the basis that the judge was not bound by the guidance given in that case as to the circumstances in which a reduction in the victim's damages would be appropriate and the proportion thereof. (In the event, the defendant was refused permission to appeal by the House of Lords, and subsequently, by the Court of Appeal.)

Leave to appeal to Supreme Court

9B-33 **13.**—(1) Where in any proceedings the judge grants a certificate under section 12 of this Act, then, at any time within one month from the date on which that certificate is granted or such extended time as in any particular case the Supreme Court may allow, any of the parties to the proceedings may make an application to the Supreme Court under this section.

(2) Subject to the following provisions of this section, if on such an application it appears to the Supreme Court to be expedient to do so, the Supreme Court may grant leave for an appeal to be brought directly to the Supreme Court; and where leave is granted under this section—

- (a) no appeal from the decision of the judge to which the certificate relates shall lie to the Court of Appeal, but
- (b) an appeal shall lie from that decision to the Supreme Court.

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

(3) Applications under this section shall be determined without a hearing.

(4) [...]

(5) Without prejudice to subsection (2) of this section, no appeal shall lie to the Court of Appeal from a decision of the judge in respect of which a certificate is granted under section 12 of this Act until—

- (a) the time within which an application can be made under this section has expired, and
- (b) where such an application is made, that application has been determined in accordance with the preceding provisions of this section.

Note —Amended by the Constitutional Reform Act 2005 s.40 and Sch.9, para.20(4), with effect from October 1, 2009 (SI 2009/1604). **9B-33.1**

No appeal to Court of Appeal

In *R. (Jones) v Ceredigion CC* [2007] UKHL 24; May 23, 2007, unrep., HL, a High Court judge determined an application for judicial review in favour of the claimant and quashed a decision made by the defendant local authority. The judge granted the defendants a certificate under s.12(1) to apply for permission to appeal to the House of Lords and, in addition, granted the defendants permission to appeal to the Court of Appeal if, in the event, the Lords did not grant permission. The House of Lords granted the defendants permission to appeal to them in relation to one of three issues on which the defendants sought to appeal. Subsequently, the defendants withdrew that appeal (in effect, abandoning the point), and applied for permission to appeal to the Court of Appeal on one of the two issues on which the House of Lords had refused permission. The claimant contended that, by virtue of s.13(2)(a), the defendants were precluded from bringing an appeal to the Court of Appeal. The Court held (by majority) that it did have jurisdiction to entertain the appeal, rejecting the argument that “decision” in s.13(2) could, in the circumstances of this case, refer only to the quashing order made by the judge ([2005] EWCA Civ 986; [2005] 1 W.L.R. 3626, CA). The House of Lords dismissed the claimant’s further appeal, but for reasons different to that given by the Court of Appeal. The House explained and stated: (1) it is open to the Appeal Committee in response to an application for leave under s.13 to indicate that it will not receive argument on a particular point, (2) in accordance with the practice stated in para.4.15 of the Practice Directions Applicable to Civil Appeals (see para. 4A–31 above), where (as here) the Committee decides that leave to appeal should be given (in this case, restricting argument to one only of the issues appealed), it proposes such terms to the parties and invites submissions, (3) in this case, the defendants made such submissions which the Committee considered before confirming its order in the terms previously communicated, but the defendants then rejected what was proposed by exercising their option to withdraw the appeal, (4) in s.13(2) the words “leave is granted” must be understood to refer (a) to an unconditional grant of leave, or (b) to a grant of leave subject to conditions which are accepted or not unequivocally rejected; only then does the applicant lose his right to proceed in the Court of Appeal, (5) as the Committee’s order in this case fell into neither category, the defendants were free to pursue a full appeal in the Court of Appeal. The Committee further explained that the defendants appreciated that the terms put forward by the Committee were proposals which it resisted, but they did not invite the Committee to refuse leave to appeal if minded to adhere to them; had the defendants done so the Committee doubtless would have accepted the invitation to refuse leave and then it would have been clear that they were free to pursue an appeal on all points to the Court of Appeal.

As a result of the transfer of the jurisdiction formerly exercised by the House of Lords to the Supreme Court of the United Kingdom, para.4.15 of Practice Directions Applicable to Civil Appeals is replaced by r.16 of the Supreme Court Rules 2009.

Appeal where leave granted

14. *[Repealed by the Constitutional Reform Act 2005 s.40 and Sch.9, para.20(5), with effect from October 1, 2009 (SI 2009/1604).]* **9B-35**

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

Cases excluded from section 12

9B-36 15.—(1) No certificate shall be granted under section 12 of this Act in respect of a decision of the judge in any proceedings where by virtue of any enactment, apart from the provisions of this Part of this Act, no appeal would lie from that decision to the Court of Appeal, with or without the leave of the judge or of the Court of Appeal.

(2) No certificate shall be granted under section 12 of this Act in respect of a decision of the judge where—

(a) [...]

(b) by virtue of any enactment, apart from the provisions of this Part of this Act, no appeal would (with or without the leave of the Court of Appeal or of the Supreme Court) lie from any decision of the Court of Appeal on an appeal from the decision of the judge.

(3) Where by virtue of any enactment, apart from the provisions of this Part of this Act, no appeal would lie to the Court of Appeal from the decision of the judge except with the leave of the judge or of the Court of Appeal, no certificate shall be granted under section 12 of this Act in respect of that decision unless it appears to the judge that apart from the provisions of this Part of this Act it would be a proper case for granting such leave.

(4) No certificate shall be granted under section 12 of this Act where the decision of the judge, or any order made by him in pursuance of that decision, is made in the exercise of jurisdiction to punish for contempt of court.

9B-37 *Note* —Subsection (2)(a) was repealed by the Administration of Justice Act 1977 s.32(4) and Sch.5. Amended by the Constitutional Reform Act 2005 s.40 and Sch.9 para.20(6), with effect from October 1, 2009 (SI 2009/1604).

[THE NEXT PARAGRAPH IS 9B-39.]

Administration of Justice Act 1970

9B-39 (1970 c.31)

ARRANGEMENT OF SECTIONS

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PART V

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PART VI

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

ADMINISTRATION OF JUSTICE ACT 1970

Schedule 8—Maintenance Orders for purposes of 1958 Act and Part II
of this Act 9B-55+

Paragraph numbers marked with a “+” denote content that is available on White
Book on Westlaw UK or the Civil Procedure CD.



Administration of Justice Act 1985

(1985 c.61)

9B-57

ARRANGEMENT OF SECTIONS

PART IV

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Paragraph numbers marked with a “+” denote content that is available on White
Book on Westlaw UK or the Civil Procedure CD.



County Courts (Interest on Judgment Debts) Order 1991

(S.I. 1991 No.1184)

Citation, commencement, interpretation and savings

1.—(1) This Order may be cited as the County Courts (Interest on
Judgment Debts) Order 1991 and shall come into force on 1st July
1991. 9B-70

- (2) In this Order, unless the context otherwise requires,—
- “administration order” means an order under section 112 of
the 1984 Act;
 - “given”, in relation to a relevant judgment, means “given or
made”;
 - “judgment creditor” means the person who has obtained or is
entitled to enforce the relevant judgment and “debtor” means
the person against whom it was given;
 - “judgment debt” means a debt under a relevant judgment;
 - “relevant judgment” means a judgment or order of a county
court for the payment of a sum of money (a) of not less than
£5,000 or (b) in respect of a debt which is a qualifying debt for
the purposes of the Late Payment of Commercial Debts (Inter-
est) Act 1998 and, in relation to a judgment debt, means the
judgment or order which gives rise to the judgment debt.
 - “the 1984 Act” means the County Courts Act 1984.

(3) Where in accordance with the provisions of this Order inter-
est ceases to accrue on a specified day, interest shall cease to accrue
at the end of that day.

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(4) Nothing in this Order shall apply where the relevant judgment is given before 1st July 1991.

The general rule

9B-71 2.—(1) Subject to the following provisions of this Order, every judgment debt under a relevant judgment shall, to the extent that it remains unsatisfied, carry interest under this Order from the date on which the relevant judgment was given.

(2) In the case of a judgment or order for the payment of a judgment debt, other than costs, the amount of which has to be determined at a later date, the judgment debt shall carry interest from that later date.

(3) Interest shall not be payable under this Order where the relevant judgment—

- (a) is given in proceedings to recover money due under an agreement regulated by the Consumer Credit Act 1974;
- (b) grants—

- (i) the landlord of a dwelling house, or
- (ii) the mortgagee under a mortgage of land which consists of or includes a dwelling house,

a suspended order for possession.

(4) Where the relevant judgment makes financial provision for a spouse or a child, interest shall only be payable on an order for the payment of not less than £5,000 as a lump sum (whether or not the sum is payable by instalments).

For the purposes of this paragraph, no regard shall be had to any interest payable under section 23(6) of the Matrimonial Causes Act 1973.

Interest where payment deferred

9B-72 3. Where under the terms of the relevant judgment payment of a judgment debt—

- (a) is not required to be made until a specified date, or
- (b) is to be made by instalments,

interest shall not accrue under this Order—

- (i) until that date, or
 - (ii) on the amount of any instalment, until it falls due,
- as the case may be.

Interest and enforcement or other proceedings

9B-73 4.—(1) Where a judgment creditor takes proceedings in a county court to enforce payment under a relevant judgment, the judgment debt shall cease to carry interest thereafter, except where those proceedings fail to produce any payment from the debtor in which case interest shall accrue as if those proceedings had never been taken.

(2) For the purposes of this article “proceedings to enforce payment under a relevant judgment” include any proceeding for examining or summoning a judgment debtor or attaching a debt owed to

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

him, but do not include proceedings under the Charging Orders Act 1979;

(3) Where an administration order or an attachment of earnings order is made, interest shall not accrue during the time the order is in force.

Rate of interest

5.—(1) Subject to paragraph (2), where a judgment debt carries interest the rate of interest shall be the rate for the time being specified in section 17 of the Judgments Act 1838. **9B-74**

(2) Where a judgment debt carries interest and has been given for a sum expressed in a currency other than sterling, a county court may order that the rate of interest shall be such rate as the court thinks fit (instead of the rate otherwise applicable under paragraph (1)) and, where the court makes such an order, section 17 of the Judgments Act 1838 shall have effect in relation to the judgment debt as if the rate specified in the order were substituted for the rate specified in that section.

Appropriation of interest

6.—(1) Where the debtor is indebted to the same judgment creditor under two or more judgments or orders, money paid by him shall be applied to satisfy such of the judgments as the debtor may stipulate or, where no such stipulation is made, according to their priority in time. **9B-75**

(2) Money paid by the debtor in respect of any judgment debt shall be appropriated first to discharge or reduce the principal debt and then towards the interest.

[THE NEXT PARAGRAPH IS 9B-77.]

County Court Remedies Regulations 1991

(S.I. 1991 No. 1222)

(As amended by S.I. 1995 No. 206)

9B-77

Introductory note

See also CPR Pt 25.

The effect of the amendments to these Regulations brought about by the County Court Remedies (Amendment) Regulations 1995 (SI 1995/206) is to give the nominated judge jurisdiction to grant freezing injunctions restraining parties from removing assets from the jurisdiction of the High Court or dealing with assets in proceedings which are to be handled by, or are being handled by, a Mercantile Court (see CPR Pt 59 (Mercantile Courts)).

1. These Regulations may be cited as the County Court Remedies Regulations 1991 and shall come into force on 1st July 1991. **9B-78**

2. In these Regulations, “prescribed relief” means relief of any of the following kinds—

- (a) an order requiring a party to admit any other party to premises for the purpose of inspecting or removing documents or

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

SECTION 9B: OTHER STATUTES AND REGULATIONS

articles which may provide evidence in any proceedings, whether or not the proceedings have been commenced;

(b) an interlocutory injunction—

(i) restraining a party from removing from the jurisdiction of the High Court assets located within that jurisdiction; or

(ii) restraining a party from dealing with assets whether located within the jurisdiction of the High Court or not.

3.—(1) Subject to the following provisions of this regulation, a county court shall not grant prescribed relief or vary or revoke an order made by the High Court granting such relief.

(2) Paragraph (1) shall not apply to—

(a) any county court held by a judge of the Court of Appeal or judge of the High Court sitting as a judge for any county court district;

(b) a patents county court held by a person nominated under section 291 of the Copyright, Designs and Patents Act 1988 to sit as a judge of that court.

(3) A county court may grant relief of a kind referred to in regulation 2(b)—

(a) when exercising jurisdiction in family proceedings within the meaning of Part V of the Matrimonial and Family Proceedings Act 1984;

(b) for the purpose of making an order for the preservation, custody or detention of property which forms or may form the subject matter of proceedings,

(c) in aid of execution of a judgment or order made in proceedings in a county court to preserve assets until execution can be levied upon them, or

(d) where proceedings are to be or are included in the Central London County Court Mercantile List and the application is made to a Circuit judge nominated by the Senior Presiding Judge.

(3A) In paragraph (3)(d)—

“the Central London County Court Mercantile List” means the Mercantile Court established at the Central London County Court pursuant to Part 59 of the Civil Procedure Rules 1998; and

“the Senior Presiding Judge” means the judge appointed as such under section 72(2) of the Courts and Legal Services Act 1990.

(4) Paragraph (1) shall not—

(a) affect or modify powers expressly conferred on a county court by or under any enactment other than section 38 of the County Courts Act 1984; or

(b) prevent a county court from varying an order granting prescribed relief where all the parties are agreed on the terms of the variation.

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

COURTS ACT 1971

4. An application to the High Court for relief of a kind referred to in regulation 2(a) in county court proceedings shall be deemed to include an application for transfer of the proceedings to the High Court.

5.—(1) After an application for prescribed relief has been disposed of by the High Court, the proceedings shall, unless the High Court orders otherwise, be transferred to a county court if—

- (a) they were transferred to the High Court; or
- (b) apart from these Regulations, they should have been commenced in a county court.

(2) Where an order is made on an ex parte application, the application shall not be treated as disposed of for the purposes of paragraph (1) until any application to set aside or vary the order has been heard, or until the expiry of 28 days (or such other period as the Court may specify) during which no such application has been made.

Courts Act 1971

(1971 c.23)

9B-79

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Courts and Legal Services Act 1990

(1990 c.41)

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Paragraph numbers marked with a “+” denote content that is available on White Book on Westlaw UK or the Civil Procedure CD.



Introductory note

For detailed commentary on this Act, see Courts and Legal Services Act 1990, Current Law Statutes Annotated 1991. **9B-101**

The functions of the Lord Chancellor under Pts 2 and 4 and ss.113 and 125, and s.124 (Commencement) so far as relating to any of the provisions, were transferred to the Secretary of State for Constitutional Affairs by the Secretary of State for Constitutional Affairs Order 2003 (SI 2003/1887) with effect from August 19, 2003.

PART I

PROCEDURE ETC. IN CIVIL COURTS

ALLOCATION AND TRANSFER OF BUSINESS

Allocation of business between High Court and county courts

1.—(1) The Lord Chancellor may by order make provision— **9B-102**

- (a) conferring jurisdiction on the High Court in relation to proceedings in which county courts have jurisdiction;
- (b) conferring jurisdiction on county courts in relation to proceedings in which the High Court has jurisdiction;
- (c) allocating proceedings to the High Court or to county courts;
- (d) specifying proceedings which may be commenced only in the High Court;
- (e) specifying proceedings which may be commenced only in a county court;
- (f) specifying proceedings which may be taken only in the High Court;
- (g) specifying proceedings which may be taken only in a county court.

(1A) An order under subsection (1)(a) or (b) may be made only with the concurrence of the Lord Chief Justice.

(2) Without prejudice to the generality of section 120(2), any such order may differentiate between categories of proceedings by reference to such criteria as the Lord Chancellor sees fit to specify in the order.

- (3) The criteria so specified may, in particular, relate to—
 - (a) the value of an action (as defined by the order);

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- (b) the nature of the proceedings;
- (c) the parties to the proceedings;
- (d) the degree of complexity likely to be involved in any aspect of the proceedings; and
- (e) the importance of any question likely to be raised by, or in the course of, the proceedings.

(4) An order under subsection (1)(b) (e) or (g) may specify one or more particular county courts in relation to the proceedings so specified.

(5) Any jurisdiction exercisable by a county court, under any provision made by virtue of subsection (4), shall be exercisable throughout England and Wales.

(6) Rules of court may provide for a matter—

- (a) which is pending in one county court; and
- (b) over which that court has jurisdiction under any provision made by virtue of subsection (4),

to be heard and determined wholly or partly in another county court which also has jurisdiction in that matter under any such provision.

(7) Any such order may—

- (a) amend or repeal any provision falling within subsection (8) and relating to—

- (i) the jurisdiction, practice or procedure of the Senior Courts; or
- (ii) the jurisdiction, practice or procedure of any county court,

so far as the Lord Chancellor considers it to be necessary, or expedient, in consequence of any provision made by the order; or

- (b) make such incidental or transitional provision as the Lord Chancellor considers necessary, or expedient, in consequence of any provision made by the order.

(8) A provision falls within this subsection if it is made by any enactment other than this Act or made under any enactment.

(9) Before making any such order the Lord Chancellor shall consult the Lord Chief Justice, the Master of the Rolls, the President of the Queen's Division, the President of the Family Division, the Chancellor of the High Court and the Senior Presiding Judge (appointed under section 72).

(10) No such order shall be made so as to confer jurisdiction on any county court to hear any application for judicial review.

(11) For the purposes of this section the commencement of proceedings may include the making of any application in anticipation of any proceedings or in the course of any proceedings.

(12) [...]

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

9B-103 Note —Amended by the Courts Act 2003 s.109(1) and (3), Sch.8 para.348 and Sch.10; and the Constitutional Reform Act 2005 s.15(1) and Sch.4 para.212. Subsec-

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tion (7) was amended by the Constitutional Reform Act 2005 s.59 and Sch.11 para.4, with effect from October 1, 2009 (SI 2009/1604).

Subsection (9) was amended by the Constitutional Reform Act 2005 s.15 and Sch.4 para.212(3). This section empowers the Lord Chancellor, after consulting senior judges (see subs.(9)), by order to make provision for the allocation of business between the High Court and the county courts (subs.(1)). The powers given by this section are very wide. An order made under this section may amend or repeal existing provisions, including primary legislation and delegated legislation such as rules of court, on the jurisdiction, practice or procedure of the Supreme Court or of the county courts but may not amend or repeal any provision of this Act (subss.(7) (8)). By order, jurisdiction may be conferred on the High Court in relation to proceedings in which county courts have jurisdiction and vice versa; further, it may be specified that proceedings falling within the jurisdiction of the High Court should be commenced in a county court and vice versa (as to “commencement of proceedings,” see subs.(11)); furthermore it may be specified that proceedings may be taken only in the High Court or only in a county court. The power is broad enough to enable provision to be made for the transfer of particular proceedings from one court to another at different stages of case progress, for example, for trial or enforcement. The exclusive jurisdiction of the High Court to hear applications for judicial review is preserved (subs.(10)). In conferring jurisdiction in relation to a particular type of proceeding on the county courts the Lord Chancellor may choose one or more county courts to exercise that jurisdiction rather than to confer such jurisdiction on all county courts (subss.(4),(5) and (6)). (Such an arrangement would parallel the Copyright, Designs and Patents Act 1988 Pt VI which empowers the Lord Chancellor to confer patent jurisdiction on one or more particular county courts.)

The first exercise of the powers given by this section was the High Court and County Courts Jurisdiction Order 1991 (SI 1991/724), see below, paras 9B–928 et seq.

As a result of the amendment of s.120(4) of this Act by the Civil Procedure Act 1997 s.10 and Sch.2 para.4, instruments made by the Lord Chancellor under s.1(1) are now subject, not to approval by both Houses of Parliament, but merely to annulment in pursuance of a petition of both Houses (s.120(6)).

* * * *

EVIDENCE

Witness statements

5.—(1) Rules of court may make provision—

9B–104

- (a) requiring, in specified circumstances, any party to civil proceedings to serve on the other parties a written statement of the oral evidence which he intends to adduce on any issue of fact to be decided at the trial;
- (b) enabling the court to direct any party to civil proceedings to serve such a statement on the other party; and
- (c) prohibiting a party who fails to comply with such a requirement or direction from adducing oral evidence on the issue of fact to which it relates.

(2) Where a party to proceedings has refused to comply with such a requirement or direction, the fact that his refusal was on the ground that the required statement would have been a document which was privileged from disclosure shall not affect any prohibition imposed by virtue of subsection (1)(c).

(3) This section is not to be read as prejudicing in any way any other power to make rules of court.

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

SECTION 9B: OTHER STATUTES AND REGULATIONS

- 9B-105** *Note* —This section provides the power for Rules of Court to require pre-trial exchange of non-expert witness statements throughout the High Court and the county courts. (Henceforth, the bases of such rule-making power will not have to be found in the Senior Courts Act 1981 ss.85 and 87 or in the County Courts Act 1984 s.75). This provision makes it clear that rules of court may override the legal professional privilege attaching to witness statements prepared with a view to proceedings (subs.(2)) (cf., the Civil Evidence Act 1972 s.2(3)) dealing with privilege and the disclosure of experts' evidence).

This section clarifies the rule-making authority underpinning CPR, r.32.4 (Requirement to serve witness statements for use at trial).

* * * *

APPEALS

Powers of Court of Appeal to award damages

- 9B-106** 8.—(1) In this section “case” means any case where the Court of Appeal has power to order a new trial on the ground that damages awarded by a jury are excessive or inadequate.

(2) Rules of court may provide for the Court of Appeal, in such classes of case as may be specified in the rules, to have power, in place of ordering a new trial, to substitute for the sum awarded by the jury such sum as appears to the court to be proper.

(3) This section is not to be read as prejudicing in any way any other power to make rules of court.

- 9B-107** *Note* —This section was designed to meet concerns about excessively high jury awards in defamation cases. It enables Rules of Court to confer on the Court of Appeal the power to substitute its own award of damages for the sum awarded by a jury in the court of first instance instead of ordering a new trial and to do so in classes of cases as may be specified in the rules (subs.(2)). This rule-making power was first exercised by RSC (Amendment No.3) 1990 (SI 1990/2599) reg.13, amending CPR Sch.1, RSC O.59 r.11.

Proper award

- 9B-108** In *Rantzen v Mirror Group Newspapers Ltd* [1993] 3 W.L.R. 953, CA, in reducing a jury's award in a defamation case, the Court considered the operation of s.8(2) and O.52.10(3). See also *Clark v Chief Constable of Cleveland* [2000] C.P. Rep. 22; *Thompson v Commissioner of Police of the Metropolis* [1998] Q.B. 498, CA; *Bennett v Chief Constable of West Yorkshire* April 24, 1998, unrep. CA; *John v MGN Ltd* [1997] Q.B. 586 CA; *Kiam v M.G.N Ltd* [2002] EWCA Civ 43; [2002] 2 All E.R. 219, CA.



For ss.9 and 11 of the Courts and Legal Services Act 1990 (see Arrangement) plus any related commentary see paragraphs 9B-109+ to 9B-114+ on White Book on Westlaw UK or the Civil Procedure CD.

* * * *

Enforcement

- 9B-115** 15.—(1) [...]

(2) [...]

(3) Where a person takes steps to enforce a judgment or order of the High Court or a county court for the payment of any sum due, the costs of any previous attempt to enforce that judgment shall be

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recoverable to the same extent as if they had been incurred in the taking of those steps.

(4) Subsection (3) shall not apply in respect of any costs which the court considers were unreasonably incurred (whether because the earlier attempt was unreasonable in all the circumstances of the case or for any other reason).

Note —Subsection (1) was repealed by the Courts Act 2003 s.109(3) and Sch.10.

9B-116

For ss.21 to 26, 31B, 31C, 54 to 58B and 60 to 62 of the Courts and Legal Services Act 1990 (see Arrangement) plus any related commentary see paragraphs 9B-117+ to 9B-149+ on White Book on Westlaw UK or the Civil Procedure CD.



Legal professional privilege

63. [Repealed]

9B-150

Note —Repealed by the Legal Services Act 2007 Sch.21 para.91, with effect from January 1, 2010 (SI 2009/3250).

9B-151

For ss.66, 69 to 76, 78, and 89 of the Courts and Legal Services Act 1990 (see Arrangement) plus any related commentary see paragraphs 9B-152+ to 9B-168+ on White Book on Westlaw UK or the Civil Procedure CD.



PART VI

MISCELLANEOUS AND SUPPLEMENTAL

MISCELLANEOUS

* * * *

Administration of oaths and taking of affidavits

113. [Repealed]

9B-169

Note —Repealed (subject to savings) by the Legal Services Act 2007 Sch.21 para.96 and Sch.23, with effect from January 1, 2010 (SI 2009/3250; for savings see art.9).

9B-170

* * * *

Law reports

115. A report of a case made by a person who is not a barrister but who is a solicitor or has a Senior Courts qualification (within the meaning of section 71) shall have the same authority as if it had been made by a barrister.

9B-171

Note —Amended by the Constitutional Reform Act 2005 s.59 and Sch.11 para.4, with effect from October 1, 2009 (SI 2009/1604).

9B-171.1

SUPPLEMENTAL

Interpretation

119.—(1) In this Act—

9B-172

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

“advocacy services” means any services which it would be reasonable to expect a person who is exercising, or contemplating exercising, a right of audience in relation to any proceedings, or contemplated proceedings, to provide;

[...]

“conveyancing services” means the preparation of transfers, conveyances, contracts and other documents in connection with, and other services ancillary to, the disposition or acquisition of estates or interests in land;

“designated judge” means the Lord Chief Justice, the Master of the Rolls, the President of the Queen’s Division, the President of the Family Division or the Chancellor of the High Court;

“litigation services” means any services which it would be reasonable to expect a person who is exercising, or contemplating exercising, a right to conduct litigation in relation to any proceedings, or contemplated proceedings, to provide;

“the OFT” means the Office of Fair Trading;

“probate services” means the drawing or preparation of any papers on which to found or oppose a grant of probate or a grant of letters of administration and the administration of the estate of a deceased person;

“prescribed” means prescribed by regulations under this Act;

“proceedings” means proceedings in any court;

“right of audience” means the right to appear before and address a court including the the right to call and examine witnesses;

“right to conduct litigation” means the right—

(a) issue proceedings before any court in England and Wales;

(aa) to commence, prosecute and defend such proceedings; and

(b) to perform any ancillary functions in relation to proceedings (such as entering appearances to actions);

(2) and (3) [...]

9B-173 *Note*—This interpretation section has been reduced so as to exclude definitions not relevant to the selected sections of the Act printed above. Amended by the Access to Justice Act 1999 Sch.6 para.10(3) and the Enterprise Act 2002 Sch.25 para.23(9)(b); definition of “designated judge” was amended by the Constitutional Reform Act 2005 s.15 and Sch.4, para.216; and amended by the Legal Services Act 2007 Sch.21 para.97 and Sch.23, with effect from January 1, 2010 (SI 2009/3250).



For s.120 of and Schs 3, 4 (Parts I to IV), 9, 11, 14 (Parts I and II), 17, 18, and 19 to the Courts and Legal Services Act 1990 (see Arrangement) plus any related commentary see paragraphs 9B-174+ to 9B-355+ on White Book on Westlaw UK or the Civil Procedure CD.

Legal Services Act 2007

(2007 c.29)

9B-356

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RESERVED LEGAL ACTIVITIES

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Paragraph numbers marked with a “+” denote content that is available on White Book on Westlaw UK or the Civil Procedure CD.

General Note

9B-356.1

Sections 208(2) to (5), 211, 212 and 214 came into force on the date of Royal Assent, October 30, 2007 (see s.211). As at the date of publication, the following Commencement Orders have been made in relation to this Act:

Legal Services Act 2007 (Commencement No.1 and Transitory Provisions) Order 2008 (SI 2008/222), bringing into force with effect from March 7, 2008 certain provisions of the Act which inter alia establish the Legal Services Board (“the Board”) and the Office for Legal Complaints (“the OLC”), and allow the Lord Chancellor to modify the functions of legal services regulators pending the establishment of the new regulatory regime under the 2007 Act.

Legal Services Act 2007 (Commencement No.2 and Transitory Provisions) Order 2008 (SI 2008/1436) bringing into force with effect from June 30, 2008 and October 1, 2008 certain provisions of the Act which inter alia permits a charity to be prescribed for the receipt of payments in respect of pro bono representation and allows the Law Society to determine whether indemnity rules have been broken.

Legal Services Act 2007 (Commencement No.3 and Transitory Provisions) Order 2008 (SI 2008/3149) bringing further provisions into force on January 31, 2009.

Legal Services Act 2007 (Commencement No.4, Transitory and Transitional Provisions and Appointed Day) Order 2009 (SI 2009/503) bringing further provisions into force on March 31, 2009. Legal Services Act 2007 (Commencement No.5, Transitory and Transitional Provisions) Order 2009 (SI 2009/1365) bringing provisions into force on July 1, 2009.

Legal Services Act 2007 (Commencement No.6, Transitory, Transitional and Saving Provisions) Order 2009 (SI 2009/3250) bringing provisions into force (subject to transitory and transitional provisions) on January 1, 2010.

We have reproduced below those provisions currently in force with relevant commencement notes. Where provisions or (in schedules) paragraphs are partially brought into force, the whole provision/paragraph is reproduced for ease of reference.

PART 1

THE REGULATORY OBJECTIVES

The regulatory objectives

9B-357 1.—(1) In this Act a reference to “the regulatory objectives” is a reference to the objectives of—

- (a) protecting and promoting the public interest;
- (b) supporting the constitutional principle of the rule of law;
- (c) improving access to justice;
- (d) protecting and promoting the interests of consumers;
- (e) promoting competition in the provision of services within subsection (2);
- (f) encouraging an independent, strong, diverse and effective legal profession;
- (g) increasing public understanding of the citizen’s legal rights and duties;
- (h) promoting and maintaining adherence to the professional principles.

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

(2) The services within this subsection are services such as are provided by authorised persons (including services which do not involve the carrying on of activities which are reserved legal activities).

(3) The “professional principles” are—

- (a) that authorised persons should act with independence and integrity,
- (b) that authorised persons should maintain proper standards of work,
- (c) that authorised persons should act in the best interests of their clients,
- (d) that persons who exercise before any court a right of audience, or conduct litigation in relation to proceedings in any court, by virtue of being authorised persons should comply with their duty to the court to act with independence in the interests of justice, and
- (e) that the affairs of clients should be kept confidential.

(4) In this section “authorised persons” means authorised persons in relation to activities which are reserved legal activities.

Note —Brought into force (subject to transitional provisions) by the Legal Services Act 2007 (Commencement No.1 and Transitory Provisions) Order 2008 (SI 2008/222), with effect from March 7, 2008. The transitional provisions contained in art.7(1) are as follows: **9B-357.1**

“Until section 13 (Entitlement to carry on a reserved legal activity) comes into force a reference to an authorised person in section 1 and in the definition of ‘consumers’ in section 207 is to be treated as a reference to a person who will be an authorised person on the coming into force of section 13.”

For ss.2 to 11 of the Legal Services Act 2007 (see Arrangement) plus any related commentary see paragraphs 9B-358+ to 9B-367+ on White Book on Westlaw UK or the Civil Procedure CD.



PART 3

RESERVED LEGAL ACTIVITIES

RESERVED LEGAL ACTIVITIES

Meaning of “reserved legal activity” and “legal activity”

12.—(1) In this Act “reserved legal activity” means—

9B-368

- (a) the exercise of a right of audience;
- (b) the conduct of litigation;
- (c) reserved instrument activities;
- (d) probate activities;
- (e) notarial activities;
- (f) the administration of oaths.

(2) Schedule 2 makes provision about what constitutes each of those activities.

(3) In this Act “legal activity” means—

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

- (a) an activity which is a reserved legal activity within the meaning of this Act as originally enacted, and
- (b) any other activity which consists of one or both of the following—
 - (i) the provision of legal advice or assistance in connection with the application of the law or with any form of resolution of legal disputes;
 - (ii) the provision of representation in connection with any matter concerning the application of the law or any form of resolution of legal disputes.

(4) But “legal activity” does not include any activity of a judicial or quasi-judicial nature (including acting as a mediator).

(5) For the purposes of subsection (3) “legal dispute” includes a dispute as to any matter of fact the resolution of which is relevant to determining the nature of any person’s legal rights or liabilities.

(6) Section 24 makes provision for adding legal activities to the reserved legal activities.

9B–368.1 *Note* —Brought into force for certain purposes by the Legal Services Act 2007 (Commencement No.1 and Transitory Provisions) Order 2008 (SI 2008/222), with effect from March 7, 2008. The purposes (contained in art.3) for which s.12 comes into force are in so far as it defines the term “Reserved legal activity” for the purpose of the following provisions:

- Section 1;
- The definition of “consumers” in s.207;
- Section 69(4) as modified by the Order;
- Paragraph 2(3) to (5) of Sch.1;
- Paragraph 2(3) and (4) of Sch.15;
- Paragraph 2(6) and 2(7)(b) of Sch.22.

Brought into force for certain purposes by the Legal Services Act 2007 (Commencement No.4, Transitory and Transitional Provisions and Appointed Day) Order 2009 (SI 2009/503), with effect from March 31, 2009. The purposes (contained in art.3) for which s.12 comes into force are in so far as it defines the term “Reserved legal activity” for the purpose of ss.9 and 32A of the Administration of Justice Act 1985.

CARRYING ON THE ACTIVITIES

Entitlement to carry on a reserved legal activity

9B–369 **13.**—(1) The question whether a person is entitled to carry on an activity which is a reserved legal activity is to be determined solely in accordance with the provisions of this Act.

(2) A person is entitled to carry on an activity (“the relevant activity”) which is a reserved legal activity where—

- (a) the person is an authorised person in relation to the relevant activity, or
- (b) the person is an exempt person in relation to that activity.

(3) Subsection (2) is subject to section 23 (transitional protection for noncommercial bodies).

(4) Nothing in this section or section 23 affects section 84 of the Immigration and Asylum Act 1999 (c. 33) (which prohibits the provi-

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

sion of immigration advice and immigration services except by certain persons).

Note

Brought into force (subject to transitory and transitional provisions) by the Legal Services Act 2007 (Commencement No.6, Transitory, Transitional and Saving Provisions) Order 2009 (SI 2009/3250), with effect from January 1, 2010; for transitory and transitional provisions see arts 3–6.

9B–369.1

OFFENCES

Offence to carry on a reserved legal activity if not entitled

14.—(1) It is an offence for a person to carry on an activity (“the relevant activity”) which is a reserved legal activity unless that person is entitled to carry on the relevant activity.

9B–370

(2) In proceedings for an offence under subsection (1), it is a defence for the accused to show that the accused did not know, and could not reasonably have been expected to know, that the offence was being committed.

(3) A person who is guilty of an offence under subsection (1) is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both), and

(b) on conviction on indictment, to imprisonment for a term not exceeding 2 years or a fine (or both).

(4) A person who is guilty of an offence under subsection (1) by reason of an act done in the purported exercise of a right of audience, or a right to conduct litigation, in relation to any proceedings or contemplated proceedings is also guilty of contempt of the court concerned and may be punished accordingly.

(5) In relation to an offence under subsection (1) committed before the commencement of section 154(1) of the Criminal Justice Act 2003 (c. 44), the reference in subsection (3)(a) to 12 months is to be read as a reference to 6 months.

Note

Brought into force (subject to transitory and transitional provisions) by the Legal Services Act 2007 (Commencement No.6, Transitory, Transitional and Saving Provisions) Order 2009 (SI 2009/3250), with effect from January 1, 2010; for transitory and transitional provisions see arts 3–6.

9B–370.1

For ss.15 to 17 of the Legal Services Act 2007 (see Arrangement) plus any related commentary see paragraphs 9B–371+ to 9B–373+ on White Book on Westlaw UK or the Civil Procedure CD.



INTERPRETATION

Authorised persons

18.—(1) For the purposes of this Act “authorised person”, in relation to an activity (“the relevant activity”) which is a reserved legal activity, means—

9B–374

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

SECTION 9B: OTHER STATUTES AND REGULATIONS

- (a) a person who is authorised to carry on the relevant activity by a relevant approved regulator in relation to the relevant activity (other than by virtue of a licence under Part 5), or
 - (b) a licensable body which, by virtue of such a licence, is authorised to carry on the relevant activity by a licensing authority in relation to the reserved legal activity.
- (2) A licensable body may not be authorised to carry on the relevant activity as mentioned in subsection (1)(a).
- (3) But where a body (“A”) which is authorised as mentioned in subsection (1)(a) becomes a licensable body, the body is deemed by virtue of this subsection to continue to be so authorised from that time until the earliest of the following events—
- (a) the end of the period of 90 days beginning with the day on which that time falls;
 - (b) the time from which the relevant approved regulator determines this subsection is to cease to apply to A;
 - (c) the time when A ceases to be a licensable body.
- (4) Subsection (2) is subject to Part 2 of Schedule 5 (by virtue of which licensable bodies may be deemed to be authorised as mentioned in subsection (1)(a) in relation to certain activities during a transitional period).
- (5) A person other than a licensable body may not be authorised to carry on the relevant activity as mentioned in subsection (1)(b).
- (6) But where a body (“L”) which is authorised as mentioned in subsection (1)(b) ceases to be a licensable body, the body is deemed by virtue of this subsection to continue to be so authorised from that time until the earliest of the following events—
- (a) the end of the period of 90 days beginning with the day on which that time falls;
 - (b) the time from which the relevant licensing authority determines this subsection is to cease to apply to L;
 - (c) the time when L becomes a licensable body.

9B-374.1 *Note*—Subsection (1)(a) was brought into force (subject to transitory and transitional provisions) by the Legal Services Act 2007 (Commencement No.6, Transitory, Transitional and Saving Provisions) Order 2009 (SI 2009/3250), with effect from January 1, 2010; for transitory and transitional provisions see arts 3–6. Specifically, art.3(1) states that until s.18(2) comes into force, s.18(1)(a) is to be read as if the words “(other than by virtue of a licence under Part 5), or” were omitted.

Exempt persons

9B-375 **19.** In this Act, “exempt person”, in relation to an activity (“the relevant activity”) which is a reserved legal activity, means a person who, for the purposes of carrying on the relevant activity, is an exempt person by virtue of—

- (a) Schedule 3 (exempt persons), or
- (b) paragraph 13 or 18 of Schedule 5 (additional categories of exempt persons during transitional period).

9B-375.1 *Note*—Brought into force (subject to transitory and transitional provisions) by the

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

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Legal Services Act 2007 (Commencement No.6, Transitory, Transitional and Saving Provisions) Order 2009 (SI 2009/3250), with effect from January 1, 2010; for transitory and transitional provisions see arts 3–6.

For ss.20 to 175 of the Legal Services Act 2007 (see Arrangement) plus any related commentary see paragraphs 9B–376+ to 9B–531+ on White Book on Westlaw UK or the Civil Procedure CD.



PART 8

MISCELLANEOUS PROVISIONS ABOUT LAWYERS ETC

DUTIES OF REGULATED PERSONS

Duties of regulated persons

176.—(1) A person who is a regulated person in relation to an approved regulator has a duty to comply with the regulatory arrangements of the approved regulator as they apply to that person. **9B–532**

(2) A person is a regulated person in relation to an approved regulator if the person—

- (a) is authorised by the approved regulator to carry on an activity which is a reserved legal activity, or
- (b) is not so authorised, but is a manager or employee of a person who is so authorised.

(3) This section applies in relation to the Board in its capacity as a licensing authority and its licensing rules, as it applies in relation to an approved regulator and its regulatory arrangements.

Note —Subsections (1) and (2) were brought into force (subject to transitory and transitional provisions) by the Legal Services Act 2007 (Commencement No.6, Transitory, Transitional and Saving Provisions) Order 2009 (SI 2009/3250), with effect from January 1, 2010; for transitory and transitional provisions see arts 3–6. **9B–532.1**

For ss.177 to 180 of the Legal Services Act 2007 (see Arrangement) plus any related commentary see paragraphs 9B–533+ to 9B–536.1+ on White Book on Westlaw UK or the Civil Procedure CD.



OTHER LAWYERS

Unqualified person not to pretend to be a barrister

181.—(1) It is an offence for a person who is not a barrister— **9B–537**

- (a) wilfully to pretend to be a barrister, or
- (b) with the intention of implying falsely that that person is a barrister to take or use any name, title or description.

(2) A person who is guilty of an offence under subsection (1) is liable—

- (a) on summary conviction, to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both), and
- (b) on conviction on indictment, to imprisonment for a term not exceeding 2 years or a fine (or both).

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

(3) In relation to an offence under subsection (1) committed before the commencement of section 154(1) of the Criminal Justice Act 2003 (c. 44), the reference in subsection (2)(a) to 12 months is to be read as a reference to 6 months.

9B-537.1 *Note* —Brought into force (subject to transitory and transitional provisions) by the Legal Services Act 2007 (Commencement No.6, Transitory, Transitional and Saving Provisions) Order 2009 (SI 2009/3250), with effect from January 1, 2010; for transitory and transitional provisions see arts 3– 6.



For ss.182 to 187 of the Legal Services Act 2007 (see Arrangement) plus any related commentary see paragraphs 9B-538+ to 9B-543.1+ on White Book on West-law UK or the Civil Procedure CD.

ADVOCATES AND LITIGATORS

Duties of advocates and litigators

- 9B-544** 188.—(1) This section applies to a person who—
- (a) exercises before any court a right of audience, or
 - (b) conducts litigation in relation to proceedings in any court,
- by virtue of being an authorised person in relation to the activity in question.
- (2) A person to whom this section applies has a duty to the court in question to act with independence in the interests of justice.
- (3) That duty, and the duty to comply with relevant conduct rules imposed on the person by section 176(1), override any obligations which the person may have (otherwise than under the criminal law) if they are inconsistent with them.
- (4) “Relevant conduct rules” are the conduct rules of the relevant authorising body which relate to the exercise of a right of audience or the conduct of litigation.
- (5) The relevant authorising body is—
- (a) the approved regulator by which the person is authorised to exercise the right of audience or conduct the litigation, or
 - (b) where the person is authorised to exercise the right of audience or conduct the litigation by the Board in its capacity as a licensing authority, the Board.

9B-544.1 *Note* —Brought into force (subject to transitory and transitional provisions) by the Legal Services Act 2007 (Commencement No.6, Transitory, Transitional and Saving Provisions) Order 2009 (SI 2009/3250), with effect from January 1, 2010; for transitory and transitional provisions see arts 3–6.

Employed advocates

- 9B-545** 189.—(1) This section applies where an authorised person in relation to the exercise of a right of audience is employed as a Crown Prosecutor or in any other description of employment.
- (2) Qualification regulations or conduct rules of the approved regulator by whom the person is authorised to carry on that activity

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

which relate to the right of audience do not have effect in relation to the person if—

- (a) they—
 - (i) limit the courts before which, or proceedings in which, that activity may be carried on by persons who are employed, or
 - (ii) limit the circumstances in which that activity may be carried on by persons who are employed by requiring such persons to be accompanied by some other person when carrying on that activity, and
- (b) they do not impose the same limitation on persons who are authorised persons in relation to the activity in question but are not employed.

Note —Brought into force (subject to transitory and transitional provisions) by the Legal Services Act 2007 (Commencement No.6, Transitory, Transitional and Saving Provisions) Order 2009 (SI 2009/3250), with effect from January 1, 2010; for transitory and transitional provisions see arts 3–6.

9B-545.1

LEGAL PROFESSIONAL PRIVILEGE

Legal professional privilege

190.—(1) Subsection (2) applies where an individual (“P”) who is not a barrister or solicitor— **9B-546**

- (a) provides advocacy services as an authorised person in relation to the exercise of rights of audience,
- (b) provides litigation services as an authorised person in relation to the conduct of litigation,
- (c) provides conveyancing services as an authorised person in relation to reserved instrument activities, or
- (d) provides probate services as an authorised person in relation to probate activities.

(2) Any communication, document, material or information relating to the provision of the services in question is privileged from disclosure in like manner as if P had at all material times been acting as P’s client’s solicitor.

(3) Subsection (4) applies where—

- (a) a licensed body provides services to a client, and
- (b) the individual (“E”) through whom the body provides those services—
 - (i) is a relevant lawyer, or
 - (ii) acts at the direction and under the supervision of a relevant lawyer (“the supervisor”).

(4) Any communication, document, material or information relating to the provision of the services in question is privileged from disclosure only if, and to the extent that, it would have been privileged from disclosure if—

- (a) the services had been provided by E or, if E is not a relevant lawyer, by the supervisor, and

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

- (b) at all material times the client had been the client of E or, if E is not a relevant lawyer, of the supervisor.
- (5) “Relevant lawyer” means an individual who is—
- (a) a solicitor;
 - (b) a barrister;
 - (c) a solicitor in Scotland;
 - (d) an advocate in Scotland;
 - (e) a solicitor of the Court of Judicature of Northern Ireland;
 - (f) a member of the Bar of Northern Ireland;
 - (g) a registered foreign lawyer (within the meaning of section 89 of the Courts and Legal Services Act 1990 (c. 41));
 - (h) an individual not within paragraphs (a) to (g) who is an authorised person in relation to an activity which is a reserved legal activity; or
 - (i) a European lawyer (within the meaning of the European Communities (Services of Lawyers) Order 1978 (S.I. 1978/1910)).
- (6) In this section—
- “advocacy services” means any services which it would be reasonable to expect a person who is exercising, or contemplating exercising, a right of audience in relation to any proceedings, or contemplated proceedings, to provide;
- “litigation services” means any services which it would be reasonable to expect a person who is exercising, or contemplating exercising, a right to conduct litigation in relation to any proceedings, or contemplated proceedings, to provide;
- “conveyancing services” means the preparation of transfers, conveyances, contracts and other documents in connection with, and other services ancillary to, the disposition or acquisition of estates or interests in land;
- “probate services” means the preparation of any papers on which to found or oppose a grant of probate or a grant of letters of administration and the administration of the estate of a deceased person.
- (7) This section is without prejudice to any other enactment or rule of law by virtue of which a communication, a document, material or information is privileged from disclosure.

9B-546.1 *Note* —Brought into force (subject to transitory and transitional provisions) by the Legal Services Act 2007 (Commencement No.6, Transitory, Transitional and Saving Provisions) Order 2009 (SI 2009/3250), with effect from January 1, 2010; for transitory and transitional provisions see arts 3–6.



For s.191 of the Legal Services Act 2007 (see Arrangement) plus any related commentary see paragraph 9B-547+ on White Book on Westlaw UK or the Civil Procedure CD.

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

Powers of court in respect of rights of audience and conduct of litigation

192.—(1) Nothing in this Act affects the power of any court in any proceedings to refuse to hear a person (for reasons which apply to that person as an individual) who would otherwise have a right of audience before the court in relation to those proceedings. **9B-548**

(2) Where a court refuses to hear a person as mentioned in subsection (1), it must give its reasons for refusing.

(3) Where—

(a) immediately before the commencement of section 13 (entitlement to carry on reserved legal activities), or

(b) by virtue of any provision made by or under an enactment passed subsequently,

a court does not permit the appearance of advocates, or permits the appearance of advocates only with leave, no person may exercise a right of audience before the court, in relation to any proceedings, solely by virtue of being entitled to do so under this Act.

(4) But a court may not limit the right to appear before the court in any proceedings to only some of those who are entitled to exercise that right by virtue of this Act.

(5) A court may not limit the right to conduct litigation in relation to proceedings before the court to only some of those who are entitled to exercise that right by virtue of this Act.

(6) In this section “advocate”, in relation to any proceedings, means a person exercising a right of audience as a representative of, or on behalf of, any party to the proceedings.

Note —Brought into force (subject to transitory and transitional provisions) by the Legal Services Act 2007 (Commencement No.6, Transitory, Transitional and Saving Provisions) Order 2009 (SI 2009/3250), with effect from January 1, 2010; for transitory and transitional provisions see arts 3–6. **9B-548.1**

Solicitors to public departments and the City of London

193.—(1) Nothing in this Act is to prejudice or affect any rights or privileges of— **9B-549**

(a) the Treasury Solicitor,

(b) the solicitor to any other public department,

(c) the solicitor to the Church Commissioners, or

(d) the solicitor to the Duchy of Cornwall.

(2) Nothing in this Act requires a person to whom subsection (1) applies, or any clerk or officer appointed to act for such a person, to be entitled to carry on an activity which is a reserved legal activity in any case where, by virtue of section 88(1) of the Solicitors Act 1974 (c. 47), it would not have been necessary for that person to be admitted and enrolled and to hold a practising certificate under that Act if this Act had not been passed.

(3) Nothing in this Act is to prejudice or affect any rights or priv-

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

ileges which immediately before the commencement of this Act attached to the office of Solicitor of the City of London.

(4) Nothing in section 17 (offence to pretend to be entitled) applies to a person to whom subsection (1) applies, or any clerk or officer appointed to act for such a person, or to the Solicitor of the City of London.

(5) A person who—

(a) exercises before any court a right of audience, or

(b) conducts litigation in relation to proceedings in any court,

by virtue of this section has a duty to the court in question to act with independence in the interests of justice.

(6) That duty overrides any obligations which the person may have (otherwise than under the criminal law) if it is inconsistent with them.

Note

9B-549.1 Brought into force (subject to transitory and transitional provisions) by the Legal Services Act 2007 (Commencement No.6, Transitory, Transitional and Saving Provisions) Order 2009 (SI 2009/3250), with effect from January 1, 2010; for transitory and transitional provisions see arts 3–6.

PRO BONO REPRESENTATION

Payments in respect of pro bono representation

9B-550 **194.**—(1) This section applies to proceedings in a civil court in which—

(a) a party to the proceedings (“P”) is or was represented by a legal representative (“R”), and

(b) R’s representation of P is or was provided free of charge, in whole or in part.

(2) This section applies to such proceedings even if P is or was also represented by a legal representative not acting free of charge.

(3) The court may order any person to make a payment to the prescribed charity in respect of R’s representation of P (or, if only part of R’s representation of P was provided free of charge, in respect of that part).

(4) In considering whether to make such an order and the terms of such an order, the court must have regard to—

(a) whether, had R’s representation of P not been provided free of charge, it would have ordered the person to make a payment to P in respect of the costs payable to R by P in respect of that representation, and

(b) if it would, what the terms of the order would have been.

(5) The court may not make an order under subsection (3) against a person represented in the proceedings if the person’s representation was at all times within subsection (6).

(6) Representation is within this subsection if it is—

(a) provided by a legal representative acting free of charge, or

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

- (b) funded by the Legal Services Commission as part of the Community Legal Service.
- (7) Rules of court may make further provision as to the making of orders under subsection (3), and may in particular—
- (a) provide that such orders may not be made in civil proceedings of a description specified in the rules;
 - (b) make provision about the procedure to be followed in relation to such orders;
 - (c) specify matters (in addition to those mentioned in subsection (4)) to which the court must have regard in deciding whether to make such an order, and the terms of any order.
- (8) “The prescribed charity” means the charity prescribed by order made by the Lord Chancellor.
- (9) An order under subsection (8) may only prescribe a charity which—
- (a) is registered in accordance with section 3A of the Charities Act 1993 (c. 10), and
 - (b) provides financial support to persons who provide, or organise or facilitate the provision of, legal advice or assistance (by way of representation or otherwise) which is free of charge.
- (10) In this section—
- “legal representative”, in relation to a party to proceedings, means a person exercising a right of audience or conducting litigation on the party’s behalf;
 - “civil court” means the civil division of the Court of Appeal, the High Court, or any county court;
 - “free of charge” means otherwise than for or in expectation of fee, gain or reward.
- (11) The court may not make an order under subsection (3) in respect of representation if (or to the extent that) it is provided before this section comes into force.

Note —Subsections (8) and (9), and the definition “free of charge” in subs.(10) were brought into force with effect from June 30, 2008; the remaining subsections and remainder of subs.(10) were brought into force with effect from October 1, 2008, by the Legal Services Act 2007 (Commencement No.2 and Transitory Provisions) Order 2008 (SI 2008/1436).

9B-550.1

For ss.195 to 214 of and Sch.1 to the Legal Services Act 2007 (see Arrangement) plus any related commentary see paragraphs 9B-551+ to 9B-586.1+ on White Book on Westlaw UK or the Civil Procedure CD.



SCHEDULE 2

THE RESERVED LEGAL ACTIVITIES

Introduction

1. This Schedule makes provision about the reserved legal activities.
2. In this Schedule “the appointed day” means the day appointed for the coming into force of section 13 (entitlement to carry on reserved legal activities).

9B-587

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

SECTION 9B: OTHER STATUTES AND REGULATIONS

Rights of audience

9B-588 3.—(1) A “right of audience” means the right to appear before and address a court, including the right to call and examine witnesses.

(2) But a “right of audience” does not include a right to appear before or address a court, or to call or examine witnesses, in relation to any particular court or in relation to particular proceedings, if immediately before the appointed day no restriction was placed on the persons entitled to exercise that right.

Conduct of litigation

9B-589 4.—(1) The “conduct of litigation” means—

- (a) the issuing of proceedings before any court in England and Wales,
- (b) the commencement, prosecution and defence of such proceedings, and
- (c) the performance of any ancillary functions in relation to such proceedings (such as entering appearances to actions).

(2) But the “conduct of litigation” does not include any activity within paragraphs (a) to (c) of sub-paragraph (1), in relation to any particular court or in relation to any particular proceedings, if immediately before the appointed day no restriction was placed on the persons entitled to carry on that activity.



For Sch.2, paras 5 to 8, to the Legal Services Act 2007 (see Arrangement) plus any related commentary see paragraphs 9B-590+ to 9B-593+ on White Book on Westlaw UK or the Civil Procedure CD.

9B-593.1 *Note*—Schedule 2 was brought into force for certain purposes by the Legal Services Act 2007 (Commencement No.1 and Transitory Provisions) Order 2008 (SI 2008/222), with effect from March 7, 2008. The purposes (contained in art.3) for which Schedule 2 comes into force are in so far as it defines the term “Reserved legal activity” for the purpose of the following provisions:

- s.1;
- The definition of “consumers” in s.207;
- s.69(4) as modified by this Order;
- para.2(3) to (5) of Sch.1;
- para.2(3) and (4) of Sch.15;
- paras 2(6) and 2(7)(b) of Sch.22.

Schedule 2 was brought into force for certain purposes by the Legal Services Act 2007 (Commencement No.4, Transitory and Transitional Provisions and Appointed Day) Order 2009 (SI 2009/503), with effect from March 31, 2009. The purposes (contained in art.3) for which Sch.2 comes into force are in so far as it defines the term “Reserved legal activity” for the purpose of ss.9 and 32A of the Administration of Justice Act 1985.

Brought into force for remaining purposes (subject to transitory and transitional provisions) by the Legal Services Act 2007 (Commencement No.6, Transitory, Transitional and Saving Provisions) Order 2009 (SI 2009/3250), with effect from January 1, 2010; for transitory and transitional provisions see arts 3–6.

SCHEDULE 3

EXEMPT PERSONS

Rights of audience

9B-594 1.—(1) This paragraph applies to determine whether a person is an exempt person for the purpose of exercising a right of audience before a court in relation to any proceedings (subject to paragraph 7).

(2) The person is exempt if the person—

- (a) is not an authorised person in relation to that activity, but
- (b) has a right of audience granted by that court in relation to those proceedings.

(3) The person is exempt if the person—

- (a) is not an authorised person in relation to that activity, but

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

- (b) has a right of audience before that court in relation to those proceedings granted by or under any enactment.
- (4) The person is exempt if the person is the Attorney General or the Solicitor General and—
 - (a) the name of the person is on the roll kept by the Law Society under section 6 of the Solicitors Act 1974 (c. 47), or
 - (b) the person has been called to the Bar by an Inn of Court.
- (5) The person is exempt if the person is the Advocate General for Scotland and is admitted—
 - (a) as a solicitor in Scotland under section 6 of the Solicitors (Scotland) Act 1980 (c. 46), or
 - (b) to practise as an advocate before the courts of Scotland.
- (6) The person is exempt if the person—
 - (a) is a party to those proceedings, and
 - (b) would have a right of audience, in the person's capacity as such a party, if this Act had not been passed.
- (7) The person is exempt if—
 - (a) the person is an individual whose work includes assisting in the conduct of litigation,
 - (b) the person is assisting in the conduct of litigation—
 - (i) under instructions given (either generally or in relation to the proceedings) by an individual to whom sub-paragraph (8) applies, and
 - (ii) under the supervision of that individual, and
 - (c) the proceedings are being heard in chambers in the High Court or a county court and are not reserved family proceedings.
- (8) This sub-paragraph applies to—
 - (a) any authorised person in relation to an activity which constitutes the conduct of litigation;
 - (b) any person who by virtue of section 193 is not required to be entitled to carry on such an activity.
- (9) The person is an exempt person in relation to the exercise of a right of audience in proceedings on an appeal from the Comptroller-General of Patents, Designs and Trade Marks to the Patents Court under the Patents Act 1977 (c. 37), if the person is a solicitor of the Court of Judicature of Northern Ireland.
- (10) For the purposes of this paragraph—
 - “family proceedings” has the same meaning as in the Matrimonial and Family Proceedings Act 1984 (c. 42) and also includes any other proceedings which are family proceedings for the purposes of the Children Act 1989 (c. 41);
 - “reserved family proceedings” means such category of family proceedings as the Lord Chancellor may, after consulting the President of the Law Society and with the concurrence of the President of the Family Division, by order prescribe;

and any order made under section 27(9) of the Courts and Legal Services Act 1990 (c. 41) before the day appointed for the coming into force of this paragraph is to have effect on and after that day as if it were an order made under this sub-paragraph.

Conduct of litigation

2.—(1) This paragraph applies to determine whether a person is an exempt person for the purpose of carrying on any activity which constitutes the conduct of litigation in relation to any proceedings (subject to paragraph 7).

9B-595

- (2) The person is exempt if the person—
 - (a) is not an authorised person in relation to that activity, but
 - (b) has a right to conduct litigation granted by a court in relation to those proceedings.
- (3) The person is exempt if the person—
 - (a) is not an authorised person in relation to that activity, but
 - (b) has a right to conduct litigation in relation to those proceedings granted by or under any enactment.

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

SECTION 9B: OTHER STATUTES AND REGULATIONS

- (4) The person is exempt if the person—
 (a) is a party to those proceedings, and
 (b) would have a right to conduct the litigation, in the person's capacity as such a party, if this Act had not been passed.

(5) The person is an exempt person in relation to any activity which is carried on in or in connection with proceedings on an appeal from the Comptroller-General of Patents, Designs and Trade Marks to the Patents Court under the Patents Act 1977 (c. 37), if the person is a solicitor of the Court of Judicature of Northern Ireland.



For Sch.3, paras 3 to 6, to the Legal Services Act 2007 (see Arrangement) plus any related commentary see paragraphs 9B-596+ to 9B-599+ on White Book on Westlaw UK or the Civil Procedure CD.

European lawyers

9B-600

7. A European lawyer (within the meaning of the European Communities (Services of Lawyers) Order 1978 (S.I. 1978/1910)) is an exempt person for the purposes of carrying on an activity which is a reserved legal activity and which the European lawyer is entitled to carry on by virtue of that order.



For Sch.3, paras 8 and 9, and Schs 4 to 24 to the Legal Services Act 2007 (see Arrangement) plus any related commentary see paragraphs 9B-601+ to 9B-927+ on White Book on Westlaw UK or the Civil Procedure CD.

High Court and County Courts Jurisdiction Order 1991

(S.I. 1991 No. 724)

Introductory note

The Order was made by the Lord Chancellor in exercise of powers granted by the Courts and Legal Services Act 1990 s.1 (see para.9B-102, above). **9B-928**

The Lord Chancellor may by order make provision (a) allocating proceedings under the Arbitration Act 1996 to the High Court or to county courts, or (b) specifying proceedings under that Act which may be commenced or taken only in the High Court or in a county court (s.105(2)). The High Court and County Courts (Allocation of Arbitration Proceedings) Order 1996 (SI 1996/3215) (see para.2E-375) was made in exercise of this power.

This Order has been amended by the following statutory instruments: High Court and County Courts Jurisdiction (Amendment) Order 1993 (SI 1993/1407), High Court and County Courts Jurisdiction (Amendment) Order 1995 (SI 1995/205), High Court and County Courts Jurisdiction (Amendment) Order 1996 (SI 1996/3141), High Court and County Courts Jurisdiction (Amendment) Order 1999 (SI 1999/1014), High Court and County Courts Jurisdiction (Amendment) Order 2001 (SI 2001/1387), High Court and County Courts Jurisdiction (Amendment No.2) Order 2001 (SI 2001/2685), High Court and County Courts Jurisdiction (Amendment) Order 2005 (SI 2005/587), High Court and County Courts Jurisdiction (Amendment) Order 2008 (SI 2008/2934), High Court and County Courts Jurisdiction (Amendment) Order 2009 (SI 2009/577) (making amendments to arts 4A, 5(1) and 9 consequential upon amendments to the CPR relating to fast track claims made by SI 2008/3327 which came into force on April 6, 2009, but has effect only in relation to proceedings issued before that date, and other amendments). The 1999 Order provides, amongst other things, that for the word “plaintiff”, wherever it appears in the 1991 Order, there should be substituted the word “claimant”.

Title and commencement

1. This Order may be cited as the High Court and County Courts Jurisdiction Order 1991 and shall come into force on 1st July 1991. **9B-929**

Interpretation

1A. In this Order—

9B-929.1

(a) “the EOP Regulation” means Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure; and

(b) “the ESCP Regulation” means Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European small claims procedure.

Jurisdiction

2.—(1) A county court shall have jurisdiction under—

9B-930

- (a) sections 146 and 147 of the Law of Property Act 1925,
- (b) [...]
- (c) section 26 of the Arbitration Act 1950,
- (d) section 63(2) of the Landlord and Tenant Act 1954,
- (e) section 28(3) of the Mines and Quarries (Tips) Act 1969,
- (f) section 66 of the Taxes Management Act 1970,
- (g) section 41 of the Administration of Justice Act 1970,
- (h) [Revoked]
- (i) section 13 of the Torts (Interference with Goods) Act 1977,
- (j) section 87 of the Magistrates’ Courts Act 1980,
- (k) sections 19 and 20 of the Local Government Finance Act 1982,

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

SECTION 9B: OTHER STATUTES AND REGULATIONS

- (l) sections 15, 16, 21, 25 and 139 of the County Courts Act 1984,
 - (m) section 39(4) of, and paragraph 3(1) of Schedule 3 to, the Legal Aid Act 1988,
 - (n) sections 99, 102(5), 114, 195, 204, 230, 231 and 235(5) of the Copyright, Designs and Patents Act 1988,
 - (o) section 40 of the Housing Act 1988,
 - (p) sections 13 and 14 of the Trusts of Land and Appointment of Trustees Act 1996.
 - (q) the EOP Regulation,
 - (r) the ESCP Regulation,
- whatever the amount involved in the proceedings and whatever the value of any fund or asset connected with the proceedings.
- (2) A county court shall have jurisdiction under—
- (a) section 10 of the Local Land Charges Act 1975, and
 - (b) section 10(4) of the Rentcharges Act 1977,
- where the sum concerned or amount claimed does not exceed £5,000.
- (3) A county court shall have jurisdiction under the following provisions of the Law of Property Act 1925 where the capital value of the land or interest in land which is to be dealt with does not exceed £30,000:
- (a) sections 3, 49, 66, 181, and 188;
 - (b) proviso (iii) to paragraph 3 of Part III of Schedule 1;
 - (c) proviso (v) to paragraph 1(3) of Part IV of Schedule 1;
 - (d) provisos (iii) and (iv) to paragraph 1(4) of Part IV of Schedule 1.
- (4) A county court shall have jurisdiction under sections 89, 90, 91 and 92 of the Law of Property Act 1925 where the amount owing in respect of the mortgage or charge at the commencement of the proceedings does not exceed £30,000.
- (5) A county court shall have jurisdiction under the proviso to section 136(1) of the Law of Property Act 1925 where the amount or value of the debt or thing in action does not exceed £30,000.
- (6) A county court shall have jurisdiction under section 1(6) of the Land Charges Act 1972—
- (a) in the case of a land charge of Class C(i), C(ii) or D(i), if the amount does not exceed £30,000;
 - (b) in the case of a land charge of Class C(iii), if it is for a specified capital sum of money not exceeding £30,000 or, where it is not for a specified capital sum, if the capital value of the land affected does not exceed £30,000;
 - (c) in the case of a land charge of Class A, Class B, Class C(iv), Class D(ii), Class D(iii) or Class E, if the capital value of the land affected does not exceed £30,000;
 - (d) in the case of a land charge of Class F, if the land affected by it is the subject of an order made by the court under section 1 of the Matrimonial Homes Act 1983 or an application for an order under that section relating to that land has been made to the court;

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

- (e) in a case where an application under section 23 of the Deeds of Arrangement Act 1914 could be entertained by the court.

(7) A county court shall have jurisdiction under sections 69, 70 and 71 of the Solicitors Act 1974 where a bill of costs relates wholly or partly to contentious business done in a county court and the amount of the bill does not exceed £5,000.

(7A) A patents county court and the county courts listed in paragraph (7B) shall have jurisdiction under the following provisions of the Trade Marks Act 1994—

- (a) sections 15, 16, 19, 23(5), 25(4)(b), 30, 31, 46, 47, 64, 73 and 74;
- (b) paragraph 12 of Schedule 1;
- (c) paragraph 14 of Schedule 2,

to include jurisdiction to hear and determine any claims or matters ancillary to, or arising from proceedings brought under such provisions.

(7B) For the purposes of paragraph (7A), the county courts at—

- (a) Birmingham;
- (b) Bristol;
- (c) Cardiff;
- (d) Leeds;
- (e) Liverpool
- (f) Manchester; and
- (g) Newcastle upon Tyne,

shall have jurisdiction.

(8) The enactments and statutory instruments listed in the Schedule to this Order are amended as specified therein, being amendments which are consequential on the provisions of this article.

Note —Amended by the High Court and County Courts Jurisdiction (Amendment) Order 1996 (SI 1996/3141) the High Court and County Courts Jurisdiction (Amendment) Order 2005 (SI 2005/587), and the High Court and County Courts Jurisdiction (Amendment) Order 2008 (SI 2008/2934). **9B-931**

Effect

The amendments made by SI 1996/3141 to the 1991 Order grant county courts jurisdiction in proceedings under the Trusts of Land and Appointment of Trustees Act 1996 ss.13 and 14 (art.2(1)), reduce to £1,000 (from £2,000) the value-limit for enforcement by execution against goods, above which judgment debts may be transferred from a county court to the High Court (art.8(1)), and make consequential amendments to take account of extension to areas outside London of statutory scheme for enforcement through county courts of certain road traffic debts. The amendments made by SI 2005/587 altered the jurisdictions of a patents county court and certain county courts in relation to proceedings under the Trade Marks Act 1994 (see paras (7A) and (7B) of art.2). Sub-paras (q) and (r) were added to art. 2(1) by SI 2008/2934. **9B-932**

Injunctions

3. The High Court shall have jurisdiction to hear an application for an injunction made in the course of or in anticipation of proceedings in a county court where a county court may not, by virtue of regulations under section 38(3)(b) of the County Courts Act 1984 or otherwise, grant such an injunction. **9B-933**

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

“Regulations under s.38(3)(b)”

9B-934 See the County Court Remedies Regulations 1991 (SI 1991/1222), para.9B-77, above.

Allocation—Commencement of proceedings

9B-935 4. Subject to articles 5, 6, 6A and 6B, proceedings in which both the county courts and the High Court have jurisdiction may be commenced either in a county court or in the High Court.

4A. Except for proceedings to which article 5 applies, a claim for money in which the county courts have jurisdiction may only be commenced in the High Court if the value of the claim is more than £25,000.

5.—(1) Proceedings which include a claim for damages in respect of personal injuries may only be commenced in the High Court if the value of the claim is £50,000 or more.

(2) In this article “personal injuries” means personal injuries to the plaintiff or any other person, and includes disease, impairment of physical or mental condition, and death.

(3) This article does not apply to proceedings which include a claim for damages in respect of an alleged breach of duty of care committed in the course of the provision of clinical or medical services (including dental or nursing services).

6. Applications and appeals under section 19 of the Local Government Finance Act 1982 and appeals under section 20 of that Act shall be commenced in the High Court.

6A. Applications under section 1 of the Access to Neighbouring Land Act 1992 shall be commenced in a county court.

6B. Applications under article 4 of the ESCP Regulation must be commenced in a county court.

9B-936 *Note* —Amended by the High Court and County Courts Jurisdiction (Amendment) Order 1993 (SI 1993/1407); and the Access to Neighbouring Land Act 1992 s.7(2). Article 6B was inserted by SI 2008/2934. Article 4A was substituted and art.5(1) was amended in relation to proceedings issued on or after April 6, 2009 by the High Court and County Courts Jurisdiction (Amendment) Order 2009 (SI 2009/577).

Allocation—Trial

9B-937 7. [...]

9B-938 *Note* —Repealed by SI 1999/1014.

Enforcement

9B-939 8.—(1) Subject to paragraph (1A) a judgment or order of a county court for the payment of a sum of money which it is sought to enforce wholly or partially by execution against goods—

(a) shall be enforced only in the High Court where the sum which it is sought to enforce is £5,000 or more;

(b) shall be enforced only in a county court where the sum which it is sought to enforce is less than £600.

(1A) A judgment or order of a county court for the payment of a sum of money in proceedings arising out of an agreement regulated

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

by the Consumer Credit Act 1974 shall be enforced only in a county court.

- (2) [*amends the County Courts Act 1984, s.85(1)*]
- (2) Subject to paragraph (3), where—
 - (a) an enactment provides that a sum of money shall be or may be recoverable as if it were payable under a county court order; and
 - (b) the recovery of that sum is sought wholly or partially by execution against goods, payment of that sum shall be enforced in accordance with paragraphs (1)(a) to (c).
- (3) Paragraph (1)(b) does not apply to the enforcement of—
 - (a) a sum of money recoverable under section 15(1) of the Employment Tribunals Act 1996; or
 - (b) a compromise sum which is recoverable under section 19A(3) of that Act.

Note —Amended by SI 1993/1407; SI 1995/205 art.5, SI 1996/3141 and new paras (2) and (3) inserted in relation to proceedings issued on or after April 6, 2009 by SI 2009/577. **9B-940**

Transfer to the High Court for execution

The amendments made by SI 1996/3141 to the 1991 Order reduce to £1,000 (from £2,000) the value-limit for enforcement by execution against goods, above which judgment debts may be transferred from a county court to the High Court (art.8(1)). **9B-941**

“enforced ... in the High Court”

For procedure and practice where transfer of county court judgment or order to High Court for enforcement, see CPR Pt 30. **9B-942**

Where county court judgments between £2,000 and £5,000 are transferred to the High Court for enforcement interest is earned from the date of transfer.

The amendments brought about by SI 1995/205 make clear that judgments given in proceedings arising out of the Consumer Credit Act 1974 may only be enforced in a county court, whatever the enforcement chosen (whether execution against grounds or some other method).

Enforcement of traffic penalties

- 8A.—(1) Proceedings for the recovery of— **9B-943**
 - (a) increased penalty charges provided for in charge certificates issued under—
 - (i) paragraph 6 of Schedule 6 to the 1991 Act¹;
 - (ii) paragraph 8 of Schedule 1 to the London Local Authorities Act 1996²
 - (iii) regulation 17 of the Road User Charging (Enforcement and Adjudication) (London) Regulations 2001;
 - (iv) regulation 21 of the Civil Enforcement of Parking Contraventions (England) General Regulations 2007; and

¹ The Road Traffic Act 1991 (c.40).

² 1996 c.ix; para.8 of Sch.1 was amended by para.7 of Sch.2 to the London Local Authorities Act 2000 (c. vii) and Sch.1 is repealed by Sch.31 to the Transport Act 2000 (c.38) on such day as the Secretary of State may by order provide.

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

SECTION 9B: OTHER STATUTES AND REGULATIONS

- (v) regulation 13 of the Civil Enforcement of Parking Contraventions (Penalty Charge Notices, Enforcement and Adjudication) (Wales) Regulations 2008;
 - (b) amounts payable by a person other than a local authority under an adjudication of a parking adjudicator pursuant to section 73 of the 1991 Act
 - (c) amounts payable by a person other than a local authority under an adjudication pursuant to—
 - (i) the Road User Charging (Enforcement and Adjudication) (London) Regulations 2001;
 - (ii) the Civil Enforcement of Parking Contraventions (England) Representations and Appeals Regulations 2007; and
 - (iii) the Civil Enforcement of Parking Contraventions (Representations and Appeals) (Wales) Regulations 2008; and
 - (d) increased fixed penalties referred to in—
 - (i) regulation 17(6) of the Road Traffic (Vehicle Emissions) (Fixed Penalty) (England) Regulations 2002; and
 - (ii) regulation 17(6) of the Road Traffic (Vehicle Emissions) (Fixed Penalty) (Wales) Regulations 2003,shall be taken in Northampton County Court
- (2) In this article, “the 1991 Act” means the Road Traffic Act 1991.
- (3) In this article, “a local authority” means—
- (a) in England, a London borough council, the Common Council of the City of London, Transport for London,, a county or district council or the Council of the Isles of Scilly; and
 - (b) in Wales, a county or county borough council.

9B-944 *Note* —Amended by the High Court and County Courts Jurisdiction (Amendment) Order 1993 (SI 1993/1407), the High Court and County Courts Jurisdiction (Amendment) Order 1995 (SI 1995/205), the High Court and County Courts Jurisdiction (Amendment) Order 2001 (SI 2001/1387) and (in relation to proceedings issued on or after April 6, 2009) the High Court and County Courts Jurisdiction (Amendment) Order 2009 (SI 2009/577).

Road traffic debts

9B-945 The Road Traffic Act 1991 introduced a new regime for the enforcement of parking charges in London removing the enforcement proceedings from the jurisdiction of magistrates’ courts. CPR Sch.2, CCR O.48B, introduced into the CCR in 1993, enables local authorities to issue county court orders to recover certain parking charges and to enforce such orders. This article gives Cardiff County Court exclusive jurisdiction to deal with the initial processing of orders.

Enforcement of possession orders against trespassers

9B-946 **8B.**—(1) A judgment or order of a county court for possession of land made in a possession claim against trespassers may be enforced in the High Court or a county court.

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

ATTACHMENT OF EARNINGS ACT 1971

(2) In this article “a possession claim against trespassers” has the same meaning as in Part 55 of the Civil Procedure Rules 1998.

Note —Paragraph 8B was added to the Order by the High Court and County Courts Jurisdiction (Amendment No.2) Order 2001 (SI 2001/2685). CPR Pt 55 (Possession Claims) came into force on October 15, 2001. For transitional provisions relating to Pt 55, see Vol.1, para.51.1.4.

9B-947

Value of claim

9. For the purposes of Articles 4A, and 5, the value of the claim shall be calculated in accordance with rule 16.3(6) of the Civil Procedure Rules 1998.

9B-948

Note —Amended in relation to proceedings issued on or after April 6, 2009 by the High Court and County Courts Jurisdiction (Amendment) Order 2009 (SI 2009/577).

9B-948.1

CPR r.16.3(6)

This provision states that, in calculating how much he expects to recover, certain sums that the claimant might possibly recover in addition to the basic claim should be disregarded (e.g. interest and costs). Further, the possibility that the amount claimed may in the event be reduced by certain factors (e.g. a set-off included in the defence) should also be disregarded. In addition to CPR, r.16.3(6), note also Practice Direction (How to Start Proceedings—The Claim Form) para.2.2 (Vol.1, para.7PD.2).

9B-949

10. [...]

9B-950

Note —Repealed by SI 1999/1014.

9B-951

Crown proceedings—transitional provisions

11. For a period of two years from the date upon which this Order comes into force no order shall be made transferring proceedings in the High Court to which the Crown is a party to a county court, except—

9B-952

- (a) when the proceedings are set down to be tried or heard;
or
- (b) with the consent of the Crown.

Savings

12. This Order shall not apply to:

9B-953

(a) family proceedings within the meaning of Part V of the Matrimonial and Family Proceedings Act 1984;

(b) [...]

Attachment of Earnings Act 1971

(1971 c.32)

9B-954

ARRANGEMENT OF SECTIONS

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

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CASES IN WHICH ATTACHMENT IS AVAILABLE

Courts with power to attach earnings

9B-955 1.—(1) The High Court may make an attachment of earnings order to secure payments under a High Court maintenance order.

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

(2) A county court may make an attachment of earnings order to secure—

- (a) payments under a High Court or a county court maintenance order;
- (b) the payment of a judgment debt, other than a debt of less than £5 or such other sum as may be prescribed by county court rules; or
- (c) payments under an administration order.

(3) A magistrates' court may make an attachment of earnings order to secure—

- (a) payments under a magistrates' court maintenance order; or
- (b) [...]
- (c) the payment of any sum required to be paid by an order under section 17(2) of the Access to Justice Act 1999 or under regulations under section 17A(1) of that Act.

(4) The following provisions of this Act apply, except where otherwise stated, to attachment of earnings orders made, or to be made, by any court.

(5) Any power conferred by this Act to make an attachment of earnings order includes a power to make such an order to secure the discharge of liabilities arising before the coming into force of this Act.

Note —Amended by the Access to Justice Act 1999 Sch.4, para.8; SI 2006/1737; and the Criminal Defence Service Act 2006 s.4(1). **9B-956**

Orders to which this Act applies

1A. The following provisions of this Act apply, except where otherwise stated, to attachment of earnings orders made, or to be made, by any court under this Act or under Schedule 5 to the Courts Act 2003, or by a fines officer under that Schedule. **9B-957**

Note —Inserted by SI 2006/1737, with effect from July 3, 2006. **9B-958**

Principal definitions

2. In this Act— **9B-959**

(a) “maintenance order” means any order specified in Schedule 1 to this Act and includes such an order which has been discharged if any arrears are recoverable thereunder;

(b) “High Court maintenance order”, “county court maintenance order” and “magistrates' court maintenance order” mean respectively a maintenance order enforceable by the High Court, a county court and a magistrates' court;

(c) “judgment debt” means a sum payable under—

- (i) a judgment or order enforceable by a court in England and Wales (not being a magistrates' court);
- (ii) an order of a magistrates' court for the payment of money recoverable summarily as a civil debt; or
- (iii) an order of any court which is enforceable as if it were for the payment of money so recoverable,

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but does not include any sum payable under a maintenance order or an administration order;

(d) “the relevant adjudication”, in relation to any payment secured or to be secured by an attachment of earnings order, means the conviction, judgment, order or other adjudication from which there arises the liability to make the payment; and

(e) “the debtor”, in relation to an attachment of earnings order, or to proceedings in which a court has power to make an attachment of earnings order, or to proceedings arising out of such an order, means the person by whom payment is required by the relevant adjudication to be made.

Application for order and conditions of court’s power to make it

9B-960 3.—(A1) This section shall not apply to an attachment of earnings order to be made under Schedule 5 to the Courts Act 2003.

(1) The following persons may apply for an attachment of earnings order:—

- (a) the person to whom payment under the relevant adjudication is required to be made (whether directly or through an officer of any court);
- (b) where the relevant adjudication is an administration order, any one of the creditors scheduled to the order;
- (c) without prejudice to paragraph (a) above, where the application is to a magistrates’ court for an order to secure maintenance payments, and there is in force an order under section 59 of the Magistrates’ Courts Act 1980 or section 19(2) of the Maintenance Orders Act 1950, that those payments be made to the designated officer for a magistrates’ court, that officer;
- (d) in the following cases the debtor—
 - (i) where the application is to a magistrates’ court; or
 - (ii) where the application is to the High Court or a county court for an order to secure maintenance payments.

(2) [...]

(3) Subject to subsection (3A) below, for an attachment of earnings order to be made on the application of any person other than the debtor it must appear to the court that the debtor has failed to make one or more payments required by the relevant adjudication.

(3A) Subsection (3) above shall not apply where the relevant adjudication is a maintenance order.

(3B) [...]

(3C) [...]

(4) Where proceedings are brought—

- (a) in the High Court or a county court for the enforcement of a maintenance order by committal under section 5 of the Debtors Act 1869; or
- (b) in a magistrates’ court for the enforcement of a maintenance order;

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nance order under section 76 of the Magistrates' Courts Act 1980 (distress or committal),

then, the court may make an attachment of earnings order to secure payments under the maintenance order, instead of dealing with the case under section 5 of the said Act of 1869 or, as the case may be, section 76 of the said Act of 1980.

(5) [...]

(6) Where proceedings are brought in a county court for an order of committal under section 5 of the Debtors Act 1869 in respect of a judgment debt for any of the taxes, contributions premiums or liabilities specified in Schedule 2 to this Act, the court may, in any circumstances in which it has power to make such an order, make instead an attachment of earnings order to secure the payment of the judgment debt.

(7) A county court shall not make an attachment of earnings order to secure the payment of a judgment debt if there is in force an order or warrant for the debtor's committal, under section 5 of the Debtors Act 1869, in respect of that debt; but in any such case the court may discharge the order or warrant with a view to making an attachment of earnings order instead.

Note —Amended by the Social Security Act 1973 Sch.27; the Magistrates' Courts Act 1980 Sch.7; and the Maintenance Enforcement Act 1991 Sch.2; the Criminal Procedure and Investigations Act 1996 s.53; the Powers of Criminal Courts (Sentencing) Act 2000 Sch.9, para.44; the Courts Act 2003 s.109(1), Sch.8, para.141; and SI 2006/1737.

9B-961

ADMINISTRATION ORDERS IN THE COUNTY COURT

Extension of power to make administration order

4.—(1) Where, on an application to a county court for an attachment of earnings order to secure the payment of a judgment debt, it appears to the court that the debtor also has other debts, the court—

9B-962

- (a) shall consider whether the case may be one in which all the debtor's liabilities should be dealt with together and that for that purpose an administration order should be made; and
- (b) if of opinion that it may be such a case, shall have power (whether or not it makes the attachment of earnings order applied for), with a view to making an administration order, to order the debtor to furnish to the court a list of all his creditors and the amounts which he owes to them respectively.

(2) If, on receipt of the list referred to in subsection (1)(b) above, it appears to the court that the debtor's whole indebtedness amounts to not more than the amount which for the time being is the county court limit for the purposes of section 112 of the County Courts Act 1984 (limit of total indebtedness governing county court's power to make administration order on application of debtor), the court may make such an order in respect of the debtor's estate.

(2A) Subsection (2) above is subject to section 112(3) and (4) of the County Courts Act 1984 (which require that, before an adminis-

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

tration order is made, notice is to be given to all the creditors and thereafter restricts the right of any creditor to institute bankruptcy proceedings).

(3) [...]

(4) Nothing in this section is to be taken as prejudicing any right of a debtor to apply, under section 112 of the County Courts Act 1984, for an administration order.

9B-963 *Note* —Amended by the Insolvency Act 1976 s.13, Sch.3; and the County Court Act 1984 s.148, Sch.2.

Attachment of earnings to secure payments under administration order

9B-964 5.—(1) Where a county court makes an administration order in respect of a debtor's estate, it may also make an attachment of earnings order to secure the payments required by the administration order.

(2) At any time when an administration order is in force a county court may (with or without an application) make an attachment of earnings order to secure the payments required by the administration order, if it appears to the court that the debtor has failed to make any such payment.

(3) The power of a county court under this section to make an attachment of earnings order to secure the payments required by an administration order shall, where the debtor is already subject to an attachment of earnings order to secure the payment of a judgment debt, include power to direct that the last-mentioned order shall take effect (with or without variation under section 9 of this Act) as an order to secure the payments required by the administration order.

CONSEQUENCES OF ATTACHMENT ORDER

Effect and contents of order

9B-965 6.—(1) An attachment of earnings order shall be an order directed to a person who appears to the court, or as the case may be the fines officer, making the order to have the debtor in his employment and shall operate as an instruction to that person—

(a) to make periodical deductions from the debtor's earnings in accordance with Part I of Schedule 3 to this Act; and

(b) at such times as the order may require, or as the court, or where the order is made under Schedule 5 to the Courts Act 2003 as the court or the fines officer as the case may be, may allow, to pay the amounts deducted to the collected officer of the court, as specified in the order.

(2) For the purposes of this Act, the relationship of employer and employee shall be treated as subsisting between two persons if one of them, as a principal and not as a servant or agent, pays to the other any sums defined as earnings by section 24 of this Act.

(3) An attachment of earnings order shall contain prescribed particulars enabling the debtor to be identified by the employer.

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

(4) Except where it is made to secure maintenance payments, the order shall specify the whole amount payable under the relevant adjudication (or so much of that amount as remains unpaid), including any relevant costs.

(5) Subject to subsection (5A) below, the order shall specify—

- (a) the normal deduction rate, that is to say, the rate (expressed as a sum of money per week, month or other period) at which the court thinks it reasonable for the debtor's earnings to be applied to meeting his liability under the relevant adjudication; and
- (b) the protected earnings rate, that is to say the rate (so expressed) below which, having regard to the debtor's resources and needs, the court thinks it reasonable that the earnings actually paid to him should not be reduced.

(5A) If the order is made under Schedule 5 to the Courts Act 2003 then it shall specify the percentage deduction rate in accordance with fines collection regulations made under that Schedule.

(6) In the case of an order made to secure payments under a maintenance order (not being an order for the payment of a lump sum), the normal deduction rate—

- (a) shall be determined after taking account of any right or liability of the debtor to deduct income tax when making the payments; and
- (b) shall not exceed the rate which appears to the court necessary for the purpose of—
 - (i) securing payment of the sums falling due from time to time under the maintenance order, and
 - (ii) securing payment within a reasonable period of any sums already due and unpaid under the maintenance order.

(7) For the purposes of an attachment of earnings order, the collecting officer of the court shall be (subject to later variation of the order under section 9 of this Act)—

- (a) in the case of an order made by the High Court, either—
 - (i) the proper officer of the High Court, or
 - (ii) the appropriate officer of such county court as the order may specify;
- (b) in the case of an order made by a county court, the appropriate officer of that court; and
- (c) in the case of an order made by a magistrates' court, the designated officer for that court or for another magistrates' court specified in the order.

(8) In subsection (7) above "appropriate officer" means an officer designated by the Lord Chancellor.

(9) The Lord Chancellor may by order make such provision as he considers expedient (including transitional provisions) with a view to providing for the payment of amounts deducted under attachment of earnings orders to be made to such officers as may be designated by the order rather than to collecting officers of the court.

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

(10) Any such order may make such amendments in this Act, in relation to functions exercised by or in relation to collecting officers of the court as he considers expedient in consequence of the provision made by virtue of subsection (9) above.

(11) The power to make such an order shall be exercisable by statutory instrument.

(12) Any such statutory instrument shall be subject to annulment in pursuance of a resolution of either House of Parliament.

9B-966 *Note* —Amended by the Administration of Justice Act 1977 s.19; Courts Act 2003 s.109(1), Sch.8, para.142; and SI 2006/1737; subss.(9)–(12) were prospectively inserted by the Courts and Legal Services Act 1990 s.125(2) and Sch.17, para.5, as from a date to be appointed.

Compliance with order by employer

9B-967 7.—(1) Where an attachment of earnings order has been made, the employer shall, if he has been served with the order, comply with it; but he shall be under no liability for non-compliance before seven days have elapsed since the service.

(2) Where a person is served with an attachment of earnings order directed to him and he has not the debtor in his employment, or the debtor subsequently ceases to be in his employment, he shall (in either case), within ten days from the date of service or, as the case may be, the cesser, give notice of that fact to the court.

(3) Part II of Schedule 3 to this Act shall have effect with respect to the priority to be accorded as between two or more attachment of earnings orders directed to a person in respect of the same debtor.

(4) On any occasion when the employer makes, in compliance with the order, a deduction from the debtor's earnings—

(a) he shall be entitled to deduct, in addition, £1.00, or such other sum as may be prescribed by order made by the Lord Chancellor, towards his clerical and administrative costs; and

(b) he shall give to the debtor a statement in writing of the total amount of the deduction.

(5) An order of the Lord Chancellor under subsection (4)(a) above—

(a) may prescribe different sums in relation to different classes of cases;

(b) may be varied or revoked by a subsequent order made under that paragraph; and

(c) shall be made by statutory instrument subject to annulment by resolution of either House of Parliament.

9B-968 *Note* —Amended by the Attachment of Earnings (Employer's Deduction) Order 1991 (SI 1991/356).

Interrelation with alternative remedies open to creditors

9B-969 8.—(1) Where an attachment of earnings order has been made to secure maintenance payments, no order or warrant of commitment shall be issued in consequence of any proceedings for the enforce-

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

ment of the related maintenance order begun before the making of the attachment of earnings order.

(2) Where a county court has made an attachment of earnings order to secure the payment of a judgment debt—

- (a) no order or warrant of commitment shall be issued in consequence of any proceedings for the enforcement of the debt begun before the making of the attachment of earnings order; and
- (b) so long as the order is in force, no execution for the recovery of the debt shall issue against any property of the debtor without the leave of the county court.

(3) An attachment of earnings order made to secure maintenance payments shall cease to have effect upon the making of an order of commitment or the issue of a warrant of commitment for the enforcement of the related maintenance order, or upon the exercise for that purpose of the power conferred on a magistrates' court by section 77(2) of the Magistrates' Courts Act 1980 to postpone the issue of such a warrant.

(4) An attachment of earnings order made to secure the payment of a judgment debt shall cease to have effect on the making of an order of commitment or the issue of a warrant of commitment for the enforcement of the debt.

(5) An attachment of earnings order made to secure—

- (a) any payment mentioned in section 1(3)(c) of this Act; or
- (b) the payment of any sum mentioned in paragraph 1 of Schedule 5 to the Courts Act 2003, shall cease to have effect on the issue of a warrant committing the debtor to prison for default in making that payment.

Note —Amended by the Magistrates' Courts Act 1980 s.154, Sch.7; and SI 2006/ 1737. **9B-970**

SUBSEQUENT PROCEEDINGS

Variation, lapse and discharge of orders

9.—(1) The court, or where an attachment of earnings order is made under Schedule 5 to the Courts Act 2003 the court or the fines officer as the case may be, may make an order discharging or varying an attachment of earnings order. **9B-971**

(2) Where an order is varied, the employer shall, if he has been served with notice of the variation, comply with the order as varied; but he shall be under no liability for non-compliance before seven days have elapsed since the service.

(3) Rules of court may make provision—

- (a) as to the circumstances in which an attachment of earnings order may be varied or discharged by the court of its own motion;
- (aa) as to the circumstances in which an attachment of earnings order made under Schedule 5 to the Courts Act

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

2003 may be varied or discharged by the court or the fines officer of its or his own motion;

- (b) in the case of an attachment of earnings order made by a magistrates' court, for enabling a single justice, on an application made by the debtor on the ground of a material change in his resources and needs since the order was made or last varied, to vary the order for a period of not more than four weeks by an increase of the protected earnings rate.

(4) Where an attachment of earnings order has been made and the person to whom it is directed ceases to have the debtor in his employment, the order shall lapse (except as respects deduction from earnings paid after the cesser and payment to the collecting officer of amounts deducted at any time) and be of no effect unless and until the court, or where the order was made under Schedule 5 to the Courts Act 2003 unless and until the court or the fines officer as the case may be, again directs it to a person (whether the same as before or another) who appears to the court or the fines officer (as the case may be), or where the order was made under Schedule 5 to the Courts Act 2003 unless and until the court or the fines officer as the case may be, again directs it to a person (whether the same as before or another) who appears to the court or the fines officer (as the case may be) to have the debtor in his employment.

(5) The lapse of an order under subsection (4) above shall not prevent its being treated as remaining in force for other purposes.

9B-972 Note —Amended by SI 2006/1737.

Normal deduction rate to be reduced in certain cases

9B-973 **10.**—(1) The following provisions shall have effect, in the case of an attachment of earnings order made to secure maintenance payments, where it appears to the collecting officer of the court that—

- (a) the aggregate of the payments made for the purposes of the related maintenance order by the debtor (whether under the attachment of earnings order or otherwise) exceeds the aggregate of the payments required up to that time by the maintenance order; and
- (b) the normal deduction rate specified by the attachment of earnings order (or, where two or more such orders are in force in relation to the maintenance order, the aggregate of the normal deduction rates specified by those orders) exceeds the rate of payments required by the maintenance order; and
- (c) no proceedings for the variation or discharge of the attachment of earnings order are pending.

(2) In the case of an order made by the High Court or a county court, the collecting officer shall give the prescribed notice to the person to whom he is required to pay sums received under the attachment of earnings order, and to the debtor; and the court shall make the appropriate variation order, unless the debtor requests it to discharge the attachment of earnings order, or to vary it in some other way, and the court thinks fit to comply with the request.

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

(3) In the case of an order made by a magistrates' court, the collecting officer shall apply to the court for the appropriate variation order; and the court shall grant the application unless the debtor appears at the hearing and requests the court to discharge the attachment of earnings order, or to vary it in some other way, and the court thinks fit to comply with the request.

(4) In this section, "the appropriate variation order" means an order varying the attachment of earnings order in question by reducing the normal deduction rate specified thereby so as to secure that that rate (or, in the case mentioned in subsection (1)(b) above, the aggregate of the rates therein mentioned)—

- (a) is the same as the rate of payments required by the maintenance order; or
- (b) is such lower rate as the court thinks fit having regard to the amount of the excess mentioned in subsection (1)(a).

Attachment order in respect of maintenance payments to cease to have effect on the occurrence of certain events

11.—(1) An attachment of earnings order made to secure maintenance payments shall cease to have effect— **9B-974**

- (a) upon the grant of an application for registration of the related maintenance order under section 2 of the Maintenance Orders Act 1958 (which provides for the registration in a magistrates' court of a High Court or county court maintenance order, and for registration in the High Court of a magistrates' court maintenance order);
- (b) where the related maintenance order is registered under Part I of the said Act of 1958, upon the giving of notice with respect thereto under section 5 of that Act (notice with view to cancellation of registration);
- (c) subject to subsection (3) below, upon the discharge of the related maintenance order while it is not registered under Part I of the said Act of 1958;
- (d) upon the related maintenance order ceasing to be registered in a court in England or Wales, or becoming registered in a court in Scotland or Northern Ireland, under Part II of the Maintenance Orders Act 1950.

(2) Subsection (1)(a) above shall have effect, in the case of an application for registration under section 2(1) of the said Act of 1958, notwithstanding that the grant of the application may subsequently become void under subsection (2) of that section.

(3) Where the related maintenance order is discharged as mentioned in subsection (1)(c) above and it appears to the court discharging the order that arrears thereunder will remain to be recovered after the discharge, that court may, if it thinks fit, direct that subsection (1) shall not apply.

Termination of employer's liability to make deductions

12.—(1) Where an attachment of earnings order ceases to have ef- **9B-975**

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

SECTION 9B: OTHER STATUTES AND REGULATIONS

fect under section 8 or 11 of this Act, the proper officer of the prescribed court shall give notice of the cesser to the person to whom the order was directed.

(2) Where, in the case of an attachment of earnings order made otherwise than to secure maintenance payments, the whole amount payable under the relevant adjudication has been paid, and also any relevant costs, the court shall give notice to the employer that no further compliance with the order is required.

(3) Where an attachment of earnings order—

- (a) ceases to have effect under section 8 or 11 of this Act; or
- (b) is discharged under section 9,

the person to whom the order has been directed shall be under no liability in consequence of his treating the order as still in force at any time before the expiration of seven days from the date on which the notice required by subsection (1) above or, as the case may be, a copy of the discharging order is served on him.

ADMINISTRATIVE PROVISIONS

Application of sums received by collecting officer

9B-976 13.—(1) Subject to subsection (3) below, the collecting officer to whom a person makes payments in compliance with an attachment of earnings order shall, after deducting such court fees, if any, in respect of proceedings for or arising out of the order, as are deductible from those payments, deal with the sums paid in the same way as he would if they had been paid by the debtor to satisfy the relevant adjudication.

(2) Any sums paid to the collecting officer under an attachment of earnings order made to secure maintenance payments shall, when paid to the person entitled to receive those payments, be deemed to be payments made by the debtor (with such deductions, if any, in respect of income tax as the debtor is entitled or required to make) so as to discharge—

- (a) first, any sums for the time being due and unpaid under the related maintenance order (a sum due at an earlier date being discharged before a sum due at a later date); and
- (b) secondly, any costs incurred in proceedings relating to the related maintenance order which were payable by the debtor when the attachment of earnings order was made or last varied.

(3) Where a county court makes an attachment of earnings order to secure the payment of a judgment debt and also, under section 4(1) of this Act, orders the debtor to furnish to the court a list of all his creditors, sums paid to the collecting officer in compliance with the attachment of earnings order shall not be dealt with by him as mentioned in subsection (1) above, but shall be retained by him pending the decision of the court whether or not to make an administration order and shall then be dealt with by him as the court may direct.

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

Power of court to obtain statement of earnings, etc.**9B-977**

14.—(1) Where in any proceedings a court has power to make an attachment of earnings order, under this Act or under Schedule 5 to the Courts Act 2003 or a fines officer has power under that Schedule, to make an attachment of earnings order, the court or the fines officer, as the case may be, may—

- (a) order the debtor to give to the court, or the fines officer, as the case may be, within a specified period, a statement signed by him of—
 - (i) the name and address of any person by whom earnings are paid to him;
 - (ii) specified particulars as to his earnings and anticipated earnings, and as to his resources and needs; and
 - (iii) specified particulars for the purpose of enabling the debtor to be identified by any employer of his;
- (b) order any person appearing to the court or the fines officer, as the case may be, to have the debtor in his employment to give to the court or the fines officer, as the case may be, within a specified period, a statement signed by him or on his behalf of specified particulars of the debtor's earnings and anticipated earnings.

(2) Where an attachment of earnings order has been made, the court or the fines officer, as the case may be, may at any time thereafter while the order is in force

- (a) make such an order as is described in subsection 1(a) or (b) above; and
- (b) order the debtor to attend before the court on a day and at a time specified in the order to give the information described in subsection 1(a) above.

(3) In the case of an application to a magistrates' court for an attachment of earnings order, or for the variation or discharge of such an order, the power to make an order under subsection (1) or (2) above shall be exercisable also, before the hearing of the application, by a single justice.

(4) Without prejudice to subsections (1) to (3) above, rules of court may provide that where notice of an application for an attachment of earnings order is served on the debtor, it shall include a requirement that he shall give to the court, within such period and in such manner as may be prescribed, a statement in writing of the matters specified in subsection (1)(a) above and of any other prescribed matters which are, or may be, relevant under section 6 of this Act to the determination of the normal deduction rate and the protected earnings rate to be specified in any order made on the application. This subsection does not apply to an attachment of earnings order to be made under Schedule 5 to the Courts Act 2003.

(5) In any proceedings in which a court has power under this Act or under Schedule 5 to the Courts Act 2003 or a fines officer has power under that Schedule, to make an attachment of earnings order, and in any proceedings for the making, variation or discharge of

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SECTION 9B: OTHER STATUTES AND REGULATIONS

such an order, a document purporting to be a statement given to the court or the fines officer, as the case may be, in compliance with an order under subsection (1)(a) or (b) above, or with any such requirement of a notice of application for an attachment of earnings order as is mentioned in subsection (4) above, shall, in the absence of proof to the contrary, be deemed to be a statement so given and shall be evidence of the facts stated therein.

9B-978 *Note* —Amended by the Administration of Justice Act 1982 s.53; and SI 2006/1737.

Obligation of debtor and his employers to notify changes of employment and earnings

9B-979 15.—(1) While an attachment of earnings order is in force—

- (a) the debtor shall from time to time notify the court in writing of every occasion on which he leaves any employment, or becomes employed or re-employed, not later (in each case) than seven days from the date on which he did so;
- (b) the debtor shall, on any occasion when he becomes employed or re-employed, include in his notification under paragraph (a) above particulars of his earnings and anticipated earnings from the relevant employment; and
- (c) any person who becomes the debtor's employer and knows that the order is in force and by, or (if the order was made by a fines officer), which court what court it was made shall, within seven days of his becoming the debtor's employer or of acquiring that knowledge (whichever is the later) notify that court in writing that he is the debtor's employer, and include in his notification a statement of the debtor's earnings and anticipated earnings.

(2) In the case of an attachment of earnings order made by a fines officer, the reference to “the court” in subsection (1)(a) above shall mean the court for which that order was made.

9B-980 *Note* —Amended by SI 2006/1737.

Power of court to determine whether particular payments are earnings

9B-981 16.—(1) Where an attachment of earnings order is in force, the court shall, on the application of a person specified in subsection (2) below, determine whether payments to the debtor of a particular class or description specified by the application are earnings for the purposes of the order; and the employer shall be entitled to give effect to any determination for the time being in force under this section.

- (2) The persons referred to in subsection (1) above are—
- (a) the employer;
 - (b) the debtor.

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- (c) the person to whom payment under the relevant adjudication is required to be made (whether directly or through an officer of any court); and
- (d) without prejudice to paragraph (c) above, where the application is in respect of an attachment of earnings order made to secure payments under a magistrates' court maintenance order, the collecting officer.

(3) Where an application under this section is made by the employer, he shall not incur any liability for non-compliance with the order as respects any payments of the class or description specified by the application which are made by him to the debtor while the application, or any appeal in consequence thereof, is pending; but this subsection shall not, unless the court otherwise orders, apply as respects such payments if the employer subsequently withdraws the application or, as the case may be, abandons the appeal.

Consolidated attachment orders

17.—(1) The powers of a county court under sections 1 and 3 of **9B-982** this Act shall include power to make an attachment of earnings order to secure the payment of any number of judgment debts; and the powers of a magistrates' court under those sections or under Schedule 5 to the Courts Act 2003, and the powers of a fines officer under that Schedule, shall include power to make an attachment of earnings order to secure the discharge of any number of such liabilities as are specified in section 1(3) of this Act and paragraph 1 of Schedule 5 to the Courts Act 2003.

(2) An attachment of earnings order made by virtue of this section shall be known as a consolidated attachment order.

(3) The power to make a consolidated attachment order shall be exercised subject to and in accordance with rules of court; and rules made for the purposes of this section may provide—

- (a) for the transfer from one court to another or (where Schedule 5 to the Courts Act 2003 applies) from a court or a fines officer, as the case may be, acting in one local justice area, to a court or a fines officer, as the case may be, acting in another local justice area—
 - (i) of an attachment of earnings order, or any proceedings for or arising out of such an order; and
 - (ii) of functions relating to the enforcement of any liability capable of being secured by attachment of earnings;
- (b) for enabling a court or a fines officer, as the case may be, to which or to whom any order, proceedings or functions have been transferred under the rules to vary or discharge an attachment of earnings order made by another court or fines officer and to replace it (if the court, or fines officer as the case may be, thinks fit) with a consolidated attachment order;
- (c) for the cases in which any power exercisable under this section or the rules may be exercised by a court of its or

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a fines officer, as the case may be, of its or his own motion or on the application of a prescribed person;

- (d) for requiring the clerk or registrar of a court who receives payments made to him in compliance with an attachment of earnings order, instead of complying with section 13 of this Act, to deal with them as directed by the court or the rules; and
- (e) for modifying or excluding provisions of this Act of Part III of the Magistrates' Courts Act 1980, but only so far as may be necessary or expedient for securing conformity with the operation of rules made by virtue of paragraphs (a) to (d) of this subsection

9B-983 *Note* —Amended by the Magistrates Courts Act 1980 s.154, Sch.7; and SI 2006/1737.

SPECIAL PROVISIONS WITH RESPECT TO MAGISTRATES' COURTS

Certain action not to be taken by collecting officer except on request

9B-984 **18.**—(1) A designated officer for a magistrates' court who is entitled to receive payments under a maintenance order for transmission to another person shall not—

- (a) apply for an attachment of earnings order to secure payments under the maintenance order; or
- (b) except as provided by section 10(3) of this Act, apply for an order discharging or varying such an attachment of earnings order; or
- (c) apply for a determination under section 16 of this Act, unless he is requested in writing to do so by a person entitled to receive the payments through him.

(2) Where the designated officer for a magistrates' court is so requested—

- (a) he shall comply with the request unless it appears to him unreasonable in the circumstances to do so; and
- (b) the person by whom the request was made shall have the same liabilities for all the costs properly incurred in or about any proceedings taken in pursuance of the request as if the proceedings has been taken by that person.

(3) For the purposes of subsection (2)(b) above, any application made by the designated officer for a magistrates' court as required by section 10(3) of this Act shall be deemed to be made on the request of the person in whose favour the attachment of earnings order in question was made.

Note —Amended by the Courts Act 2003 s.109(1), Sch.8, para.143.

Procedure on applications

9B-985 **19.**—(1) Subject to rules of court made by virtue of the following

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subsection, an application to a magistrates' court for an attachment of earnings order, or an order discharging or varying an attachment of earnings order, shall be made by complaint.

(2) Rules of court may make provision excluding subsection (1) in the case of such an application as is referred to in section 9(3)(b) of this Act.

(3) An application to a magistrates' court for a determination under section 16 of this Act shall be made by complaint.

(4) For the purposes of section 51 of the Magistrates' Courts Act 1980 (which provides for the issue of a summons directed to the person against whom an order may be made in pursuance of a complaint)—

- (a) the power to make an order in pursuance of a complaint by the debtor for an attachment of earnings order, or the discharge or variation of such an order, shall be deemed to be a power to make an order against the person to whom payment under the relevant adjudication is required to be made (whether directly or through an officer of any court); and
- (b) the power to make an attachment of earnings order, or an order discharging or varying an attachment of earnings order, in pursuance of a complaint by any other person (including a complaint in proceedings to which section 3(4)(b) of this Act applies) shall be deemed to be a power to make an order against the debtor.

(5) A complaint for an attachment of earnings order may be heard notwithstanding that it was made within the six months allowed by section 127(1) of the Magistrates' Courts Act 1980.

Note —Amended by the Magistrates' Court Act 1980 s.154, Sch.7.

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Jurisdiction in respect of persons residing outside England and Wales

20.—(1) It is hereby declared that a magistrates' court has jurisdiction to hear a complaint by or against a person residing outside England and Wales for the discharge or variation of an attachment of earnings order made by a magistrates' court to secure maintenance payments; and where such a complaint is made, the following provisions shall have effect.

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(2) If the person resides in Scotland or Northern Ireland, section 15 of the Maintenance Orders Act 1950 (which relates to the service of process on persons residing in those countries) shall have effect in relation to the complaint as it has effect in relation to the proceedings therein mentioned.

(3) Subject to the following subsection, if the person resides outside the United Kingdom and does not appear at the time and place appointed for the hearing of the complaint, the court may, if it thinks it reasonable in all the circumstances to do so, proceed to hear and determine the complaint at the time and place appointed for the hearing, or for any adjourned hearing, in like manner as if the person had then appeared.

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(4) Subsection (3) above shall apply only if it is proved to the satisfaction of the court, on oath or in such other manner as may be prescribed, that the complainant has taken such steps as may be prescribed to give to the said person notice of the complaint and of the time and place appointed for the hearing of it.

Costs on application under s.16

9B-988 21.—(1) On making a determination under section 16 of this Act, a magistrates' court may in its discretion make such order as it thinks just and reasonable for payment by any of the persons mentioned in subsection (2) of that section of the whole or any part of the costs of the determination (but subject to section 18(2)(b) of this Act).

(2) Costs ordered to be paid under this section shall—

(a) in the case of costs to be paid by the debtor to the person in whose favour the attachment of earnings order in question was made, be deemed—

(i) if the attachment of earnings order was made to secure maintenance payments, to be a sum due under the related maintenance order, and

(ii) otherwise, to be a sum due to the designated officer for the magistrates' court; and

(b) in any other case, be enforceable as a civil debt.

Note —Amended by the Courts Act 2003 s.109(1), Sch.8, para.144.

MISCELLANEOUS PROVISIONS

Persons employed under the Crown

9B-989 22.—(1) The fact that an attachment of earnings order is made at the suit of the Crown shall not prevent its operation at any time when the debtor is in the employment of the Crown.

(2) Where a debtor is in the employment of the Crown and an attachment of earnings order is made in respect of him, then for the purposes of this Act—

(a) the chief officer for the time being of the department, office or other body in which the debtor is employed shall be treated as having the debtor in his employment (any transfer of the debtor from one department, office or body to another being treated as a change of employment); and

(b) any earnings paid by the Crown or a Minister of the Crown, or out of the public revenue of the United Kingdom, shall be treated as paid by the said chief officer.

(3) If any question arises, in proceedings for or arising out of an attachment of earnings order, as to what department, office or other body is concerned for the purposes of this section, or as to who for those purposes is the chief officer thereof, the question shall be referred to and determined by the Minister for the Civil Service; but

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that Minister shall not be under any obligation to consider a reference under this subsection unless it is made by the court.

(4) A document purporting to set out a determination of the said Minister under subsection (3) above and to be signed by an official of the Office of Public Service shall, in any such proceedings as are mentioned in that subsection, be admissible in evidence and be deemed to contain an accurate statement of such a determination unless the contrary is shown.

(5) This Act shall have effect notwithstanding any enactment passed before 29th May 1970 and preventing or avoiding the attachment or diversion of sums due to a person in respect of service under the Crown, whether by way of remuneration, pension or otherwise.

Note —Amended by the Transfer of Functions (Minister for the Civil Service and Treasury) Order 1981 (SI 1981/1670); the Transfer of Functions (Minister for the Civil Service and Treasury) Order 1987 (SI 1987/2039); the Transfer of Functions (Science) Order 1992 (SI 1992/1296); and the Transfer of Functions (Science) Order 1995 (SI 1995/2985).

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Enforcement provisions

23.—(1) If, after being served with notice of an application to a county court for an attachment of earnings order or for the variation of such an order or with an order made under section 14(2)(b) above, the debtor fails to attend on the day and at the time specified for any hearing of the application or specified in the order, the court may adjourn the hearing and order him to attend at a specified time on another day; and if the debtor—

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(a) fails to attend at that time on that day; or

(b) attends, but refuses to be sworn or give evidence,

he may be ordered by the judge to be imprisoned for not more than fourteen days.

(1A) In any case where the judge has power to make an order of imprisonment under subsection (1) for failure to attend, he may, in lieu of or in addition to making that order, order the debtor to be arrested and brought before the court either forthwith or at such time as the judge may direct.

(2) Subject to this section, a person commits an offence if—

(a) being required by section 7(1) or 9(2) of this Act to comply with an attachment of earnings order, he fails to do so; or

(b) being required by section 7(2) of this Act to give a notice for the purposes of that subsection, he fails to give it, or fails to give it within the time required by that subsection; or

(c) he fails to comply with an order under section 14(1) of this Act or with any such requirement of a notice of application for an attachment of earnings order as is mentioned in section 14(4), or fails (in either case) to comply within the time required by the order or notice; or

(d) he fails to comply with section 15 of this Act; or

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- (e) he gives a notice for the purposes of section 7(2) of this Act, or a notification for the purposes of section 15, which he knows to be false in a material particular, or recklessly gives such a notice or notification which is false in a material particular; or
- (f) in purported compliance with section 7(2) or 15 of this Act, or with an order under section 14(1), or with any such requirement of a notice of application for an attachment of earnings order as is mentioned in section 14(4), he makes any statement which he knows to be false in a material particular, or recklessly makes any statement which is false in a material particular.

(3) Where a person commits an offence under subsection (2) above in relation to proceedings in, or to an attachment of earnings order made by, the High Court or a county court, he shall be liable on summary conviction to a fine of not more than level 2 on the standard scale or he may be ordered by a judge of the High Court or the county court judge (as the case may be) to pay a fine of not more than £250 or, in the case of an offence specified in subsection (4) below, to be imprisoned for not more than fourteen days; and where a person commits an offence under subsection (2) otherwise than as mentioned above in this subsection, he shall be liable on summary conviction to a fine of not more than level 2 on the standard scale.

(4) The offences referred to above in the case of which a judge may impose imprisonment are—

- (a) an offence under subsection (2)(c) or (d), if committed by the debtor; and
- (b) an offence under subsection (2)(e) or (f), whether committed by the debtor or any other person.

(5) It shall be a defence—

- (a) for a person charged with an offence under subsection (2)(a) above to prove that he took all reasonable steps to comply with the attachment of earnings order in question;
- (b) for a person charged with an offence under subsection (2)(b) to prove that he did not know, and could not reasonably be expected to know, that the debtor was not in his employment, or (as the case may be) had ceased to be so, and that he gave the required notice as soon as reasonably practicable after the fact came to his knowledge.

(6) Where a person is convicted or dealt with for an offence under subsection (2)(a), the court may order him to pay, to whoever is the collecting officer of the court for the purposes of the attachment of earnings order in question, any sums deducted by that person from the debtor's earnings and not already paid to the collecting officer.

(7) Where under this section a person is ordered by a judge of the High Court or a county court judge to be imprisoned, the judge may at any time revoke the order and, if the person is already in custody, order his discharge.

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(8) Any fine imposed by a judge of the High Court under subsection (3) above and any sums ordered by the High Court to be paid under subsection (6) above shall be recoverable in the same way as a fine imposed by that court in the exercise of its jurisdiction to punish for contempt of court; section 129 of the County Courts Act 1984 (enforcement of fines) shall apply to payment of a fine imposed by a county court judge under subsection (3) and of any sums ordered by a county court judge to be paid under subsection (6); and any sum ordered by a magistrates' court to be paid under subsection (6) shall be recoverable as a sum adjudged to be paid on a conviction by that court.

(9) For the purposes of section 13 of the Administration of Justice Act 1960 (appeal in cases of contempt of court), subsection (3) above shall be treated as an enactment enabling the High Court or a county court to deal with an offence under subsection (2) above as if it were contempt of court.

(10) In this section references to proceedings in a court are to proceedings in which that court has power to make an attachment of earnings order or has made such an order.

(11) A district judge, assistant district judge or deputy district judge shall have the same powers under this section as a judge of a county court.

Note—Amended by the Contempt of Court Act 1981 Sch.2; the Criminal Justice Act 1982 Sch.4; the Administration of Justice Act 1982 s.53; the County Courts Act 1984 Sch.2; the Court and Legal Services Act 1990 Sch.17; and the Criminal Justice Act 1991 Sch.4.

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Meaning of “earnings”

24.—(1) For the purposes of this Act, but subject to the following subsection, “earnings” are any sums payable to a person—

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- (a) by way of wages or salary (including any fees, bonus, commission, overtime pay or other emoluments payable in addition to wages or salary or payable under a contract of service);
 - (b) by way of pension (including an annuity in respect of past services, whether or not rendered to the person paying the annuity, and including periodical payments by way of compensation for the loss, abolition or relinquishment, or diminution in the emoluments, of any office or employment);
 - (c) by way of statutory sick pay.
- (2) The following shall not be treated as earnings:—
- (a) sums payable by any public department of the Government of Northern Ireland or of a territory outside the United Kingdom;
 - (b) pay or allowances payable to the debtor as a member of Her Majesty's forces other than pay or allowances payable by his employer to him as a special member of a reserve force (within the meaning of the Reserve Forces Act 1996);

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- (ba) a tax credit (within the meaning of the Tax Credits Act 2002);
 - (c) pension, allowances or benefit payable under any enactment relating to social security;
 - (d) pension or allowances payable in respect of disablement or disability;
 - (e) except in relation to a maintenance order wages payable to a person as a seaman, other than wages payable to him as a seaman of a fishing boat;
 - (f) guaranteed minimum pension within the meaning of the Pension Schemes Act 1993.
- (3) In subsection (2)(e) above:
- “fishing boat” means a vessel of whatever size, and in whatever way propelled, which is for the time being employed in sea fishing or in the sea-fishing service;
- “seaman” includes every person (except masters and pilots) employed or engaged in any capacity on board any ship; and
- “wages” includes emoluments.

9B-994 *Note* —Amended by the Social Security Pensions Act 1975 Sch.4; the Merchant Shipping Act 1979 s.39; the Social Security Act 1985 Sch.4; the Social Security Act 1986 Sch.10; the Pension Schemes Act 1993 Sch.8; the Merchant Shipping Act 1995 Sch.13, para.46; the Reserve Forces Act 1996 (Consequential Provisions, etc.) Regulations 1998 (SI 1998/3086) reg.6; and by the Tax Credits Act 2002 Sch.3, para.1.

General interpretation

- 9B-995** **25.**—(1) In this Act, except where the context otherwise requires—
- “administration order” means an order made under, and so referred to in, Part VI of the County Courts Act 1984;
- “the court”, in relation to an attachment of earnings order, means the court which made the order, subject to rules of court as to the venue for, and the transfer of, proceedings in county courts and magistrates’ courts;
- “debtor” and “relevant adjudication” have the meanings given by section 2 of this Act;
- “the employer”, in relation to an attachment of earnings order, means the person who is required by the order to make deductions from earnings paid by him to the debtor;
- “the fines officer”, in relation to a debtor who is subject to a collection order made under Schedule 5 to the Courts Act 2003, means any fines officer working at the fines office specified in that order;
- “judgment debt” has the meaning given by section 2 of this Act;
- “maintenance order” has the meaning given by section 2 of this Act;
- “maintenance payments” means payments required under a maintenance order;
- “prescribed” means prescribed by rules of court;
- and, in relation to a magistrates’ court, references to a single justice are to a justice of the peace acting for the same petty sessions area as the court.

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

(2) Any reference in this Act to sums payable under a judgment or order, or to the payment of such sums, includes a reference to costs and the payment of them; and the references in sections 6(4) and 12(2) to relevant costs are to any costs of the proceedings in which the attachment of earnings order in question was made, being costs which the debtor is liable to pay.

(3) References in sections 6(5)(b), 9(3)(b) and 14(1)(a) of this Act to the debtor's needs include references to the need of any person for whom he must, or reasonably may, provide.

(4) [...]

(5) Any power to make rules which is conferred by this Act is without prejudice to any other power to make rules of court.

(6) This Act, so far as it relates to magistrates' courts, and Part III of the Magistrates' Courts Act 1980 shall be construed as if this Act were contained in that Part.

(7) References in this Act to any enactment include references to that enactment as amended by or under any other enactment, including this Act.

Note —Amended by the Legal Aid Act 1974 Sch.4; the Magistrates. Courts Act ss.144, 154, Sch.7; the County Courts Act 1984 s.148, Sch.2; the Legal Aid Act 1988 s.45, Sch.5; the Dock Work Act 1989 Sch.1; the Access to Justice Act 1999 Sch.15; the Courts Act 2003 Sch.10, para.1; and SI 2006/1737. **9B-996**

GENERAL

Transitional provision

26.—(1) As from the appointed day, an attachment of earnings order made before that day under Part II of the Maintenance Orders Act 1958 (including an order made under that Part of that Act as applied by section 46 or 79 of the Criminal Justice Act 1967) shall take effect as an attachment of earnings order made under the corresponding power in this Act, and the provisions of this Act shall apply to it accordingly, so far as they are capable of doing so. **9B-997**

(2) Rules of court may make such provision as the rule-making authority considers requisite—

(a) for enabling an attachment of earnings order to which subsection (1) above applies to be varied so as to bring it into conformity, as from the appointed day, with the provisions of this Act, or to be replaced by an attachment of earnings order having effect as if made under the corresponding power in this Act;

(b) to secure that anything required or authorised by this Act to be done in relation to an attachment of earnings order made thereunder is required or, as the case may be, authorised to be done in relation to an attachment of earnings order to which the said subsection (1) applies.

(3) In this section “the appointed day” means the day appointed under section 54 of the Administration of Justice Act 1970 for the coming into force of Part II of that Act.

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

Consequential amendment of enactments

9B-998 27.—(1) In consequence of the repeals effected by this Act, section 20 of the Maintenance Orders Act 1958 (which contains certain provisions about magistrates' courts and their procedure), except subsection (6) of that section (which amends section 52(3) of the Magistrates' Courts Act 1952), shall have effect as set out in Schedule 5 to this Act.

(2) [...]

(3) [...]

9B-999 *Note* —Amended by the Insolvency Act 1976 Sch.3.

9B-1000 28. [...]

9B-1001 *Note* —Repealed with savings by the Northern Ireland Constitution Act 1973 s.42, Sch.6.

Citation, repeal, extent and commencement

9B-1002 29.—(1) This Act may be cited as the Attachment of Earnings Act 1971.

(2) The Enactments specified in Schedule 6 to this Act are hereby repealed to the extent specified in the third column of that Schedule.

(3) This Act, except section 20(2), does not extend to Scotland and, except sections 20(2) ... does not extend to Northern Ireland.

(4) This Act shall come into force on the day appointed under section 54 of the Administration of Justice Act 1970 for the coming into force of Part II of that Act.

9B-1003 *Note* —Amended by the Northern Ireland Constitution Act 1973 s.42, Sch.6.

SCHEDULE 1

MAINTENANCE ORDERS TO WHICH THIS ACT APPLIES

9B-1004 1. An order for alimony, maintenance or other payments made, or having effect as if made, under Part II of the Matrimonial Causes Act 1965 (ancillary relief in actions for divorce etc.).

2. An order for payments to or in respect of a child, being an order made, or having effect as if made, under Part III of the said Act of 1965 (maintenance of children following divorce, etc.).

3. An order for periodical or other payments made, or having effect as if made, under Part II of the Matrimonial Causes Act 1973.

4. An order for maintenance or other payments to or in respect of a spouse or child, being an order made under Part I of the Domestic Proceedings and Magistrates' Court Act 1978.

5. An order for periodical or other payments made or having effect as if made under Schedule 1 to the Children Act 1989.

6. [...]

7. An order under paragraph 23 of Schedule 2 to the Children Act 1989... section 23 of the Ministry of Social Security Act 1966 ... section 18 of the Supplementary Benefits Act 1976 ... or section 106 of the Social Security Administration Act 1992 (various provisions for obtaining contributions from a person whose dependants are assisted or maintained out of public funds).

8. An order under section 43 of the National Assistance Act 1948 (recovery of costs of maintaining assisted person).

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

ATTACHMENT OF EARNINGS ACT 1971

9. An order to which section 16 of the Maintenance Orders Act 1950 applies by virtue of subsection (2)(b) or (c) of that section (that is to say an order made by a court in Scotland or Northern Ireland and corresponding to one of those specified in the foregoing paragraphs) and which has been registered in a court in England and Wales under Part II of that Act.

10. A maintenance order within the meaning of the Maintenance Orders (Facilities for Enforcement) Act 1920 (Commonwealth orders enforceable in the United Kingdom) registered in, or confirmed by, a court of England and Wales under that Act.

11. A maintenance order within the meaning of Part I of the Maintenance Orders (Reciprocal Enforcement) Act 1972 registered in a magistrates' court under the said Part I.

12. An order under section 34(1)(b) of the Children Act 1975 (payments of maintenance in respect of a child to his custodian).

13. A maintenance order within the meaning of Part I of the Civil Jurisdiction and Judgments Act 1982 which is registered in a magistrates' court under that Part.

14. A maintenance judgment within the meaning of Council Regulation (EC) No. 44/2001 of 22nd December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, as amended from time to time and as applied by the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ No. L 299 16.11.2005 at p62) which is registered in a magistrates' court under that Regulation.

15. An order made under Schedule 5 to the Civil Partnership Act 2004 (financial relief in the High Court or a county court etc), for periodical or other payments.

16. An order made under Schedule 6 to the 2004 Act (financial relief in magistrates' courts etc), for maintenance or other payments to or in respect of a civil partner or child.

Note —Amended by the Maintenance Orders (Reciprocal Enforcement) Act 1972 Sch.; the Matrimonial Causes Act 1973 Sch.2; the Guardianship Act 1973 s.9; the Children Act 1975 Sch.3; the Supplementary Benefits Act 1976 Sch.7; the Domestic Proceedings and Magistrates. Courts Act 1978 s.89 and Sch.2; the Child Care Act 1980 Sch.5; the Civil Jurisdiction and Judgments Act 1982 s.15 and Sch.12; the Social Security Act 1986 Sch.10; the Family Law Reform Act 1987 s.33 and Schs 2 and 4; the Children Act 1989 s.108, Sch.3; the Courts and Legal Services Act 1990 Sch.16; the Social Security (Consequential Provisions) Act 1992 Sch.2; SI 2001/3929; the Civil Partnership Act 2004 s.261(1) and Sch.27, para.35; and the Civil Jurisdiction and Judgments Regulations 2007 (SI 2007/1655) Sch. para.7.

9B-1005

SECTION 3

SCHEDULE 2

TAXES, SOCIAL SECURITY CONTRIBUTIONS ETC RELEVANT FOR PURPOSES OF SECTION 3(6)

1. Income tax or any other tax or liability recoverable under section 65, 66 or 68 of the Taxes Management Act 1970.

2. [...]

3. Contributions equivalent premiums under Part III of the Pension Schemes Act 1993.

3A. Class 1, 2 and 4 contributions under Part I of the Social Security Contributions and Benefits Act 1992.

4. [...]

Note —Amended by the Social Security Act 1973 Sch.28; the Social Security (Consequential Provisions) Act 1975 Sch.2; the Social Security Pensions Act 1975 Sch.4; the Statute Law (Repeals) Act 1989 s.1, Sch.1; the Social Security (Consequential Provision) Act 1992 Sch.2; the Pension Schemes Act 1993 Sch.8; and the Pensions Act 1995 Sch.5.

9B-1007

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

SECTION 9B: OTHER STATUTES AND REGULATIONS

SECTIONS 6 AND 7

SCHEDULE 3

DEDUCTIONS BY EMPLOYER UNDER ATTACHMENT OF EARNINGS ORDER

PART I

SCHEME OF DEDUCTIONS

Preliminary definitions

- 9B-1008** 1. The following three paragraphs have effect for defining and explaining, for purposes of this Schedule, expressions used therein.
2. “Pay-day”, in relation to earnings paid to a debtor, means an occasion on which they are paid.
3. “Attachable earnings”, in relation to a pay-day, are the earnings which remain payable to the debtor on that day after deduction by the employer of—
- (a) income tax;
 - (b) ...
 - (bb) primary Class 1 contributions under Part I of the Social Security Act 1975.
 - (c) amounts deductible under any enactment, or in pursuance of a request in writing by the debtor, for the purposes of a superannuation scheme, namely any enactment, rules, deed or other instrument providing for the payment of annuities or lump sums—
 - (i) to the persons with respect to whom the instrument has effect on their retirement at a specified age or on becoming incapacitated at some earlier age, or
 - (ii) to the personal representatives or the widows, relatives or dependants of such persons on their death or otherwise, whether with or without any further or other benefits.
- 4.—(1) On any pay-day—
- (a) “the normal deduction” is arrived at by applying the normal deduction rate (as specified in the relevant attachment of earnings order) with respect to the relevant period; and
 - (b) “the protected earnings” are arrived at by applying the protected earnings rate (as so specified) with respect to the relevant period.
- (2) For the purposes of this paragraph the relevant period in relation to any pay-day is the period beginning—
- (a) if it is the first pay-day of the debtor’s employment with the employer, with the first pay-day of the employment; or
 - (b) if on the last pay-day earnings were paid in respect of a period falling wholly or partly after that pay-day, with the first day after the end of that period; or
 - (c) in any other case, with the first day after the last pay-day, and ending—
 - (i) where earnings are paid in respect of a period falling wholly or partly after the pay-day, with the last day of that period; or
 - (ii) in any other case, with the pay-day.

Employer’s deduction (judgment debts and administration orders)

- 9B-1009** 5. In the case of an attachment of earnings order made to secure the payment of a judgment debt or payments under an administration order, the employer shall on any pay-day—
- (a) if the attachable earnings exceed the protected earnings, deduct from the attachable earnings the amount of the excess or the normal deduction, whichever is the less;
 - (b) make no deduction if the attachable earnings are equal to, or less than, the protected earnings.

Employer’s deduction (other cases)

- 9B-1010** 6.—(1) The following provision shall have effect in the case of an attachment of earnings order to which paragraph 5 above and paragraph 6A below do does not apply.

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

- (2) If on a pay-day the attachable earnings exceed the sum of—
 - (a) the protected earnings; and
 - (b) so much of any amount by which the attachable earnings on any previous pay-day fell short of the protected earnings as has not been made good by virtue of this sub-paragraph on another previous pay-day,
 then, in so far as the excess allows, the employer shall deduct from the attachable earnings the amount specified in the following sub-paragraph.
- (3) The said amount is the sum of—
 - (a) the normal deduction; and
 - (b) so much of the normal deduction on any previous pay-day as was not deducted on that day and has not been paid by virtue of this sub-paragraph on any other previous pay-day.
- (4) No deduction shall be made on any pay-day when the attachable earnings are equal to, or less than, the protected earnings.
- (6A) In the case of an attachment of earnings order made under Schedule 5 to the Courts Act 2003, the employer shall make deductions from the debtor's earnings in accordance with fines collection regulations made under that Schedule.

PART II

PRIORITY AS BETWEEN ORDERS

7. Where the employer is required to comply with two or more attachment of earnings orders in respect of the same debtor, all or none of which orders are made to secure either the payment of judgment debts or payments under an administration order, then on any pay-day the employer shall, for the purpose of complying with Part I of this Schedule—

9B-1011

- (a) deal with the orders according to the respective dates on which they were made, disregarding any later order until an earlier one has been dealt with;
- (b) deal with any later order as if the earnings to which it relates were the residue of the debtor's earnings after the making of any deduction to comply with any earlier order.

8. Where the employer is required to comply with two or more attachment of earnings orders, and one or more (but not all) of those orders are made to secure either the payment of judgment debts or payments under an administration order, then on any pay-day the employer shall, for the purpose of complying with Part I of this Schedule—

- (a) deal first with any order which is not made to secure the payment of a judgment debt or payments under an administration order (complying with paragraph 7 above if there are two or more such orders); and
- (b) deal thereafter with any order which is made to secure the payment of a judgment debt or payments under an administration order as if the earnings to which it relates were the residue of the debtor's earnings after the making of any deduction to comply with an order having priority by virtue of sub-paragraph (a) above; and
- (c) if there are two or more orders to which sub-paragraph (b) above applies, comply with paragraph 7 above in respect of those orders.

Note —Amended by the Social Security (Consequential Provisions) Act 1975 Sch.2; the Wages Councils Act 1979 Sch.6; the Administration of Justice Act 1982 s.54; the Wages Act 1986 Sch.4; and the Employment Rights Act 1996 Sch.1 para.3; and SI 2006/1737.

9B-1012

SECTION 24

SCHEDULE 4

ENACTMENTS PROVIDING BENEFITS WHICH ARE NOT TO BE TREATED AS DEBTOR'S EARNINGS

[...]

9B-1013

Note —Repealed by the Social Security Act 1986 s.86, Sch.11.

9B-1014

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

SECTION 9B: OTHER STATUTES AND REGULATIONS

SECTION 27

SCHEDULE 5

SECTION 20 OF MAINTENANCE ORDERS ACT 1958 AS HAVING EFFECT IN CONSEQUENCE OF THIS ACT

Special provisions as to magistrates' courts

9B-1015 20.—(1) Notwithstanding anything in this Act, the clerk of a magistrates' court who is entitled to receive payments under a maintenance order for transmission to another person shall not apply for the registration of the maintenance order under Part I of this Act or give notice in relation to the order in pursuance of subsection (1) of section five thereof unless he is requested in writing to do so by a person entitled to receive the payments through him; and where the clerk is requested as aforesaid—

(i) he shall comply with the request unless it appears to him unreasonable in the circumstances to do so;

(ii) the person by whom the request was made shall have the same liabilities for all the costs properly incurred in or about any proceedings taken in pursuance of the request as if the proceedings had been taken by that person.

(2) An application to a magistrates' court by virtue of subsection (2) of section four of this Act for the variation of a maintenance order shall be made by complaint.

(3)–(7) [*Not reproduced here*]

(8) For the avoidance of doubt it is hereby declared that a complaint may be made to enforce payment of a sum due and unpaid under a maintenance order notwithstanding that a previous complaint has been made in respect of that sum or a part thereof and whether or not an order was made in pursuance of the previous complaint.

Charging Orders Act 1979

9B-1016

(1979 C.53)

ARRANGEMENT OF SECTIONS

CHARGING ORDERS

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CHARGING ORDERS

Charging orders

9B-1017 1.—(1) Where, under a judgment or order of the High Court or a county court, a person (the “debtor”) is required to pay a sum of money to another person (the “creditor”) then, for the purpose of enforcing that judgment or order, the appropriate court may make an order in accordance with the provisions of this Act imposing on any such property of the debtor as may be specified in the order a charge for securing the payment of any money due or to become due under the judgment or order.

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

(2) The appropriate court is—

- (a) in a case where the property to be charged is a fund in court, the court in which that fund is lodged;
- (b) in a case where paragraph (a) above does not apply and the order to be enforced is a maintenance order of the High Court, the High Court or a county court;
- (c) in a case where neither paragraph (a) nor paragraph (b) above applies and the judgment or order to be enforced is a judgment or order of the High Court for a sum exceeding the county court limit, the High Court or a county court; and
- (d) in any other case, a county court.

In this section “county court limit” means the county court limit for the time being specified in an Order in Council under section 145 of the County Courts Act 1984, as the county court limit for the purposes of this section and “maintenance order” has the same meaning as in section 2(a) of the Attachment of Earnings Act 1971.

(3) An order under subsection (1) above is referred to in this Act as a “charging order”.

(4) Where a person applies to the High Court for a charging order to enforce more than one judgment or order, that court shall be the appropriate court in relation to the application if it would be the appropriate court, apart from this subsection, on an application relating to one or more of the judgments or orders concerned.

(5) In deciding whether to make a charging order the court shall consider all the circumstance of the case and, in particular, any evidence before it as to—

- (a) the personal circumstances of the debtor, and
- (b) whether any other creditor of the debtor would be likely to be unduly prejudiced by the making of the order.

(6) Subsections (7) and (8) apply where, under a judgment or order of the High Court or a county court, a debtor is required to pay a sum of money by instalments.

(7) The fact that there has been no default in payment of the instalments does not prevent a charging order from being made in respect of that sum.

(8) But if there has been no default, the court must take that into account when considering the circumstances of the case under subsection (5).

Note—Amended by the County Courts Jurisdiction Order 1981 (SI 1981/1123); the Administration of Justice Act 1982 ss.34, 37, Sch.3; and the County Courts Act 1984 Sch.2. Subsections (6) to (8) were added by the Tribunals, Courts and Enforcement Act 2007. **9B-1018**

“the county court limit”

The limit is £5,000. See para.9B-1020 below.

9B-1019

“appropriate court may make an order”

In a case where a High Court judgment or order is to be enforced and neither paras (a) nor (b) of s.1(2) applies, generally the appropriate court to make a charging order will be a county court. Where the amount required to be paid exceeds a statu-

9B-1020

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

SECTION 9B: OTHER STATUTES AND REGULATIONS

tory sum, the appropriate court will be the High Court or a county court. Originally, the statutory sum was fixed at £2,000. Subsequently it was set at the same level as “the county court limit” (s.1(2)(c)). By operation of the County Court Jurisdiction Order 1981 (SI 1981/1123) that limit currently stands at £5,000.

“money due under judgment or order”

- 9B–1020.1** There is a fundamental distinction between money which will inevitably become due, such as future instalments, and money which may or may not become due depending on whether a further procedural step is taken (e.g. obtaining judgment without trial after striking out under CPR r.3.5). The closing words of s.1(1) are wide enough to encompass future instalments specified in a judgment or order, but not wide enough to cover money which might become due under a future judgment or order (*Monte Developments Ltd v Court Management Consultants Ltd* [2010] EWHC 3071 (Ch), November 29, 2010, unrep. (Floyd J.) (charging order against defendant for sums identified in order for conditional leave to defend as sums for which claimant would be entitled to enter judgment in default and for costs which had not been assessed discharged)).

Property which may be charged

- 9B–1021** 2.—(1) Subject to subsection (3) below, a charge may be imposed by a charging order only on—

(a) any interest held by the debtor beneficially—

(i) in any asset of a kind mentioned in subsection (2) below, or

(ii) under any trust; or

(b) any interest held by a person as trustee of a trust (“the trust”), if the interest is in such an asset or is an interest under another trust and—

(i) the judgment or order in respect of which a charge is to be imposed was made against that person as trustee of the trust, or

(ii) the whole beneficial interest under the trust is held by the debtor unencumbered and for his own benefit, or

(iii) in a case where there are two or more debtors all of whom are liable to the creditor for the same debt, they together hold the whole beneficial interest under the trust unencumbered and for their own benefit.

(2) The assets referred to in subsection (1) above are—

(a) land,

(b) securities of any of the following kinds—

(i) government stock,

(ii) stock of any body (other than a building society) incorporated within England and Wales,

(iii) stock of any body incorporated outside England and Wales or of any state or territory outside the United Kingdom, being stock registered in a register kept at any place within England and Wales,

(iv) units of any unit trust in respect of which a register of the unit holders is kept at any place within England and Wales, or

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

(c) funds in court.

(3) In any case where a charge is imposed by a charging order on any interest in an asset of a kind mentioned in paragraph (b) or (c) of subsection (2) above, the court making the order may provide for the charge to extend to any interest or dividend payable in respect of the asset.

Provisions supplementing sections 1 and 2

3.—(1) A charging order may be made either absolutely or subject to conditions as to notifying the debtor or as to the time when the charge is to become enforceable, or as to other matters. **9B-1022**

(2) The Land Charges Act 1972 and the Land Registration Act 2002 shall apply in relation to charging orders as they apply in relation to other orders or writs issued or made for the purpose of enforcing judgments.

(3) [...]

(4) Subject to the provisions of this Act, a charge imposed by a charging order shall have the like effect and shall be enforceable in the same courts and in the same manner as an equitable charge created by the debtor by writing under his hand.

(5) The court by which a charging order was made may at any time, on the application of the debtor or of any person interested in any property to which the order relates, make an order discharging or varying the charging order.

(6) Where a charging order has been protected by an entry registered under the Land Charges Act 1972 or the Land Registration Act 2002, an order under subsection (5) above discharging the charging order may direct that the entry be cancelled.

(7) The Lord Chancellor may by order made by statutory instrument amend section 2(2) of this Act by adding to, or removing from, the kinds of asset for the time being referred to there, any asset of a kind which in his opinion ought to be so added or removed.

(8) Any order under subsection (7) above shall be subject to annulment in pursuance of a resolution of either House of Parliament.

Note —Amended by the Land Registration Act 2002 Sch.11, para.15.

9B-1023

* * * *

STOP ORDERS AND NOTICES

Stop orders and notices

5.—(1) In this section—

9B-1024

“stop order” means an order of the court prohibiting the taking, in respect of any of the securities specified in the order, of any of the steps mentioned in subsection (5) below;

“stop notice” means a notice requiring any person or body on whom it is duly served to refrain from taking, in respect of any of the securities specified in the notice, any of those steps

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

without first notifying the person by whom, or on whose behalf, the notice was served; and

“prescribed securities” means securities (including funds in court) of a kind prescribed by rules of court made under this section.

(2) The power to make rules of court under section 1 of, and Schedule 1 to, the Civil Procedure Act 1997 shall include power by any such rules to make provision—

- (a) for the High Court to make a stop order on the application of any person claiming to be entitled to an interest in prescribed securities; and
- (b) for the service of a stop notice by any person claiming to be entitled to an interest in prescribed securities.

(3) [...]

(4) Rules of court made by virtue of subsection (2) above shall prescribe the person or body on whom a copy of any stop order or a stop notice is to be served.

(5) The steps mentioned in subsection (1) above are—

- (a) the registration of any transfer of the securities;
- (b) in the case of funds in court, the transfer, sale, delivery out, payment or other dealing with the funds, or of the income thereon;
- (c) the making of any payment by way of dividend, interest or otherwise in respect of the securities; and
- (d) in the case of a unit trust, any acquisition of or other dealing with the units by any person or body exercising functions under the trust.

(6) Any rules of court made by virtue of this section may include such incidental, supplemental and consequential provisions as the authority making them consider necessary or expedient, and may make different provision in relation to different cases or classes of case.

9B-1025 *Note* —Amended by the Senior Courts Act 1981 s.153 and Sch.5; and the County Courts Act 1984 s.148, Sch.2. Section 75 of the County Courts Act 1984 (referred to in subs.(3)) was omitted by, and s.84 of the Senior Courts Act 1981 (referred to in subs.(2)) was amended by, the Civil Procedure Act 1997 Sch.2 paras 1(4) and 2(6).

SUPPLEMENTAL

Interpretation

9B-1026 6.—(1) In this Act—

“building society” has the same meaning as in the Building Societies Act 1986;

“charging order” means an order made under section 1(1) of this Act;

“debtor” and “creditor” have the meanings given by section 1(1) of this Act;

“dividend” includes any distribution in respect of any unit of a unit trust;

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

“government stock” means any stock issued by her Majesty’s government in the United Kingdom or any funds of, or annuity granted by, that government;

“stock” includes shares, debentures and any securities of the body concerned, whether or not constituting a charge on the assets of that body;

“unit trust” means any trust established for the purpose, or having the effect, of providing, for persons having funds available for investment, facilities for the participation by them, as beneficiaries under the trust, in any profits or income arising from the acquisition, holding management or disposal of any property whatsoever.

(2) For the purposes of section 1 of this Act references to a judgment or order of the High Court or a county court shall be taken to include references to a judgment, order, decree or award (however called) of any court or arbitrator (including any foreign court or arbitrator) which is or has become enforceable (whether wholly or to a limited extent) as if it were a judgment or order of the High Court or a county court.

(3) References in section 2 of this Act to any securities include references to any such securities standing in the name of the Accountant General.

Note —Amended by the Building Societies Act 1986 ss.54, 120, Sch.18.

9B-1027

Consequential amendment, repeals and transitional provisions

7.—(1) [...]

9B-1028

(2) [...]

(3) Any order made or notice given under any enactment repealed by this Act or under any rules of court revoked by rules of court made under this Act (the “new rules”) shall, if still in force when the provisions of this Act or, as the case may be, the new rules come into force, continue to have effect as if made under this Act or, as the case may be, under the new rules.

(4) [...]

Note —Amended by the Senior Courts Act 1981 Sch.7; the County Courts Act 1984 s.148, Sch.4; and by the Land Registration Act 2002 Sch.13, para.1.

9B-1029

Short title, commencement and extent

8.—(1) This Act may be cited as the Charging Orders Act 1979.

9B-1030

(2) This Act comes into force on such day as the Lord Chancellor may appoint by order made by statutory instrument.

(3) This Act does not extend to Scotland or Northern Ireland.

Civil Evidence Act 1968

9B-1031

(1968 c.64)

ARRANGEMENT OF SECTIONS

PART II

MISCELLANEOUS AND GENERAL

CONVICTIONS, ETC. AS EVIDENCE IN CIVIL PROCEEDINGS

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PART II

MISCELLANEOUS AND GENERAL

CONVICTIONS, ETC. AS EVIDENCE IN CIVIL PROCEEDINGS

Convictions as evidence in civil proceedings

9B-1032

11.—(1) In any civil proceedings the fact that a person has been convicted of an offence by or before any court in the United Kingdom or by a court-martial there or elsewhere shall (subject to subsection (3) below) be admissible in evidence for the purpose of proving, where to do so is relevant to any issue in those proceedings, that he committed that offence, whether he was so convicted upon a plea of guilty or otherwise and whether or not he is a party to the civil proceedings; but no conviction other than a subsisting one shall be admissible in evidence by virtue of this section.

(2) In any civil proceedings in which by virtue of this section a person is proved to have been convicted of an offence by or before any court in the United Kingdom or by a court-martial there or elsewhere—

- (a) he shall be taken to have committed that offence unless the contrary is proved; and
- (b) without prejudice to the reception of any other admissible evidence for the purpose of identifying the facts on which the conviction was based, the contents of any document which is admissible as evidence of the conviction, and the contents of the information, complaint, indictment or charge-sheet on which the person in question was convicted, shall be admissible in evidence for that purpose.

(3) Nothing in this section shall prejudice the operation of section 13 of this Act or any other enactment whereby a conviction or a find-

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ing of fact in any criminal proceedings is for the purposes of any other proceedings made conclusive evidence of any fact.

(4) Where in any civil proceedings the contents of any document are admissible in evidence by virtue of subsection (2) above, a copy of that document, or of the material part thereof, purporting to be certified or otherwise authenticated by or on behalf of the court or authority having custody of that document shall be admissible in evidence and shall be taken to be a true copy of that document or part unless the contrary is shown.

(5) Nothing in any of the following enactments, that is to say—

- (a) section 1C of the Powers of Criminal Courts Act 1973 (under which a conviction leading to discharge is to be disregarded except as therein mentioned);
- (b) section 191 of the Criminal Procedure (Scotland) Act 1975 (which makes similar provision in respect of convictions on indictment in Scotland); and
- (c) section 8 of the Probation Act (Northern Ireland) 1950 (which corresponds to the said section 12) or any corresponding enactment of the Parliament of Northern Ireland for the time being in force,

shall affect the operation of this section; and for the purposes of this section any order made by a court of summary jurisdiction in Scotland under section 383 or section 384 of the said Act of 1975 shall be treated as a conviction.

(6) In this section “court-martial” means a court-martial constituted under the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957 and in relation to a court-martial “conviction” means a finding of guilty which is, or falls to be treated as, the finding of the court, and “conviction” shall be construed accordingly.

Effect of rule

This section came into force on December 2, 1968 (Civil Evidence Act 1968 (Commencement No.1) Order 1968 (SI 1968/1734)). Amended by the Powers of Criminal Courts Act 1973 s.56(1); Sch.5; the Criminal Justice Act 1991 Sch.11; the Armed Forces Act 1996 Sch.1 para.100, Sch.7 Pt II; and by the Armed Forces Act 2001 Sch.7, para.1.

9B-1033

This section, and ss.12 and s.13, provide statutory exceptions to a rule established in *Hollington v Hewthorn* [1943] 1 K.B. 587, CA. The rule, insofar as it survives, has the effect of rendering inadmissible in civil proceedings findings in other, earlier proceedings (not being earlier criminal or matrimonial proceedings covered by ss.11 to 13). The rule has been subject to judicial criticism. For explanation, see *Secretary of State for Business Enterprise & Regulatory Reform v Aaron* [2008] EWCA Civ 1146, October 16, 2008, CA, unrep. (where held that findings in report of company investigators appointed under statute not rendered inadmissible by the rule in disqualification proceedings). In English criminal proceedings, evidence is admissible of convictions before any UK court in earlier proceedings (Police and Criminal Evidence Act 1984 s.73). In *Director of the Assets Recovery Agency v Virtosu* [2008] EWHC 149 (QB); [2008] 3 All E.R. 637 (Tugendhat J.), the question arose whether, in English civil recovery proceedings, evidence of the defendant’s previous conviction, not in a UK court (as s.11(1) provides), but in a foreign court, was admissible. Under Pt 5 of the Proceeds of Crime Act 2002, an order may be made for the recovery of property obtained through “unlawful conduct”. Such conduct is defined as including conduct occurring in a country outside the UK which is unlawful under the criminal law of that country, provided it would also be criminal conduct within the UK (s.241). In this case, in discharging the burden of proving such conduct, the claimant relied on evidence of

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SECTION 9B: OTHER STATUTES AND REGULATIONS

the defendant's conviction in a French court of people trafficking offences, including a summary of the matters found proved by that court. The judge rejected the submission that the evidence was rendered inadmissible by the rule in *Hollington v Hewthorn*.

Subsection (1): "Admissible in evidence"

9B-1034 The effect of admitting the conviction in evidence is in civil proceedings to shift on to the convicted person the burden of proving that he is innocent. This should be contrasted with the effect of s.13, below.

"A subsisting one"

9B-1035 A conviction which has been quashed on appeal cannot be "subsisting"; nor, it is thought, can it be "subsisting" if a free pardon has been granted. Moreover, although a conviction as to which an appeal is pending is "subsisting", a court cannot enter judgment in reliance upon it in a civil action, since the conviction may be quashed on appeal (*Re Raphael Dec'd, Raphael v D'antin* [1973] 1 W.L.R. 998).

Findings of adultery and paternity as evidence in civil proceedings

9B-1036 12.—(1) In any civil proceedings—

- (a) the fact that a person has been found guilty of adultery in any matrimonial proceedings; and
- (b) the fact that a person has been found to be the father of a child in relevant proceedings before any court in England and Wales or Northern Ireland or has been adjudged to be the father of a child in affiliation proceedings before any court in the United Kingdom,

shall (subject to subsection (3) below) be admissible in evidence for the purpose of proving, where to do so is relevant to any issue in those civil proceedings, that he committed the adultery to which the finding relates or, as the case may be, is (or was) the father of that child, whether or not he offered any defence to the allegation of adultery or paternity and whether or not he is a party to the civil proceedings; but no finding or adjudication other than a subsisting one shall be admissible in evidence by virtue of this section.

(2) In any civil proceedings in which by virtue of this section a person is proved to have been found guilty of adultery as mentioned in subsection (1)(a) above or to have been found or adjudged to be the father of a child as mentioned in subsection (1)(b) above—

- (a) he shall be taken to have committed the adultery to which the finding relates or, as the case may be, to be (or have been) the father of that child, unless the contrary is proved; and
- (b) without prejudice to the reception of any other admissible evidence for the purpose of identifying the facts on which the finding or adjudication was based, the contents of any document which was before the court, or which contains any pronouncement of the court, in the other proceedings in question shall be admissible in evidence for that purpose.

(3) Nothing in this section shall prejudice the operation of any enactment whereby a finding of fact in any matrimonial or affiliation proceedings is for the purposes of any other proceedings made conclusive evidence of any fact.

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

(4) Subsection (4) of section 11 of this Act shall apply for the purposes of this section as if the reference to subsection (2) were a reference to subsection (2) of this section.

(5) In this section—

“matrimonial proceedings” means any matrimonial cause in the High Court or a county court in England and Wales or in the High Court in Northern Ireland, any consistorial action in Scotland, or any appeal arising out of any such cause or action;

“relevant proceedings” means—

(a) proceedings on a complaint under section 42 of the National Assistance Act 1948 or section 26 of the Social Security Act 1986;

(b) proceedings under the Children Act 1989;

(c) proceedings which would have been relevant proceedings for the purposes of this section in the form in which it was in force before the passing of the Children Act 1989;

“affiliation proceedings” means, in relation to Scotland, any action of affiliation and aliment;

and in this subsection “consistorial action” does not include an action of aliment only between husband and wife raised in the Court of Session or an action of interim aliment raised in the sheriff court.

Note —This section came into force on December 2, 1968 (Civil Evidence Act 1968 **9B-1037** (Commencement No.1) Order 1968 (SI 1968/1734)). It has been amended by the Family Law Reform Act 1987 s.29; the Children Act 1989 Sch.13; the Courts and Legal Services Act 1990 Sch.16; and the Children (Northern Ireland Consequential Amendments) Order 1995 (SI 1995/756).

Subsection (1): “Found guilty of adultery”

See Practice Direction [1969] 1 W.L.R. 1192.

9B-1038

Conclusiveness of convictions for purposes of defamation actions

13.—(1) In an action for libel or slander in which the question whether the plaintiff did or did not commit a criminal offence is relevant to an issue arising in the action, proof that, at the time when that issue falls to be determined, he stands convicted of that offence shall be conclusive evidence that he committed that offence; and his conviction thereof shall be admissible in evidence accordingly. **9B-1039**

(2) In any such action as aforesaid in which by virtue of this section the plaintiff is proved to have been convicted of an offence, the contents of any document which is admissible as evidence of the conviction, and the contents of the information, complaint, indictment or charge-sheet on which he was convicted, shall, without prejudice to the reception of any other admissible evidence for the purpose of identifying the facts on which the conviction was based, be admissible in evidence for the purpose of identifying those facts.

(2A) In the case of an action for libel or slander in which there is more than one plaintiff—

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- (a) the references in subsections (1) and (2) above to the plaintiff shall be construed as references to any of the plaintiffs, and
- (b) proof that any of the plaintiffs stands convicted of an offence shall be conclusive evidence that he committed that offence so far as that fact is relevant to any issue arising in relation to his cause of action or that of any other plaintiff.

(3) For the purposes of this section a person shall be taken to stand convicted of an offence if but only if there subsists against him a conviction of that offence by or before a court in the United Kingdom or by a court-martial there or elsewhere.

(4) Subsections (4) to (6) of section 11 of this Act shall apply for the purposes of this section as they apply for the purposes of that section, but as if in the said subsection (4) the reference to subsection (2) were a reference to subsection (2) of this section.

(5) The foregoing provisions of this section shall apply for the purposes of any action begun after the passing of this Act, whenever the cause of action arose, but shall not apply for the purposes of any action begun before the passing of this Act or any appeal or other proceedings arising out of any such action.

9B-1040 *Note* —Amended by the Defamation Act 1996 s.12.

Subsection (1): “Shall be conclusive”

9B-1041 This should be contrasted with the effect of s.11 above. It is of course elementary that an *acquittal* in a criminal trial of the plaintiff is no bar to a plea of justification by a defendant in defamation proceedings.

PRIVILEGE

Privilege against incrimination of self or spouse

9B-1042 **14.**—(1) The right of a person in any legal proceedings other than criminal proceedings to refuse to answer any question or produce any document or thing if to do so would tend to expose that person to proceedings for an offence or for the recovery of a penalty—

- (a) shall apply only as regards criminal offences under the law of any part of the United Kingdom and penalties provided for by such law; and
- (b) shall include a like right to refuse to answer any question or produce any document or thing if to do so would tend to expose the spouse or civil partner of that person to proceedings for any such criminal offence or for the recovery of any such penalty.

(2) In so far as any existing enactment conferring (in whatever words) powers of inspection or investigation confers on a person (in whatever words) any right otherwise than in criminal proceedings to refuse to answer any question or give any evidence tending to incriminate that person, subsection (1) above shall apply to that right as it applies to the right described in that subsection; and every such existing enactment shall be construed accordingly.

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(3) In so far as any existing enactment provides (in whatever words) that in any proceedings other than criminal proceedings a person shall not be excused from answering any question or giving any evidence on the ground that to do so may incriminate that person, that enactment shall be construed as providing also that in such proceedings a person shall not be excused from answering any question or giving any evidence on the ground that to do so may incriminate the husband or wife of that person.

(4) Where any existing enactment (however worded) that—

(a) confers powers of inspection or investigation; or

(b) provides as mentioned in subsection (3) above,

further provides (in whatever words) that any answer or evidence given by a person shall not be admissible in evidence against that person in any proceedings or class of proceedings (however described, and whether criminal or not) that enactment shall be construed as providing also that any answer or evidence given by that person shall not be admissible in evidence against the husband or wife of that person in the proceedings or class of proceedings in question.

(5) In this section “existing enactment” means any enactment passed before this Act; and the references to giving evidence are references to giving evidence in any manner, whether by furnishing information, making discovery, producing documents or otherwise.

Note—Amended by the Civil Partnership Act 2004 s.261(1), Sch.27, para.30.

9B-1043

Effect of section

Section 72 of the Senior Courts Act 1981 (see para.9A-335 above) withdraws the privilege against incrimination of self or spouse in certain proceedings. The effect of s.14 is confined to the risk of exposure to proceedings and penalties under the law of any part of the UK in legal proceedings other than criminal proceedings. In subs.(1) of s.14 “penalty” is apt to include a fine under the EC Treaty (*Rio Tinto Zinc Corporation v Westinghouse Electrical Corporation*, [1978] A.C. 547, HL), or a fine imposed by a civil court as a penalty for contempt (*Bhimji v Chatwani (No.2)* [1992] 1 W.L.R. 1158). The phrase “proceedings for an offence” does not include proceedings in respect of a contempt of court (*Garvin v Domus Publishing* [1989] Ch. 335). In *C. Plc v P.* [2007] EWCA Civ 493; [2007] 3 W.L.R. 437, CA, the privilege was asserted by a respondent to a search order, generally and specifically in relation to incriminating material found on computer discs. In dismissing the respondent’s appeal the Court of Appeal held that the privilege can be invoked to refuse to disclose matters (including documents or other things) which are ordinarily discoverable, but material existing independently of the order and coming to light in the course of executing a proper order of the court are in an altogether different category (see further para.9A-271 above).

9B-1044

“Under the law of any part of the United Kingdom”

For an example of a case in which consideration was given to the risk of incrimination by reference to foreign law, see *Arab Monetary Fund v Hashim* [1989] 1 W.L.R. 565.

9B-1045

15. [...]

9B-1045.1

Note—Repealed by the Patents Act 1977 s.132 and Sch.6. See *ibid.*, ss.103-105.

9B-1045.2

Abolition of certain privileges

16.—(1) The following rules of law are hereby abrogated except in relation to criminal proceedings, that is to say—

9B-1046

(a) the rule whereby, in any legal proceedings, a person

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cannot be compelled to answer any question or produce any document or thing if to do so would tend to expose him to a forfeiture; and

- (b) the rule whereby, in any legal proceedings, a person other than a party to the proceedings cannot be compelled to produce any deed or other document relating to his title to any land.

(2) The rule of law whereby, in any civil proceedings, a party to the proceedings cannot be compelled to produce any document relating solely to his own case and in no way tending to impeach that case or support the case of any opposing party is hereby abrogated.

(3) Section 3 of the Evidence (Amendment) Act 1853 (which provides that a husband or wife shall not be compellable to disclose any communication made to him or her by his or her spouse during the marriage) shall cease to have effect except in relation to criminal proceedings.

(4) In section 43(1) of the Matrimonial Causes Act 1965 (under which the evidence of a husband or wife is admissible in any proceedings to prove that marital intercourse did or did not take place between them during any period, but a husband or wife is not compellable in any proceedings to give evidence of the matters aforesaid) the words from “but a husband or wife” to the end of the subsection shall cease to have effect except in relation to criminal proceedings.

(5) A witness in any proceedings instituted in consequence of adultery, whether a party to the proceedings or not, shall not be excused from answering any question by reason that it tends to show that he or she has been guilty of adultery; and accordingly the proviso to section 3 of the Evidence (Further Amendment) Act 1869 and, in section 43(2) of the Matrimonial Causes Act 1965, the words from “but” to the end of the subsection shall cease to have effect.

Consequential amendments relating to privilege

9B-1047 17.—(1) In relation to England and Wales—

- (a) [...]
- (b) section 8(5) of the Parliamentary Commissioner Act 1967 (which provides that, subject as there mentioned, no person shall be compelled for the purposes of an investigation under that Act to give any evidence or produce any document which he could not be compelled to give or produce in proceedings before the High Court) shall have effect as if before the word “proceedings” there were inserted the word “civil”;

and, so far as it applies to England and Wales, any other existing enactment, however framed or worded, which in relation to any tribunal, investigation or inquiry (however described) confers on persons required to answer questions or give evidence any privilege described by reference to the privileges of witnesses in proceedings before any court shall, unless the contrary intention appears, be construed as referring to the privileges of witnesses in civil proceedings before that court.

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(2) [...]

(3) Without prejudice to the generality of subsection (2) to (4) of section 14 of this Act, the enactments mentioned in the Schedule to this Act shall have effect subject to the amendments provided for by that Schedule (being verbal amendments to bring those enactments into conformity with the provisions of that section).

(4) Subsection (5) of section 14 of this Act shall apply for the purposes of this section as it applies for the purposes of that section.

Note—Subsection (2) was repealed by the Evidence (Proceedings in Other Jurisdictions) Act 1975 s.8(2) and Sch.2; subs.(1)(a) was repealed by the Inquiries Act 2005 s.49(2) and Sch.3.

9B-1048

GENERAL

General interpretation, and savings

18.—(1) In this Act “civil proceedings” includes, in addition to civil proceedings in any of the ordinary courts of law— **9B-1049**

(a) civil proceedings before any other tribunal, being proceedings in relation to which the strict rules of evidence apply; and

(b) an arbitration or reference, whether under an enactment or not,

but does not include civil proceedings in relation to which the strict rules of evidence do not apply.

(2) In this Act—

“court” does not include a court-martial, and, in relation to an arbitration or reference, means the arbitrator or umpire and, in relation to proceedings before a tribunal (not being one of the ordinary courts of law) means the tribunal;

“legal proceedings” includes an arbitration or reference, whether under an enactment or not;

and for the avoidance of doubt it is hereby declared that in this Act, and in any amendment made by this Act in any other enactment, references to a person’s husband or wife do not include references to a person who is no longer married to that person.

(3) Any reference in this Act to any other enactment is a reference thereto as amended, and includes a reference thereto as applied, by or under any other enactment.

(4) Nothing in this Act shall prejudice the operation of any enactment which provides (in whatever words) that any answer or evidence given by a person in specified circumstances shall not be admissible in evidence against him or some other person in any proceedings or class of proceedings (however described).

In this subsection the reference to giving evidence is a reference to giving evidence in any manner, whether by furnishing information, making discovery, producing documents or otherwise.

(5) Nothing in this Act shall prejudice—

(a) any power of a court, in any legal proceedings, to exclude evidence (whether by preventing questions from being put or otherwise) at its discretion; or

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SECTION 9B: OTHER STATUTES AND REGULATIONS

(b) the operation of any agreement (whenever made) between the parties to any legal proceedings as to the evidence which is to be admissible (whether generally or for any particular purpose) in those proceedings.

(6) It is hereby declared that where, by reason of any defect of speech or hearing from which he is suffering, a person called as a witness in any legal proceedings gives his evidence in writing or by signs, that evidence is to be treated for the purposes of this Act as being given orally.

9B-1050 *Note* —Committal proceedings for contempt of court in the course of civil litigation are not criminal but remain civil proceedings for the purposes of s.18, and although they were unreasoned or extraordinary because of possible penal consequences and thus the proof required was the criminal standard of proof that did not convert such proceedings (*Savings and Investment Bank Ltd v Gasco Investments (Netherlands) BV* (No.2) [1988] Ch. 422, CA).

Subsection (1): “Proceedings in relation to which the strict rules of evidence apply”

9B-1051 Some courts and tribunals, notably coroners’, election and prize courts, are not bound by the rules of evidence (*R. v Deputy Industrial Injuries Commissioner, Ex p. Moore* [1965] 1 Q.B. 456; and *Wednesbury Corporation v Ministry of Housing and Local Government* (No.2) [1966] 2 Q.B. 275).

* * * *

Short title, repeals, extent and commencement

9B-1052 **20.**—(1) This Act may be cited as the Civil Evidence Act 1968.

(2) Sections 1, 2, 6(1)(except the words from “Proceedings” to “references”) and 6(2)(b) of the Evidence Act 1938 are hereby repealed.

(3) This Act shall not extend to Scotland or to Northern Ireland.

(4) The following provisions of this Act, namely sections 13 to 19, this section (except subsection (2)) and the Schedule, shall come into force on the day this Act is passed, and the other provisions of this Act shall come into force on such day as the Lord Chancellor may by order made by statutory instrument appoint; and different days may be so appointed for different purposes of this Act or for the same purposes in relation to different courts or proceedings or otherwise in relation to different circumstances.

9B-1053 *Note* —Amended by the Northern Ireland Constitution Act 1973 Sch.6.

[THE NEXT PARAGRAPH IS 9B-1055.]

Civil Evidence Act 1972

9B-1055 (1972 c.30)

ARRANGEMENT OF SECTIONS

| SECT. | | |
|-------|---|---------|
| 2. | Rules of court with respect to expert reports and oral expert evidence..... | 9B-1057 |
| 3. | Admissibility of expert opinion and certain expressions of non-expert opinion | 9B-1060 |
| 4. | Evidence of foreign law | 9B-1063 |

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CIVIL EVIDENCE ACT 1972

| | | |
|----|--|---------|
| 5. | Interpretation, application to arbitrations, etc., and savings . . . | 9B-1064 |
| 6. | Short title, extent and commencement. | 9B-1066 |

Note

This Act is concerned with (1) evidence of opinion, and (2) foreign evidence. **9B-1056**
Initially, s.5 (Interpretation, application to arbitration, etc.) stated that the provisions of the Act applied to “civil proceedings” and in “courts” as defined in the Civil Evidence Act 1968 s.18 (see para.9B-1049 above). This provision, in combination with Commencement Orders issued in 1973 and 1974, restricted the application of the Act to certain civil proceedings in certain courts. However, s.5(1) was amended by the Civil Evidence Act 1995 and now states (see para.9B-1064 below) that “civil proceedings” means civil proceedings “before any tribunal in relation to which the strict rules of evidence apply, whether as a matter of law or by agreement between the parties” (e.g. an arbitration agreement); references to “court” should be construed accordingly (note also s.5(2)).

* * * *

Rules of court with respect to expert reports and oral expert evidence

2.—(1) [...] **9B-1057**

(2) [...]

(3) Notwithstanding any enactment or rule of law by virtue of which documents prepared for the purpose of pending or contemplated civil proceedings or in connection with the obtaining or giving of legal advice are in certain circumstances privileged from disclosure, provision may be made by rules of court—

- (a) for enabling the court in any civil proceedings to direct, with respect to medical matters or matters of any other class which may be specified in the direction, that the parties or some of them shall each by such date as may be so specified (or such later date as may be permitted or agreed in accordance with the rules) disclose to the other or others in the form of one or more expert reports the expert evidence on matters of that class which he proposes to adduce as part of his case at the trial; and
- (b) for prohibiting a party who fails to comply with a direction given in any such proceedings under rules of court made by virtue of paragraph (a) above from adducing in evidence except with the leave of the court, any statement (whether of fact or opinion) contained in any expert report whatsoever in so far as that statement deals with matters of any class specified in the direction.

(4) Provision may be made by rules of court as to the conditions subject to which oral expert evidence may be given in civil proceedings.

(5) Without prejudice to the generality of subsection (4) above, rules of court made in pursuance of that subsection may make provision for prohibiting a party who fails to comply with a direction given as mentioned in subsection (3)(b) above from adducing, except with the leave of the court, any oral expert evidence whatsoever with respect to matters of any class specified in the direction.

(6) Any rules of court made in pursuance of this section may make different provisions for different classes of cases, for expert

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reports dealing with matters of different classes, and for other different circumstances.

(7) References in this section to an expert report are references to a written report by a person dealing wholly or mainly with matters on which he is (or would if living be) qualified to give expert evidence.

(8) [...]

9B-1058 *Note* —Amended by the MCA 1980 s.154, Sch.7; the Senior Courts Act 1981 s.152(4), Sch.7; the County Courts Act 1984 s.148(1), Sch.2; the Civil Evidence Act 1995 s.15(2), Sch.2; the Courts Act 2003 s.109(1), (3), Sch.8, para.165, Sch.10.

Subsection (2): “Documents”

9B-1059 This word is apt to include a letter (*Carlish v East Ham Corporation and Edwards* [1948] 3 K.B. 380; a tape-recording: *Grant v South-Western and County Properties* [1975] Ch. 185; or a film: *Senior v Holdsworth Ex p. Independent Television* [1976] Q.B. 23).

Admissibility of expert opinion and certain expressions of non-expert opinion

9B-1060 3.—(1) Subject to any rules of court made in pursuance of this Act, where a person is called as a witness in any civil proceedings, his opinion on any relevant matter on which he is qualified to give expert evidence shall be admissible in evidence.

(2) It is hereby declared that where a person is called as a witness in any civil proceedings, a statement of opinion by him on any relevant matter on which he is not qualified to give expert evidence, if made as a way of conveying relevant facts personally perceived by him, is admissible as evidence of what he perceived.

(3) In this section “relevant matter” includes an issue in the proceedings in question.

9B-1061 *Note* —Amended by the Civil Evidence Act 1995 s.15(2), Sch.2.

“shall be automatically given in evidence”

9B-1062 An expert’ report is not automatically admissible solely by virtue of its coming within s.3; it must also be helpful to the court in arriving at its conclusions where the court accepted that there existed a recognised expertise (*Barings Plc (In Liquidation) v Coopers & Lybrand (No.2)* [2001] Lloyd’s Rep. Bank. 85; [2001] Lloyd’s Rep. P.N. 379; [2001] P.N.L.R. 22; (2001) 98(13) L.S.G. 40 (Evans-Lombe J.)).

Evidence of foreign law

9B-1063 4.—(1) It is hereby declared that in civil proceedings a person who is suitably qualified to do so on account of his knowledge or experience is competent to give expert evidence as to the law of any country or territory outside the United Kingdom, or of any part of the United Kingdom other than England and Wales, irrespective of whether he has acted or is entitled to act as a legal practitioner there.

(2) Where any question as to the law of any country or territory outside the United Kingdom, or of any part of the United Kingdom other than England and Wales, with respect to any matter has been determined (whether before or after the passing of this Act) in any such proceedings as are mentioned in subsection (4) below, then in any civil proceedings (not being proceedings before a court which can take judicial notice of the law of that country, territory or part with respect to that matter)—

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- (a) any finding made or decision given on that question in the first-mentioned proceedings shall, if reported or recorded in citable form, be admissible in evidence for the purpose of proving the law of that country, territory or part with respect to that matter; and
- (b) if that finding or decision, as so reported or recorded, is adduced for that purpose, the law of that country, territory or part with respect to that matter shall be taken to be in accordance with that finding or decision unless the contrary is proved:

Provided that paragraph (b) above shall not apply in the case of a finding or decision which conflicts with another finding or decision on the same question adduced by virtue of this subsection in the same proceedings.

(3) Except with the leave of the court, a party to any civil proceedings shall not be permitted to adduce any such finding or decision as is mentioned in subsection (2) above by virtue of that subsection unless he has in accordance with rules of court given to every other party to the proceedings notice that he intends to do so.

(4) The proceedings referred to in subsection (2) above are the following, whether civil or criminal, namely—

- (a) proceedings at first instance in any of the following courts, namely the High Court, the Crown Court, a court of quarter sessions, the Court of Chancery of the county palatine of Lancaster and the Court of Chancery of the county palatine of Durham;
- (b) appeals arising out of any such proceedings as are mentioned in paragraph (a) above;
- (c) proceedings before the Judicial Committee of the Privy Council on appeal (whether to Her Majesty in Council or to the Judicial Committee as such) from any decision of any court outside the United Kingdom.

(5) For the purposes of this section a finding or decision on any such question as is mentioned in subsection (2) above shall be taken to be reported or recorded in citable form if, but only if, it is reported or recorded in writing in a report, transcript or other document which, if that question had been a question as to the law of England and Wales, could be cited as an authority in legal proceedings in England and Wales.

Interpretation, application to arbitrations, etc., and savings

5.—(1) In this Act “civil proceedings” means civil proceedings, **9B-1064** before any tribunal, in relation to which the strict rules of evidence apply, whether as a matter of law or by agreement of the parties; and references to “the court” shall be construed accordingly.

(2) The rules of court made for the purposes of the application of sections 2 and 4 of this Act to proceedings in the High Court apply, except in so far as their application is excluded by agreement, to proceedings before tribunals other than the ordinary courts of law, subject to such modifications as may be appropriate.

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

SECTION 9B: OTHER STATUTES AND REGULATIONS

Any question arising as to what modifications are appropriate shall be determined, in default of agreement, by the tribunal.

(3) Nothing in this Act shall prejudice—

- (a) any power of a court, in any civil proceedings, to exclude evidence (whether by preventing questions from being put or otherwise) at its discretion; or
- (b) the operation of any agreement (whenever made) between the parties to any civil proceedings as to the evidence which is to be admissible (whether generally or for any particular purpose) in those proceedings.

9B-1065 *Note* —Subsections (1) and (2) were substituted by the Civil Evidence Act 1995 s.15(1) and Sch.1 para.7.

Short title, extent and commencement

9B-1066 6.—(1) This Act may be cited as the Civil Evidence Act 1972.

(2) This Act shall not extend to Scotland or Northern Ireland.

(3) This Act, except sections 4(2) to (5) shall come into force on 1st January 1973, and sections 4(2) to (5) shall come into force on such day as the Lord Chancellor may by order made by statutory instrument appoint; and different days may be so appointed for different purposes or for the same purposes in relation to different courts or proceedings or otherwise in relation to different circumstances.

9B-1067 *Note* —Amended by the Civil Evidence Act 1995 s.15(2), Sch.2.

Civil Evidence Act 1995

9B-1068 (1995 c.38)

ARRANGEMENT OF SECTIONS

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Introduction

The Civil Evidence Act 1995 received the Royal Assent on November 8, 1995, and, with the single exception of s.10 (Ogden Tables), came into force on January 31, 1997 (SI 1996/3217). Essentially, it: **9B-1069**

- (1) Abolishes the principle excluding evidence on the ground that it is hearsay.
- (2) Creates provisions governing the receiving of such evidence.
- (3) Preserves certain Common Law rules relating to hearsay.
- (4) Provides for the manner of proving documents and records.
- (5) Applies to any proceedings in England and Wales to which the strict rules of evidence apply.
- (6) Does not apply to cases started before January 31, 1996 (but see below, "Important note").
- (7) Repeals the Civil Evidence Act 1968 Pt I.

Editorial comment

For rules of court, see CPR Pt 33. In 1998, the Lord Chancellor decided not to bring s.10 into force, pending further consideration. **9B-1070**

ADMISSIBILITY OF HEARSAY EVIDENCE

Admissibility of hearsay evidence

1.—(1) In civil proceedings evidence shall not be excluded on the ground that it is hearsay. **9B-1071**

(2) In this Act—

- (a) "hearsay" means a statement made otherwise than by a person while giving oral evidence in the proceedings which is tendered as evidence of the matters stated; and
- (b) references to hearsay include hearsay of whatever degree.

(3) Nothing in this Act affects the admissibility of evidence admissible apart from this section.

(4) The provisions of sections 2 to 6 (safeguards and supplementary provisions relating to hearsay evidence) do not apply in relation to hearsay evidence admissible apart from this section, notwithstanding that it may also be admissible by virtue of this section.

SAFEGUARDS IN RELATION TO HEARSAY EVIDENCE

Notice of proposal to adduce hearsay evidence

2.—(1) A party proposing to adduce hearsay evidence in civil proceedings shall, subject to the following provisions of this section, give to the other party or parties to the proceedings— **9B-1072**

- (a) such notice (if any) of that fact, and
- (b) on request, such particulars of or relating to the evidence,

as is reasonable and practicable in the circumstances for the purpose of enabling him or them to deal with any matters arising from its being hearsay.

(2) Provision may be made by rules of court—

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- (a) specifying classes of proceedings or evidence in relation to which subsection (1) does not apply, and
- (b) as to the manner in which (including the time within which) the duties imposed by that subsection are to be complied with in the cases where it does apply.

(3) Subsection (1) may also be excluded by agreement of the parties; and compliance with the duty to give notice may in any case be waived by the person to whom notice is required to be given.

(4) A failure to comply with subsection (1), or with rules under subsection (2)(b), does not affect the admissibility of the evidence but may be taken into account by the court—

- (a) in considering the exercise of its powers with respect to the course of proceedings and costs, and
- (b) as a matter adversely affecting the weight to be given to the evidence in accordance with section 4.

Power to call witness for cross-examination on hearsay statement

9B-1073 3. Rules of court may provide that where a party to civil proceedings adduces hearsay evidence of a statement made by a person and does not call that person as a witness, any other party to the proceedings may, with the leave of the court, call that person as a witness and cross-examine him on the statement as if he had been called by the first-mentioned party and as if the hearsay statement were his evidence in chief.

Considerations relevant to weighing of hearsay evidence

9B-1074 4.—(1) In estimating the weight (if any) to be given to hearsay evidence in civil proceedings the court shall have regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence.

- (2) Regard may be had, in particular, to the following—
 - (a) whether it would have been reasonable and practicable for the party by whom the evidence was adduced to have produced the maker of the original statement as a witness;
 - (b) whether the original statement was made contemporaneously with the occurrence or existence of the matters stated;
 - (c) whether the evidence involves multiple hearsay;
 - (d) whether any person involved has any motive to conceal or misrepresent matters;
 - (e) whether the original statement was an edited account, or was made in collaboration with another or for a particular purpose;
 - (f) whether the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight.

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Competence and credibility

5.—(1) Hearsay evidence shall not be admitted in civil proceedings if or to the extent that it is shown to consist of, or to be proved by means of, a statement made by a person who at the time he made the statement was not competent as a witness. For this purpose “not competent as a witness” means suffering from such mental or physical infirmity, or lack of understanding, as would render a person incompetent as a witness in civil proceedings; but a child shall be treated as competent as a witness if he satisfies the requirements of section 96(2)(a) and (b) of the Children Act 1989 (conditions for reception of unsworn evidence of child). **9B-1075**

(2) Where in civil proceedings hearsay evidence is adduced and the maker of the original statement, or of any statement relied upon to prove another statement, is not called as a witness—

- (a) evidence which if he had been so called would be admissible for the purpose of attacking or supporting his credibility as a witness is admissible for that purpose in the proceedings; and
- (b) evidence tending to prove that, whether before or after he made the statement, he made any other statement inconsistent with it is admissible for the purpose of showing that he had contradicted himself.

Provided that evidence may not be given of any matter of which, if he had been called as a witness and had denied that matter in cross-examination, evidence could not have been adduced by the cross-examining party.

Previous statements of witnesses

6.—(1) Subject as follows, the provisions of this Act as to hearsay evidence in civil proceedings apply equally (but with any necessary modifications) in relation to a previous statement made by a person called as a witness in the proceedings. **9B-1076**

(2) A party who has called or intends to call a person as a witness in civil proceedings may not in those proceedings adduce evidence of a previous statement made by that person, except—

- (a) with the leave of the court, or
- (b) for the purpose of rebutting a suggestion that his evidence has been fabricated.

This shall not be construed as preventing a witness statement (that is, a written statement of oral evidence which a party to the proceedings intends to lead) from being adopted by a witness in giving evidence or treated as his evidence.

(3) Where in the case of civil proceedings section 3, 4 or 5 of the Criminal Procedure Act 1865 applies, which make provision as to—

- (a) how far a witness may be discredited by the party producing him,
- (b) the proof of contradictory statements made by a witness, and

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(c) cross-examination as to previous statements in writing, this Act does not authorise the adducing of evidence of a previous inconsistent or contradictory statement otherwise than in accordance with those sections.

This is without prejudice to any provision made by rules of court under section 3 above (power to call witness for cross-examination on hearsay statement).

(4) Nothing in this Act affects any of the rules of law as to the circumstances in which, where a person called as a witness in civil proceedings is cross-examined on a document used by him to refresh his memory, that document may be made evidence in the proceedings.

(5) Nothing in this section shall be construed as preventing a statement of any description referred to above from being admissible by virtue of section 1 as evidence of the matters stated.

Evidence formerly admissible at common law

9B-1077 7.—(1) The common law rule effectively preserved by section 9(1) and (2)(a) of the Civil Evidence Act 1968 (admissibility of admissions adverse to a party) is superseded by the provisions of this Act.

(2) The common law rules effectively preserved by section 9(1) and (2)(b) to (d) of the Civil Evidence Act 1968, that is, any rule of law whereby in civil proceedings—

- (a) published works dealing with matters of a public nature (for example, histories, scientific works, dictionaries and maps) are admissible as evidence of facts of a public nature stated in them,
- (b) public documents (for example, public registers, and returns made under public authority with respect to matters of public interest) are admissible as evidence of facts stated in them, or
- (c) records (for example, the records of certain courts, treaties, Crown grants, pardons and commissions) are admissible as evidence of facts stated in them.

shall continue to have effect.

(3) The common law rules effectively preserved by section 9(3) and (4) of the Civil Evidence Act 1968, that is, any rule of law whereby in civil proceedings—

- (a) evidence of a person's reputation is admissible for the purpose of proving his good or bad character, or
- (b) evidence of reputation or family tradition is admissible—
 - (i) for the purpose of proving or disproving pedigree or the existence of a marriage, or
 - (ii) for the purpose of proving or disproving the existence of any public or general right or of identifying any person or thing,

shall continue to have effect in so far as they authorise the court to treat such evidence as proving or disproving that matter.

Where any such rule applies, reputation or family tradition shall

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be treated for the purposes of this Act as a fact and not as a statement or multiplicity of statements about the matter in question.

(4) The words in which a rule of law mentioned in this section is described are intended only to identify the rule and shall not be construed as altering it in any way.

OTHER MATTERS

Proof of statements contained in documents

8.—(1) Where a statement contained in a document is admissible **9B-1078** as evidence in civil proceedings, it may be proved—

- (a) by the production of that document, or
- (b) whether or not that document is still in existence, by the production of a copy of that document or of the material part of it,

authenticated in such manner as the court may approve.

(2) It is immaterial for this purpose how many removes there are between a copy and the original.

Proof of records of business or public authority

9.—(1) A document which is shown to form part of the records of a **9B-1079** business or public authority may be received in evidence in civil proceedings without further proof.

(2) A document shall be taken to form part of the records of a business or public authority if there is produced to the court a certificate to that effect signed by an officer of the business or authority to which the records belong.

For this purpose—

- (a) a document purporting to be a certificate signed by an officer of a business or public authority shall be deemed to have been duly given by such an officer and signed by him; and
- (b) a certificate shall be treated as signed by a person if it purports to bear a facsimile of his signature.

(3) The absence of an entry in the records of a business or public authority may be proved in civil proceedings by affidavit of an officer of the business or authority to which the records belong.

(4) In this section—

“records” means records in whatever form;

“business” includes any activity regularly carried on over a period of time, whether for profit or not, by any body (whether corporate or not) or by an individual;

“officer” includes any person occupying a responsible position in relation to the relevant activities of the business or public authority or in relation to its records; and

“public authority” includes any public or statutory undertaking, any government department and any person holding office under Her Majesty.

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(5) The court may, having regard to the circumstances of the case, direct that all or any of the above provisions of this section do not apply in relation to a particular document or record, or description of documents or records.

Admissibility and proof of Ogden Tables

9B-1080 10.—(1) The actuarial tables (together with explanatory notes) for use in personal injury and fatal accident cases issued from time to time by the Government Actuary's Department are admissible in evidence for the purpose of assessing, in an action for personal injury, the sum to be awarded as general damages for future pecuniary loss.

(2) They may be proved by the production of a copy published by Her Majesty's Stationery Office.

(3) For the purposes of this section—

- (a) "personal injury" includes any disease and any impairment of a person's physical or mental condition; and
- (b) "action for personal injury" includes an action brought by virtue of the Law Reform (Miscellaneous Provisions) Act 1934 or the Fatal Accidents Act 1976.

GENERAL

Meaning of "civil proceedings"

9B-1081 11. In this Act "civil proceedings" means civil proceedings, before any tribunal, in relation to which the strict rules of evidence apply, whether as a matter of law or by agreement of the parties. References to "the court" and "rules of court" shall be construed accordingly.

Provisions as to rules of court

9B-1082 12.—(1) Any power to make rules of court regulating the practice or procedure of the court in relation to civil proceedings includes power to make such provision as may be necessary or expedient for carrying into effect the provisions of this Act.

(2) Any rules of court made for the purposes of this Act as it applies in relation to proceedings in the High Court apply, except in so far as their operation is excluded by agreement, to arbitration proceedings to which this Act applies, subject to such modifications as may be appropriate.

Any question arising as to what modifications are appropriate shall be determined, in default of agreement, by the arbitrator or umpire, as the case may be.

Interpretation

9B-1083 13. In this Act—

"civil proceedings" has the meaning given by section 11 and "court" and "rules of court" shall be construed in accordance with that section;

"document" means anything in which information of any de-

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scription is recorded, and “copy”, in relation to a document, means anything onto which information recorded in the document has been copied, by whatever means and whether directly or indirectly;

“hearsay” shall be construed in accordance with section 1(2);

“oral evidence” includes evidence which, by reason of a defect of speech or hearing, a person called as a witness gives in writing or by signs;

“the original statement”, in relation to hearsay evidence, means the underlying statement (if any) by—

(a) in the case of evidence of fact, a person having personal knowledge of that fact, or

(b) in the case of evidence of opinion, the person whose opinion it is; and

“statement” means any representation of fact or opinion, however made.

Savings

14.—(1) Nothing in this Act affects the exclusion of evidence on grounds other than that it is hearsay. This applies whether the evidence falls to be excluded in pursuance of any enactment or rule of law, for failure to comply with rules of court or an order of the court, or otherwise. **9B-1084**

(2) Nothing in this Act affects the proof of documents by means other than those specified in section 8 or 9.

(3) Nothing in this Act affects the operation of the following enactments—

- (a) section 2 of the Documentary Evidence Act 1868 (mode of proving certain official documents);
- (b) section 2 of the Documentary Evidence Act 1882 (documents printed under the superintendence of Stationery Office);
- (c) section 1 of the Evidence (Colonial Statutes) Act 1907 (proof of statutes of certain legislatures);
- (d) section 1 of the Evidence (Foreign, Dominion and Colonial Documents) Act 1933 (proof and effect of registers and official certificates of certain countries);
- (e) section 5 of the Oaths and Evidence (Overseas Authorities and Countries) Act 1963 (provision in respect of public registers of other countries).

Consequential amendments and repeals

15.—(1) The enactments specified in Schedule 1 are amended in accordance with that Schedule, the amendments being consequential on the provisions of this Act. **9B-1085**

(2) The enactments specified in Schedule 2 are repealed to the extent specified.

Short title, commencement and extent

16.—(1) This Act may be cited as the Civil Evidence Act 1995. **9B-1086**

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

SECTION 9B: OTHER STATUTES AND REGULATIONS

(2) The provisions of this Act come into force on such day as the Lord Chancellor may appoint by order made by statutory instrument, and different days may be appointed for different provisions and for different purposes.

(3) Subject to subsection (3A), the provisions of this Act shall not apply in relation to proceedings begun before commencement.

(3A) Transitional provisions for the application of the provisions of this Act to proceedings begun before commencement may be made by rules of court or practice directions.

(4) This Act extends to England and Wales.

(5) Section 10 (admissibility and proof of Ogden Tables) also extends to Northern Ireland.

As it extends to Northern Ireland, the following shall be substituted for subsection (3)(b)—

“(b) “action for personal injury” includes an action brought by virtue of the Law Reform (Miscellaneous Provisions) (Northern Ireland) Act 1937 or the Fatal Accidents (Northern Ireland) Order 1977.”

(6) The provisions of Schedules 1 and 2 (consequential amendments and repeals) have the same extent as the enactments respectively amended or repealed.

9B-1087 *Note*—Subsection (3) was replaced by, and subs.(3A) was added by, the Civil Procedure (Modification of Enactments) Order 1999 (SI 1999/1217) art.4. These modifications enabled the 1995 Act and the CPR provisions related to it to be applied to cases begun before the original commencement date of the Act (i.e. before January 31, 1997) (see further Vol.1, para.33.0.2).

Civil Liability (Contribution) Act 1978

9B-1088

(1978 c.47)

ARRANGEMENT OF SECTIONS

PROCEEDINGS FOR CONTRIBUTION

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Section 1—Entitlement to contribution

PROCEEDINGS FOR CONTRIBUTION

Entitlement to contribution

9B-1089 1.—(1) Subject to the following provisions of this section, any

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person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise).

(2) A person shall be entitled to recover contribution by virtue of subsection (1) above notwithstanding that he has ceased to be liable in respect of the damage in question since the time when the damage occurred, provided that he was so liable immediately before he made or was ordered or agreed to make the payment in respect of which the contribution is sought.

(3) A person shall be liable to make contribution by virtue of subsection (1) above notwithstanding that he has ceased to be liable in respect of the damage in question since the time when the damage occurred, unless he ceased to be liable by virtue of the expiry of a period of limitation or prescription which extinguished the right on which the claim against him in respect of the damage was based.

(4) A person who has made or agreed to make any payment in bona fide settlement or compromise of any claim made against him in respect of any damage (including a payment into court which has been accepted) shall be entitled to recover contribution in accordance with this section without regard to whether or not he himself is or ever was liable in respect of the damage, provided, however, that he would have been liable assuming that the factual basis of the claim against him could be established.

(5) A judgment given in any action brought in any part of the United Kingdom by or on behalf of the person who suffered the damage in question against any person from whom contribution is sought under this section shall be conclusive in the proceedings for contribution as to any issue determined by that judgment in favour of the person from whom the contribution is sought.

(6) References in this section to a person's liability in respect of any damage are references to any such liability which has been or could be established in an action brought against him in England and Wales by or on behalf of the person who suffered the damage; but it is immaterial whether any issue arising in any such action was or would be determined (in accordance with the rules of private international law) by reference to the law of a country outside England and Wales.

Note —The words “any person liable in respect of any damage suffered by another person ... in respect of the same damage” means the damage suffered by the same person (*Birse Construction Ltd v Haiste Ltd* [1996] 1 W.L.R. 675; [1996] 2 All E.R. 1, CA). See also *Howkins & Harrison v Taylor* [2001] Lloyd's Rep. PN 1, and *Eastgate Group Ltd v Lindsey Morden Group Inc* (2001) 151 N.L.J. 458. In *Royal Brompton Hospital NHS Trust v Hammond* [2002] UKHL 14; [2002] 1 W.L.R. 1397, HL, it was said that, although the purpose of the 1978 Act was to enlarge the category of causes of action capable of giving rise to claims for contribution, the requirement of a shared, or common, liability among contributors remains the root of the contribution principle. The word “payment” in s.1(4) includes a payment in kind, at any rate where the payment in kind is capable of valuation in monetary terms. There is no suggestion in s. 1(1) of a limit or restriction on the right of a person to claim contribution from another person liable in respect of the same damage. Subsections (2) to (4) of s. 1 were designed, not to restrict such right, but to remove restrictions or defences that might otherwise be raised (*Baker & Davies plc v Leslie Wilks* [2005] EWHC 1179 (TCC); [2005] 3 All E.R. 603).

Section 6(1) states that a party is a person “liable in respect of any damage” within

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SECTION 9B: OTHER STATUTES AND REGULATIONS

s.1(1) if the person who suffered the damage “is entitled to recover compensation from him in respect of that damage” (s.6(1)). In *Charter plc v City Index Ltd* [2007] EWCA Civ 1382; [2008] 2 W.L.R. 950, CA the authorities on these provisions were examined, a case in which a claim was made for “knowing receipt” and the defendants sought contribution from the claimant’s auditors. It was held (affirming the trial judge in this respect) that the claimant’s remedy was compensatory (even if it could also be described as restitutionary), and the Pt 20 claim satisfied ss.1 and 6. In this case the trial judge further held that, as the overriding cause of the claimant’s loss was that the defendants, having knowingly received money, paid it away in bad faith, it would not be just or equitable to require the auditors to contribute to the defendants’ liability, and summarily dismissed the defendants’ contribution claim on this ground (see [2006] EWHC 2508 (Ch), [2007] 1 W.L.R. 26). The Court of Appeal reversed the judge and allowed the defendants’ appeal on this ground, holding that there was no rule of law or practice (at least on the facts of this case) that the knowing recipient should bear 100 per cent of the loss. Such a rule would place an unjustified restriction on the wide scope of the court’s discretion under s.2. The extent of the claimant’s loss depended on the facts which could only be assessed at trial. A party (X) is liable in respect of any damage within the meaning of these provisions if another party (Y) was entitled to recover compensation from X in respect of that damage, whatever the legal basis of X’s liability (*BRB (Residuary) Ltd v Connex South Eastern Ltd* [2008] EWHC 1172 (QB); [2008] 1 W.L.R. 2867 (Cranston J.) where X, under the mistaken belief that they were contractually obliged to indemnify a third party (Z) in respect of Y’s damage and had suffered judgment on liability to be entered against them, were subsequently allowed, on the basis that they and Z were liable in respect of the same damage, to bring a contribution claim against Z).

The Compensation Act 2006 s.3(3) expressly preserves a defendant’s right to claim contribution from another in mesothelioma cases in the circumstances covered by that provision.

Claims for contribution are subject to a special time limit for limitation purposes (Limitation Act 1980 s.10, see para.8–21 above).

Assessment of contribution

9B–1091 2.—(1) Subject to subsection (3) below, in any proceedings for contribution under section 1 above the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person’s responsibility for the damage in question.

(2) Subject to subsection (3) below, the court shall have power in any such proceedings to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity.

(3) Where the amount of the damages which have or might have been awarded in respect of the damage in question in any action brought in England and Wales by or on behalf of the person who suffered it against the person from whom the contribution is sought was or would have been subject to—

- (a) any limit imposed by or under any enactment or by any agreement made before the damage occurred;
- (b) any reduction by virtue of section 1 of the Law Reform (Contributory Negligence) Act 1945 or section 5 of the Fatal Accidents Act 1976; or
- (c) any corresponding limit or reduction under the law of a country outside England and Wales;

the person from whom the contribution is sought shall not by virtue of any contribution awarded under section 1 above be required

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to pay in respect of the damage a greater amount than the amount of those damages as so limited or reduced.

Note —The similarity in the language used in s.2(1) and in the Law Reform (Contributory Negligence) Act 1945 s.1(1) (see para.9B–1198.1 below) is striking and there is no reason why the principles applicable under the two provisions should be different in cases where the facts are themselves similar (*J (A Child) v Wilkins* [2001] R.T.R. 19). An apportionment made under s.2(1) by a trial judge will only be interfered with on appeal where it is clearly wrong or there has been an error of principle or mistake of fact (*ibid.*). As the discretion as to costs granted by the Senior Courts Act s.51 is not limited so as to exclude an order in contribution proceedings in respect of a sum paid to the original claimants in respect of their costs, the court is entitled to order a contribution in respect of the full sum paid by the person applying for contribution inclusive of any part referable to costs (*B.I.C.C. Ltd v Cumbrian Industrials Ltd* [2001] EWCA Civ 1621; October 30, 2001, unrep., CA).

For an illustration of circumstances where, because the defendant had assigned his contribution claim against his co-defendant to the claimant on terms that did not extinguish the defendant's liability entirely, the court held that it was not possible in the proceedings on the assigned claim to identify the just and equitable proportion of the claim for which the defendant was liable, see *Abbey National Bank Plc v Matthews & Son* [2003] EWHC 925 (Mr Simon Berry Q.C.).

Section 2(1) requires the court to have regard to the parties' responsibility for the damage. The personal innocence of a person vicariously liable for the wrongful act of his employee or partner is not relevant for the purposes of determining contribution proceedings between that person and another wrongdoer, even in cases of dishonesty (*Dubai Aluminium Co Ltd v Salaam*, [2002] UKHL 48 [2003] 1 All E.R. 97, H.L.).

In *Nationwide Building Society v Dunlop Haywards (DHL) Ltd* [2009] EWHC 254 (Comm); [2010] 1 W.L.R. 258 (Christopher Clarke J.) the meaning of "the damage in question" within s.2(1) was analysed and explained. The facts were that a building society (C), having suffered substantial losses as a result of making loans to a company in reliance on fraudulently overstated valuations, brought a single action against the valuers (D1) in deceit and/or negligence and against their own solicitors (D2) in negligence. By way of defence, D2 alleged that C were contributorily negligent. C obtained summary judgment against D1 with damages to be assessed, and accepted in settlement D2's Pt 36 offer of £5.5 million. D2 brought a contribution claim against D1 (now in liquidation). On the basis that C's contributory negligence was 50 per cent, the judge (1) found that the amount for which both D1 and D2 would have been responsible to C was £6.6 million, and (2) held (a) that in s.2(2) "the damage in question" is a reference to "the same damage" specified in s.1(1) in respect of which rights of contribution arise, and (b) that therefore £6.6 million was "the damage in question" in this case, rejecting D1's submission that such damage was the £5.5 million settlement figure. The judge further held that D2 should be responsible for 20 per cent of the £6.6 million (£1.3 million) with the result that D1 should contribute £4.2 million to the £5.5 million paid by D2 to C (£5.5 million less £1.3 million).

PROCEEDINGS FOR THE SAME DEBT OR DAMAGE

Proceedings against persons jointly liable for the same debt or damage

3. Judgment recovered against any person liable in respect of any debt or damage shall not be a bar to an action, or to the continuance of an action, against any other person who is (apart from any such bar) jointly liable with him in respect of the same debt or damage. **9B–1093**

Successive actions against persons liable (jointly or otherwise) for the same damage

4. If more than one action is brought in respect of any damage by **9B–1094**

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

or on behalf of the person by whom it was suffered against persons liable in respect of the damage (whether jointly or otherwise) the plaintiff shall not be entitled to costs in any of those actions, other than that in which judgment is first given, unless the court is of the opinion that there was reasonable ground for bringing the action.

SUPPLEMENTAL

Application to the Crown

- 9B-1095** 5. Without prejudice to section 4(1) of the Crown Proceedings Act 1947 (indemnity and contribution) this Act shall bind the Crown, but nothing in this Act shall be construed as in any way affecting Her Majesty in Her private capacity (including in right of Her Duchy of Lancaster) or the Duchy of Cornwall.

Interpretation

- 9B-1096** 6.—(1) A person is liable in respect of any damage for the purposes of this Act if the person who suffered it (or anyone representing his estate or dependants) is entitled to recover compensation from him in respect of that damage (whatever the legal basis of his liability whether tort, breach of contract, breach of trust or otherwise).
- (2) References in this Act to an action brought by or on behalf of the person who suffered any damage include references to an action brought for the benefit of his estate or dependants.
- (3) In this Act “dependants” has the same meaning as in the Fatal Accidents Act 1976.
- (4) In this Act, except in section 1(5) above, “action” means an action brought in England and Wales.

Savings

- 9B-1097** 7.—(1) Nothing in this Act shall affect any case where the debt in question became due or (as the case may be) the damage in question occurred before the date on which it comes into force.
- (2) A person shall not be entitled to recover contribution or liable to make contribution in accordance with section 1 above by reference to any liability based on breach of any obligation assumed by him before the date on which this Act comes into force.
- (3) The right to recover contribution in accordance with section 1 above supersedes any right, other than an express contractual right, to recover contribution (as distinct from indemnity) otherwise than under this Act in corresponding circumstances; but nothing in this Act shall affect—
- (a) any express or implied contractual or other right to indemnity; or
 - (b) any express contractual provision regulating or excluding contribution;
- which would be enforceable apart from this Act (or render enforceable any agreement for indemnity or contribution which would not be enforceable apart from this Act).

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

Consequential amendments and repeals

9.—(1) The enactments specified in Schedule 1 to this Act shall have effect subject to the amendments set out in that Schedule, being amendments consequential on the preceding provisions of this Act. **9B-1098**

(2) The enactments specified in Schedule 2 to this Act are hereby repealed to the extent specified in column 3 of that Schedule.

* * * *

Crown Proceedings Act 1947

(1947 10 & 11 GEO. 6 C.44)

9B-1099

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JUDGMENTS AND EXECUTION

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MISCELLANEOUS AND SUPPLEMENTAL

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

SECTION 9B: OTHER STATUTES AND REGULATIONS

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| | | |
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Paragraph numbers marked with a “+” denote content that is available on White Book on Westlaw UK Service or Civil Procedure CD.

Introduction

9B-1100

Part I of this Act contains provisions broadening the liability of the Crown. Provisions in other Parts of the Act concern matters relating to the jurisdiction of the High Court and the county courts in civil proceedings brought by or against the Crown and to the procedures to be adopted in such cases.

The broad intention of the 1947 Act is that proceedings by and against the Crown should be taken in the same circumstances and in the same way as proceedings between subjects. However, procedurally speaking, in a significant number of ways (and usually for obvious reasons) the Crown as a party is in a special position and enjoys advantages not extended to the ordinary party in civil proceedings. Some of these advantages are granted expressly by particular provisions in the 1947 Act (supplemented by rules of court). Others are granted indirectly by s.35(1) of the Act. That sub-section states that any power to make rules of court may contain provisions to have effect in Crown proceedings “in substitution for or by way of addition to any of the provisions of the Rules applying to proceedings between subjects”. In relation to the procedural matters listed in s.35(2), rules conferring on the Crown procedural advantages not available to ordinary parties must be made (e.g. as to default judgment, summary judgment, and interrogatories).

Before the CPR came into effect, rule making powers granted by the 1947 Act were exercised principally through the provisions of RSC O.77 and CCR O.42. Both of these Orders were carried forward into the CPR. They were revoked by the Civil Procedure (Amendment No.3) Rules 2005 (SI 2005/2292) and, with effect from October 1, 2005, replaced by CPR Pt 66 (Crown Proceedings). In the new provisions, the effects of some of the rules formerly found in RSC O.77 and CCR O.42 were retained. But to an extent the new provisions altered the effects of former provisions by removing or limiting some of the advantages enjoyed by the Crown as a party. Inevitably, certain of the new rule provisions conflicted with statutory provisions in the 1947 Act. Accordingly, by the Civil Procedure (Modification of Crown Proceedings Act 1947) Order 2005 (SI 2005/2712), the Lord Chancellor has exercised his powers under the Civil Procedure Act 1997 s.4(2) (see Vol.2, para.9A-749), for the purpose of making necessary changes to sections in the 1947 Act that placed the Crown in a special position. The principal modifications were: the repeal of s.19 (Venue and related matters) and s.20(1) (Removal and transfer of proceedings), and the substantial amendment of s.35(2) (removing statutory requirements placing the Crown in a special position as to default judgment, summary judgment, and interrogatories).

“The Crown”

9B-1101

An agency or person carrying out functions of executive government on behalf of the Crown, such as a health board established under legislation relating to the National Health Service, is not itself or himself “the Crown”; the general purpose of the Act is to make it easier rather than more difficult for a subject to sue the Crown, and to hold that the Act had clothed with immunity from proceedings a body which prior to its passing would have enjoyed no such immunity would be to run wholly counter to its spirit (*British Medical Association v Greater Glasgow Health Board* [1989] A.C. 1211; [1989] 1 All E.R. 984, HL).



For ss.1 to 4, 11, 13 to 18 and 20 to 23 of the Crown Proceedings Act 1947 (see Arrangement) plus any related commentary see paragraphs 9B-1102+ to 9B-1146+ on White Book on Westlaw UK or the Civil Procedure CD.

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

PART III

JUDGMENTS AND EXECUTION

Interest on debts, damages and costs

24.—(1) Section 17 of the Judgments Act 1838 (which provides **9B–1147** that a judgment debt shall carry interest) and section 44A of the Administration of Justice Act 1970 (which enables the court to order an appropriate rate for a judgment debt expressed in a currency other than sterling) shall apply to judgment debts due from or to the Crown.

(2) Where any costs are awarded to or against the Crown in the High Court, interest shall be payable upon those costs unless the Court otherwise orders, and any interest so payable shall be at the same rate as that at which interest is payable upon judgment debts due from or to the Crown.

(3) Section 35A of the Senior Courts Act 1981 and section 69 of the County Courts Act 1984 (which respectively empower the High Court and county courts to award interest on debts and damages) see section 3 of the Law Reform (Miscellaneous Provisions) Act 1934 (which empowers other courts of record to do so) shall apply to judgments given in proceedings by and against the Crown.

Note —Amended by the Administration of Justice Act 1982 s.15, Sch.1 Pt III; the County Courts Act 1984 Sch.2; the Statute Law (Repeals) Act 1993; the Private International Law (Miscellaneous Provisions) Act 1995 s.4; and the Constitutional Reform Act 2005 s.59 and Sch.11, para.1 with effect from October 1, 2009 (SI 2009/1604). **9B–1148**

Satisfaction of orders against the Crown

25.—(1) Where in any civil proceedings by or against the Crown, **9B–1149** or in any proceedings on the Crown side of the King’s Bench Division, or in connection with any arbitration to which the Crown is a party, any order (including an order for costs) is made by any Court in favour of any person against the Crown or against a Government department or against an officer of the Crown as such, the proper officer of the Court shall, on an application in that behalf made by or on behalf of that person at any time after the expiration of twenty-one days from the date of the order or, in case the order provides for the payment of costs and the costs require to be taxed, at any time after the costs have been taxed, whichever is the later, issue to that person a certificate in the prescribed form containing particulars of the order: Provided that, if the Court so directs, a separate certificate shall be issued with respect to the costs (if any) ordered to be paid to the applicant.

(2) A copy of any certificate issued under this section may be served by the person in whose favour the order is made upon the person for the time being named in the record as the solicitor, or as the person acting as solicitor, for the Crown or for the Government department or officer concerned.

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

(3) If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the appropriate Government department shall, subject as hereinafter provided, pay to the person entitled or to his solicitor the amount appearing by the certificate to be due to him together with the interest, if any, lawfully due thereon:

Provided that the Court by which any such order as aforesaid is made or any Court to which an appeal against the order lies may direct that, pending an appeal or otherwise, payment of the whole of any amount so payable, or any part thereof, shall be suspended, and if the certificate has not been issued may order any such directions to be inserted therein.

(4) Save as aforesaid no execution or attachment or process in the nature thereof shall be issued out of any Court for enforcing payment by the Crown of any such money or costs as aforesaid, and no person shall be individually liable under any order for the payment by the Crown, or any Government department, or any officer of the Crown as such of any such money or costs.

9B-1150 Note —Amended by the Statute (Repeals) Act 1993.

Orders, etc., against the Crown

9B-1151 See CPR r.66.6(1).

Execution by the Crown

9B-1152 26.—(1) Subject to the provisions of this Act, any order made in favour of the Crown against any person in any civil proceedings to which the Crown is a party may be enforced in the same manner as an order made in an action between subjects, and not otherwise.

(2) Sections four and five of the Debtors Act 1869 (which provide respectively for the abolition of imprisonment for debt, and for saving the power of committal in case of small debts) shall apply to sums of money payable and debts due to the Crown:

Provided that for the purpose of the application of the said section four to any sum of money payable or debt due to the Crown, the section shall have effect as if there were included among the exceptions therein mentioned default in payment of any sum payable in respect of death duties.

(3) Nothing in this section shall affect any procedure which immediately before the commencement of this Act was available for enforcing an order made in favour of the Crown in proceedings brought by the Crown for the recovery of any fine or penalty, or the forfeiture or condemnation of any goods, or the forfeiture of any ship or any share in a ship.

9B-1153 Note —Amended by the Statute (Repeals) Act 1993; and the Finance Act 1972 s.134, Sch.28.

Section 5

9B-1154 Since the abolition by the Senior Courts Act 1981 s.141 of the writ of *capias ad satisfaciendum*, the only special method of enforcing Crown debts which remains is the very limited power of committal under s.5 preserved to the county court by the Access to Justice Act 1970 s.11; it extends only to income tax and certain other social security and tax payments (see Access to Justice Act 1970 Sch.4).

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

Attachment of moneys payable by the Crown

27.—(1) Where any money is payable by the Crown to some person who, under any order of any Court, is liable to pay any money to any other person, and that other person would, if the money so payable by the Crown were money payable by a subject, be entitled under Rules of Court to obtain an order for the attachment thereof as a debt due or accruing due, or an order for the appointment of a sequestrator or receiver to receive the money on his behalf, the High Court may, subject to the provisions of this Act and in accordance with Rules for receiving that money, and directing payment thereof to that other Court, make an order restraining the first-mentioned person from receiving that money and directing payment thereof to that other person, or to the sequestrator or receiver: Provided that no such order shall be made in respect of:—

- (a) any wages or salary payable to any officer of the Crown as such;
- (b) any money which is subject to the provisions of any enactment prohibiting or restricting assignment or charging or taking in execution.

(2) The provisions of the preceding subsection shall, so far as they relate to forms of relief falling within the jurisdiction of a county court, have effect in relation to county courts as they have effect in relation to the High Court.

(3) In their application to England and Wales the preceding provisions of this section shall have effect subject to any order for the time being in force under section 139(2) of the Senior Courts Act 1981.

Note —Amended by the Post Office Act 1969 Sch.6; the Senior Courts Act 1981 ss.139(1), 152(4), Sch.7; and SI 2005/2712 and the Constitutional Reform Act 2005 s.59 and Sch.11 para.1 with effect from October 1, 2009 (SI 2009/1604).

Orders, etc., against the Crown

See CPR r.66.7.

PART IV**MISCELLANEOUS AND SUPPLEMENTAL***MISCELLANEOUS***Discovery**

28.—(1) Subject to and in accordance with Rules of Court:— **9B-1158**

- (a) in any civil proceedings in the High Court or a county court to which the Crown is a party, the Crown may be required by the Court to make discovery of documents and produce documents for inspection; and
- (b) in any such proceedings as aforesaid, the Crown may be required by the Court to answer interrogatories:

Provided that this section shall be without prejudice to any rule of

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

SECTION 9B: OTHER STATUTES AND REGULATIONS

law which authorities or requires the withholding of any document or the refusal to answer any question on the ground that the disclosure of the document or the answering of the question would be injurious to the public interest.

Any order of the Court made under the powers conferred by paragraph (b) of this subsection shall direct by what officer of the Crown the interrogatories are to be answered.

(2) Without prejudice to the proviso to the preceding subsection, any Rules made for the purposes of this section shall be such as to secure that the existence of a document will not be disclosed if, in the opinion of a Minister of the Crown, it would be injurious to the public interest to disclose the existence thereof.

Note—Amended by SI 2005/2712.

Discovery in proceeding by or against the Crown

9B-1159 See CPR r.66.3. See also CPR r.31.19(1) as to Crown privilege and “Documents privileged on the ground that production would be injurious to the public interest,” Vol.1, para.31.3.33.



For ss.29, 31 to 33, 35, 38, 40, 52 and 54 of and Sch.1 to the Crown Proceedings Act 1947 (see Arrangement) plus any related commentary see paragraphs 9B-1160+ to 9B-1177+ on White Book on Westlaw UK or the Civil Procedure CD.

Evidence (Proceedings in Other Jurisdictions) Act 1975

9B-1178

(1975 c.34)

ARRANGEMENT OF SECTIONS

EVIDENCE FOR CIVIL PROCEEDINGS

SECT.

- | | | |
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| 1. | Application to United Kingdom court for assistance in obtaining evidence for civil proceedings in other court | 9B-1180 |
| 2. | Power of United Kingdom court to give effect to application for assistance | 9B-1182 |
| 3. | Privilege of witnesses | 9B-1184 |
| 4. | Extension of powers of High Court, etc., in relation to obtaining evidence for proceedings in that court | 9B-1186 |

EVIDENCE FOR INTERNATIONAL PROCEEDINGS

- | | | |
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| 6. | Power of United Kingdom court to assist in obtaining evidence for international proceedings | 9B-1188 |
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SUPPLEMENTARY

- | | | |
|-----|--|---------|
| 7. | Rules of court | 9B-1190 |
| 8. | Consequential amendments and repeals | 9B-1192 |
| 9. | Interpretation | 9B-1193 |
| 10. | Short title, commencement and extent | 9B-1196 |

“General”

9B-1179 The Act enables a foreign or international court to obtain an order from specified courts of the United Kingdom requiring evidence to be given in the United Kingdom for purposes of proceedings before the requesting court. See, generally, O.70 and notes thereto.

EVIDENCE FOR CIVIL PROCEEDINGS

Application to United Kingdom court for assistance in obtaining evidence for civil proceedings in other court

9B-1180 1. Where an application is made to the High Court, the Court of

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

Session or the High Court of Justice in Northern Ireland for an order for evidence to be obtained in the part of the United Kingdom in which it exercises jurisdiction, and the court is satisfied—

- (a) that the application is made in pursuance of a request issued by or on behalf of a court or tribunal (“the requesting court”) exercising jurisdiction in any other part of the United Kingdom or in a country or territory outside the United Kingdom; and
- (b) that the evidence to which the application relates is to be obtained for the purposes of civil proceedings which either have been instituted before the requesting court or whose institution before that court is contemplated,

the High Court, Court of Session or the High Court of Justice in Northern Ireland, as the case may be, shall have the powers conferred on it by the following provisions of this Act.

Note —For relevant rules of court, see Sect.II of CPR Pt 34, replacing CPR Sch.1 RSC O.70 with effect from December 2, 2002. **9B-1181**

Power of United Kingdom court to give effect to application for assistance

2.—(1) Subject to the provisions of this section, the High Court, the Court of Session and the High Court of Justice in Northern Ireland shall each have power, on any such application as is mentioned in section 1 above, by order to make such provision for obtaining evidence in the part of the United Kingdom in which it exercises jurisdiction as may appear to the court to be appropriate for the purpose of giving effect to the request in pursuance of which the application is made; and any such order may require a person specified therein to take such steps as the court may consider appropriate for that purpose. **9B-1182**

(2) Without prejudice to the generality of subsection (1) above but subject to the provisions of this section, an order under this section may, in particular, make provision—

- (a) for the examination of witnesses, either orally or in writing;
- (b) for the production of documents;
- (c) for the inspection, photographing, preservation, custody or detention of any property;
- (d) for the taking of samples of any property and the carrying out of any experiments on or with any property;
- (e) for the medical examination of any person;
- (f) without prejudice to paragraph (e) above, for the taking and testing of samples of blood from any person.

(3) An order under this section shall not require any particular steps to be taken unless they are steps which can be required to be taken by way of obtaining evidence for the purposes of civil proceedings in the court making the order (whether or not proceedings of the same description as those to which the application for the order relates); but this subsection shall not preclude the making of an or-

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

der requiring a person to give testimony (either orally or in writing) otherwise than on oath where this is asked for by the requesting court.

(4) An order under this section shall not require a person—

- (a) to state what documents relevant to the proceedings to which the application for the order relates are or have been in his possession, custody or power; or
- (b) to produce any documents other than particular documents specified in the order as being documents appearing to the court making the order to be, or to be likely to be, in his possession, custody or power.

(5) A person who, by virtue of an order under this section, is required to attend at any place shall be entitled to the like conduct money and payment for expenses and loss of time as on attendance as a witness in civil proceedings before the court making the order.

9B-1183 *Note*—See notes to CPR Sch.1, RSC O.70, Vol.1, para.sc70.6.1. For discussion of this section, see *Refco Capital Markets Ltd v Credit Suisse (First Boston) Ltd* [2001] EWCA Civ 1733; *The Times*, December 7, 2001, CA, and *Commerce and Industry Insurance Co of Canada v Certain Underwriters at Lloyd's of London* [2002] 1 W.L.R. 1323 (Moore-Bick J.). For relevant rules of court, see Sect.II of CPR Pt 34, replacing CPR Sch.1 RSC O.70 with effect from December 2, 2002.

Privilege of witnesses

9B-1184 **3.—**(1) A person shall not be compelled by virtue of an order under section 2 above to give any evidence which he could not be compelled to give—

- (a) in civil proceedings in the part of the United Kingdom in which the court that made the order exercises jurisdiction; or
- (b) subject to subsection (2) below, in civil proceedings in the country or territory in which the requesting court exercises jurisdiction.

(2) Subsection (1)(b) above shall not apply unless the claim of the person in question to be exempt from giving the evidence is either—

- (a) supported by a statement contained in the request (whether it is so supported unconditionally or subject to conditions that are fulfilled); or
- (b) conceded by the applicant for the order;

and where such a claim made by any person is not supported or conceded as aforesaid he may (subject to the other provisions of this section) be required to give the evidence to which the claim relates but that evidence shall not be transmitted to the requesting court if that court, on the matter being referred to it, upholds the claim.

(3) Without prejudice to subsection (1) above, a person shall not be compelled by virtue of an order under section 2 above to give any evidence if his doing so would be prejudicial to the security of the United Kingdom; and a certificate signed by or on behalf of the Secretary of State to the effect that it would be so prejudicial for that person to do so shall be conclusive evidence of that fact.

(4) In this section references to giving evidence include refer-

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ences to answering any question and to producing any document and the reference in subsection (2) above to the transmission of evidence given by a person shall be construed accordingly.

Note —See CPR r.34.20, replacing CPR Sch.1 RSC O.70 r.6 (with effect from December 2, 2002). **9B-1185**

Extension of powers of High Court, etc., in relation to obtaining evidence for proceedings in that court

4. The Attendance of Witnesses Act 1854 (which enables the Court of Session to order the issue of a warrant of citation in special form throughout the United Kingdom, for the attendance of a witness at trial) shall have effect as if references to attendance at a trial included references to attendance before an examiner or commissioner appointed by the court or a judge thereof in any cause or matter in that court, including an examiner or commissioner appointed to take evidence outside the jurisdiction of the court. **9B-1186**

Note —Amended by the Judicature (Northern Ireland) Act 1978 s.122(2) and Sch.7; and the Senior Courts Act 1981 s.152(4) and Sch.7. **9B-1187**

* * * *

EVIDENCE FOR INTERNATIONAL PROCEEDINGS

Power of United Kingdom court to assist in obtaining evidence for international proceedings

6.—(1) Her Majesty may by Order in Council direct that, subject to such exceptions, adaptations or modifications as may be specified in the Order, the provisions of sections 1 to 3 above shall have effect in relation to international proceedings of any description specified in the order. **9B-1188**

(2) An Order in Council under this section may direct that section 1(4) of the Perjury Act 1911 or Article 3(4) of the Perjury (Northern Ireland) Order 1979 shall have effect in relation to international proceedings to which the Order applies as it has effect in relation to a judicial proceeding in a tribunal of a foreign state.

(3) In this section “international proceedings” means proceedings before the International Court of Justice or any other court, tribunal, commission, body or authority (whether consisting of one or more persons) which in pursuance of any international agreement or any resolution of the General Assembly of the United Nations, exercises any jurisdiction or performs any functions of a judicial nature or by way of arbitration, conciliation or inquiry or is appointed (whether permanently or temporarily) for the purpose of exercising any jurisdiction or performing any such functions.

Note —Amended by SI 1979/1714. **9B-1189**

SUPPLEMENTARY

Rules of court

7. Civil Procedure Rules or rules of court under section 7 of the **9B-1190**

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

SECTION 9B: OTHER STATUTES AND REGULATIONS

Northern Ireland Act 1962 shall include power to make rules of court—

- (a) as to the manner in which any such application as is mentioned in section 1 above is to be made;
- (b) subject to the provisions of this Act, as to the circumstances in which an order can be made under section 2 above; and
- (c) as to the manner in which any such reference as is mentioned in section 3(2) above is to be made;

and any such rules may include such incidental, supplementary and consequential provision as the authority making the rules may consider necessary or expedient.

9B-1191 *Note* —Amended by the Senior Courts Act 1981 s.152(4) and Sch.7; and by the Courts Act 2003 s.109(1), Sch.8, para.177(a).

With effect from December 2, 2002, the provisions in Sect.II of CPR Pt 34 replaced RSC O.70 (Obtaining Evidence for Foreign Courts, Etc.) as the rules of court authorised by this section.

Consequential amendments and repeals

9B-1192 8.—(1) The enactments mentioned in Schedule 1 to this Act shall have effect subject to the amendments there specified, being amendments consequential on the provisions of this Act.

(2) The enactments mentioned in Schedule 2 to this Act are hereby repealed to the extent specified in the third column of that Schedule.

(3) Nothing in this section shall affect—

- (a) any application to any court or judge which is pending at the commencement of this Act;
- (b) any certificate given for the purposes of any such application;
- (c) any power to make an order on such an application; or
- (d) the operation or enforcement of any order made on such an application.

(4) Subsection (3) above is without prejudice to section 38(2) of the Interpretation Act 1889 (effect of repeals).

Interpretation

9B-1193 9.—(1) In this Act—

“civil proceedings”, in relation to the requesting court, means proceedings in any civil or commercial matter;

“requesting court” has the meaning given in section 1 above;

“property” includes any land, chattel or other corporeal property of any description;

“request” includes any commission, order or other process issued by or on behalf of the requesting court.

(2) In relation to any application made in pursuance of a request issued by the High Court under section 56 of the County Courts Act 1984 or the High Court of Justice in Northern Ireland under Article 43 of the County Courts (Northern Ireland) Order 1980, the refer-

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

LAW REFORM (CONTRIBUTORY NEGLIGENCE) ACT 1945

ence in section 1(b) above to proceedings instituted before the requesting court shall be construed as a reference to the relevant proceedings in the county court.

(3) Any power conferred by this Act to make an Order in Council includes power to revoke or vary any such Order by a subsequent Order in Council.

(4) Nothing in this Act shall be construed as enabling any court to make an order that is binding on the Crown or on any person in his capacity as an officer or servant of the Crown.

(5) Except so far as the context otherwise requires, any reference in this Act to any enactment is a reference to that enactment as amended or extended by or under any other enactment.

Note—Amended by the County Courts Act 1984 s.148(1) and Sch.2.

9B-1194

“Civil or commercial matters”

The words “civil or commercial matters” in the Act of 1975 cannot be construed with reference to any internationally acceptable meaning but equally they are not to be given a restricted construction derived from the distinction between public and private law in civil law systems and accordingly the definition extends to relevant proceedings in a civil or commercial matter in both the United Kingdom and the requesting state, e.g. proceedings in the foreign court challenging a tax assessment made by a foreign tax authority (*Re State of Norway's Application (Nos 1 and 2)* [1990] 1 A.C. 723; [1989] 2 W.L.R. 458, HL(E), affirming [1987] Q.B. 433).

9B-1195

Short title, commencement and extent

10.—(1) This Act may be cited as the Evidence (Proceedings in Other Jurisdictions) Act 1975. **9B-1196**

(2) This Act shall come into operation on such day as Her Majesty may by Order in Council appoint.

(3) Her Majesty may by Order in Council make provision for extending any of the provisions of this Act (including section 6 or any Order in Council made thereunder) with such exceptions, adaptations or modifications as may be specified in the Order, to any of the Channel Islands, the Isle of Man, any colony (other than a colony for whose external relations a country other than the United Kingdom is responsible) or any country or territory outside Her Majesty's dominions in which Her Majesty has jurisdiction in right of Her Majesty's Government in the United Kingdom.

[THE NEXT PARAGRAPH IS 9B-1196.]

Law Reform (Contributory Negligence) Act 1945

(1945 8 & 9 GEO. 6 c.28)

9B-1198

ARRANGEMENT OF SECTIONS

SECT.

| | | |
|----|--|---------|
| 1. | Apportionment of liability in case of contributory negligence... | 9B-1198 |
| 3. | Saving for Maritime Conventions Act 1911, and past cases... | 9B-1201 |
| 4. | Interpretation..... | 9B-1202 |

Apportionment of liability in case of contributory negligence

1.—(1) Where any person suffers damage as the result partly of his

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own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage: Provided that—

- (a) this subsection shall not operate to defeat any defence arising under a contract;
- (b) where any contract or enactment providing for the limitation of liability is applicable to the claim, the amount of damages recoverable by the claimant by virtue of this subsection shall not exceed the maximum limit so applicable.

(2) Where damages are recoverable by any person by virtue of the foregoing subsection subject to such reduction as is therein mentioned, the Court shall find and record the total damages which would have been recoverable if the claimant had not been at fault.

(3) [...]

(4) [...]

(5) Where, in any case to which subsection (1) of this section applies, one of the persons at fault avoids liability to any other such person or his personal representative by pleading the Limitation Act 1939, or any other enactment limiting the time within which proceedings may be taken, he shall not be entitled to recover any damages from that other person or representative by virtue of the said subsection.

(6) [...]

(7) [...]

9B-1199 *Note* —Amended by the Carriage by Air Act 1961 Sch.2, the Fatal Accidents Act 1976 s.6 and Sch.6 and the Civil Liability (Contribution) Act 1978 s.9(2) and Sch.2; see now Limitation Act 1980 Vol.2, Section 8.

9B-1200 *Note* —Where the plaintiff brings a claim in tort and the defendant makes a counterclaim in contract, both claims being attributable to two concurrent causes contemporaneously, the apportionment of liability cannot be solved by applying the Act of 1945 but can only be resolved by assessing the recoverable damages per each claim on the basis of causation (*Tenant Radiant Heat Ltd v Warrington Development Corp* (1988) 11 E.G. 71, CA, distinguishing *Forsikringsaktielskapet Vesta v Butcher* [1988] 3 W.L.R. 565, CA, apportionment of liability between two claims in contract).

In the case of a claimant “fault” in this context means “negligence, breach of statutory duty or other act or omission”(see s.4) which gives rise, at common law, to a defence of contributory negligence (*Standard Chartered Bank v Pakistan National Shipping Corporation (No.2)* [2002] UKHL 43; [2003] 1 All E.R. 173, HL (there is no common law defence of contributory negligence in the case of fraudulent misrepresentation)).

* * * *

Saving for Maritime Conventions Act 1911, and past cases

9B-1201 3.—(1) This Act shall not apply to any claim to which section one of the Maritime Conventions Act 1911, applies and that Act shall have effect as if this Act had not passed.

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(2) This Act shall not apply to any case where the acts or omissions giving rise to the claim occurred before the passing of this Act.

Interpretation

4. The following expressions have the meanings hereby respectively assigned to them, that is to say— **9B-1202**

“Court” means, in relation to any claim, the Court or arbitrator by or before whom the claim falls to be determined;

“damage” includes loss of life and personal injury;

“fault” means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence;

Note —The meaning of “dependant” was repealed by the Fatal Accidents Act 1976 and the meaning of “employer” and “workman” was repealed by the National Insurance (Industrial Injuries) Act 1946. **9B-1203**

Law Reform (Miscellaneous Provisions) Act 1934

(1934 24 & 25 GEO. 5 C.41)

9B-1204

ARRANGEMENT OF SECTIONS

| SECT. | | |
|-------|--|---------|
| 1. | Effect of death on certain causes of action | 9B-1204 |
| 3. | Power of Courts of Record to award interest on debts and damages | 9B-1206 |
| 4. | Short title and extent | 9B-1208 |

Effect of death on certain causes of action

1.—(1) Subject to the provisions of this section, on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of his estate: Provided that this subsection shall not apply to causes of action for defamation.

(1A) The right of a person to claim under section 1A of the Fatal Accidents Act 1976 (bereavement) shall not survive for the benefit of his estate on his death.

(2) Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person:—

(a) shall not include—

(i) any exemplary damages;

(ii) any damages for loss of income in respect of any period after that person’s death;

(b) [...]

(c) where the death of that person has been caused by the act or omission which gives rise to the cause of action, shall be calculated without reference to any loss or gain to his estate consequent on his death, except that a sum in respect of funeral expenses may be included.

(3) [...]

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

(4) Where damage has been suffered by reason of any act or omission in respect of which a cause of action would have subsisted against any person if that person had not died before or at the same time as the damage was suffered, there shall be deemed, for the purposes of this Act, to have been subsisting against him before his death such cause of action in respect of that act or omission as would have subsisted if he had died after the damage was suffered.

(5) The rights conferred by this Act for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the Fatal Accidents Acts 1846 to 1908, and so much of this Act as relates to causes of action against the estates of deceased persons shall apply in relation to causes of action under the said Acts as it applies in relation to other causes of action not expressly excepted from the operation of subsection (1) of this section.

(6) In the event of the insolvency of an estate against which proceedings are maintainable by virtue of this section, any liability in respect of the cause of action in respect of which the proceedings are maintainable shall be deemed to be a debt provable in the administration of the estate, notwithstanding that it is a demand in the nature of unliquidated damages arising otherwise than by a contract, promise or breach of trust.

9B-1205 *Note* —Amended by the Statute Law Revision Act 1950; the Law Reform (Miscellaneous Provisions) Act 1970 Sch.; the Proceedings Against Estates Act 1970; and the Administration of Justice Act 1982 ss.4, 41 and 75, Sch.9. Subsection (5) extended by the Fatal Accidents Act 1976 s.6(1), Sch.1.

* * * *

Power of Courts of Record to award interest on debts and damages

9B-1206 **3.**—(1) In any proceedings tried in any Court of Record for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment: Provided that nothing in this section—

- (a) shall authorise the giving of interest upon interest; or
- (b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or
- (c) shall affect the damages recoverable for the dishonour of a bill of exchange.

(1A) Where in any such proceedings as are mentioned in subsection (1) of this section judgment is given for a sum which (apart from interest on damages) exceeds £200 and represents or includes damages in respect of personal injuries to the plaintiff or any other person, or in respect of a person's death, then (without prejudice to the exercise of the power conferred by that subsection in relation to

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any part of that sum which does not represent such damages) the court shall exercise that power so as to include in that sum interest on those damages or on such part of them as the court considers appropriate, unless the court is satisfied that there are special reasons why no interest should be given in respect of those damages.

(1B) Any order under this section may provide for interest to be calculated at different rates in respect of different parts of the period for which interest is given, whether that period is the whole or part of the period mentioned in subsection (1) of this section.

(1C) For the avoidance of doubt it is hereby declared that in determining, for the purposes of any enactment contained in the County Courts Act 1959, whether an amount exceeds, or is less than, a sum specified in that enactment, no account shall be taken of any power exercisable by virtue of this section or of any order made in the exercise of such a power.

(1D) In this section “personal injuries” includes any disease and any impairment of a person’s physical or mental condition.

Note—Amended by the Statute Law Revision Act 1950 and the Administration of Justice Act 1969 s.22. **9B-1207**

By the AJA 1982 s.15(4) and (5), the provisions of this section have ceased to have effect in relation to the High Court and the county courts, but they remain in force and operation in relation to other Courts of Record, e.g. the Court of Appeal (Civil Division), so that on the hearing of an appeal, where that Court gives judgment for any debt or damages, it may also award interest under this section. It would seem that the hearing of an appeal will be regarded as coming within the word “tried”, since the Court will have made a judicial decision (see *per* Lord Denning M.R. in *Wallersteiner v Moir* (No.2) [1975] Q.B. 373 at 387).

For the power to award interest on any debt or damages in the High Court, see SCA 1981 s.35A; in the county courts see C.C.A. 1984, s.69; in arbitration proceedings, see Arb. A. 1950 s.19A. See also AJA 1982 s.15; and by the Statute Law (Repeals) Act 2004 Sch.1 Pt 1 Group 4.

Short title and extent

4.—(1) This Act may be cited as the Law Reform (Miscellaneous Provisions) Act 1934. **9B-1208**

(2) This Act shall not extend to Scotland or Northern Ireland.

Litigants in Person (Costs and Expenses) Act 1975

(1975 c.47)

9B-1209

ARRANGEMENT OF SECTIONS

SECT.

| | | |
|----|---|---------|
| 1. | Costs or expenses recoverable | 9B-1210 |
| 2. | Short title, commencement and extent..... | 9B-1211 |

Costs or expenses recoverable

1.—(1) Where, in any proceedings to which this subsection applies, any costs of a litigant in person are ordered to be paid by any other party to the proceedings or in any other way, there may, subject to rules of court, be allowed on the taxation or other determination of those costs sums in respect of any work done, and any expenses and losses incurred, by the litigants in or in connection with the proceed- **9B-1210**

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ings to which the order relates. This subsection applies to civil proceedings—

- (a) in a county court, in the Senior Courts, in the Court of Judicature or in the Supreme Court on appeal from the High Court or the Court of Appeal,
- (b) before [...] the Lands Tribunal for Northern Ireland, or
- (ba) before the First-tier Tribunal or the Upper Tribunal, or
- (c) in or before any other court or tribunal specified in an order made under this subsection by the Lord Chancellor.

(2) Where, in any proceedings to which this subsection applies, any costs or expenses of a party litigant are ordered to be paid by any other party to the proceedings or in any other way, there may, subject to rules of court, be allowed on the taxation or other determination of those costs or expenses sums in respect of any work done, and any outlays and losses incurred, by the litigant or in connection with the proceedings to which the order relates.

This subsection applies to civil proceedings—

- (a) in the sheriff court, the Scottish Land Court, the Court of Session or the Supreme Court on appeal from the Court of Session.
- (b) before the Lands Tribunal for Scotland, or
- (ba) before the First-tier Tribunal or the Upper Tribunal, or
- (c) in or before any other court or tribunal specified in an order made under this subsection by the Lord Advocate.

(3) An order under subsection (1) or (2) above shall be made by statutory instrument and shall be subject to annulment in pursuance of the resolution of either House of Parliament.

(4) In this section “rules of court”—

- (a) in relation to [...] the Lands Tribunal for Scotland, means rules made under section 3 of the Lands Tribunal Act 1949,
- (b) in relation to the Lands Tribunal for Northern Ireland means rules made under section 9 of the Lands Tribunal and Compensation Act (Northern Ireland) 1964, and
- (ba) in relation to the First-tier Tribunal or the Upper Tribunal, means Tribunal Procedure Rules, and
- (c) in relation to any other tribunal specified in an order made under subsection (1) or (2) above, shall have the meaning given by the order as respects that tribunal.

(5) In the application of subsection (1) above to Northern Ireland, the expression “county court,” “the High Court” and “the Court of Appeal” shall have the meanings respectively assigned to them by section 29(1) of the Northern Ireland Act 1962.

9B-1210.1 *Note* —Amended by the Tribunals, Courts and Enforcement Act 2007 Sch.8 para.6, with effect from November 3, 2008; by SI 2009/1307, with effect from June 1, 2009; and by the Constitutional Reform Act 2005 s.59 and Sch.11 para.22 with effect from October 1, 2009 (SI 2009/1604).

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OATHS ACT 1978

Short title, commencement and extent

2.—(1) This Act may be cited as the Litigants in Person (Costs and Expenses) Act 1975. **9B-1211**

(2) [...]

(3) [...]

Note —See also CPR r.48.6.

9B-1212

This Act applies to all costs incurred after April 1, 1976, and was partially brought into force on that day by the Litigants in Person (Costs and Expenses) Act 1975 Commencement Order 1976 (SI 1976/364) and the residue by (Commencement No.2) Order 1980 (SI 1980/1158). The scope of the Act was extended to the Employment Appeal Tribunal by the Litigants in Person (Costs and Expenses) Order 1980 (SI 1980/1159) and to civil proceedings in magistrates' courts by the Litigants in Person (Costs and Expenses) (Magistrates' Courts) Order 2001 (SI 2001/3438).

There is no provision for the costs of litigants in person in criminal proceedings.

For notes on costs and expenses which are recoverable see Vol.1, paras 48.6.1 and for rights of audience see para.47.14.7 et seq.

Subsections (2) and (3) were repealed by the Statute Law (Repeals) Act 2004 Sch.1 Pt 1 Group 4.

Oaths Act 1978

(1978 c.19)

9B-1213

ARRANGEMENT OF SECTIONS

PART I

SECT.

- | | | |
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| 1. | Manner of administration of oaths | 9B-1215+ |
| 2. | Consequential amendments | 9B-1217+ |

PART II

- | | | |
|----|--|----------|
| 3. | Swearing with uplifted hand | 9B-1218+ |
| 4. | Validity of oaths | 9B-1219+ |
| 5. | Making of solemn affirmations | 9B-1221+ |
| 6. | Form of affirmation | 9B-1222+ |
| 8. | Short title, extent and commencement | 9B-1223+ |

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Paragraph numbers marked with a “+” denote content that is available on White Book on Westlaw UK or the Civil Procedure CD.



High Court Enforcement Officers Regulations 2004

(S.I. 2004 No. 400)

9B-1224

ARRANGEMENT OF SECTIONS

PART I

SECT.

- | | | |
|----|---|----------|
| 1. | Citation and commencement | 9B-1225+ |
| 2. | Interpretation | 9B-1226+ |
| 3. | Districts for enforcement of writs of execution by enforcement officers | 9B-1227+ |

PART 2

- | | | |
|----|------------------------------------|----------|
| 4. | Conditions to be satisfied | 9B-1229+ |
| 5. | Application procedure | 9B-1230+ |
| 6. | Authorisation and assignment | 9B-1231+ |

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

SECTION 9B: OTHER STATUTES AND REGULATIONS

| PART 3 | | |
|--|--|----------|
| 7. | Duty to execute writs | 9B-1232+ |
| 8. | Conditions to be satisfied following authorisation | 9B-1233+ |
| 9. | Change of details | 9B-1234+ |
| 10. | Changes to assignment | 9B-1235+ |
| 11. | Resignation | 9B-1236+ |
| 12. | Termination of authorisation or assignment | 9B-1237+ |
| PART 4 | | |
| 13. | Fees | 9B-1238+ |
| 14. | Directories | 9B-1239+ |
| 15. | Walking possession agreement | 9B-1240+ |
| SCHEDULES: | | |
| Schedule 1—Districts for Writs of Execution Enforced by Enforcement Officers | | 9B-1241+ |
| Schedule 2—Professional Bodies Recognised by the Lord Chancellor .. | | 9B-1243+ |
| Schedule 3—Fees Chargeable by Enforcement Officers | | 9B-1244+ |
| Schedule 4—Walking Possession Agreement | | 9B-1245+ |



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

9B-1246

(S.I. 2005 No. 3382)

ARRANGEMENT OF REGULATIONS

PART 1

INTRODUCTION

| | | |
|------|---------------------------------|---------|
| REG. | | |
| 1. | Citation and commencement | 9B-1246 |
| 2. | Interpretation | 9B-1247 |

PART 2

REQUIRED CONDITIONS: GENERAL

| | | |
|----|---|---------|
| 3. | Effect of this part | 9B-1248 |
| 4. | Condition relating to work covered by exclusion | 9B-1249 |
| 5. | Condition relating to notification | 9B-1250 |
| 6. | Condition relating to payment of expenses | 9B-1251 |

PART 3

REQUIRED CONDITIONS: RELEASE OF INTERIM PAYMENTS

| | | |
|-----|--|---------|
| 7. | Effect of this Part | 9B-1252 |
| 8. | Request for relevant enforcement authority's agreement to release of interim payment | 9B-1253 |
| 9. | Relevant enforcement authority's response to request | 9B-1254 |
| 10. | Release of interim payment | 9B-1255 |

PART 4

AGREEMENT OR ASSESSMENT OF EXPENSES AT CONCLUSION OF CIVIL

RECOVERY PROCEEDINGS

| | | |
|-----|--|---------|
| 11. | Effect of this Part | 9B-1256 |
| 12. | Agreement of expenses by the relevant enforcement authority .. | 9B-1257 |
| 13. | Expenses to be assessed if not agreed | 9B-1258 |
| 14. | Payment of expenses | 9B-1259 |

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

PART 5

BASIS OF ASSESSMENT OF LEGAL EXPENSES

| | | |
|-----|---------------------------------|---------|
| 15. | Effect of this Part | 9B-1260 |
| 16. | General principles | 9B-1261 |
| 17. | Rates of remuneration | 9B-1262 |

* * * *

PART 1

INTRODUCTION

Citation and commencement

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

Interpretation

2.—(1) In these Regulations—

9B-1247

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

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

“CPR” means the Civil Procedure Rules 1998;

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

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

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

“notice” means notice in writing;

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

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

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

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

Note —Amended by SI 2008/523 and SI 2009/3348, with effect from January 1, 2010. **9B-1247.1**

PART 2

REQUIRED CONDITIONS: GENERAL

Effect of this part

3. This Part specifies the required conditions for the purposes of

9B-1248

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SECTION 9B: OTHER STATUTES AND REGULATIONS

sections 245C(5) and 252(4) of the 2002 Act and articles 149(5) and 157(4) of the Order in Council.

Condition relating to work covered by exclusion

- 9B-1249** 4. An exclusion from a property freezing order or interim receiving order must specify—
- (a) the stage or stages in civil recovery proceedings to which it relates; and
 - (b) the maximum amount which may be released in respect of legal expenses for each stage to which it relates.

Condition relating to notification

- 9B-1250** 5. If the solicitor acting for the person to whose legal expenses the exclusion relates becomes aware that—
- (a) that person's legal expenses in respect of any stage in civil recovery proceedings have exceeded or will exceed the maximum amount specified in the exclusion for that stage; or
 - (b) that person's total legal expenses in respect of all the stages to which the exclusion relates have exceeded or will exceed the total amount that may be released pursuant to the exclusion,
- the solicitor must give notice to the relevant enforcement authority and the court as soon as reasonably practicable.

9B-1250.1 *Note* —Amended by SI 2008/523.

Condition relating to payment of expenses

- 9B-1251** 6. Where a person has incurred legal expenses in relation to a stage in civil recovery proceedings specified in an exclusion—
- (a) during any period when the property freezing order or interim receiving order has effect, a sum may only be released in respect of those expenses in accordance with Part 3;
 - (b) where the court makes a recovery order which provides for the payment of that person's reasonable legal expenses in respect of civil recovery proceedings, the sum payable in respect of his legal expenses shall be determined in accordance with Part 4, regardless of whether a sum has been released in respect of any of those expenses under Part 3.

PART 3

REQUIRED CONDITIONS: RELEASE OF INTERIM PAYMENTS

Effect of this Part

- 9B-1252** 7. This Part applies where, during a period when a property freezing order or interim receiving order has effect, a person to

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whose property the order applies seeks the release of a sum in respect of his legal expenses pursuant to an exclusion from the order.

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

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

(2) The request must—

- (a) describe the stage or stages in the civil recovery proceedings in relation to which the legal expenses were incurred;
- (b) summarise the work done in connection with each stage;
- (c) be accompanied by any invoices, receipts or other documents which are necessary to show that the expenses have been incurred; and
- (d) identify any item or description of property from which the person making the request wishes the sum to be released.

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

- (a) in respect of legal expenses which he has not yet incurred; or
- (b) more than once in any 2 month period.

Note —Amended by SI 2008/523.

9B-1253.1

Relevant enforcement authority's response to request

9.—(1) Not later than 21 days after it receives the request, the relevant enforcement authority must give notice to the person who made the request stating— **9B-1254**

- (a) whether it agrees to the release of the requested sum; and
- (b) if it does not agree to the release of the requested sum—
 - (i) the amount (if any) which it agrees may be released; and
 - (ii) the reasons for its decision.

(2) Where an interim receiving order applies to the property from which it is proposed that the requested sum should be released, the relevant enforcement authority must at the same time send copies of the request and the notice referred to in paragraph (1) to the interim receiver.

(3) In determining the amount which may be released in respect of legal expenses with its agreement, the relevant enforcement authority must have regard to the provisions of Part 5 which would apply on the assessment of those expenses by the court.

Note —Amended by SI 2008/523.

9B-1254.1

Release of interim payment

10.—(1) The sum which may be released pursuant to the exclusion is the greater of— **9B-1255**

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

SECTION 9B: OTHER STATUTES AND REGULATIONS

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

9B-1255.1 *Note* —Amended by SI 2008/523.

PART 4

AGREEMENT OR ASSESSMENT OF EXPENSES AT CONCLUSION OF CIVIL RECOVERY PROCEEDINGS

Effect of this Part

9B-1256 **11.** This Part specifies the procedure for determining the amount payable in respect of a person's reasonable legal expenses in civil recovery proceedings, where the court has made a recovery order which provides for the payment of those expenses.

Agreement of expenses by the relevant enforcement authority

9B-1257 **12.—**(1) This regulation applies where a person seeks the relevant enforcement authority's agreement to the payment of a sum in respect of its legal expenses pursuant to section 266(8B)(a) of the 2002 Act or article 177(11)(a) of the Order in Council.

(2) In determining the amount which may be paid in respect of legal expenses with its agreement, the relevant enforcement authority must have regard to the provisions of Part 5 which would apply on the assessment of those expenses by the court.

(3) Where the relevant enforcement authority agrees to the payment of the sum which a person seeks in respect of his legal expenses—

- (a) it shall give that person and the trustee for civil recovery notice of the agreed sum; and
- (b) the sum payable in respect of those expenses shall be the agreed sum.

9B-1257.1 *Note* —Amended by SI 2008/523.

Expenses to be assessed if not agreed

9B-1258 **13.—**(1) Unless the relevant enforcement authority agrees to the payment of the sum which a person seeks in respect of his legal expenses pursuant to provision made in a recovery order, that person must commence proceedings for the assessment of those expenses in accordance with paragraph (2).

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

(2) Where paragraph (1) requires a person to commence proceedings for the assessment of his legal expenses—

(a) in relation to civil recovery proceedings in England and Wales, he must commence proceedings for the detailed assessment of those expenses in accordance with CPR Part 47, subject to the modifications that—

(i) rule 47.7 shall have effect as if it provided that he must commence those proceedings not later than 2 months after the date of the recovery order; and

(ii) rule 47.14(2) shall have effect as if it provided that he must file a request for a detailed assessment hearing not later than 2 months after the expiry of the period for commencing the detailed assessment proceedings;

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

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

Note —Amended by SI 2008/523.

9B-1258.1

Payment of expenses

14.—(1) Where the sum payable in respect of a person's legal expenses—

9B-1259

(a) exceeds the total amount which has been released in respect of those expenses in accordance with Part 3, the trustee for civil recovery must pay the balance out of the sums referred to in section 280(1) of the 2002 Act or article 191(1) of the Order in Council;

(b) is less than the total amount which has been released in respect of those expenses in accordance with Part 3, the person to whose expenses the sum relates must repay the balance to the trustee.

(2) The trustee for civil recovery may only make a payment in respect of a person's legal expenses to—

(a) the solicitor who is instructed to act for that person; or

(b) where appropriate, the solicitor who was so instructed when the legal expenses to which the sum relates were incurred.

PART 5

BASIS OF ASSESSMENT OF LEGAL EXPENSES

Effect of this Part

15. This Part sets out the basis on which the court must assess the

9B-1260

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

amount payable in respect of a person's reasonable legal expenses of civil recovery proceedings pursuant to provision made in a recovery order.

General principles

9B-1261 16.—(1) Subject to regulation 17, the court will assess a person's legal expenses on the standard basis.

(2) The court must give effect to—

- (a) any provision made in the recovery order for the purpose of enabling the person to meet his reasonable legal expenses of civil recovery proceedings; and
- (b) subject to sub-paragraph (a), the terms of any exclusion made for the purpose of enabling that person to meet those legal expenses (including the required conditions).

(3) In paragraph (1), “the standard basis” has the meaning given in—

- (a) CPR rule 44.4 in relation to proceedings in England and Wales;
- (b) RSC (NI) Order 62 rule 12 in relation to proceedings in Northern Ireland.

Rates of remuneration

9B-1262 17.—(1) Subject to the following paragraphs of this regulation, remuneration for work done by a legal representative may only be allowed at the appropriate hourly rate shown in the Table below.

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

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

- (a) 20% for legal representatives whose offices are situated in Central London; and
- (b) 10% for legal representatives whose offices are situated in Outer London.

(4) In paragraph (3)—

- (a) “Central London” means postcode districts EC1—4, SW1, W1 and WC1—2;
- (b) “Outer London” means all other postcode districts in postcode areas BR, CR, DA, E, N, NW, SE, SW, UB and W.

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

BLOOD TESTS (EVIDENCE OF PATERNITY) REGULATIONS 1971

TABLE:
TABLE: RATES OF REMUNERATION FOR LEGAL REPRESENTATIVES

| <i>Category of fee earner⁽¹⁾</i> | <i>Standard hourly rate (excluding VAT)</i> | <i>Higher hourly rate (excluding VAT)</i> |
|---|---|---|
| Solicitors and their employees | | |
| Senior solicitor (of at least 8 years' standing) | £187.50 | £225.00 |
| Solicitor (of at least 4 years' and less than 8 years' standing) | £150.00 | £187.50 |
| Junior solicitor (of less than 4 years' standing) | £107.50 | £131.25 |
| Trainee solicitor, paralegal or other fee earner | £75.00 | £93.75 |
| Counsel | | |
| Queen's Counsel | — | £275.00 |
| Senior junior counsel (of at least 10 years' standing) | £150.00 | £225.00 |
| Junior counsel (of less than 10 years' standing) | £100.00 | £150.00 |
| ⁽¹⁾ In relation to England and Wales, a reference to a number of years' standing as a solicitor or counsel to be interpreted as referring to that number of years' general qualification (within the meaning of section 71 of the 1990 Act). | | |

Blood Tests (Evidence of Paternity) Regulations 1971

(S.I. 1971 No. 1861)

[As amended by the Transfer of Functions (Magistrates' Court and Family Law) Order 1992 (SI 1992/709), the Blood Tests (Evidence of Paternity) (Amendment) Regulations 2001 (SI 2001/773), the Blood Tests (Evidence of Paternity) (Amendment) Regulations 2004 (SI 2004/596), the Blood Tests (Evidence of Paternity) (Amendment) Regulations 2008 (SI 2008/972), the Health Professions (Operating Department Practitioners and Miscellaneous Amendments) Order 2004 (SI 2004/2033) and the Tests (Evidence of Paternity) (Amendment) Regulations 2008 (SI 2008/972).] **9B-1263**

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

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Paragraph numbers marked with a “+” denote content that is available on White Book on Westlaw UK or the Civil Procedure CD.

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

9B-1276.1

1951 (14 AND 15 GEO. 6 C.65)

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

LATE PAYMENT OF COMMERCIAL DEBTS (INTEREST) ACT 1998

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Paragraph numbers marked with a “+” denote content that is available on White Book on Westlaw UK or the Civil Procedure CD.



Late Payment of Commercial Debts (Interest) Act 1998

(1998 c.20)

9B-1325

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

PART I

STATUTORY INTEREST ON QUALIFYING DEBTS

Statutory interest

1.—(1) It is an implied term in a contract to which this Act applies **9B-1326**

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

that any qualifying debt created by the contract carries simple interest subject to and in accordance with this Part.

(2) Interest carried under that implied term (in this Act referred to as “statutory interest”) shall be treated, for the purposes of any rule of law or enactment (other than this Act) relating to interest on debts, in the same way as interest carried under an express contract term.

(3) This Part has effect subject to Part II (which in certain circumstances permits contract terms to oust or vary the right to statutory interest that would otherwise be conferred by virtue of the term implied by subsection (1)).

“implied term”/“express term”

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

“statutory interest”

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

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

Contracts to which Act applies

9B-1329 **2.**—(1) This Act applies to a contract for the supply of goods or services where the purchaser and the supplier are each acting in the course of a business, other than an excepted contract.

(2) In this Act “contract for the supply of goods or services” means—

- (a) a contract of sale of goods; or
- (b) a contract (other than a contract of sale of goods) by which a person does any, or any combination, of the things mentioned in subsection (3) for a consideration that is (or includes) a money consideration.
- (3) Those things are—
 - (a) transferring or agreeing to transfer to another the property in goods;
 - (b) bailing or agreeing to bail goods to another by way of hire or, in Scotland, hiring or agreeing to hire goods to another; and
 - (c) agreeing to carry out a service.
- (4) For the avoidance of doubt a contract of service or apprenticeship is not a contract for the supply of goods or services.
- (5) The following are excepted contracts—
 - (a) a consumer credit agreement;
 - (b) a contract intended to operate by way of mortgage, pledge, charge or other security.
- (6) [...]
- (7) In this section—

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

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

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

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

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

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

Note —Amended by the Late Payment of Commercial Debts (Scotland) Regulations 2002 (SSI 2002/335), reg.2(2). **9B-1330**

“in the course of a business”

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

“excepted contracts”

Excepted contracts include mortgage and contracts governed by the Consumer Credit Act 1974. **9B-1332**

Note —Section 2A applies to Scotland and is not reproduced here. **9B-1333**

Qualifying debts

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

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

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

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

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

“qualifying debt”

The Act applies to a “qualifying debt” as defined. By s.3(1) it applies both to contracts providing for a lump sum payment and to those providing for stage payments. The Act is intended to deal with contracts not already subject to a different statutory regime: hence s.3(2). **9B-1336**

Period for which statutory interest runs

4.—(1) Statutory interest runs in relation to a qualifying debt in accordance with this section (unless section 5 applies). **9B-1337**

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

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

(3) Where the supplier and the purchaser agree a date for payment of the debt (that is, the day on which the debt is to be created by the contract), that is the relevant day unless the debt relates to an obligation to make an advance payment.

A date so agreed may be fixed one or may depend on the happening of an event or the failure of an event to happen.

(4) Where the debt relates to an obligation to make an advance payment, the relevant day is the day on which the debt is treated by section 11 as having been created.

(5) In any other case, the relevant day is the last day of the period of 30 days beginning with—

- (a) the day on which the obligation of the supplier to which the debt relates is performed; or
- (b) the day on which the purchaser has notice of the amount of the debt or (where that amount is unascertained) the sum which the supplier claims is the amount of the debt, whichever is the later.

(6) Where the debt is created by virtue of an obligation to pay a sum due in respect of a period of hire of goods, subsection (5)(a) has effect as if it referred to the last day of that period.

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

(8) In this section “advance payment” has the same meaning as in section 11.

When does the statutory interest start to run?

9B-1338 The question posed in this sub-heading is answered by s.4. Interest runs from the day after the “relevant day” as defined. Where a date has been agreed for payment that is the relevant day (s.4(3)). Where the contract provides for an advance payment see s.11. In other cases the relevant day is 30 days after the date specified in s.4(5).

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

Remission of statutory interest

9B-1339 5.—(1) This section applies where, by reason of any conduct of the supplier, the interests of justice require that statutory interest should be remitted in whole or part in respect of a period for which it would otherwise run in relation to a qualifying debt.

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

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

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

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

- (a) by reason of conduct at any time (whether before or after the time at which the debt is created); and
 - (b) for the whole period for which statutory interest would otherwise run or for one or more parts of that period.
- (5) In this section “conduct” includes any act or omission.

Discretion

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

9B-1340

The leading case on remission is *Ruttle Plant Hire Limited v Secretary of State for Environment Food and Rural Affairs*, op cit; see also *Fitzroy Robinson Ltd v Mentmore Towers Ltd* [2009] EWHC 3365 (TCC), December 21, 2009, unrep. (Coulson J.).

Compensation arising out of late payment

5A.—(1) Once statutory interest begins to run in relation to a qualifying debt, the supplier shall be entitled to a fixed sum (in addition to the statutory interest on the debt). **9B-1341**

(2) That sum shall be—

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

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

Note —Amended by the Late Payment of Commercial Debts (Scotland) Regulations (SSI 2002/335) reg.2(5). **9B-1342**

Compensation payment

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

Rate of statutory interest

6.—(1) The Secretary of State shall by order made with the consent of the Treasury set the rate of statutory interest by prescribing— **9B-1344**

- (a) a formula for calculating the rate of statutory interest; or
- (b) the rate of statutory interest.

(2) Before making such an order the Secretary of State shall, among other things, consider the extent to which it may be desirable to set the rate so as to—

- (a) protect suppliers whose financial position makes them particularly vulnerable if their qualifying debts are paid late; and
- (b) deter generally the late payment of qualifying debts.

“rate of statutory interest”

The rate of statutory interest prescribed pursuant to s.6 is currently that set out in the Late Payment of Commercial Debts (Rate of Interest) (No.3) Order 2002 (SI 2002/1675). The rate is eight per cent above the official bank rate. For all relevant rates see Vol.1 para. 7.0.17(h). Paragraph 4 of SI 2002/1675 provides that the rate is eight per **9B-1345**

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

SECTION 9B: OTHER STATUTES AND REGULATIONS

cent above the official bank rate in force on the June 30 (in respect of interest which starts to run between July 1 and December 31) or on the December 31 (in respect of interest which starts to run between January 1 and June 30) immediately before the day on which statutory interest starts to run.

SI 2002/1675 refers to “the official dealing rate” but this is the rate now known as the official bank rate, as set out at para. 7.0.17(h). (Somewhat unhelpfully the statutory instrument’s “explanatory note” mentions the “repo” rate which is no longer in use.)

Editorial note

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

PART II

CONTRACT TERMS RELATING TO LATE PAYMENT OF QUALIFYING DEBTS

Purpose of Part II

9B–1347 7.—(1) This Part deals with the extent to which the parties to a contract to which this Act applies may by reference to contract terms oust or vary the right to statutory interest that would otherwise apply when a qualifying debt created by the contract (in this Part referred to as “the debt”) is not paid.

(2) This Part applies to contract terms agreed before the debt is created; after that time the parties are free to agree terms dealing with the debt.

(3) This Part has effect without prejudice to any other ground which may affect the validity of a contract term.

Forbearance

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

Circumstances where statutory interest may be ousted or varied

9B–1349 8.—(1) Any contract terms are void to the extent that they purport to exclude the right to statutory interest in relation to the debt, unless there is a substantial contractual remedy for late payment of the debt.

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

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

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

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

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

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

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

Limited contracting out

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

Meaning of “substantial remedy”

9.—(1) A remedy for the late payment of the debt shall be regarded as a substantial remedy unless— **9B-1351**

- (a) the remedy is insufficient either for the purpose of compensating the supplier for late payment or for deterring late payment; and
- (b) it would not be fair or reasonable to allow the remedy to be relied on to oust or (as the case may be) to vary the right to statutory interest that would otherwise apply in relation to the debt.

(2) In determining whether a remedy is not a substantial remedy, regard shall be had to all the relevant circumstances at the time the terms in question are agreed.

(3) In determining whether subsection (1)(b) applies, regard shall be had (without prejudice to the generality of subsection (2)) to the following matters—

- (a) the benefits of commercial certainty;
- (b) the strength of the bargaining positions of the parties relative to each other;
- (c) whether the term was imposed by one party to the detriment of the other (whether by the use of standard terms or otherwise); and
- (d) whether the supplier received an inducement to agree to the term.

“substantial remedy”

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

Interpretation of Part II

10.—(1) In this Part—

9B-1353

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

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

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

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

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

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

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

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

PART III

GENERAL AND SUPPLEMENTARY

Treatment of advance payments of the contract price

9B-1354 11.—(1) A qualifying debt created by virtue of an obligation to make an advance payment shall be treated for the purposes of this Act as if it was created on the day mentioned in subsection (3), (4) or (5) (as the case may be).

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

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

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

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

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

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

- (a) references to the day on which the supplier's obligation is performed were references to the last day of that period; and
- (b) references to part performance of that obligation were references to part of that period.

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

“advance payment”

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

9B-1355

Conflict of laws

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

9B-1356

- (a) there is no significant connection between the contract and that part of the United Kingdom; and
- (b) but for that choice, the applicable law would be a foreign law.

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

- (a) but for that choice, the applicable law would be the law of a part of the United Kingdom; and
- (b) there is no significant connection between the contract and any country other than that part of the United Kingdom.

(3) In this section—

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

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

“conflict of laws”

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

9B-1357

Assignments, etc.

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

9B-1358

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

- (a) any change in the identity of the parties to the contract creating the debt; or
- (b) the passing of the right to be paid the debt, or the duty to pay it (in whole or in part) to a person other than the person who is the original creditor or the original debtor when the debt is created.

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

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

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

“change in identity of the parties”

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

Contract terms relating to the date for payment of the contract price

9B-1360 14.—(1) This section applies to any contract term which purports to have the effect of postponing the time at which a qualifying debt would otherwise be created by a contract to which this Act applies.

(2) Sections 3(2)(b) and 17(1)(b) of the Unfair Contract Terms Act 1977 (no reliance to be placed on certain contract terms) shall apply in cases where such a contract term is not contained in written standard terms of the purchaser as well as in cases where the term is contained in such standard terms.

(3) In this section “contract term” has the same meaning as in section 10(1).

Postponing payment

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

Orders and regulations

9B-1362 15.—(1) Any power to make an order or regulations under this Act is exercisable by statutory instrument.

(2) Any statutory instrument containing an order or regulations under this Act, other than an order under section 17(2), shall be subject to annulment in pursuance of a resolution of either House of Parliament.

Interpretation

9B-1363 16.—(1) In this Act—

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

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

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

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

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

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

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

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

Short title, commencement and extent

17.—(1) This Act may be cited as the Late Payment of Commercial Debts (Interest) Act 1998. **9B-1364**

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

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

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

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

(5) This Act extends to Northern Ireland.